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**IN THE HIGH COURT OF SOUTH AFRICA
(FREE STATE DIVISION, BLOEMFONTEIN)**

Application no. 3692/2020

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

JOHANNES JACOBUS ERASMUS N.O.

1st Applicant/Defendant

[In his capacity as Trustee of the **WHITELINEN
LAUNDRY TRUST –[....]**

GERHARD ALBERTUS VAN RHYN N.O.

2nd Applicant/Defendant

[In his capacity as Trustee of the **WHITELINEN
LAUNDRY TRUST – [....]**

JOHANNES JACOBUS ERASMUS

3rd Applicant/Defendant

[Identity number: [....]

GERHARD ALBERTUS VAN RHYN

4th Applicant/Defendant

[Identity number: [...]]

And

STEFANUS JOHANNES NEL VAN RENSBURG N.O. 1st Respondent/Plaintiff

[In his capacity as Trustee of the **LOURIELLA**
TRUST – [...]

MARGARETHA ALETTA NOTLEY N.O.

2nd Respondent/Plaintiff

[In her capacity as Trustee of the **LOURIELLA**
TRUST – [...]

ZANIA HARTMAN N.O.

3rd Respondent/Plaintiff

[In her capacity as Trustee of the **LOURIELLA**
TRUST – [...]

JUDGMENT LEAVE TO APPEAL

JUDGMENT BY:

DE KOCK, AJ

**HEARD ON: HEADS OF ARGUMENT FILED IN TERMS OF RULE 16.5 OF THE
FREE STATE PRACTICE RULES**

DELIVERED:

This Judgment was handed down electronically by circulation to the parties' representatives by e-mail and released to SAFLII. The date and time for handing down is deemed to be 13h00 on 4 July 2022.

INTRODUCTION:

[1] The Applicants applied in the Court *a quo* for the rescission of the Judgment granted by this Court on 15 July 2021 in favour of the Respondents and for condonation for the late filing of the application for rescission of judgment. On 28 April 2022 I dismissed Applicants' application for condonation for the late filing of their application for rescission of judgment and accordingly the application for rescission of judgment was evenly dismissed.

[2] This is an application for leave to appeal against my judgment dated the 28 April 2021. The Applicants' grounds for leave to appeal are set out in detail in their Notice of application for leave to appeal and need not be restated here.

[3] In the Applicants' Heads of Argument it is for the first time submitted on behalf of the Applicants that the Respondents do not have the necessary *locus standi* to have brought the action. The Applicants also for the first time raised a second new ground in their Heads of Argument that the order of my brother Justice Mhlambi refers only to "*Defendant*" instead of "*Defendants*".

[4] I do not intend repeating the arguments advanced in support of the application for leave to appeal. I have considered all the grounds as well as the submissions in support thereof. I have once again considered the Heads of Argument filed in the application for condonation and rescission of judgment.

APPLICABLE LEGAL PRINCIPLES:

[5] In an unreported Judgment of *De Mont Chevaux Trust v Tina Goosen 2014 JDR 2325 LCC* Bertelsmann, J held that:

"It is clear that the threshold for granting leave to appeal against the 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 ... 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."

[6] *De Mont Chevaux*-decision was cited with approval in the matter of *Matoto v Free State Gambling and Liquor Authority* (4629/2015) [2017] ZAFSHC 80 (8 June 2017) where Daffue, J said:

"There can be no doubt that the bar for granting leave to appeal has been raised. Previously, the test was whether there was a reasonable prospect that another court might come to a different conclusion. Now, the use of the word 'would' indicates a measure of certainty that another court will differ from the court whose judgement is sought to be appealed against. The use by the legislator of the word 'only' (emphasized supra) is a further indication of a more stringent test."

[7] In *Smith v S* 2012 (1) SACR 567 (SCA), the Court dealt with the question of what constitute reasonable prospects of success and stated as follows:

"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 arise at the 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 categorized as hopeless. There

must in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.”

[8] In *Workmen’s Compensation Commissioner v Crawford* 1987 (1) SA 296 (A), it was held that the Court may consider any point which is not covered by the grounds of appeal only if the issues involved is a pure question of law covered by the pleadings and turning on facts which had been fully canvassed.

ANALYSIS:

[9] I am not persuaded that another Court would find that the Applicants provided a reasonable explanation for condonation or a reasonable explanation for their default in defending the action.

[10] I am evenly not persuaded that another Court would find that the Applicants raised a *bona fide* defence or defences and that the Applicants have a reasonable prospect of success if the Judgment is rescinded.

[11] I am not persuaded that another Court would come to a different conclusion especially regarding the issue that the transaction was a going concern.

[12] I am in particular not persuaded that another Court would come to different findings on the following issues that support the contention that the property in question was sold as a going concern:

12.1 that Jose Carlos da Cruz Nunes represented the Seller in the sale agreement of the property and evenly represented the Carlos Nunes CC and that the dual representation is in accordance with Clause 4.4 of the Sale Agreement.

12.2 that the mere existence of Clause 4.4 of the Sale Agreement which states that the Respondents shall obtain occupation of the property “*subject to the tenant’s rights*” is indicative and dispositive of the fact that the Seller and the Respondents agreed that

the Applicants would remain in occupation of the property post-transfer and that Mr Nunes facilitated the Respondent in becoming the landlord.

12.3 the essence of Applicants' contention regarding the Respondents' acquisition of rights as the landlord is that it was not alleged in the particulars of claim that *"amounts that the summons was issued for were ceded to the Respondents."*

12.4 the property sold in terms of the Deed of Sale is the same property which was leased by the Applicants. The Applicants entered into a Lease Agreement on 17 November 2015. The Respondents purchased the property in September 2016. In paragraph 6.8 of the Applicants' founding affidavit in the application for rescission of judgment it is stated that:

"It further needs to be noted that the leased premises was sold to the Plaintiff and the building was transferred into the name of the Plaintiff."

[13] the Applicants on their own version only vacated the property during June 2019. The Applicants did not advance any evidence in their application for rescission of judgment that they did not regard the Respondents as the landlord for the period from September 2017 to June 2019 or that they had paid rental to any person or entity other than the Respondents.

[14] it was common cause in the Court *a quo* that the amount which the Respondents claimed constitutes an amount which accrued after the date of transfer of the property. It was never advanced by the Applicants that the Respondents was not the Lessor of the property.

[15] The following grounds are also raised in support of the application for leave to appeal:

15.1 That I erred in not considering the requirements needed in a contract to make a transaction qualify as a going concern.

15.2 That I erred in not finding that it is not even mentioned in the Deed of Sale that the transaction is a going concern.

15.3 That I erred in not considering the requirements by SARS to make a transaction qualify as a going concern.

[16] The above grounds are now raised for the first time and for the first time the Applicants take issue with the *facta probantia* which formed the basis for the existence of the sale as a going concern whilst such sale was never disputed in the Court *a quo*. For the latter reasons I did not err.

[17] With due regard to the matter of *Workmen's Compensation Commissioner v Crawford supra*, I am of the view that the points raised in the Applicants' Heads of Argument for the first time are not purely points of law and cannot be raised at this stage/

17.1 I am in any event of the view that the Applicants' contention is not an outright denial of the Respondents' *locus standi* but a denial that the Respondents' *locus standi* was properly pleaded in the particulars of claim and thus renders the particulars of claim excipiable. It is trite that a defence of excipiability is an objection to a pleading and does not constitute a defence to the merits as was correctly conceded by counsel for the Applicants during argument in the Court *a quo*.

17.2 Furthermore the second attempt at a defence raised in the Heads of Argument that my brother Justice Mhlambi only referred to "*Defendant*" and not "*Defendants*" evenly does not constitute a defence to the merits and can in terms of the rules be rectified by the Court.

[18] I am therefore of the considered view that the application is without merit and that the Applicants do not have reasonable prospects of success on appeal.

ORDER:

[19] I accordingly make the following order:

1. The application for leave to appeal is dismissed with costs.

DE KOCK, A.J.

Appearances on behalf of the Applicants:

Counsel - Advocate FG Janse van Rensburg

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Appearance on behalf of Respondents:

Counsel - Advocate R van der Merwe

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