

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE Number: 11142/2020

(1)	REPORTABLE: YES /NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED: YES/ NO
16/2/2023	

In the matter between: -

MARK FARBER

Applicant

AND

COMMISSIONER FOR THE SOUTH AFRICAN REVENUE

1st Respondent

SERVICE

KIRAL KOSTODINOV

2nd Respondent

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

1. This is an application for leave to appeal to the full bench of this division against my judgment dated 15 December 2022.

2. There seems, these days, always to be some debate on what the proper test for granting leave to appeal is in this division. The debate seems to be based upon the statements of Justice Bertelsmann in paragraph 6 of his judgment in *Mount Chevaux Trust [IT2012/28] v Tina Goosen & 18 others 2014 JVR 2325 (LCC)* in which he says 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 may come to a different conclusion ... The use of the 'would' in the new statute indicates a measure of certainty that another court would differ from the court whose judgment is sought to be appealed against'.

3. With respect to the learned judge, I have always had some difficulty with this finding. The logical consequence of this interpretation of the new Act is that, practically, the presiding judge *a quo* must almost be certain that he or she was wrong in his or her judgment. Mr Bester SC, appearing for the respondent in the leave to appeal, Mr Farber, relying on *Acting National Director of Public Prosecutions and others v Democratic Alliance [29577/09] HCGDP (24 June 2016) at para 25* argues that there is now a 'higher threshold for the granting of leave of appeal' than what the test was under the Supreme Court Act, 59 of 1959.

4. Mr Snyman SC, on behalf of the applicant for leave to appeal, Mr Kostodinov, contends that there is now no difference in the test than what the position was the case under the previous legislation. He relies *inter alia*, on *Ramakotsi and others v African National Congress and another [2021] ZASCA 31* where at para 10 it is stated, *inter alia*:

'The test of reasonable prospects of success postulates dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different than 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 for 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 the prospects of success must be shown to exist'.

5. In *John Walker Pools v Consolidated Aone Trade & Invest 6 (Pty) Ltd (in liquidation) & another* [2018] ZASCA 012 the Supreme Court of Appeal stated at paragraph 2:

'At the commencement of the hearing before us the presiding judge raised with the applicant's counsel whether the proposed appeal had not become moot. Subject to the question of mootness, the test we must apply is not whether JWP's proposed appeal should succeed but whether there are reasonable prospects of success in the proposed appeal'.

6. Furthermore, in *Maqebhula v The State* [2018] ZASCA 010 at paragraph 2 the Supreme Court of Appeal stated:

'The test we must apply is whether the applicant enjoys reasonable prospects of success, not whether an appeal would succeed'.

7. In my view the test according to the Supreme Court of Appeal, has not changed.
8. Nevertheless, despite the debate, I will, in this matter, consider that the threshold of obtaining leave to appeal has not increased and that it is simply whether there is a 'reasonable prospect of success'. My views, in favour of Kostodinov in this regard, do not save him and I am not of the view that there are not reasonable prospects of success in this matter. There is also no other compelling reason to grant leave.

9. The application for leave to appeal was a lengthy one, with no less than 18 grounds. They were somewhat disjointed and not that easy to follow. Nevertheless, I think that I have managed.
10. At the outset Mr Snyman SC, despite what was contained in his heads argument filed some minutes before the hearing, advised that Mr Kostodinov is no longer proceeding with the grounds for leave to appeal that my finding in respect of the lien is correct. When, pressed further, he conceded that that is the end of the counter-application.
11. He also, despite what was in the notice of application for leave to appeal and in particularly the statement in paragraph 11(d) that the applicant was not substantially successful in that the matter, should not go on appeal simply on the issue of costs.
12. When I gave my judgment in this matter I was of the view that I should make a clear distinction between the common law requirements for the transfer of ownership of an immovable property on the one hand, and what may or may not be owed to the South African Revenue Services for the import of the rifle or whether or not any USA law or regulation had been complied with on the other. I was also of the view that whether or not Mr Farber is entitled to possess the rifle in question in terms of the provisions of the Firearms Control Act is irrelevant for the purposes of ownership and whether or not it was transferred.
13. Counsel for Mr Kostodinov has not persuaded me that there is a reasonable prospect that another court will differ from me. There is no formal requirement for the transfer of ownership of an immovable item such as a rifle. It is common cause that Mr Kostodinov took physical possession of the rifle from Customs, qua agent of Mr Farber. That to me constitutes constructive delivery to Mr Farber, notwithstanding the incorrect clearance of the rifle. There are numerous formal requirements to be complied with for a licence for Mr Farber to possess the rifle. Finding that Mr Farber is the owner of the rifle is not in

any way a finding that he is entitled to a licence to possess it. He will of course have to persuade the necessary authorities that he is entitled to do so in terms of the Firearms Control Act. This may or may not involve a consideration of US law and regulations but this court is not asked to decide that. No doubt, and I suggest that he will be well advised to do so, he will in his application for a firearm license make a full disclosure of the history of this matter.

14. I am not persuaded that there is a reasonable prospect that another court will find that when Mr Kostodinov took possession of the rifle prior to him returning it to SARS, delivery was not complete, irrespective of other outstanding issues such as import and excise duties.
15. The application for leave to appeal is dismissed. Both parties deemed it necessary to call the big guns and appoint senior counsel. As such, the costs order will include the costs of two counsel.

Order

16. Application for leave to appeal is dismissed with costs, including the costs consequent upon the employment of two counsel.



REINARD MICHAU

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Date of hearing: 13 February 2023

Date of judgment: 16 February 2023

Appearance

On behalf of the Applicant

Adv A Bester SC

Adv C Cremer

On behalf of the Second Respondent: Adv M Snyman SC

Adv P P Ferreira