



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

CASE NO: 2019/40372

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

22/2/2024
DATE

SIGNATURE

In the matter between:

MASEHLA, TEBOGO MATHIBENG

Applicant

and

GANCA, NOLUSIBA

First Respondent

GANCA, SIMO-SIHLE

Second Respondent

In re

GANCA, NOLUSIBA

First Plaintiff

GANCA, SIMO-SIHLE

Second Plaintiff

and

MASEHLA, TEBOGO MATHIBENG

First Defendant

MATHIBENG, ADAM CHINAME

Second Defendant

MOODLEY, RHONA

Third Defendant

JUDGMENT

MOORCROFT AJ:

Summary

Application for leave to appeal – section 17(1)(a)(i) and (ii) of the Superior Courts Act 10 of 2013 – reasonable prospects of success – absence of

Order

[1] In this matter I make the following order:

1. *The application for leave to appeal is dismissed;*
2. *The applicant in the application for leave to appeal is ordered to pay the costs of the application.*

[2] The reasons for the order follow below.

Introduction

[3] This is an application for leave to appeal a judgment¹ handed down by me on 16

¹ Reported as *Masehla v Ganca and another* 2023 JDR 3901 (GJ).

October 2023 in an application for the upliftment of a bar.

For the sake of convenience I refer below to the parties as they are referred to in the application and in the action: The applicant in this application is the first defendant in the action and is referred to as such.

The applicable principles in an application for leave to appeal

[4] Section 17(1)(a)(i) and (ii) 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 the appeal would have a reasonable prospect of success or there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration. Once such an opinion is formed leave may not be refused. Importantly, a judge hearing an application for leave to appeal is not called upon to decide if his or her decision was right or wrong.

[5] In *KwaZulu-Natal Law Society v Sharma*² Van Zyl J held that the test enunciated in *S v Smith*³ still holds good under the Act of 2013. An appellant must convince the court of appeal that the prospects of success are not remote but have a realistic chance of succeeding. A mere possibility of success is not enough. There must be a sound and rational basis for the conclusion that there are reasonable prospect of success on appeal.

² *KwaZulu-Natal Law Society v Sharma* [2017] JOL 37724 (KZP) para 29. See also *Shinga v The State and another (Society of Advocates (Pietermaritzburg Bar) intervening as Amicus Curiae)*; *S v O'Connell and others* 2007 (2) SACR 28 (CC).

³ *S v Smith* 2012 (1) SACR 567 (SCA) para 7.

[6] In an *obiter dictum* the Land Claims Court in *Mont Chevaux Trust (IT 2012/28) v Tina Goosen*⁴ held that the test for leave to appeal is more stringent under the Superior Courts Act of 2013 than it was under the repealed Supreme Court Act, 59 of 1959. The sentiment in *Mont Chevaux Trust* was echoed in the Supreme Court of Appeal by Shongwe JA in *S v Notshokovu*⁵ and by Schippers AJA in *Member of the Executive Council for Health, Eastern Cape v Mkhitha and another*,⁶ where the learned Justice said:

“[16] Once again it is necessary to say that leave to appeal, especially to this Court, must not be granted unless there truly is a reasonable prospect of success. Section 17(1)(a) of the Superior Courts Act 10 of 2013 makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success; or there is some other compelling reason why it should be heard.”

[7] In *Ramakatsa and others v African National Congress and another*⁷ Dlodlo JA placed the authorities in perspective. The Learned Justice of Appeal said:

“[10] .. I am mindful of the 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 other compelling reasons why the appeal should be heard, leave to appeal should be granted. The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the

⁴ *Mont Chevaux Trust (IT 2012/28) v Tina Goosen* 2014 JDR 2325 (LCC), [2014] ZALCC 20 para 6.

⁵ *S v Notshokovu* 2016 JDR 1647 (SCA), [2016] ZASCA 112 para 2.

⁶ *Member of the Executive Council for Health, Eastern Cape v Mkhitha and another* [2016] JOL 36940 (SCA) para 16. See also *Van Loggerenberg Erasmus: Superior Court Practice* A2-55; *The Acting National Director of Public Prosecution v Democratic Alliance* [2016] ZAGPPHC 489, JOL 36123 (GP) para 25; *South African Breweries (Pty) Ltd v Commissioner of the South African Revenue Services* [2017] ZAGPPHC 340 para 5; *Lakaje N.O v MEC: Department of Health* [2019] JOL 45564 (FB) para 5; *Nwafor v Minister of Home Affairs* [2021] JOL 50310 (SCA), 2021 JDR 0948 (SCA) paras 25 and 26; and *Lephoi v Ramakarane* [2023] JOL 59548 (FB) para 4.

⁷ *Ramakatsa and others v African National Congress and another* [2021] JOL 49993 (SCA), also reported as *Ramakatsa v ANC* 2021 ZASCA 31. See also *Mphahlele v Scheepers NO* 2023 JDR 2899 (GP).

law that a court of 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 a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist.”

The judgment

[8] In the judgment of 16 October 2023 I dealt with the contract between the parties in paragraphs 4 to 6, with the bar in paragraphs 7 to 8, with the application for removal of the bar in paragraphs 9 to 11, with rule 27(1) and the requirements of good cause in paragraphs 12 to 18, and with prescription in paragraph 19. I point out however that the reference to December 2016 in paragraph 4 of the judgment is incorrect and that the contract was entered into in September 2016.

[9] The following dates are important:

- 9.1 September 2016: Contract of sale concluded;
- 9.2 October 2016: Addendum concluded;
- 9.3 December 2016: Transfer of ownership;
- 9.4 1 January 2017: Plaintiffs took occupation of the property;
- 9.5 January 2017: Plaintiffs became aware of defects;
- 9.6 20 November and 2 December 2019: Service of summons;
- 9.7 6 December 2019: Notice of intention to defend;

- 9.8 9 March 2019: Notice of bar;
- 9.9 April 2022: Application for default judgment removed from roll for lack of compliance with enrolment requirements;
- 9.10 12 September 2022: Application for default judgment removed from roll at request of the first defendant;
- 9.11 January 2023: Request that plaintiffs remove bar by agreement;
- 9.12 6 February 2023: Application to remove bar;
- 9.13 25 March 2023: Answering affidavit filed.

[10] It is in the interests of justice that litigation be concluded and not be delayed indefinitely. I am satisfied that there is no reasonable prospect of success on appeal, and that a court of appeal will not find that the first defendant had given a reasonable explanation for the default. The first defendant failed to file a plea in or after January 2019, and when placed under bar did not act to remove the bar during the period March 2019 and January 2023.

The first defendant did not take steps during the period September to December 2022 under circumstances where an application for default judgment was removed from the court roll in September 2022 to enable her to take steps to apply for the removal of the bar. She waited until January 2023 to request the removal of the bar by agreement, and only then applied in February 2023.

Conclusion

[11] I conclude therefore that there are no reasonable prospects of success on appeal and the application for leave to appeal stands to be dismissed. I therefore make the order

in paragraph 1 above.



J MOORCROFT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **22 FEBRUARY 2024**.

COUNSEL FOR THE APPLICANT/1 st DEFENDANT:	T QHALI
INSTRUCTED BY:	NYAPOTSE INC
COUNSEL FOR THE RESPONDENTS/PLAINTIFFS:	N TERBLANCHE
INSTRUCTED BY:	COETZEE ATTORNEYS
DATE OF HEARING:	20 FEBRUARY 2024
DATE OF JUDGMENT:	22 FEBRUARY 2024