

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

CASE NO: 44937/2019

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

15/06/23

In the matter between:

LESLEY ANN PRICE

First Applicant

JENNIFER RUTH HYTON

Second Applicant

and

MORRIS KAPLAN N.O.

First Respondent

HILTON NORMAN KAPLAN N.O.

Second Respondent

SUSAN EVE WOOLF N.O.

Third Respondent

MORRIS KAPLAN

Fourth Respondent

HILTON NORMAN KAPLAN

Fifth Respondent

SUSAN EVE WOOLF

Sixth Respondent

RONALD WOOLF

Seventh Respondent

NORTH ATHERSTONE (PROPRIETARY) LIMITED

Eighth Respondent

TWO-K-ADMINISTRATION CC

Ninth Respondent

APPLICATION FOR LEAVE TO APPEAL JUDGMENT

BAQWA J

This Judgment was handed down electronically by circulation to the parties' and or parties representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed on June 2023.

Introduction

[1] This is an application for leave to appeal against an order handed down by this court on 14 June 2022.

The law

[2] Section 17 (1)(a) of the Superior Acts sets the threshold for leave to appeal to be granted. It provides that leave to appeal may only be granted where court is of the opinion that the appeal would have a reasonable prospect of success or that there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter.

[3] The test under Section 17(1)(a)(i) is whether the appeal "would" have reasonable prospects of success, rather than whether it "might" have reasonable prospects, as was the case prior to the amendment.

[4] The full court in *Acting National Director of Public Prosecution and Others vs. Democratic Alliance in re: Democratic Alliance vs. Acting National Director of Prosecutions and Others*¹ explained that:

"The Superior Courts Act has raised the bar for granting leave to appeal in *The Mont Chevaux Trust (IT2012/28) v. Tina Goosen & 18 Others*,

¹ [2016] ZAGPPHC 489.

Bertelsmann J held as follows '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 might come to a different conclusion, see *Van Heerden vs. Cronwright & Others 1985 (2) SA 342 (T)* at 343 H. 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. The legal position articulated in Acting NDPP accords with the decision of the Supreme Court of Appeal in *MEC for Health, Eastern Cape v Mkhita [2016] ZASCA 176*. In that case, Supreme Court of Appeal held: 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 reasonable prospects of success; or there is some other compelling reason why it should be heard."

[5] The Supreme Court of Appeal enunciated what would constitute reasonable prospects in the *Smith v S*,² where it held that:

"What the test of reasonable prospects of success postulates is 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 order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound rational basis for the conclusion that there are prospects of success on appeal.

Prospects of success

² 2012 (1) SACR 567 (SCA).

[6] The application for leave to appeal is based on four alleged errors by this Court:

6.1. failing to apply the Plascon-Evans rule, and erring in finding that the applicant acted in dereliction of his duties as trustee to such a degree that it warrants his removal as a trustee and the making of a punitive *de bonis propriis* cost against him (“the first ground”);

6.2. failing to properly interpret the Trust Deed, and particularly clause 5.1 thereof (“the second ground”);

6.3. finding that the first respondent’s appointment as director to North Atherstone and the extension of the distribution event in the Trust Deed were (each) not acts of maintenance and preservation of the trust assets, but rather acts of the nature contemplated in *Parker*, being capacity infringing events. (“the third ground”)

6.4. appointing three additional trustees to the board of trustees³ (“the fourth ground”)

[7] The absence of prospects of success is re-inforced by the Supreme Court of Appeal decision in *Shepstone and Wylie Attorneys v Abraham Johannes de Witt N.O & Others*³ in which a Deed of Suretyship signed by a majority of trustees in absence of authority from the trust deed was held to be invalid and unenforceable.

In the present case, for a period of about 20 years the trustees purported to conclude agreements on behalf of the trust in the absence of authority from the trust deed. Absent such authority, there are no prospects of success.

[8] Having read the comprehensive heads of argument by both counsel and having listened to submissions by counsel and for the reasons fully set out in the judgment sought to be appealed against I have to come to the conclusion that the application for leave to appeal has no merit in that there are no prospects of success on appeal.

³ (1270/2021 [2023] ZASCA 74 (26 May 2023)).

Based on the facts and the law, a court of appeal would not reasonably arrive at a conclusion different to that of the trial court. Further, I find no compelling reasons to grant leave.

Conclusion

[9] In the circumstances the application falls to be dismissed with costs.

Order

[10] The application for leave is dismissed with costs including the costs of senior counsel.

SELBY BAQWA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of hearing: 14 June 2022

Date of judgment: 15 June 2023