



**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MAKHANDA**

**CASE NO: 1824/2021
Date heard: 16 September 2022
Date delivered: 13 October 2022**

In the matter between

STRUCTURED MEZZANINE INVESTMENTS (PTY) LTD

First Applicant

JEAN PRIEUR DU PLESSIS

Second Applicant

And

**THE COMMISSIONER FOR THE SOUTH AFRICAN
REVENUE SERVICE**

Respondent

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

LOWE J:

INTRODUCTION

1. In this matter, I originally heard extensive argument from the parties in an application brought by applicants in this matter against the South African Revenue Service as respondent.
2. Having considered the arguments, I dismissed the application with costs.
3. In due course applicants filed a very full notice of application for leave to appeal which contained no fewer than twenty grounds upon which it is alleged that I erred.

4. Subsequently being represented by new counsel, heads of argument were filed by applicants in the application for leave to appeal going to some thirty-nine pages and citing a very considerable number of authorities.
5. The application for leave to appeal in its heads, in part, depart from the notice of application for leave to appeal and in essence these constitute heads of argument that would be filed in the appeal itself were leave to be granted.
6. Respondent adopted a more restrained approach shortly listing and then dealing with the arguments raised in the application for leave to appeal.
7. In essence my judgment, in accordance with the application itself, concluded that:
 - a. The provisions of the Tax Administration Act 28 of 2011 (the "TAA") did not constitute an exception as contemplated by section 32 of the Superior Courts Act 10 of 2013 (the "Superior Courts Act"); and
 - b. Applicants had not made out a special case for a departure from the principle of open justice.
8. In the applicants' argument for leave to appeal, there were nine substantive grounds advanced, and argued that not only were there reasonable prospects of success before another Court, but there was in addition, a compelling reason for granting leave in that there appeared to be a lacuna or at least an absence of authority on the question whether matters relating to tax and tax affairs, particularly matter regulated by the TAA and which matters are prosecuted in the High Court, should be heard in camera pursuant to the general principle of privacy of persons' tax affairs.
9. It was argued in addition that applicants were seeking to vindicate their constitutional rights to privacy.
10. In response, respondents joined issue on each point raised pointing out that I had, in my decision, and in dealing with the matter in terms of section 32 of the Superior Courts Act, exercised a discretionary power in terms of section 32 and

that a court on appeal would not likely interfere with the exercise of that judicial discretion, this factor militating against the applicants' prospects of success on appeal. It was also argued that there was no other compelling reason why leave to appeal should be granted particularly when regard was had to the fact that the application of section 32 of the Superior Courts Act is entirely fact dependant.

11. In essence my consideration of the matter revolved around the fact that whilst it seemed that originally in the application applicants had not directly considered section 32 of the Superior Courts Act, I assumed in applicants' favour that this section was sought to be invoked. This underpinned the consideration of the argument surrounding the principle of open justice.
12. Respondent's argument in the application for leave to appeal that the provisions of the TAA do not constitute an exception as contemplated by section 32 and further that applicants did not make out a special case for a departure from the principle of open justice, is certainly attractive as it accords with my view as expressed.
13. Nevertheless, on a consideration of the very detailed argument advanced by applicants in the application for leave, it cannot be said, in my view, that the various points raised are such as to be dismissed without more, as the detailed argument certainly and clearly raises interesting issues for consideration as also raising the question relevant to the apparent absence of authority on the question as to whether matters relating to tax and tax affairs, particularly matters regulated by the TAA in the High Court, should be heard in camera pursuant to the general principle of privacy of persons tax affairs.
14. The test to be applied at this stage of the enquiry articulates that the interim order sought is undoubtedly in principle appealable having regard to the relevant principles applicable in this particular matter in the so-called secrecy application.
15. In my view a sufficient argument has been put up to persuade me that there is reasonable prospect of success on appeal, and further, in any event, there is a

compelling reason surrounding the principle that is where the matters relating to tax and tax affairs particular regulated by the TAA when prosecuted in the High Court should be heard in camera, certainly it would seem in principle invoking the constitutional right to privacy.

16. In the circumstances, the application for leave to appeal is such as to be granted.
17. The question is to which court. The original application for leave sought that I refer the matter to the Full Bench of the Eastern Cape Division, Makhanda. In its heads of argument, applicants sought first leave to appeal to the Supreme Court of Appeal and in the alternative to the Full Bench.
18. I have given the matter considerable thought, and it would seem to me, that having regard to respondent's contention that this was a fact driven enquiry on the papers before me, relevant to the application of section 32 of the Superior Courts Act and notwithstanding applicant's extensive submissions, there is no compelling reason as to why this matter should be referred to the Supreme Court of Appeal.

ORDER

19. It is ordered that:

- 19.1 The application for leave to appeal succeeds, applicants being afforded leave to appeal against the whole of my order and judgment to the Full Bench of the Eastern Cape Division;

- 19.2 The costs relating to the application for leave to appeal will be costs in the appeal.


M.J. LOWE
JUDGE OF THE HIGH COURT

Appearing for applicants: Adv. A.C. Botha S.C with Adv. J. F. Pretorius
Instructed by: De Jager and Lordan Attorneys, Mr. L. Vaccaro.

Appearing for respondent: Adv. A.R. Sholto-Douglas S.C.
Instructed by: Huxtable Attorneys, Mr. O. Huxtable.