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**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)
REPUBLIC OF SOUTH AFRICA**

CASE NO: 09248/2020

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

NOT REVISED

25.05.23

In the matter between:

M B M

Applicant

and

AFRICA A MINA ENGINEERING CC

First Respondent

M J M

Second Respondent

Neutral Citation: *M B M v Afrika Amina Engineering CC and Another* (Case No: 39621/2017) [2023] ZAGPJHC 572 (25 May 2023)

Delivered: By transmission to the parties via email and uploading onto Case Lines the Judgment is deemed to be delivered.

JUDGMENT

(Leave to Appeal Application)

SENYATSI J:

- [1] This is an application for leave to appeal the final sequestration order of the first respondent granted in favour of the first applicant (“Afrika A Mina Engineering CC”) on the 24 January 2023.
- [2] The applicant raised several grounds of appeal against the judgment, such as the so-called misjoinder which he contends was not even considered in the judgment. He also claims that there are other compelling reasons why leave to appeal should be granted and claims that there are conflicting judgments on the dispute at hand. The latter proposition has not been supported by case law which identifies which are those judgments with similar facts. The applicant contends that another court will come to a different conclusion.
- [3] The issue for determination is whether there is reasonable prospect that the appeal would succeed in terms of s17 of the Superior Courts Act 10 of 2013(“the Act”).
- [4] The application for leave to appeal is regulated by s 17(1)(a) (i) and (ii) of the Act which states that:

“17. (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;”

[5] Our courts have given the true meaning of what is sought to be proven as stated in section 17(1). In Acting National Director of Public Prosecutions and Others v Democratic Alliance v Acting National Director of Public Prosecutions and Others¹ the court said the following:

“The Superior Court has raised the bar for granting leave to appeal in The Mount Chevaux Trust (IT 201/28) v Tina Goosen & 18 Others, Bertelsmann J held as follows:

‘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.”

[6] In Mount Chevaux Trust v Goosen², the court explains the test as follows:

“[3] The principle to be adopted in applications for leave to appeal has been codified in section 17(1) of the Superior Courts Act 10 of 2013 (‘the new Act’)

¹ (1957/09) [2016] ZAGPPHC 489 (24 June 2016)

² 2014 JDR 2325 (LCC)

and is, *inter alia*, 'whether the appeal would have a reasonable prospect of success'. Bertelsmann J, in *The Mont Chevaux Trust (IT 2012/28) v Tina Goosen & 18 Others LCC14R/2014*, (an unreported judgment of this Court delivered on 3 November 2014) in considering whether leave to appeal ought to be granted in that matter, held that the threshold for granting leave to appeal had been raised in the new Act. Bertelsmann J found that the use of the word 'would' in the new Act indicated a measure of certainty that another Court will differ from the Court whose judgment is sought to be appealed against. Consequently, the bar set in the previous test, which required 'a reasonable prospect that another Court might come to a different conclusion', has been raised by the new Act and this then, is the test to be applied in this matter."

[7] In Matoto v Free State Gambling and Liquor Authority³, the court referred to Mount Chevaux Trust with approval and said that:

"...there can be no doubt that the bar for granting leave to appeal has been raised. The use by the legislature of the word 'only' ... is a further indication of a more stringent test."

[8] In S v Notshokovu⁴ the Supreme Court of Appeal reaffirmed that:

"an appellant ...faces a higher and stringent threshold in terms of the Act compared to the provisions of the repealed Supreme Court Act 59 of 1959".

[9] In S v Smith Plasket⁵ AJA explained the meaning of 'a reasonable prospect of success' as follows:

³ [2017] ZAFSHC 80 at para 5

⁴ [2016] ZASCA 112 para 2

⁵ 2012 (1) SACR 567 (SCA) at para 7

“What the test of reasonable prospect of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that these prospects are not remote but have a realistic chance of succeeding. More is required to be established than there is mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.”

[10] In Pretoria Society of Advocates and Others v Nthai⁶ the court held that:

“The enquiry as to whether leave should be granted is twofold. The first step that a court seized with such application should do is to investigate whether there are any reasonable prospects that another court seized with the same set of facts would reach a different conclusion. If the answer is in the positive the court should grant leave to appeal. But if the answer is negative, the next step of the enquiry is to determine the existence of any compelling reason why the appeal should be heard.”

Based on the authorities referred to above it is apparent that our courts have been consistent in the application of the test on whether leave to appeal should be granted.

[11] The liberal approach to grant leave by courts is discouraged as being inconsistent with s17 of the Act. For instance, in Mothule Inc Attorneys v The

⁶ 2020 (1) SA 267 (LP) at [4]

Law Society of the Northern Provinces and Another⁷, the Supreme Court of Appeal stated as follows regarding the trial court's liberal approach on granting leave to appeal:

"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 reasonably prospects of success in an appeal. It is not whether a litigant has an arguable case or mere possibility of success."

- [12] More importantly, the approach is now also developed that if the inquiry into whether the appeal would not have a reasonable prospect of success, the court must now also inquire whether it is in the interests of justice that the appeal should be heard.
- [13] The contention that the court erred by *inter alia* not considering the misjoinder is misplaced. On becoming aware of the divorce between the respondents, the applicant in the main application filed notice to amend its papers to sequester the estates of the respondents separately. This became evident when the respondent filed his answering papers in the main application. This point was fully considered in the judgment and it is the reason sequestration of the second respondent in the main application was refused. The refusal was also supported by the Matrimonial Property Act.
- [14] The applicant has failed to provide compelling reasons why the Court should grant leave to appeal. He has failed to identify conflicting cases with similar facts but with different conclusion. Accordingly, the application for leave to appeal must fail.

⁷ (213/16) [2017] ZASCA 17 (22 March 2017)

F. ORDER

[15] As a result, the following order is made:

- (a) The application for leave to appeal is refused and the applicant is ordered to pay the costs on an attorney and client scale.

ML SENYATSI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

DATE APPLICATION HEARD: 28 April 2023

DATE JUDGMENT HANDED DOWN: 25 May 2023

APPEARANCES

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