



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHERS JUDGES: NO
- (3) REVISED

26 March 2024
DATE


SIGNATURE

CASE NUMBER: 46115/2021

In the matter between:

CRYSTAL BALL PROPERTIES 65 (PTY) LTD
(REGISTRATION NUMBER: 2006/027260/07)

FIRST APPLICANT

ALLAN ROBERT DAWSON

SECOND APPLICANT

MICRO-THERM CLOSE CORPORATION
(REGISTRATION NO: 1993/019501/23)

THIRD APPLICANT

MAGHAN 27 CLOSE CORPORATION
(REGISTRATION NO: 2002/068466/23)

FOURTH APPLICANT

LIDIA FERREIRA

FIFTH APPLICANT

WERNER BOTHA

SIXTH APPLICANT

AND

LANDSMEER HOME OWNERS'

ASSOCIATION NPC

FIRST RESPONDENT

(REGISTRATION NUMBER: 2004/031410/08)

FOOD FAIR (PTY) LTD

SECOND RESPONDENT

(REGISTRATION NUMBER: 1973/016741/07)

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on CaseLines by the Judge or her Secretary. The date of this judgment is deemed to be 26 March 2024.

JUDGMENT

COLLIS J

1. This is an application for leave to appeal against the judgment and order made on 18 December 2023.

2. The application is premised on the grounds as listed in the Application for Leave to Appeal dated 19 January 2024.

3. In anticipation for the hearing of the Application for Leave to Appeal, the parties were requested to file short heads of argument. They both acceded to this request so directed by the Court.

4. At the commencement of the proceedings the Applicant sought condonation for the late filing of the Application for Leave to Appeal. As the Respondent did not object to the said condonation application this Court granted same.

LEGAL PRINCIPLES

5. Section 17 of the Superior Court's Act provides as follows:¹

"(1) Leave to appeal may only be given where the judge or judges

¹ Act 10 of 2013

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 to 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.”

6. In *casu* the Second Respondent rely on the ground of appeal mentioned in section 17(1)(a)(i) of the Superior Courts Act 10 of 2013, namely, that the appeal would have reasonable prospects of success.

7. As to the test to be applied by a court in considering an application for leave to appeal, Bertelsmann J in *The Mont Chevaux Trust v Tina Goosen & 18 Others* 2014 JDR 2325 (LCC) at para 6 stated the following:

‘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.’

8. ‘In order to succeed, therefore, the applicant must convince this Court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. The Court must test the grounds on which leave to appeal is sought against the facts of the case and the applicable legal principles to ascertain whether an appeal court would interfere in the decision against which leave to appeal is sought. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorized as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.’²

² MEC for Health, Eastern Cape v Mkhita and Another (1221/2015) ZASCA 176 (25 November 2016) para 17.

9. In *Fair-Trade Independent Tobacco Association v President of the Republic of South Africa and Another*³ the Full Court of this Division observed that:

"As such, in considering the application for leave to appeal it is crucial for this Court to remain cognizant of the higher threshold that needs to be met before leave to appeal may be granted. There must exist more than just a mere possibility that another court, the SCA in this instance, will, not might, find differently on both facts and law. It is against this background that we consider the most pivotal grounds of appeal."

10. The genesis of this appeal in essence is against the special resolution adopted on 10 June 2021 by the members of the HOA, to amend clauses 1.6 and 7.2 of its Memorandum of Incorporation.

11. As a point of departure in considering this application for leave to appeal, it is first necessary to observe that there is nothing novel raised in the application for leave to appeal, and the grounds relied upon in the application for leave to appeal were all raised by the Second Respondent in its answering affidavit to the main application. These grounds now so formulated were all adequately considered by this Court in its judgment.

³ Case no: 21688/2020 [2020] ZAGPPHC 311 (24 July 2020) at [6].

GROUNDS OF APPEAL

12. Paragraphs 1.1.1 to 1.1.3 of the said grounds so listed conclude with the contention in paragraph 1.1.3 that it was a tacit term of the MOI that the developer had not been a member of the HOA.

13. This proposition however cannot be correct for the following reasons:

13.1 It has been held authoritatively that a tacit term cannot be relied upon if the introduction of a tacit term would be in conflict with an existing express term contained in the agreement. Furthermore, it is onerous to establish a tacit term and in *Wilkins NO v Voges*⁴ the Court held as follows:

“Moreover a tacit term will not be inferred merely because it is one that ‘would have been reasonable, or convenient, for the parties to have included in their agreement ... But (it) is rather a term which, by necessary implication, the parties must have intended would form part of their agreement or would have so intended if they had turned their minds to the particular issue’.”

13.2 Membership of the First Respondent is dealt with in paragraph 2 of the MOI. The relevant part of it reads as follows:

“Membership of the Association shall be limited to each of the owners and

⁴ 1994 (3) SA 130 (A) at 143D – F

occupiers of erven and sectional title units in the township known or to be known as Meerhof ...”

13.3 The above paragraph is an express provision in the MOI.

13.4 The next question is who is an owner of the erven in a development which had not already been sold off to prospective purchasers.

13.5 The Full Court judgment of *Heritage Hill v Devco*⁵ held that if one has regard to the provisions of Sections 46 and 47 of the Deeds Registries Act, 47 of 1937 (“the Deeds Act”), then it is clear that the registration of the general plan had the effect of creating separate erven, the ownership of which could only have vested in the township developer.

13.6 As a result the crux is that owners of erven are members of the HOA. This is an express provision and it is clear and unequivocal. The introduction of a tacit term to the effect that the developer is not a member by necessary implication means that such a term would be in conflict with the express provision of the MOI as set out above and on this basis this proposition was rejected by this Court.

⁵ 2016 (2) SA 387 (GP), par.16 – 19 and 25 – 29

14. In paragraph 1.1.4 a further ground of appeal is listed which states that, in the alternative to a tacit term, that it was contended that there was iustus error and that this allegedly entitled the First and Second Respondents to resile from the MOI or to renegotiate it by way of rectification or amendment.

15. The fundamental difficulty with this argument is that no rectification was asked for by the Second Respondent. For this ground to have any substance the Second Respondent ought to have launched a counter application in which it was obliged to have asked for rectification. It failed to do so.

16. In relation to the ground formulated in paragraph 1.2. This ground also, has no merit because the *court a quo* was correct in making the finding in paragraph 11 of its judgment.

17. There is similarly no merit in the ground formulated in paragraph 1.3 of the Application for Leave to Appeal, as this ground is again linked to the alleged tacit term, which as has been pointed out above, there cannot be placed reliance upon.

18. As for the ground formulated in paragraph 1.4. This ground is of no moment, in the prevailing circumstances as the real issues in this matter

did not relate to an ignorance of the law, but it concerned the applicability of Sections 46 and 47 of the Deeds Act, compared to the definition of 'member' in the MOI.

19. In relation to the ground listed in paragraph 1.5 this ground also has no merit because it was clearly to the exclusive benefit of the Second Respondent to bring about the amendments which the Applicants complained about.

20. The ground in paragraph 1.6 again is linked to either the tacit term or iustus error. It has already been demonstrated that none of these aspects can be relied upon by the Second Respondent.

21. The grounds in paragraphs 1.7 and 1.8 are only of general application and do not require further comment by this Court.

22. For the reasons alluded to above I am not persuaded that the appeal would have a reasonable prospect of success. The *court a quo's* judgment was properly motivated and reasoned.

23. In the result the application for leave to appeal is dismissed with costs and that such costs to include those costs consequent upon the employment of

senior counsel.



C.J. COLLIS

JUDGE OF THE HIGH COURT GAUTENG
DIVISION PRETORIA

APPEARANCES

Counsel for the Applicant: Adv. MP Van Der Merwe SC

Instructed By: EW Serfontein & Association INC

Counsel for Respondent: Adv. AF Arnoldi SC

Instructed By: Linda Erasmus Attorneys

Date of Hearing: 23 February 2024

Date of Judgment: 26 March 2024

