



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

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: ✓
	
SIGNATURE	31/05/2019 DATE

CASE NO: 60085/2014

In the matter between:

GOOD FUTURE TRADING & PROJECTS 264 PLAINTIFF/RESPONDENT

and

SCOOTERS PIZZA (PTY) LTD

DEFENDANT/APPLICANT

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

THOBANE AJ,

[1] The applicant seeks leave to appeal to the full bench of this division against the whole judgment and order that this court handed down on 16 February 2018. The applicant contends that the appeal would have reasonable prospects of success.

[2] Section 17 of the Superior Courts Act 10 of 2013 states that;
“(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 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;”*

It is my understanding that this application for leave to appeal is premised on the contention that the appeal would have reasonable prospects of success and not that there is some other compelling reason why the appeal should be heard.

[3] The notice of application for leave to appeal sets out in detail the grounds upon which the application is premised. I will not repeat them. The nub of the application though is that this court should have found differently as set out in the notice. In particular, it is argued that the court should have found that the parties to the franchise agreement are bound by its terms. Further, that if the court had kept the parties to the terms of the franchise

agreement, it would have arrived at the conclusion that the terms of the agreement excluded the entitlement of the plaintiff to rely on pre-contractual representations that may have been made, unless made fraudulently.

[4] The applicant points out, with *inter alia* reference to the evidence of Mr Botha who testified on behalf of the plaintiff, that no undertakings about the profitability of the business were made to him and that the figures given to him were mere projections.

[5] It is submitted that the court should have found that it was improbable that the defendant had perpetrated fraud in that there was always a rider in the documents signed by the parties that in so far as the profitability of the franchise or its income stream is concerned, it could not be held liable.

[6] Lastly, that the plaintiff was required to prove that fraudulent misrepresentation was made prior to entering into the agreement, that the plaintiff relied on such misrepresentation to its detriment. The plaintiff, it is argued, failed to discharge the onus resting on it.

[7] In opposing the application counsel for the respondent submitted that the applicant was attacking the court's factual findings. He urged the court to dismiss the application with costs. I hasten to add that I did not understand

the submissions made by applicant's counsel to be aimed at the factual findings by this court.

[8] Prior to the Superior Courts Act, the test to be satisfied in an application for leave to appeal was whether there are reasonable prospects that another Court may come to a different conclusion. As has been observed in recent cases, section 17(1) has raised the test. The oft quoted dicta is that of Bertelsmann J, in ***The Mont Chevaux Trust v Tina Goosen & 18 Others*** 2014 JDR 2325 (LCC) at para [6] which reads 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 v Cornwright & 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."*

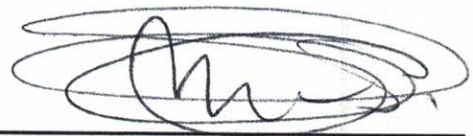
[9] In ***S v Smith*** 2012 (1) SACR 567 (SCA) para 7 Plasket AJA put it thus:

"[7] 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."

[10] The grounds of appeal set out in the notice of application for leave to appeal and argued before me were in my view dealt with in my judgment. Having considered argument I am of the view that there are reasonable prospects of success on appeal.

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

1. Leave is granted to appeal to the full bench of this division;
2. The costs of the application are to be costs in the appeal.

A handwritten signature in black ink, consisting of a large, stylized 'S' followed by a cursive 'T' and 'B', enclosed within a large, loopy oval. The signature is written over a horizontal line.

SA THOBANE

ACTING JUDGE OF THE HIGH COURT, PRETORIA