

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA



Case Number: 55858/10
55860/10
56219/10

31/3/2017

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED.

DATE

SIGNATURE

In the matter between:

BMW FINANCIAL SERVICES (SA) (PTY) LTD

APPLICANT

and

FINLAY, SEAN ALISTER
TABATA, DUMISANI DUMEKHAYA
PASCOE, JOHN LEVALLON
TWO SHIPS TRADING 148 (PTY) LTD
AMABUBESI MOTOR TRADING GROUP (PTY) LTD

1st RESPONDENT
2nd RESPONDENT
3rd RESPONDENT
4th RESPONDENT
5th RESPONDENT

Coram: HUGHES J

JUDGMENT

HUGHES J

HUGHES J

[1] This is an application for leave to appeal against my judgment and order of 24 February 2017 wherein I upheld the second respondent's defence of estoppel with costs.

[2] The section which deals with circumstances in which leave to appeal may be granted is section 17 (1) of the Superior Courts Act 10 of 2013 (the Superior Courts Act). What specifically relevant in this case, is section 17 (1) (a). For easy reference I set out section 17 (1) in its entirety below:

"(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." [My emphasis]*

[3] The test which was applied previously in applications of this nature was whether there were reasonable prospects that another court may come to a different conclusion. See *Commissioner of Inland Revenue v Tuck* 1989 (4) SA 888 (T) at 890B. What emerges from section 17 (1) is that the threshold to grant a party leave to appeal has been raised. It is now only granted in the circumstances set out and is deduced from the words 'only' used in the said section. See *The Mont Chevaux Trust v Tina Goosen & 18 Others* 2014 JDR 2325 (LCC) at para [6], Bertelsmann J held as follow:

"It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might

come to a different conclusion, see *Van Heerden v Cronwright & Others 1985 (2) SA 342 (T) at 343H*. The use of the word "would" in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against. [My emphasis]

[4] What resonates from the grounds for leave to appeal both legal and factual is to a large extent that this court's reasoning was erroneous and that I failed to take into consideration or give sufficient weight to other factors. What I do not propose to do is to set out the exhaustive grounds of appeal again or repeat that which was set out in the judgment, in as much as that which was relevant was dealt with in the judgment.

[5] Adv. Becker SC argued that this court should grant leave as there was a reasonable prospect that another court would come to a different decision. On the other Adv. Morison SC argued that this was not so.

[6] What I am basically faced with in this appeal, in my view, is submissions and contentions being made of what I should have found, should have considered critically, should have considered certain probabilities and erred in not considering factors and erred in not taking certain factors into account.

[7] There was also the submission advanced by the applicant that with regard to my finding in paragraph 44 of my judgment that '*There is nothing untoward about the response that points to him being untruthful about this aspect*', another court could come to a different conclusion on the evidence before the court as regards the aforesaid finding of Tabata.

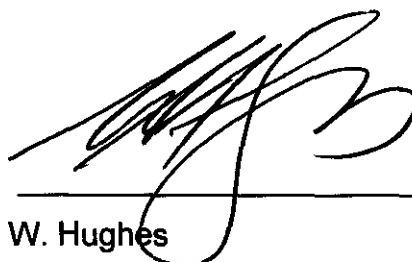
[8] I have considered all the submissions advanced by the applicant in seeking leave to appeal and I do not think I am called upon to consider each and every one to conclude as is sought by the applicant that another court would come to a different conclusion.

[9] Purely on the basis of my conclusion reached in paragraph 44 of my judgment as regards Tabata, my view, is if another court comes to a different conclusion than I did on the evidence, then the appeal would have reasonable prospects of success.

[10] In light of the aforesaid I find that in terms of section 17(1) (a) (i) the applicants have made out a case for leave to be granted.

[11] Consequently the following order is made:

[a] Leave to appeal is granted to the Supreme Court of Appeal and costs are costs in the appeal.

A handwritten signature in black ink, appearing to be 'W. Hughes', is written over a horizontal line.

W. Hughes

Judge of the High Court Gauteng, Pretoria