

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

CASE NO.: 39721/2021

(1) REPORTABLE: NO

(2) OF INTEREST TO

OTHER JUDGES: NO

(3) REVISED. NO

SIGNATURE:

DATE: 03/05/2023

In the matter between:

LIEZEL TSIHLAS

Applicant

and

S J VAN DEN BERG ATTORNEYS

Respondent

JUDGEMENT ON APPLICATION FOR LEAVE TO APPEAL

MFENYANA AJ:

[1] This is an application for leave to appeal against a judgement of this Court, handed down on 23 September 2022. Leave to appeal is sought to the Full Bench of this Division.

[2] The application is premised on the provisions of section 17(1) of the Superior Courts Act 10 of 2013, which provides as follows:

“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;*

(b)...

- [3] In the application, the applicant sets out various grounds of appeal, and contends that the Court erred on various findings of fact and/ or rulings of law, essentially, pertaining to certain aspects of the matter before the court, and in particular the following: issues relating to estoppel, the applicant's intended counterclaim and disputes of facts.
- [4] I do not intend to go into all the detail set out by the applicant in the application for leave to appeal, save for those aspects which I consider relevant for the determination of the present application.
- [5] In respect of estoppel, the applicant contends that the court erred in ruling that the applicant's defence (that the respondent was precluded from seeking performance in terms of the mandate, as it was in breach thereof) amounts to estoppel, and thus founding the summary judgement on the premise that the respondent was not precluded from claiming legal fees when it should not have done so. In this regard, the applicant contends that for it to be recognised, the defence of estoppel ought to have been pleaded. It had not been so pleaded in the present case.
- [6] The applicant further contends that the defence pleaded by the applicant is a denial of compliance by the respondent, with the mandate agreement, which would constitute a complete defence at trial.

- [7] As far as the applicant's discontent with the findings pertaining to the counterclaim, goes, she avers that the court erred in not finding that the applicant had provided a reasonable explanation for not formulating the counterclaim, considering that the applicant's file had been retained by the respondent, thus preventing the applicant from doing so. The applicant further avers that the court ought to have found that the applicant's cause of action met the *facta probanda* and there was no basis to suggest that the claim was not *bona fide*. She further contends that, in facing a summary judgement application, a defendant may rely on an intended claim in reconvention in an unliquidated amount which exceeds the plaintiff's claim. In this regard, the applicant contends that the court may not have considered all the authorities relied on by the applicant in resisting the summary judgement application.
- [8] With regard to disputes of fact, the applicant argues that the common cause facts of instances where the respondent failed to comply with his mandate were genuine and required determination in order to resolve the disputes. These are set out in elaborate detail, which this court need not go into, save to state that the applicant avers that these instances, which she further avers, included the respondent's obligation to fulfil its mandate faithfully, honestly, and with the necessary skill and diligence, and account to the applicant, constitute a triable issue.
- [9] Thus, the applicant contends that the court ought to have ruled that these factors constituted a triable issue and summary judgement should have been refused.
- [10] I have considered the applicant's grounds of appeal and listened intently to the submissions made by both counsel in the present application. I am persuaded that the applicant has made out a case for the relief sought in the application for leave to appeal, and that an appeal would have a reasonable prospect of success.

Order

[11] In the result, I make the following order:

- (i) The applicant is granted leave to appeal to the Full Bench of this Division.
- (ii) The costs of the application will be costs in the appeal.

S.M MFENYANA AJ
ACTING JUDGE OF THE HIGH COURT
HIGH COURT, PRETORIA

For the Applicant : Adv. H P Van Nieuwenhuizen
Instructed by : SJ Van den Berg Attorneys

For the Respondent : Adv. D Keet
Assisted by : Adv. N S Nxumalo
Instructed by : Steve Merchak Attorney