IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 28178/2017

Delete whichever is not applicable
(1) Reportable :- No
(2) Of interest to other Judges:- No
(3) Revised:-Yes

Date: 31/10/ 2018

Signature....Hrauley

In the matter between:

EISER, LEONARD WAYNE	Applicant
and	
ZUMA, SHEREEN	First Respondent
JAWITZ PROPERTIES	Second Respondent
FAURIE Nell INC	Third Respondent

J U D G M E N T (Leave to appeal)

MAIER-FRAWLEY AJ:

1. The applicant seeks leave to appeal against the whole of the judgment and order which I granted on 15 August 2018 wherein I dismissed the main application as instituted by the applicant, with costs.[1] The application for leave to appeal is opposed by the first respondent.

2. In this matter I gave full and detailed reasons for judgment. I have reconsidered my judgment in the light of the application for leave to appeal and I do not consider that there exists any reasonable prospect that another court would uphold the complaints raised by the applicant, for reasons which follow.

3. Section 17(1) of the Superior Courts Act 10 of 2013, *inter alia*, provides as follows:

> "(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;
>
> (b) ..."

4. The use of the word 'would' in section 17 (1)(a)(i) of the Superior Courts has been held to denote *'a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.'*[2] Such approach has been held to be correct in this division in the matter of *Acting National Director of Public Prosecutions and Others v Democratic Alliance, In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others.*[3] To this may be added, certain cautionary notes sounded by the Supreme Court of Appeal in dealing with appeals:

[1] The first respondent's counter-application was upheld to the extent set out in the judgment.

[2] *The Mont Chevaux Trust (IT 2012/28) and Tina Goosen and 18 Others* Case No. LCC 14R/2004, at para [6]

[3] (19577/09) [2016] ZAGPPHC 489 (24 June 2016) para [25], a decision of the Full Court, which is binding upon me.

In *S v Smith*,[4] it was stated that in deciding whether there is a reasonable prospect of success on appeal, there must be 'a sound, rational basis for the conclusion that there are prospects of success on appeal.' In *Dexgroup (Pty) Ltd v Trusco Group*,[5] the SCA cautioned that the 'need to obtain leave to appeal is a valuable tool in ensuring that scarce judicial resources are not spent on appeals that lack merit.'

5. I do not intend to deal *ad seriatum* with the grounds of appeal as set out in the notice of appeal, as they contain a measure of overlapping, but briefly deal with them as set out below.

6. The main ground of appeal is directed against the court's interpretation of clause 2 of the sale agreement, as dealt with in the judgment. The interpretation contended for on behalf of the applicant in the main application, was held to be insensible, not only by reason of the fact that it went against a commercially sensible construction but more particularly, because it undermined the accepted purpose of the clause,[6] which was set out in paragraph 40 of the judgment.

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[4] 2012 (1) SACR 567 (SCA) para 7.
[5] [2013] ZASCA 120 (20 September 2013).

[6] In this regard, See: *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA), para 12, where Wallis JA stated as follows: '*Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is 'essentially one unitary exercise'.* [Per Lord Clarke SCJ in Rainy Sky SA & others v Kookmin Bank [2011] UKSC 50 ([2012] Lloyds Rep 34 (SC)) para 21.] Wallis JA further pointed out that Lord Clarke SCJ relied also on the following passage in Society of Lloyd's v Robinson [1999] 1 All ER (Comm) 545, 551: '*Loyalty to the text of a commercial contract, instrument, or document read in its contextual setting is the paramount principle of interpretation. But in the process of interpreting the meaning of the language of a commercial document the court ought generally to favour a commercially sensible construction. The reason for this approach is that a commercial construction is likely to give effect to the intention of the parties. Words ought therefore to be interpreted in the way in which a reasonable commercial person would construe them. And the reasonable commercial person can safely be assumed to be unimpressed with technical interpretations and undue emphasis on niceties of language*'...

7. The gravamen of the applicant's complaint is that the interpretation accepted in the judgment fails to give effect 'to the express wording in clause 2 of the agreement, which states in unequivocal terms that the condition relating to the mortgage bond is [deemed to be] fulfilled on the issue by the financial institution of an offer upon terms the financial institution imposes',[7] and that if an offer of loan was made by the financial institution for an amount of less than R2 million, only such amount required acceptance by the first respondent (as buyer), but not the remaining terms of such offer.

8. The basis for the complaint appears from ground 3, where the applicant contends that 'if the mortgage bond was granted in the amount of R2 million the word 'acceptable to the purchaser' would cease to have any application, and the purchaser who ***receives*** *a mortgage bond* for the amount stipulated would be bound by the terms imposed by the financial institution, but not the purchaser [who] agrees to accept a lesser amount...' (own emphasis).

9. In the first instance, this was not the case which the applicant brought before court. The issue which the court was called upon to determine was whether or not the suspensive condition contained in clause 2 had been fulfilled in circumstances where an offer of loan in an amount of R1.2 million was made by Absa Bank, which required acceptance by the first respondent under the provisions of clause 2 of the agreement.

10. The argument on which ground 3 is based in any event does not assist the applicant. It loses sight of the commercial reality that underpins the basis for the obtaining of a bond, as mentioned, *inter alia*, in paragraph 38 of the judgment. In order to receive or obtain a loan, as was the underlying object, the buyer (first respondent) would have to have knowledge of any offer made by a lending

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[7] Grounds 1 and 2, in the application for leave to appeal.

institution in order to accept its quote on the terms offered, without which she would not obtain a bond. When regard is had to the purpose of the clause, namely, to protect the first respondent against the purchase of a property without having secured appropriate and acceptable financial means form a lending institution, obtaining of a bond by means of an acceptance of an offer of loan on the terms offered, directly impacted the purchaser's ability to make payment of the purchase price under the sale agreement, as further pointed out in paragraph 42 of the judgment. As such, the argument is of no assistance to the applicant.

11. The fourth ground mentioned in the appeal, namely, that the court failed to give effect to the deeming provision in the last sentence of clause 2 which 'excludes any interpretation of clause 2 which requires acceptance of the interest rates and other terms offered where a lesser amount is offered than appears in clause 2' fails to take into consideration what is stated in paragraphs 36 and 37 of the judgment, read together with footnotes thereto, particularly, footnote 38.

12. Ground 5[8] appears to be based upon a misconstruction of the basis on which the evidence of Ms Joubert was evaluated and accepted. Firstly, she tendered factual evidence of what actually transpired regarding the bond that was sought to be obtained, which belied the applicant's averments in the founding affidavit. She was called by the applicant, and tendered evidence on his behalf at the hearing. Her evidence had a bearing on whether or not the offer was accepted by the first respondent on 21 January 2015 (as averred in the founding affidavit) as well as the date on which the first respondent first obtained knowledge of the subsequent offer dated 29 January 2015. Secondly, Ms Joubert was not asked to interpret clause 2 during her testimony and even her evidence to the effect that the interest rate had to be acceptable to the buyer (as mentioned in paragraph 31 of the judgment) remained of a factual nature. As pointed out in footnote 38 on page 14

[8] In ground 5 of the application for leave to appeal, the applicant criticises the court for relying on an interpretation allegedly given by Ms Joubert who tendered oral evidence at the hearing of the main application on behalf of the applicant.

of the judgment, Ms Joubert's undisputed evidence constituted proof of the actual facts, which were contrary to the deemed facts, and served to effectively rebut the fictional state of affairs that underpinned the deeming provision.

13. Reference was made to the case of Boom v The American Swiss Watch Co 1915 AD 100 at 107 in support of the general principle mentioned in paragraph 37 of the judgment. In ground 7 of the application for leave to appeal, the applicant contends that *Bloom* is distinguishable on the facts of the matter *in casu*, since the Absa offer 'was not required to bring into existence a contract between the first respondent and the financial institution, but a contract between the first respondent and the applicant.' The ground appears to be based upon a misunderstanding of what was sought to be conveyed in paragraph 37 of the judgment, as read in context with the remainder of the judgment, and as further elucidated in paragraph 10 above. During oral argument presented at the hearing of the application for leave to appeal, the applicant's counsel contended that clause 2 did not require that a contract had to be concluded between the financial institution and the purchaser – it simply required finance to be available to the purchaser. This argument misses the point. Finance would only have become available to the purchaser upon acceptance by the buyer of the terms proposed by the financial institution. And that in turn would have required knowledge on the part of the buyer of both the existence of the offer of loan and the terms on which it was based.

14. As pointed out by the first respondent's counsel in written and oral argument tendered at the hearing of the matter, if clause 2 merely required that a loan had to be offered or that a facility had to be in place in order for the suspensive condition to be fulfilled, it begs the question as to why the condition was not considered to have been fulfilled when a facility was first offered on 2 January 2015 in the amount of R1.2 million, (referred to in paragraph 13 of the judgment).[9] The

[9] The argument was set out as follows in paras 3 & 4 of the first respondent's heads of argument: "*If the applicant honestly believed that the interest rate and terms and conditions of the approval of the home loan was not a requirement as per the agreement concluded, then the question beckons, on the*

argument is not without force. It bears mentioning that in the replying affidavit, the applicant contended that the issuing of the offer of loan on 29 January 2015 had the result of fulfilling the suspensive condition, this version being in stark contrast to the case alleged in the founding papers that the offer had been accepted by the first respondent on 21 January 2015 as was required under the provisions of clause 2. In a similar vein, in the application for leave to appeal it was contended on behalf of the applicant that the clause was clear and unambiguous, permitting of no interpretation, whereas in the main application, an interpretation was proffered, which was however rejected by the court as insensible by application of principles relating to the interpretation of contract, as dealt with extensively in the judgment.

15. For all the reasons given above, the application for leave to appeal is refused.

16. I accordingly make the following order:

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

Frawley

MAIER-FRAWLEY AJ

Date of hearing:	23 October 2018
Judgment delivered	31 October 2018

APPEARANCES:

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common cause facts, why was the suspensive condition not considered to have been fulfilled on 2 January 2015 when her home loan for the exactly the same amount of R1 200 000.00 was granted? The reason is, simply, that the applicant knew that the interest rate and the terms and conditions had to be acceptable to the first respondent should a lesser amount be offered, which negates against an interpretation now preferred by the applicant.".

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Attorneys for First Respondent:	Moodley Attorneys (ref: Mr. G. Moodley