



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

Reportable:	NO/YES
Of Interest to other Judges:	NO/YES
Circulate to Magistrates:	NO/YES

Case Number: 4213/2021

In the matter between:

MANYONI AND GIJA INVESTMENTS CC

First Applicant

SIBONGISENI SANELE NYAMBI

Second Applicant

And

**CAROSPAN (PTY) LTD t/a NASHUA
BLOEMFONTEIN**

Respondent

HEARD ON:

This application was determined on the basis of written arguments instead of an oral hearing.

JUDGMENT BY:

DANISO, J

DELIVERED ON:

This judgment was handed down electronically by circulation to the parties' representatives by way of email and by release to SAFLII. The date and time for hand-down is deemed to be 14H00 on 18 October 2022.

[1] The applicants seek leave to appeal the whole judgment delivered by this court on 24 June 2022 in which Summary Judgment ("the summary judgment application") was granted in favour of the respondents with costs on attorney

and client scale. This order was based on a finding that the applicants' pleaded defences, both in the plea and the opposing affidavit did not disclose a bona fide defence that is good in law.¹

- [2] The application is opposed by the respondents and by agreement between the parties, the application is determined on the basis of written heads of argument filed by the respective parties.
- [3] The background facts of this matter are illustrated in my main judgment paragraphs 1 to 4, it is therefore unnecessary to repeat them in this judgment.
- [4] In terms of section 17(1) (a) of the Superior Court Act² leave can only be granted where I'm of the opinion that the appeal would have a reasonable prospect of success or there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration. There must be a measure of certainty that another court will differ from my judgment.³
- [5] The onus is on the applicants to convince this court that the issues that they raise in this application have prospects of success on appeal not just a possibility of success and that another court would come to a different conclusion.⁴
- [6] It is the applicants' case that in its determination of whether the applicants' defences raised any issues for trial the court erred by overlooking the applicants' other defences raised in their heads of argument namely: the

¹ Paragraph 4 to 13 of the judgment.

² Act 10 of 2013.

³ *Acting National Director of Public Prosecutions & others v Democratic Alliance* in Re: *Democratic Alliance v Acting National Director of Public Prosecutions & others* **(19577/09) [2016] ZAGPPHC 489** (24 June 2016); **[2016] JOL 36123 (GP)**.

⁴ *S v Smith* **2012 (1) SACR 567** (SCA) para 7.

illiquidity of the respondent's claims including non-compliance with the provisions of the Conventional Penalties Act.⁵

[7] I'm not convinced that the issues raised by the applicants in their grounds of appeal and also their heads of argument meet the stringent requirements contemplated in section 17(1) (a). In my main judgment, paras 5 to 16 I have adequately dealt with all the aspects raised by the applicants in the grounds of appeal, I don't deem it necessary to rehash the provisions of my main judgment in this regard except to highlight that illiquidity of a claim is a defence in terms of rule 32(3)(b)⁶ therefore, in order to successfully resist summary judgment the applicants were required to disclose the nature and grounds of this defence and the material facts relied upon in their plea and their subsequent opposing affidavit to enable the court to make a determination as to whether the defences raised a triable issue or not.

[8] Similarly, the defence based on the provisions Conventional Penalties Act should have been disclosed fully in the plea not only in argument.⁷ The onus was on the applicants to aver that clause 9 of the rental agreement is essentially a penalty clause as provided for in the Conventional Penalties Act and that it is disproportionate relative to the prejudice suffered by the respondents. Absent those allegations, the applicants had not complied with the provisions of rule 32 (3) (b,) in that respect, there was no basis for granting the applicants leave to defend the action. See *Premier Finance Corp (Pty) Ltd v Rotainers (Pty) Ltd*.⁸

[9] It is for these reasons above that I hold that the application for leave to appeal stands to be dismissed.

⁵ Act No, 15 of 1962.

⁶ *Botha v W. Swanson and CO. (Pty) Ltd* **1968 (2) PH** F85 (C).

⁷ *Plumbago Financial Services (PTY) LTD t/a Toshiba Rentals v Janap Joseph t/a Project Finance* **2008 (3) SA 47**(C)

⁸ **1975 (1) SA 79**(W), page 83 to 84.

[10] In the result, the following order is made:

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

NS DANISO, J

For the applicants:

Adv. R. Naidoo
Blair Attorneys
BLOEMFONTEIN

For the respondents:

Adv. A. Stander
Peyper Attorneys
BLOEMFONTEIN