

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

CASE NUMBER: **31087/2019**

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED

DATE: **26 APRIL 2023**

SIGNATURE:

In the matter between:

RENOVGANATHIE KUNIE

APPLICANT

and

NEDBANK LIMITED

RESPONDENT

In re:

NEDBANK LIMITED

FIRST RESPONDENT

SB GARANTEEE COMPANY (RF) (PTY) LTD

SECOND RESPONDENT

LEBOHLANO TRADING 50 (PTY) LTD

THIRD RESPONDENT

JUDGMENT - LEAVE TO APPEAL

TLHAPI J

[1] This is an opposed application for leave to appeal premised on section 17 of the Superior Courts Act 10 of 2013, ("the Act"). For completeness, section 17 (1) of

the Act is set out below:

“Section 17(1)

(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 reasonable prospect of success; or

(ii) there is some other compelling reasons 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); 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.”

[2] It is contended that the court *a quo* erred on the following grounds:

1) erred in fact and in law in granting the order for the execution of the immovable property prior to the respondent setting its version of fact, alternatively allowing the respondent an opportunity to file an opposing affidavit in order for the court to make a determination on the fact common in cause or disputed;

2) erred in failing to consider a referral to mediation in terms of Rule 41A presented at the hearing of the application;

3) erred in failing to apply the provision of Rule 46 and Rule 46A prior to granting an order has breached the first respondent's constitutional

rights as set out in Chapter Two of the Constitution of South Africa in respect of:

3.1 Section 9(1) where everyone is equal before the law and has the right to equal protection and benefit of the law;

3.2 Section 10 where everyone has the inherent dignity and the right to have their dignity respected and protected;

3.3 Section 12(1)(a) where everyone has the right to freedom of security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause; and

3.4 Section 25(1) no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property;

4.1 erred in failing to apply the provisions of Rule 46A(5)(c);

4.2 erred in failing to allow the respondent to file an opposing answering affidavit prior to granting an order as specifically provided for in terms of rule 46A(6)(c); and

4.3 failed to consider the provisions of Rule 46A(8) in order to bring the applicant's unsubstantiated submission into line with the provisions of Rule 46 and 46A, specifically Rule 46A(f);

5. erred in granting costs of the entire application of an attorney and own client scale where no opposing affidavit had at the time been filed to oppose the application.

[3] The test applied previously to similar applications was whether there were reasonable prospects that another court may come to a different conclusion,

*Commissioner of Inland Revenue v Tuck*¹ . The threshold of reasonable prospects has now been raised by the use and meaning attached to the words ‘only’ in 17(1) and ‘would’ in section 17(1)(a)(i). Therefore, on the entire judgement there should be some certainty that another court would come to a different conclusion from the judgement the applicant seeks to appeal against. In *Mont Chevaux Trust v Tina Goosen and 18 Others*² :

“It is clear that the threshold for granting leave to appeal 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”

[4] In *S v Smith*³ a more stringent test is called for in that an applicant must convince a court, on proper grounds that there are prospects of success which are not remote, a mere possibility is not sufficient. Therefore, where the applicant has satisfied either of the two identified requirements in the Act, leave to appeal should be granted, *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others*⁴ . This standard was confirmed in *Notshokovu v S*⁵ where it was stated:

“.....An appellant on the other hand faces a higher and stringent threshold in terms of the Act compared to the provisions of the repealed Supreme Court Act 59 of 1959....”

[5] in *Ramakatsa and Others v African National Congress and Another*⁶ Dlodlo JA stated:

¹, 1989 (4) SA 888 (T)

² 2014 JDR 2325 (LCC) para [6]

³ 2012 (1) SACR 567 (SCA) para [7]

⁴ 2016 (3) SA 317 (SCA)

⁵ (157/15) [2016] ZASCA (7 September 2016) para [2]

⁶ (724/20190 [2021] ZASCA 31 (31 March 2021) para [10]

“Turning the focus to the relevant provisions of the Superior Courts Act[5] (the SC Act), leave to appeal may only be granted where the judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there are compelling reasons which exist why the appeal should be heard such as the interests of justice [6]. The Court in Curatco[7] concerning the provisions s 17(1)(a)(ii) of the SC Act pointed out that if the court unpersuaded that there are prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal, Compelling reason would of course include an important question of law or a discreet issue of public importance that will have the effect on future disputes. However, this Court correctly added that ‘but hereto the merits remain vitally important and are often decisive’.[8] I am mindful of 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 compelling reasons why the appeal should be heard, leave to appeal should be granted. The test of reasonable prospect of success postulates a dispassionate decision based on the facts and the law, that a court of appeal should be heard, leave to 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 chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist, [9]” (my underlining)

[6] In order to succeed in the appeal there must be prospects of success which must be shown to exist and not be remote as stated in Ramakatsa *supra*.

[7] The application was against an order declaring immovable property executable granted as a result of a monitory judgment in favour of the respondent exceeding R16 million in a summary judgement against the applicant. An attempt to execute against the movable assets resulted in the *nulla bona* return. It is common cause:

1) that the debt did not emanate from a mortgage loan agreement and that the applicant's liability stems from the fact that she stood surety and she is therefore not a judgement creditor.

2) that the property concerned is a residential property and the primary residence of the applicant.

[8] The respondent contended that the immovable property being identified was the only asset capable of being realized to settle the debt and that the respondent had no satisfactory alternative manner of settling the debt owed to it. The respondent relied on Deeds Registry search and not bank statements and a municipal valuation to establish what the respondent was owing in respect of the immovable property, as a result no reserve price was set having regard to the debt.

[9] Rule 46A places responsibilities on both the applicant being the debtor and the respondent as creditor to place certain information at the disposal of the court before granting an order of executability. Having revisited the application my reasons and having regard to the submissions by both counsel I am of the view there are prospects in the application and that another court may arrive at a different conclusion.

[8] In the result the following order is granted:

1. The application for leave to appeal is granted to the Full Court of this Division with costs to be costs in the appeal.

TLHAPI J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD AND RESERVED ON: 13 SEPTEMBER 2022

DELIVERED ON: 26 APRIL 2023