HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, THOHOYANDOU

CASE NO: 1812/2022

(1) REPORTABLE: NO/~~YES~~

(2) OF INTEREST TO OTHER JUDGES: NO/~~YES~~

(3) REVISED.

21 May 2024

[redacted]

In the matter between

PAUL MAKHAVHU	**APPLICANT**
And	
RICHARD KEAY POLLOCK N.O	**FIRST RESPONDENT**
NURJEHAN ABDOOL GAFAAR OMAR N.O	**SECOND RESPONDENT**
OSCAR JABULANI SITHOLE N.O	**THIRD RESPONDENT**
IGNATIUS CLEMENT MIKATEKO SHIRILELE N.O	**FOURTH RESPONDENT**
MICHELLE SCHUTTE N.O	**FIFTH RESPONDENT**
VELE INVESTMENTS (PTY) LIMITED (in liquidation)	**SIXTH RESPONDENT**

JUDGMENT – APPLICATION FOR LEAVE TO APPEAL

KHOSA AJ

Introduction

[1] This is an opposed application for leave to appeal to the Supreme Court of Appeal against the whole judgment and order of this court delivered on 16 February 2024.

The test for leave to appeal

[2] The application for leave to appeal is governed by section 17(1) of the Superior Courts Act[1] which provides:

> *"17 **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 a reasonable prospect of success; or*
>
> *(ii) there is some other compelling reason why the appeal should be heard including conflicting judgments on the matter under consideration,*
>
> *(b) the decision sought on appeal does not fall within the ambit of section 16 (2) (a), and*
>
> *(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties."*

[3] In *MEC Health, Eastern Cape v Mkhitha*[2] the Supreme Court of Appeal said the following:

> *"[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 Courts 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 applicant 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 possibility of* success, *an arguable case or one that* is *not hopeless is not enough. There must be* a *sound, rational* basis *to conclude that there is a reasonable prospect of success on appeal."*

The refusal of postponement

[4] The applicant contends that this Court erred in refusing postponement when a proper case for postponement had been made. Further, that the refusal of postponement resulted in the miscarriage of justice as no amount of criticism to the Applicant can outweigh the interest of justice. It is on these bases that the applicant submits that it is in the interests of justice to grant leave to appeal the refusal of postponement and that there is a reasonable prospect of another court coming to a different conclusion from that reached by this court.

[5] It is trite law that the application for postponement must always be *bona fide* and not used simply as a tactical manoeuvre for obtaining an advantage to which the applicant is not legitimately entitled[3]. The Applicant's historic conduct in the proceedings is a relevant factor for consideration in the determination of whether the application is made *bona fide*. The said conduct is not decisive but should be considered in conjunction with other factors to determine whether it is in the interest of justice to grant postponement.

[6] The Applicant further contends that the criticism that the applicant did not tell the Court which exact evidence he wanted to place before the Court is of no moment[4]. This contention lacks merit. The purpose for seeking postponement is a relevant factor for consideration in determining whether to grant or refuse postponement.

[7] In establishing good cause for the postponement and that it is in the interest of justice to grant postponement, the applicant for postponement has a duty to tell court, with specificity, the evidence he intend to bring.

[8] Despite the time that has elapsed from the date the applicant was furnished with the documents in terms of the Rule 35(12) order and the date of hearing, the applicant fails to say that he has considered at least a single page and found which piece of evidence on that single page.

[9] The applicant's failure to specify the evidence he intended to introduce had dire consequences for the postponement application. A

direct consequence of such failure is that the questions of relevance, admissibility of the unidentified evidence and the prejudice that would be suffered by the applicant if postponement were refused did not arise.

[10] As a result, the said factors could not be considered in the weighing of the interest of justice in this matter as the substance of the evidence sought to be introduced solely informs them. The Applicant had an opportunity to tell court the reason for seeking postponement but failed to do so with the necessary specificity or particularity to his detriment.

[11] The applicant now criticises this court for having "*no due regard*"[5] to the prejudice he would suffer if postponement is refused. This criticism is rooted upon a lack of appreciation of the relationship and interplay among the purpose of seeking postponement and the various other factors considered in an application for postponement. I find this criticism and the applicant's contention that the court failed to exercise its discretion in a judicial manner to be lacking merits. As a result, I am not of the view that the appeal would have a reasonable prospect of success.

[12] As though requesting postponement of the hearing for the introduction of the unidentified evidence was not enough of a shortcoming, in addition, the applicant failed to tell when he intends to introduce the unidentified evidence. Effectively, on the date allocated for hearing of the main application, the applicant requested

postponement of the hearing for the introduction of the unidentified evidence in the undetermined future.

[13] If such an application for postponement does not constitute an abuse of court process, nothing will ever be. In my view, no court would find that such an application is *bona fide* and that it is in the interests of justice to grant postponement.

[14] The matter of *Lekolwane*[6] is authoritative and I consider it binding on this court. In that matter, the constitutional court held as follows:

"An applicant for a postponement seeks an indulgence from the court. A postponement will not be granted, unless this Court is satisfied that it is in the interests of justice to do so. In this respect, the applicant must ordinarily show that there is good cause for the postponement. Whether a postponement will be granted is therefore in the discretion of the court. In exercising that discretion, this Court takes into account a number of factors…" I do not mention the factors as I have already done so in the main judgment[7].

[15] With regard to the determination of whether it is in the interest of justice to grant postponement, the Constitutional Court in *Lekolwane*[8] stated:

"All these factors, to the extent appropriate, together with the prospects of success on the merits of the matter, <u>will be weighed</u> by the court to determine whether it is in the interests of justice to grant the application."(Own emphasis)

[16] A court grants or refuse postponement in the exercise of discretionary power. The legal principles on the appellate court's interference with the exercise of the lower court's discretion are a relevant consideration in determining whether there are prospects of success on appeal of the refusal of postponement. The applicant in this application for leave to appeal did not deal with this. However, I consider it prudent to deal with this subject.

[17] In *Trencon Construction v Industrial Development Corporation of South Africa Limited and Another*[9] the Court, dealing with the issue of the Court exercising a discretion stated the following:

"[85] A discretion in the true sense is found where the lower court has a wide range of equally permissible options available to it. This type of discretion has been found by this Court in many instances, including matters of costs, damages and in the award of a remedy in terms of section 35 of their Restitution of Land Rights Act. It is "true" in that the lower court has an election of which option it will apply and any option can never be said to be wrong as each is entirely permissible."

[18] In my view, a court hearing an application for a postponement exercises discretion in the true sense in that the granting or refusal of postponement are equally permissible options available to court.

[19] Further, the court applied the well-established principles relating to application for postponement, considered and weighed various factors including the broader public interest and the prospects of success in the main application in determining whether it is in the interest of justice to grant postponement. All factors weighed against the granting of postponement. The court exercised its discretion

judicially in refusing postponement. There are no prospects that another court would come to a different conclusion. In this matter, I find no basis for the Appellate court's interference with this court's exercise of discretion in refusing postponement.

[20] Khampepe J, in *Union for Police Security and Corrections Organisation v South African Custodial Management (Pty) Ltd and Others*[10] said the following:

"Judicial precedent has no opt-out clause. Decisions of this Court bind all other courts. They bind the Labour Appeal Court and the Labour Court."

[21] The well-established principles in *Lekolwane* do not only bind this court, but equally binds the Supreme Court of Appeal. In the circumstances, the applicant has no reasonable prospects of succeeding on appeal.

Factual disputes

[22] Factual disputes are not factual disputes by virtue of a litigant mere say so. A court must examine an alleged dispute of fact and see whether in truth there is a real dispute of fact. If this examination is not performed, the respondent may be able to raise fictitious or trivial issues of fact and thus delay the hearing of the matter to the prejudice of the applicant.

[23] Where no real dispute of fact exists there is no reason for the incurring of the delay and expense involved in a trial action when motion proceedings are permissible. If no dispute of fact exists, the

applicant is entitled as of right to have his relief given speedily and cheaply on affidavits.

[24] The applicant bore the onus to prove that the 37 payments made to him were made for value when Vele Investments was solvent. Put simply, the applicant's defence was that Vele Investments indirectly benefitted from services he rendered to Vele Petroport.

[25] The applicant bore the onus of adducing factual evidence of the relationship between the Vele Investments and Vele Petroport. The existence of a relationship between the companies is not a dispute of fact but an ingredient of the applicant's defence. If he cannot prove it, his defence must fail.

[26] The applicant provided various factual propositions in an endeavour to prove that Vele Investments made the dispositions to him for value[11]. The said propositions rendered the version and defence of the applicant unsustainable, as not all those propositions can all exist simultaneously to prove that payments received by the applicant were for value to Vele investments.

[27] Those propositions give rise to what the applicant contends are factual disputes. In my view, the Applicant labels his failure to discharge the evidentiary burden to prove all essential components of his defence as disputes of fact. Upon examination, this court found that they are not disputes of facts[12]. I am not of the view that another court would find differently.

Failure to consider evidence that is available

[28] The applicant submit that it is not in the interest of justice to grant a final judgment without considering all available evidence.[13]

[29] This court decided the postponement and the main application on the evidence placed before court. It is a duty of a litigant to place evidence it wishes to rely upon before court. Evidence available elsewhere is of no moment. This court cannot be precluded from granting final judgment based on such evidence.

[30] I have considered the extensive application for leave to appeal and nothing argued has persuaded me that another court would find differently and that there are compelling reasons why an appeal should be heard.

[31] Accordingly, I am not persuaded that the application for leave to appeal to the Supreme Court of Appeal passes the bar raised by Section 17 of the Superior Court Act. Consequently, leave to appeal must be refused.

Costs

[32] The respondents seek costs for the employment of two counsel on scale C. The applicant accepts that the matter warrant employment of two counsel and costs on scale C. Both parties employed the services of two counsel. The nature and magnitude of the matter instructs costs on scale C.

[33] I therefore make the following order:-

[33.1] The application for leave to appeal is dismissed.

[33.2] The applicant is ordered to pay the Respondents' costs, including the costs of employment of two counsel on scale C of Uniform Rule 69(7).

IM KHOSA

ACTING JUSTICE OF THE HIGH COURT OF SOUTH AFRICA

Appearances

For the Applicant	:	**Adv. K Tsatsawane SC**
With Him	:	**Mr T Maluleke**
Instructed by	:	**Rambevha Morobane Attorneys**
For the Respondents	:	**Adv. E Van Vuuren SC**
With Him	:	**Adv. M J Cooke**
Instructed by	:	**Werkmans Attorneys**
Virtually heard	:	**02 May 2024**
Judgment	:	**21 May 2024**

Judgment date : Judgment handed down in court and electronically by circulation to the parties' legal representatives by email and publication through SAFLII. The date deemed handed down is 21 May 2024.

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[1] 10 of 2013
[2] *MEC Health, Eastern Cape v Mkhitha* (1221/15) [2016] ZASCA 176 (25 November 2016)
[3] *Insurance and Banking Staff Association and Others v SA Mutual Life Assurance Society (2000) 21 ILJ 386 (LC).*
[4] Para 3.8 applicant's heads of argument
[5] Para 2.7 application for leave to appeal
[6] 2007 (3) BCLR 280 (CC) at Para 17
[7] Para 9 of the judgment
[8] Note 6 above
See also *The National Police Service Union and Others v The Minister of Safety and Security and Others* (CCT21/00) [2000] ZACC 15; 2000 (4) SA 1110 at paras 4 – 5.

[9] *(CCT198/14) [2015] ZACC 22; 2015 (5) SA 245 (CC)*
[10] [2021] ZACC 26 at para 41
[11] judgment Para 48
[12] judgment para 43 - 44
[13] Para 2.4 Application for leave to appeal