IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION (MIDDELBURG LOCAL SEAT)

Case Number: 4959/23
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(20) REVISED
DATE: 23/08/2024
SIGNATURE

In the matter between:

GODFREY NKOSI **APPELLANT**

And

WOOLWORTHS FINANCIAL SERVICES (PTY) LTD **RESPONDENT**

JUDGMENT

CORAM: LANGA J:

Introduction and background

[1] This application for leave to appeal concerns an unopposed interlocutory order made against the Applicant on 31 May 2024. In the main action the Applicant, who was the Plaintiff, claimed damages against the Defendant. In response to the Plaintiff's Particulars of Claim, the Respondent delivered a notice in terms of Rule 23(1) in which it afforded the Applicant an opportunity to remove numerous causes of complaint failing which the Respondent would except to the Applicant's Particulars of Claim.

[2] When the Applicant failed or refused to remove the said causes of complaint, the Defendant delivered its exception to the Applicant's Particulars of Claim on 12 January 2024. On 12 January 2024 the Applicant attempted to amend the Particulars of Claim to which the Respondent objected on 18 January 2024. Eventually the notice to amend lapsed as the Applicant failed in his attempt to obtain the leave to amend as

required by the rules. However, before the Respondent could proceed with the exception, the Applicant delivered a document entitled *"Notice of withdrawal of amendments on Particulars of Claim and Resubmission of original claim with notes on annexures"*. 12 January 2024.

[3] Subsequent to this "notice", the Respondent, in a letter dated 30 January 2024, informed the Applicant that the said "notice" was irregular and requested the Applicant to remove the ambiguity in the document by filing a proper notice in terms of the rules. The Applicant failed to respond and on 8 February 2024, the Respondent delivered a Notice to Remove Cause of Complaint in terms of Rule 30(2)(b). In response thereto the Applicant filed another document entitled "Notice of Removal of the Particulars of Claim for Amendment" dated 8 February 2024. On 9 February 2024 the Respondent sent another letter to the Applicant calling upon him to withdraw the two irregular notices and tender the costs. The Applicant responded by stating that the Respondent is not sticking to the rules and that he will teach the Respondent the court rules as he had just bought the Juta book and is well equipped in law more than most senior advocates.

[4] Subsequent to this letter, on 12 February 2024 the Applicant filed another document entitled *"Notice to retract the word withdrawal and insert the word remove amendments on particulars of claim".* It is clear from the correspondence on file that the Respondent has on numerous occasions attempted to deal with the Applicant's irregular steps without success.

[5] On 12 February 2024 the Applicant served a document entitled Amended Particulars of claim purporting to amend the Applicant's Particulars of Claim without filing any notice of intention to amend as required by Rule 28(1) and (2). On 16 February 2024 the Respondent served the Applicant with a notice to remove a cause of complaint within ten (10) days and the Applicant failed to respond to this notice. Subsequent to that the Respondent filed a notice in terms of Rule 30A seeking the setting aside of the aforesaid Amended Particulars of Claim. The Applicant however failed to respond to this notice and the matter eventually served before this court on 31 May 2024 on the unopposed roll. An order setting aside the Applicant's Amended

Particulars of Claim with costs was accordingly granted. It is in pursuit of this order, that the Applicant now seeks leave to appeal.

Applicable legal principles

[6] It is trite that applications for leave to appeal are now governed by the provisions of Section 17(1) of the Superior Courts Act 10 of 2013 which provides as follows:

> "*17 Leave to appeal*
> *(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.*"

[7] It is trite that the test in such applications has changed substantially from the test ordained in terms of the repealed Supreme Court Act 59 of 1959. The current standard is captured succinctly in the case of *The Mont Chevaux Trust (IT2012/28) v Tina Goosen and Others* LCC14R/2014, (3 November 2014) at para 6 in which the Court stated that "*the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act and that in terms of the former test the question was whether or not there was a reasonable prospect that another court might come to a different conclusion, See Van Heerden v Cronwright and Others 1985 (2) SA 342 (T) at 343H. The use of the word "would' in the new statute is*

indicative of a measure of certainty that another will differ from the court whose judgment is sought to be appealed against."

[8] This position has since been confirmed in other Divisions of the High Court and it is therefore evident that the current section is now more burdensome than its predecessor. Smith J in the *Valley of the Kings Thaba Motswere (Pty) Ltd* [2016] ZAECGHC 137 (10 November 2016) acknowledged the new standard created by section 17 but added that the contextual construction of the phrase *"reasonable prospect of success' still requires of the Judge, whose judgment is sought to be appealed against, to consider, objectively and dispassionately, whether there are reasonable prospects that another court may well find merit in argument advanced by the losing party."*

[9] In *Hunter v Financial Services Board* 2017 JDR 0941 (GP) it was held that leave to appeal may only be granted if the court of first instance is of the opinion that the appeal would have reasonable prospects of success or is arguable. There must therefore be merit in the Applicant's argument in support of the application for leave to appeal and the Applicant must satisfy the court that the appeal would, not might, have reasonable prospects of success either on facts or the law. Furthermore, the peremptory provisions of Rule 49 (1) (b) require a litigant in an application of this nature to clearly and succinctly set out the grounds of appeal in unambiguous terms. *Songono v Minister of Law and Order* 1996 (4) SA 384.

The Applicant's grounds of appeal

[10] The Applicant's grounds of appeal are not clear from his application for leave to appeal. For that reason, I will refer to the salient paragraphs verbatim. What he seems to be contenting in this application is that *the "Respondent's contentions were misconstrued as they used the Rule 23 and 30 for an ulterior motive to avoid the Applicant's claims as it heavily counts against the Respondent due to unfair backlisting at the credit bureau without any justification after their own admission that he was indeed up to date with payment of all his accounts".*

[11] Further, the Applicant contends that "*Rule 28 envisages a party desiring to make amendments where the other party has already worked on the first given*

facts thus need to tender costs to compensate him for the wasted effort on need to start afresh and rework on amended facts".

The Applicant avers further that substantively and procedurally, the Respondent's exception was not supposed to succeed.

The Respondents contentions

[11] The Respondent opposed the application on technical and substantive grounds. On the technical side the Respondent contends that the application contains no pleaded grounds for appeal as contemplated by section 17 (1) above. Secondly the Respondent argued that it is irregular for the Applicant to seek an appeal against an order granted in the unopposed motion court. On the merits, the Respondent basically contends that the appeal is meritless as the application in terms of Rule 30 was not opposed.

Discussion

[12] This application for leave to appeal is still born for a number of reasons. On the procedural side it is clear that section 17(1) requires that for leave to appeal to be granted, the Applicant must prove that another court would come to a different conclusion from this court's decision. The test is stringent. In *Mothuloe Incorporated Attorneys v Law Society of the Northern Province and Anothe*r (213/16) [2017] ZASCA 17 (22 March 2017) para [18] the Supreme Court of Appeal stated the following:

"It is important to mention my dissatisfaction with the court a quo's granting of leave to appeal to this court. The test is simply whether there are any reasonable prospects of success in an appeal. It is not whether a litigant has an arguable case or a mere possibility of success. ***Section 17(1)*** *of the* ***Superior Courts Act 10 of 2013*** *provides that:*

'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';

*This court has in the past bemoaned the regularity with which leave is granted to this court in respect of matters not deserving its attention. (See Shoprite Checkers (Pty) Ltd v Bumpers Schwarmas CC & others **2003 (5) SA 354** (SCA) para 23.) This is one case where leave to appeal should have been refused for lack of reasonable prospects of success."* (my emphasis).

[13] In this case the appllication clearly no meritoriuos grounds of appeal as comtplated in the section are pleaded by the Applicant. The Applicant has simply not demonstrated that the appal has any reasonable prospects of success. On this ground aloe this application stands to be dismissed.

[14] However, in addition, on the merits the Application is still borne if one considers that the Applicant seeks to appeal an order granted on an unopposed basis. When the Respondent filed a Rule 30 application as stated above, the Applicant failed to file an answering affidavit. Instead he launched a summary judgment application. There was therefore no altaernativ version before court. It is not accordingly not permissible for the Applicant appeal an order obtaineed in these circumstances. There are cleearly other legal avenues open and availabl to an aggrieved litigant in such a case. Based on this alone the application ought to be dismissed.

Order

[15] In the result I make the following order:

1. The application for Leave to Appeal is dismissed with costs;

2. The Applicant is ordered to pay costs, including costs of counsel taxable on Scale C of Rule 69(7) of the Uniform Rules of Court.

MBG LANGA

JUDGE OF THE HIGH COURT

Appearances:

For the Applicant:	The Applicant Mr G Nkosi in Person
For the Respondent:	Advocate Adv R Scholtz
Date heard:	23 August 2024
Date delivered:	23 August 2024

This judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be the 23 August 2024 at 14h00.