



IN THE HIGH COURT OF SOUTH AFRICA,
(NORTH GAUTENG, PRETORIA)

24/8/15

Case Number: 19304/2014

In the matter between

RUSTENBURG PLATINUM MINES LTD

Applicant

and

DOROTHEA SOPHIE JENSEN

Respondent

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

MAKGOKA, J

[1] This is an application for leave to appeal against an order of the judgment of this court handed down on 20 March 2015. It is opposed by the victorious applicant in the main application, who is now the respondent in this application.

[2] The test applicable whether or not to grant leave to appeal, is trite and well settled. It is whether there are reasonable prospects that another court, given the same set of facts, might arrive to a different conclusion. A corollary consideration is that leave to appeal is not granted for the mere asking. A proper case has to be made out. That common law approach has been codified by s 17 of the Superior Court Act 10 of 2013.

[3] The proper approach to applications for leave to appeal was re-stated by the Supreme Court of Appeal in *S v Magadla* 2010 (2) SACR 316 (E) – equally apposite in civil cases. The foot-note reads:

“The chief requirement for the granting of leave to appeal was the existence of a reasonable prospect of success on appeal. The mere possibility that another court might come to a different conclusion was not sufficient, nor was it enough that the case was arguable, nor that it would offer solace to the applicant to know that the final decision would be given by a higher court.”

(my underlining for emphasis)

[4] The grounds of appeal are simply a regurgitation of the arguments advanced in the main application. All of them have been adequately dealt with in the judgment. I am not persuaded that any of them justify a finding that another court might come to a different conclusion.

[5] There is an argument which is raised for the first time in the notice of application for leave appeal. The argument is that even if the servitude could be construed to an exclusive right on the respondent, it is a single right that entitles the respondent to select and use one or more trading sites on the property. According to the applicant, the respondent cannot invoke the respondent from conducting business on the property. The applicant placed reliance for this contention on a passage in *Hollmann and another v Estate Latre* 1970 (3) SA (A) at 646G.

[6] I do not understand the remarks of the learned Chief Justice in that case to suggest that the right to select excludes the right to restrain others from similarly selecting trading sites. On the contrary, the tenor of the judgment confirms the long-standing position since *Willoughby's*¹ that a servitude to trade upon a particular property could be constituted in favour of another property. Even assuming the applicant's argument to be correct that the right is only limited to a selection of trading sites, it should logically follow that inherent in that right is to restrain others from selecting trading sites and trading on them. As Mr *Hellens*, for the respondent,

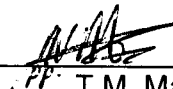
¹ *Willoughby's Consolidated Co. v Copthall Stores* 1918 AD 1.

correctly argued, there would be no point in having exclusive rights if others can exercise similar rights in respect of the same property.

[7] Taking into consideration all of the above factors, and having carefully and dispassionately applied my mind to the applicable test, I am of the view that there are no reasonable prospects that another court might arrive to different conclusion.

[8] In the circumstances the application for leave to appeal falls to fail. The following order is made:

1. The application for leave to appeal is dismissed with costs, including the costs of senior counsel.



T.M. Makgoka
Judge of the High Court

Date of hearing: 21 August 2015

Judgment delivered: 24 August 2015

Appearances:

Counsel for the Applicant: Adv. E Rudolph

Instructed by: Serfontein Viljoen & Swart, Pretoria

Counsel for the Respondent: Adv. M.R. Hellens Sc

Instructed by: Klagsbrun Edelstein Bosman Vries Inc, Pretoria