HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, PRETORIA

Case No.: 88056/2018

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED
24/01/22
DATE [redacted] SIGNATURE

In the application between:

CHRISTIAAN JOHANNES ROBBERTZE **APPLICANT**

And

BOSS SCAFFOLDING AND ACCESS SOLUTIONS (PTY) LTD **RESPONDENT**

JUDGMENT

BAQWA J:

Introduction

[1] This is an application for leave to Appeal against the judgement and order handed down by this court on the 17 July 2023. The application is opposed.

[2] It is the respondent contention that the application has no prospects of success and that there are no compelling circumstances to entertain the application.

The law

[3] Section 17(1)(a)(i) of the Superior Courts Act no 10 of 2013 (Superior Courts Act states*: "Leave to Appeal – (1) Leave to Appeal may only be given where the judge or judges concerned are of the opinion that –*

(a) (i) The appeal would have reasonable prospects of success; or

(ii) there is some other compelling reasons why the appeal should be heard, including conflicting judgements on the matter under consideration;

(b) ....."

[4] Section 17 was also commented upon in *MEC for Health, Eastern Cape v Mkhitha and another [2016] ZASCA 176 (25 November 2016) para 16-18 as follows; "[16] Once again it is necessary to say that leave to appeal, especially to this court, must not be granted unless there truly is a reasonable prospect of success. Section 17(1)(a) of the Superior Court Act 10 of 2013 makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success; or there is some other compelling reason why it should be heard. [17] An Application for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere probability of success, an arguable case or one that is not hopeless is enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal."*

Background

[5] It is common cause that the judgement sought to be appealed against is one in which an application to rescind an order and judgement of Rangata AJ handed down on the 14 September 2021 in terms of which the applicant had to furnish security in the sum of R100 000,00 (one hundred thousand rands) before proceeding with any action against the Respondent, was dismissed.

[6] In my judgement dismissing the application for recission I referred to the fact that, the application was brought in terms of Rule 42 of the Uniform Rules of Court in terms of which it was submitted that Rangata AJ made a patent error *"due to the fact that the Honorable Judge did not have regard to recent developments with regard to case law in applications for security costs."*

[7] In my judgement, I explained that an error in terms of Rule 42 occurs when a judgement does not reflect the real intention of the Judicial Officer pronouncing its, stated differently, the patent error must be attributable to the court itself and not an error of law. In the latter case, the matter must be dealt with by way of appeal, which I was not empowered to do.

[8] I therefore concluded that the rescission application did not fall within the ambit of the provisions of Rule 42(1) of the Uniform Rules as there was no ambiguity in the order or judgement of Rangata AJ, neither was there a patent error or omission or mistakes common to the parties.

[9] A further ground for the dismissal of the application for rescission was that the recission application had been launched after an unreasonable amount of time. In the third ground of appeal the applicant refers to the court quo failing to consider the merits of "the condonation application taking into account the applicant's personal circumstances".

[10] This court need not elaborate on the well-established principle that an application for condonation cannot be inferred from the facts put before a court. It must be

expressly made and supported by the relevant facts that led to the delay in such application. The whole period of delay must be explained and not just part of it.

[11] The fact of the matter is that the application for rescission was not supported by an application for condonation and absent such an application, it could have been dismissed on that ground only.

The wrong court

[12] This application for leave is brought before the wrong court and despite this fact being conveyed to both counsel for the applicant, they persisted in pursuing the application for leave.

[13] The highpoint in the applicant's argument is the submission that generally, peregrini are obliged to provide security for costs litigation in which they are involved, but incola are not so obliged. The incorrectness or otherwise of this submission need not be determined by this court because as alluded to above, that is a matter of consideration by the court which made the security for costs order, namely Madam Justice Rangata AJ's court. On the basis of such decision, she would then determine whether granting leave to appeal was appropriate or not. The matter cannot be determined by proxy through an application for rescission which was brought in terms of Rule 42(1) of the Uniform Rules of Court Act.

[14] In a manner of speaking the applicant has simply overshot the runway. He is in the wrong court. It is therefore typically the kind of case which is referred to in paragraph 4 above referring to the *MEC for Health, Eastern Cape* dealing with section 17(1)(a) of the Superior Courts Act. I am of the considered opinion that an appeal against the order dismissing the application for rescission would have no reasonable prospects of success at all and that there is no other compelling reason why it should be heard. There is no realistic chance of success on appeal.

[15] The applicant, who is assisted by two counsel ought to have known that pursuing the application before this court was a futile exercise and for that reason the application for leave to appeal is dismissed with costs on an attorney and client scale.

[redacted]

SELBY BAQWA J
Judge of the High Court
Gauteng Division, Pretoria