

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
DATE: 18 SEPTEMBER 2024
SIGNATURE: _____

CASE NUMBER: 2023/069011

In the application for leave appeal between:

Servsol Software Solutions CC

Imali Software (Pty) Ltd

Intuitive PDA (Pty) Ltd

Investa Financial Services (Pty) Ltd

First Applicant

Second Applicant

Third Applicant

Fourth Applicant

And

Emisha Software (Pty) Ltd

Respondent

In re: Application between:

Emisha Software (Pty) Ltd

Applicant

And

Sersvol Software Solutions CC

First Respondent

Imali Software (Pty) Ltd

Second Respondent

Intuitive PDA (Pty) Ltd

Third Respondent

Investa Financial Services (Pty) Ltd

Fourth Respondent

Delivery: *This judgment is issued by the Judge whose name appears herein and is submitted electronically to the parties /legal representatives by email. It is also uploaded on CaseLines and its date of delivery is deemed 18 September 2024.*

Summary: *Application to appeal-s17-Superior Courts Act 10 of 2013. Reasonable prospects of success on appeal and not a mere possibility. Courts exercise discretion judicially and the test set in s17(1) is a screening process regarding the prospects of success. Test entails an affirmative prospect that another court would decide the matter differently. Application lacks merit and is dismissed. Appeal not frivolous and costs granted on a party and party scale on Scale C in terms of Rule 69 including the costs of one Counsel where so employed.*

JUDGMENT – LEAVE TO APPEAL

NTLAMA-MAKHANYA AJ

- [1] This is an application for leave to appeal to the Supreme Court of Appeal (SCA) alternatively to the full bench of this court against the whole judgment which was presided over by me and handed down on 06 June 2024 in which a final order of an interdict was granted against the applicants.
- [2] The applicants (respondents in the main application) argued that the court *a quo* committed a material misdirection and considered prayers that were abandoned by the respondent (applicant in the main application) and there are reasonable prospects of another court coming to a different conclusion and or a compelling reason exists for the matter to be heard .

- [3] The application is opposed by the respondent in that it is a disguised attempt to overturn a costs order which is contrary to the Superior Courts Act 10 of 2013 and jurisprudence that emanated from the courts.
- [4] I need not restate the grounds set out for an appeal that the court *a quo* erred as the full reasons for the order made are contained in the main judgment. The applicants, as respondents in the main application will be referred to as applicants herein as is the case with the respondent as the applicant in the main application will be referred to as the respondent in this application.

The statutory framework

- [5] Following the adoption of the Superior Courts Act 10 of 2013, it is now settled that the applications for appeal the court *a quo* judgment are now subject to a set standard that serve as a guide in the determination of the rationality of the prospects of success of the application. In this regard, section 17(1) of the Superior Courts Act provides that 'leave to appeal *may* only be given only when a 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 reasons why the appeal should be heard including conflicting judgments on the matter under consideration, (my emphasis).*

- [6] The wording of the statute with the inclusion of the word 'may' need not be faulted as it grants a discretion which must be exercised judicially by the courts. As expressed by Van Zyl AJ in ***Ingenuity Property Investments (Pty) Ltd v Ignite Fitness (Pty) Ltd 9845/2022*** judgment, the Court gave a comprehensive perspective on the exercise of the discretion and held:

... the Court exercises a broad discretion ... [which] must be exercised judicially, bearing in mind that the yardstick for the Court's discretion is the interests of justice. When a Court a quo gives a decision on a matter in which the Court exercises a discretion, a court of appeal will interfere only if a judicial discretion was not exercised. This will be the case if (1)

the Court did not bring its unbiased judgment to bear on the question or failed to act for substantial reasons; (2) the discretion was exercised capriciously or upon a wrong principle; the decision is vitiated by misdirection or irregularity or is one to which no Court could reasonably have come, (para 7, all footnotes omitted).

The judiciary is not compelled to grant an appeal where the application, according to the court's own view and analysis of the presented arguments lacks merit in the prospects of success. The phrasing terminology which includes the word 'may' in the reading of section 17(1) further entails a strict bar for the court *a quo* to ensure that in its exercise of the discretion is grounded in the principles of the law and not misdirected in the application of the facts in the said principles. This further means the variety of options that may be considered by the courts in the determination of the order or remedy to be granted. It is not for this court to dwell extensively on the substance of the discretion as it does not deal with the substance and merits of the main appeal itself but limited to the focus on the reasonable prospects of success of this application.

- [7] The discretion set out in section 17(1) is interlinked with the mandatory obligation of the courts as envisaged in section 17(1)(a)(i) that seek to establish if there are no prospects of success on appeal. Voluminous jurisprudence has been produced to situate the quest for appeals in a context where the courts will not be overburdened by vexatious litigation with no prospects of success. The substance of section 17(1) was contextualised in ***The City of Tshwane Metropolitan Municipality v Vresthena (Pty) Ltd Case N: 1124/2022*** judgment as the court held it '*serves as a screening mechanism to prevent the abuse of the appeal process and ensure that only cases with merit proceed to appeal [and] by requiring leave to appeal the law aims to filter out cases that do not have a reasonable chance of success, allowing the appellate courts to focus on cases that raise significant legal or have a genuine chance of being overturned*' (paras 8-11). This means that the applicant does not have to show a mere possibility for a different conclusion to be reached but a reasonable prospect that another court would decide the matter differently. As similarly expressed in ***The Mont Chevaux Trust v Tina 2014 JDR LCC*** judgment that '*the measure and test of the reasonable prospects entails the certainty that another court would differ from the court whose judgment is sought to be appealed against*', (para 6).

- [8] It is not the intention in this judgment to exhaust the voluminous jurisprudence on the bar set by section 17(1) of the Superior Court Act, thus, the ***Four Wheel Drive Accessory Distributors CC v Rattan 2019 (3) SA 451 (SCA)*** judgment is worth mentioning. In that matter, Schippers JA held that *'leave to appeal should be granted only where there is a sound, rational basis for the conclusion that there are reasonable prospects of success on appeal ... [and if there are no reasonable prospects of success ... parties [need not be] put through the inconvenience and expense of an appeal without any merit', (para 34)*. The screening process of the quality of the appeal application is to ensure that the enrichment of jurisprudence is not clouded by matters that could not have seen the courtroom. Particularly South Africa's recent attainment of the 30 years of democracy where the courts are at the pedestal to engage in transformative adjudication that must give a holistic meaning to the principles of the new dispensation. In the context of this case, the niche area of copyright law presented by this matter that is also influenced by digital technology, requires the courts to broaden and purposively interpret all facets of the law to give effect to the transmission of knowledge and means of production.
- [9] Let me reiterate, as I do not intend to exhaust the test for appeal as given context by the courts, the main question is how the discretion exercised by the court *a quo* finds application in this matter?

Analysis

- [10] I must first state that this application is composed of two components. The first one is to establish whether there are reasonable prospects of success on appeal. The second is whether there is any compelling reason that justifies the granting of the appeal for the matter to be heard by a different court (SCA or full bench?). If the first leg is in the affirmative, it is my considered view that it would be a futile exercise to continue and answer the second leg. It is only if the first leg fails to meet the threshold that a further enquiry would have to be made to determine the rationality of any compelling reason to have the matter heard by a different court.
- [11] In the Heads of Arguments and during argument, the applicants raised various issues which I consolidate them to my 'erring' of not considering the application of the *Plascon Evans* rule on the granting of the final interdict and to establish whether an actual

infringement did occur and ended with considering matters that were abandoned by the respondent. The respondent has abandoned prayer 3 and 4 during argument and prayer 2 became the substance of the argument in this application.

[12] For the reasons that are substantiated in the main judgment, there is nothing that precludes this court for having considered the granting of an interdict where there was a potential for interference in the functioning of the IGS system. I found it disconcerting that the applicant having made a case for (i) the application of the *Plascon Evans Rule* (ii) dormant nature of the IGS program; (iii) the alive status of the matter that still to be argued and decided by another court; (iv) co-ownership in the main application; (v) easy access to the program if the respondent could have asked; and (vi) jurisdiction. I need to remind the applicants, although they profusely argues against it, the respondent's interest needed to be protected to ensure there is no potential for future interference with the IGS program.

[13] During argument, the applicants made an extensive argument against the mootness of the application as argued by the respondent. The applicants had indirectly conceded that there is no practical effect for the underlying dispute because they do not make use of the IGS program and is dormant and would entirely be more of an academic exercise. The applicants attempted to distract this court by bringing into life a dispute that by their own affirmation does not bear or constitute any practical effect regarding its merits. This means the order for an interdict remains legitimate as it prohibited any future reinstatement of the live dispute into the fore. The principle regarding mootness was articulated by Sadulker JA in ***Solidariteit Helpende Hand NPC and Others v Minister of Cooperative Governance and Traditional Affairs* (104/2022) [2023] ZASCA 35** and held:

the general principle is that a matter is moot when a court's judgment will have no practical effect on the parties. This usually occurs where there is no longer an existing or live controversy between the parties. A court should refrain from making rulings on such matters, as the court's decision will merely amount to an advisory opinion on the identified legal questions, which are abstract, academic or hypothetical and have no direct effect; one of the reasons for that rule being that a court's purpose is to adjudicate existing legal disputes and its scarce resources

should not be wasted away on abstract questions of law, (para 12; all footnotes omitted).

- [14] I am persuaded by the earlier judgment of the Constitutional Court by Mogoeng Mogoeng CJ in ***President of the Republic of South Africa v Democratic Alliance 2019 (11) BCLR 1403 (CC)*** which was quoted with approval in the above matter when the Court held:

... courts should be loath to fulfil an advisory role, particularly for the benefit of those who have dependable advice abundantly available to them and in circumstances where no actual purpose would be served by that decision, now. Entertaining this application requires that we expend judicial resources that are already in short supply especially at this level. Frugality is therefore called for here, (para 35, all footnotes omitted).

- [15] The forewarning by the Constitutional Court in deciding moot matters gives substance to section 16(2)(a)(i) of the Superior Courts Act without which, the livelihood of the provision will remain on paper without being translated into reality. In this regard, the said section provides that *'when at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone'*. This carries the substance of the determination of the merits of the success of the appeal. I reiterate, the applicants, by their own admission, this matter is moot and would have no practical effect on them as they are not in use of the IGS program and is also dormant. The applicants still made an argument that this court considered 'worldwide prayers' which were abandoned by the respondent and granted a mandatory and prohibitory order against them. I find it difficult that the said argument could be made as I established that a principled concession has been transmitted through the backdoor that this matter is no longer alive because the subject of the dispute is dormant and equally, they are also not in use of the IGS program. The substance of the prohibitory interdict in prayer 2 serves to put into rest to what is purportedly a 'live issue' to be re-considered' by the court, (Wallis JA in ***Minister of Justice and Correctional Development v Estate Late James Stran-sham Ford 2017 (3) BCLR 364 (SCA), paras-25-26***). The interdict prevents any potential by the applicants to interfere with the functioning of the IGS program. This application does not capture any reasonableness of the prospects of

success let alone the existence of any compelling reason that may be grounded through the lens of the interests of justice.

[16] I also refrain from engaging with the *prima facie* argument made by the application of the question of jurisdiction against applicants 2 to 4 as I have made an extensive analysis in the main judgment. The question of *prima facie* evidence against the said applicants is unlikely to advance the applicant's argument and also lacks merit. The respondent has correctly addressed this issue during argument that the applicants as evidenced by their own papers, the companies (applicants 2-4) are deeply involved in the entire operation of the entity which places them at the centrality of being joined in these proceedings alongside applicant 1. Again, I need not comment on this issue as it lacks substance and has been fully ventilated in the main judgment.

[17] Without repeating myself on re-writing the main judgment, an interdict is a creature of a statute as envisaged in section 24(1) of the Copyright Act of 1978 as amended by Act 25 of 1992 and foundational to any remedies that may be granted for copyright infringements. This is also linked to the foundations of section 34 rights on access to justice as envisaged in the Constitution of the Republic of South Africa, 1996 that were contextualised by Kollapen J in ***Social Justice Coalition and Others v Minister of Police and Others*** [2022] ZACC 27 and held:

the right to access to court is more than simply the right to approach a court and initiate a case in support of a justiciable dispute. The object of going to court is to secure a decision on a dispute and the language of section 34 expressly extends to the right to have a dispute decided. Similarly, the process by which a decision is reached is also covered by the right in its reference to a "fair hearing". Put differently, section 34 is a right that guarantees access to court to have a dispute decided in a fair public hearing, (para 51).

In this case, the prohibitory interdict is not misplaced and misdirected because it cannot be limited to the on-going infringement whilst the substance of section 34 is being compromised. It is also not a 'win or lose' mechanism but a system that entails the quality of the exercised discretion as noted above in evaluating the evidence presented before

the court. In essence, access to justice is not about the legal or financial muscle of either party but seeks to give more meaning to what the principle entails. The applicants have lost sight of the overarching granted relief in that it barred any likelihood for the interference in the IGS program and limiting it to an on-going infringement will be a travesty of justice.

[18] In my view after an intense consideration and review of the grounds of appeal as articulated by the applicants in the Notice of Appeal and during argument that I erred and committed a material misdirection regarding the order made, I am not satisfied that a justified case has been made and overwhelming evidence presented that there is a reasonable prospect of success on appeal. This application fails on this ground alone as I also did not establish any compelling reason that may warrant the granting of appeal as envisaged in section 17(1)(a)(ii).

[19] With regard to costs of this application, I am of the considered view that this application was not frivolous. It was designed to give effect to the advancement of South Africa's jurisprudence in this area of the law in ensuring what the applicants could have identified as 'blind spots' in legal reasoning in the determination of this matter. However, this court is not a 'slaughterhouse' as evidenced by the costs in the main application as it granted order on a party and party scale. Overall, the substance of the costs orders as to be indicated below are to give effect to section 34 of the Constitution which is meant not only to ensure the protection of the right to equal access to justice but the fulfilment of the said right.

[20] Accordingly, it is ordered that:

[20.1] the application for an appeal is dismissed.

[20.2] the costs are granted on a party and party scale on Scale C in terms of Rule 69 including the costs of one Counsel where so employed.



N NTLAMA-MAKHANYA (AJ)
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date Heard: 05 September 2024

Date Delivered: 18 September 2024

Appearances:

Applicants:

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Respondent:

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