



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

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

Case number: 1429/2018
1482/2018

In the matter between:

DUDLEY MYBURGH N.O.

1st Applicant

NICOLAAS JACOBUS KRIEK N.O.

2nd Applicant

(First and Second Respondents in their capacities
as duly authorised trustees of **MYBURGH EIENDOMS
TRUST, IT 1278/98**)

and

THE STANDARD BANK OF SOUTH AFRICA LTD

Respondent

HEARD ON: 9 NOVEMBER 2018

JUDGMENT BY: MATHEBULA, J

DELIVERED ON: 7 DECEMBER 2018

[1] These are applications for leave to appeal to the Supreme Court of Appeal against my findings of fact and law as well as the orders

under case number 1429/2018 and 1482/2018. The grounds upon which the appeals are based are similar in both cases. Therefore this judgment will deal with both of them as one. The applications are opposed by the respondent.

- [2] The applicants have raised eleven (11) grounds of appeal supporting their contention that I erred. Briefly the deal with the provisions of section 45 of the Companies Act 71 of 2008, suspensive condition, section 123 of the National Credit Act 34 of 2005, alleged breach of contract, the overcharging of the interest by the respondent, reckless credit agreements, disparity between the various amounts, failure to resolve conclusion of notarial bonds, the refusal to allow further affidavit, misapplication of the Badenhorst rule, failure to satisfy the requirements laid in section 12 of the Insolvency Act 24 of 1936.
- [3] Mr Maritz on behalf of the appellants contended that the fundamental issue which forms the basis of the appeal is whether there was proof of compliance with Section 45 of the Companies Act. He submitted that the authority was to sign documents relating to the loan agreements. This did not follow that he had the authority to exercise the vote as a shareholder. He pointed out that there was no general meeting held in this regard. The documents were signed without enquiring whether Dudley Myburgh was still a shareholder. The documents were signed without a general meeting.
- [4] He continued that the term loans amounted to R30 million rands while the assets exceeded R110 million rands. His argument was

that if the Trust is not bound by the Omnibus Guarantee then the Trust was not insolvent and not in default of any of its obligations.

- [5] On the issue of the suspensive condition he submitted that it was not proved that the suspensive condition was fulfilled. Therefore the respondent failed to show that the Addendum and the Omnibus Guarantee constituted valid issues of indebtedness. There was no special resolution by the Trust as the documents were simply placed before Dudley Myburgh to sign.
- [6] In opposition Mr. Zietsman submitted that it is trite law that appeals are against decisions not reasons of the court. The applicant has proved indebtedness of over R100.00, the respondent has committed an act of insolvency and that it will be to the advantage of creditors in the event that the sequestration order is granted.
- [7] He argued that there was no argument that either of the findings made were wrong. It is common cause that the authority given to Dudley Myburgh was never revoked at any stage. In this matter, the cause of action was sequestration not the enforcement of a debt. On the issue of the perfection order, he submitted that its purpose was to get a real right of the assets. Lastly that the two (2) applications did not have anything to do with each other.
- [8] Section 17(1) of the Superior Courts Act 10 of 2013 reads as follows:-

“17. Leave to appeal.—(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) the decision sought on appeal does not fall within the ambit of section 16 (2) (a); and
- (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.”

[9] The current test was succinctly explained in **Mount Chevaux Trust v Goosen 2014 JDR 2325 (LCC)**. On that occasion Bertelsmann J at para 6 stated the following:-

“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 Cronwright & 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. This new standard is applied by Section 37 (4) (b) of the Restitution of Land Rights Act 22 of 1994 to this court's duty to consider the prospects of an intended appeal.”

[10] The fact that the applicant faces a higher and stringent threshold in an application of this nature was emphasized in **Notshokovu v S.**¹

[11] The arguments advanced by Mr. Maritz runs parallel and deviate from what was the case for the respondents during the hearing. In fact he submitted that much himself. His submissions and the grounds of appeal relied upon lacks substance and are merely

¹ (157/15) [2016] ZASCA 112

nothing but the applicants disagreeing with the conclusions I made. In my view there are no reasonable prospects of success on the reasons that have been advanced in my judgment. I refer specifically to paragraphs 32 to 40 of the aforementioned judgment. The issues raised as the ground of appeal were extensively dealt with.

[12] It is so that several matters have been before the members of this court involving these parties. However, I was not referred to any conflicting decision(s) to the extent that the application should be granted to the Supreme Court of Appeal so that the matter can be finally laid to rest. The applicant does not meet the threshold laid down in the provisions of section 17.

[13] I make the following order:-

13.1 The applications for leave to appeal are dismissed with costs.

MATHEBULA, J

On behalf of Applicant:

Adv. P. Zietsman SC assisted by
Adv. J. H. Els

Instructed by:

Phatshoanne Henney Inc.
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On behalf of Respondent:

Adv. N.G.D. Maritz

Instructed by:

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