



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

CASE NO: 2023 - 102660

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

28/2/2024
DATE

SIGNATURE

In the matter between

**THE HOUSE OF TANDOOR ENTERTAINMENT
ESTATE OF THE LATE ERIC MNTUVEDWA MPOBOLA
MOKHEMA, MAHLOKO SIMON
MOKHEMA, GLORIA DINAH
MRADU, BUYISILE**

First Applicant
Second Applicant
Third Applicant
Fourth Applicant
Fifth Applicant

And

**TUHF URBAN FINANCE (RF) LTD
ACTING SHERIFF OF JOHANNESBURG EAST
SHERIFF OF JOHANNESBURG CENTRAL
SHERIFF OF RANDBURG WEST
FIRST NATIONAL BANK**

First Respondent
Second Respondent
Third Respondent
Fourth Respondent
Fifth Respondent

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 applicants in the application for leave to appeal is ordered to pay the costs of the application for leave to appeal, jointly and severally;*

[2] The reasons for the order follow below.

Introduction

[3] This is an application for leave to appeal a judgment I handed down on 23 October 2023.¹ For the sake of convenience I refer to the parties as they were referred to in the

¹ *House of Tandoor Entertainment and others v Tuhf Urban Finance (RF) Ltd and others* [2023] JOL 61460 (GJ), [2023] ZAGPJHC 1202, 2023 JDR 4026 (GJ).

main application.

[4] In the notice of appeal the applicants list twenty-eight grounds of appeal but Mr Makofane who appeared for the applicants restricted his argument to the submissions that the court erred in the findings of fact made and the law as stated in the judgment.

[5] There was some doubt whether the attorneys for the applicants were still on record but counsel for the applicants confirmed that he was appearing on their instructions and that he still held a brief to argue the application. He added that the notice of withdrawal on Caselines did not relate to the present matter but to a pending application for leave to appeal in the Supreme Court of Appeal.

Analysis

[6] I dealt with the issues raised in the judgment and do not repeat what is written there. I addressed the interdict in paragraphs 9 to 14, the foreclosure order in paragraphs 15 to 18, the attachment of money in paragraphs 19 to 23, and the counter-application in the contempt proceedings in paragraphs 24 to 31.

[7] The matter of *CB v ABSA Bank Limited and Others*² relied upon by the applicants must be distinguished from the present matter. In the present matter the attachment complained of was made in terms of a court order and due process was indeed followed.

The applicable principles in an application for leave to appeal

[8] 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

² *CB v ABSA Bank Limited and Others* [2020] ZAGPJHC 303.

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.

[9] In *KwaZulu-Natal Law Society v Sharma*³ Van Zyl J held that the test enunciated in *S v Smith*⁴ 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.

[10] In an *obiter dictum* the Land Claims Court in *Mont Chevaux Trust (IT 2012/28) v Tina Goosen*⁵ 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*⁶ and by Schippers AJA in *Member of the Executive Council for Health, Eastern Cape v Mkhitha and another*,⁷ 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

³ *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).

⁴ *S v Smith* 2012 (1) SACR 567 (SCA) para 7.

⁵ *Mont Chevaux Trust (IT 2012/28) v Tina Goosen* 2014 JDR 2325 (LCC), [2014] ZALCC 20 para 6.

⁶ *S v Notshokovu* 2016 JDR 1647 (SCA), [2016] ZASCA 112 para 2.

⁷ *Member of the Executive Council for Health, Eastern Cape v Mkhitha and another* [2016] JOL 36940 (SCA) para 16. See also See 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.

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.”

[11] In *Ramakatsa and others v African National Congress and another*⁸ 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 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.”

Conclusion

[12] For the reasons set out I find that there is no reasonable prospect of success on appeal and I make the order in paragraph 1.



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

⁸ *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).

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 **28 FEBRUARY 2024**

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INSTRUCTED BY: SCHINDLERS ATTORNEYS

DATE OF ARGUMENT: 26 FEBRUARY 2024

DATE OF JUDGMENT: 28 FEBRUARY 2024