IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG HIGH COURT DIVISION, PRETORIA

CASE NUMBER: 31458/20
REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED: NO
07 July 2022

In the matter between:

REAL TIME INVESTMENTS 214 CC	**APPLICANT**
and	
TANAGRA VAN STRAATEN (IDENTITY NUMBER [....])	**FIRST RESPONDENT**
HELEEN BEHRENS t/a BEHRENS ATTORNEYS	**SECOND RESPONDENT**
UNLAWFUL ACCOUPIERS OF 173 ERASMUS AVENUE, RASLOUW AH, CENTURION, 0157	**THIRD RESPONDENT**
REGISTRAR OF DEEDS, PRETORIA	**FOURTH RESPONDENT**
CITY OF TSHWANE MUNICIPALITY	**FIFTH RESPONDENT**

JUDGMENT - LEAVE TO APPEAL

TLHAPI J

[1] This is an application for leave to appeal to the Full Court of the above division alternatively to the Supreme Court of Appeal. The application is premised on section 17(1) of the Superior Courts Act 10 of 2013, ("the Act") which section is set out in its entirety below:

> "Section 17(1)
>
> (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 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;
>
> (b) the decision sought on appeal does not fall withing the ambit of section 16(2); 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."

[2] The test applied previously to similar applications was whether there were reasonable prospects that another court may come to a different conclusion, *Commissioner of Inland Revenue v Tuck*[1] . The threshold of reasonable prospects has now been raised by the use and meaning attached to the words 'only' in 17(1) and 'would' in section 17(1)(a)(i). Therefore on the entire judgement there should be some certainty that another court would come to a different conclusion from the judgement the applicant seeks to appeal against. In *Mont Chevaux Trust v Tina*

1 1989 (4) SA 888 (T)

Goosen and 18 Others[2] :

> "It is clear that the threshold for granting leave to appeal 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"

[3] In *S v Smith*[3] a more stringent test is called for in that an applicant must convince a court, on proper grounds that there are prospects of success which are not remote, a mere possibility is not sufficient. Therefore, where the applicant has satisfied either of the two identified requirements in the Act, leave to appeal should be granted, *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others*[4] . This standard was confirmed in *Notshokovu v S*[5] where it was stated:

> "…….An appellant on the other hand faces a higher and stringent threshold in terms of the Act compared to the provisions of the repealed Supreme Court
> Act 59 of 1959…."

[4] in *Ramakatsa and Others v African National Congress and Another*[6] Dlodlo JA stated:

> *Turning the focus to the relevant provisions of the Superior Courts Act[5] (the SC Act), leave to appeal may only be granted where the judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there are compelling reasons which exist why the appeal should*

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[2] 2014 JDR 2325 (LCC) para [6]
[3] 2012 (1)SACR 567 (SCA) para[7]
[4] 2016 (3) SA 317 (SCA)
[5] (157/15) [2016] ZASCA (7 September 2016) para [2]
[6] (724/20190 [2021] ZASCA 31 (31 March 2021) para [10]

be heard such as the interests of justice [6]. The Court in Curatco[7] concerning the provisions s 17(1)(a)(ii) of the SC Act pointed out that if the court unpersuaded that there are prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal, Compelling reason would of course include an important question of law or a discreet issue of public importance that will have the effect on future disputes. However, this Court correctly added that 'but hereto the merits remain vitally important and are often decisive'.[8] I am mindful of decisions at high court level debating whether the use of the word 'would' as opposed to 'could' possibly means that the threshold for granting the appeal has been raised. If a reasonable prospect of success is established, leave to appeal should be granted. Similarly, if there are some compelling reasons why the appeal should be heard, leave appeal should be granted. The test of reasonable prospect of success postulates a dispassionate decision based on the facts and the law, that a court of appeal should be heard, leave to appeal could reasonably arrive at a conclusion different to that of the trial court. In other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist, [9]"

[5] It is submitted on behalf of the applicant that for the grounds set out below the applicant has a reasonable prospect of success. The grounds of appeal are stated as follows, that the court erred in the following manner:

1) in finding that the second respondent as the applicant's agent in withholding the remaining balance of the purchase price of R200 000.00;

2) in finding that the second respondent did not act on the instructions of the first respondent in withholding the balance of the purchase price of R200 000.00;

3) in finding that the request to withhold the balance of the purchase price of R200 000.00 was because the applicant had no other assets which could be attached to satisfy the respondent's claim for damages;

4) in finding that the second respondent breached her mandate and acted on a frolic of her own;

5) in finding that nowhere in the agreement did it stipulate that the second respondent acted for the first respondent when the surrounding circumstances indicated that the second respondent acted on the instructions of the first respondent;

6) the court should have found that the sale agreement was breached by the first respondent in that she failed to pay the full purchase price of R3,6 million;

7) the court should have found that the applicant validly cancelled the agreement and should have succeeded in its claim for retransfer of the property;

[6] The issues raised in this application revolve around the retention of R200 000.00 by the second respondent who was the conveyancer appointed by the applicant and, the failure by her to pay over to the applicant the full purchase price in the amount of R3 200 000.00 on or after transfer of the immovable property to the first respondent. I have taken into consideration submissions and arguments of both counsel and I have carefully revisited the papers and in particular my judgment from paragraphs [23] onwards. I remain unpersuaded that there are prospects in the appeal nor do I find any compelling reasons why the appeal should be heard.

[7] In the result the following order is granted.

The application is dismissed with costs.

THLAPI VV

(JUDGE OF THE HIGH COURT)

APPEARANCES

LEAVE TO APPEAL HEARD AND RESERVED	:	27 MAY 2022
COUNSEL FOR THE APPLICANT	:	Adv C Georgiades
INSTRUCTED BY	:	ROSSEAU INCORPORATED
COUNSEL FOR THE RESPONDENT	:	Adv Natalie
INSTRUCTED BY	:	PRINSLOO BEKKER