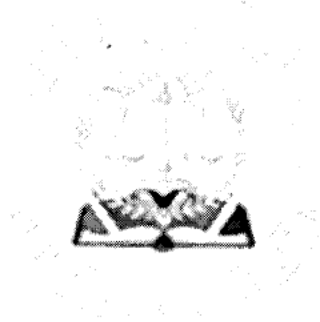




**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 29560/21

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO.
(3) REVISED.

DATE: 15 JULY 2024

SIGNATURE

In the matter between:

SIPHO NOAH MTHETHWA

1st APPLICANT

SIZIZWE SYLVIA MTHETHWA

2nd APPLICANT

NU-WAY HOUSING FINANCE DEVELOPMENTS (PTY) LTD

3rd APPLICANT

And

MAILULA ALBERT ATTE OBED

RESPONDENT

IN RE:

MAILULA ALBERT ATTE OBED

APPLICANT

And

NATIONAL HOUSING FINANCE CORPORATION SOC LTD	1 st RESPONDENT
NU-WAY HOUSING FINANCE DEVELOPMENTS (PTY) LTD	2 nd RESPONDENT
HLANO HOUSING SOLUTIONS (PTY) LTD	3 rd RESPONDENT
[PREVIOUSLY KNOWN AS KHAYALETHU HOME LOANS (PTY) LTD]	
PIERE ANDRE BRUYNS	4 th RESPONDENT
SONJA BRUYNS	5 th RESPONDENT
SIPHO NOAH MTHETHWA	6 th RESPONDENT
SIZIZWE SYLVIA MTHETHWA	7 th RESPONDENT
REGISTRAR OF DEEDS	8 th RESPONDENT
CITY OF TSHWANE METROPOLITAN MUNICIPALITY	9 th RESPONDENT
THE MINISTER OF HUMAN SETTLEMENT, WATER AND SANITATION	10 th RESPONDENT

JUDGEMENT

(Leave to Appeal Application)

This matter has been heard virtually and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgement and order are accordingly published and distributed electronically with the effective date of judgement being 15 July 2024

MNYOVU AJ

[1] This is an application for leave to appeal the declaratory order granted in favour of the Respondent (Mailula Albert Atte Obed) on the 10th of February 2023.

[2] The applicants raised several grounds of appeal against the whole judgement. Such as that the substantive relief granted in favour of the respondent was not sought in the notice of motion. Further the court accepted evidence from the bar in relation to the explanation of unreasonable delay. They also claim that there are compelling reasons why leave to appeal should be granted in view of the misdirection, vagueness, self- contradictions and defects

contained in the impugn judgement. The applicants relied to legal authorities in their heads of arguments, and the applicants contend that there is reasonable prospect of success that another court will come to a different conclusion. Further, applicant claim that there are conflicting judgements on the dispute at hand, court disregarded the Eviction Order that was granted and confirmed by the eviction judgement per Van Der Westhuizen J against the respondent, the impugn judgement is in conflict with Van Der Westhuizen J judgement¹

[3] The latter proposition was supported by third applicant who pointed out that the court incorrectly applied Section 21 (1) (c) of the Superior Courts Act ,10 of 2013 in finding that the applicant has satisfied the requirements for declaratory relief. The court erred to ought to have found that the respondent was not legal owner of the property and disregarded the Eviction order against the respondent on 04 November 2019. Therefore, there is a reasonable possibility that another court would come to another decision²

[4] The issue for determination is whether there is a reasonable prospect that the appeal would succeed in terms of s17 of the Superior Courts³ which states that:

“17. (1) leave to appeal may only be given where 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 reasons why the appeal should be heard, including conflicting judgements on the matter under consideration”

¹ 6th and 7th Heads of Arguments

² 2nd Heads of Arguments

³ Act 10 of the Act,

[5] In S v Smith⁴, Plasket AJA explained the meaning of 'a reasonable prospect of success' as follows:

"What the test of reasonable prospect 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, the appellant must convince this court on proper grounds that he has prospects of success on appeal and these prospects are not remote but have a realistic chance of succeeding. More is required to be established than 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."

[6] In Pretoria Society of Advocates and Others v Nthai⁵ the court held that:

"The enquiry as to whether leave should be granted is twofold. The first step that a court seized with such application should do is to investigate whether there are any reasonable prospects that another court seized with the same set of facts would reach a different conclusion. If the answer is in positive the court should grant leave to appeal. But if the answer is negative, the next step of the enquiry is to determine the existence of any compelling reason why the appeal should be heard."

Based on the authorities referred to above it is apparent that our courts have been consistent in the application of the test on whether leave to appeal should be granted.

⁴2012 (1) SACR 567 (SCA) at para 7

⁵2020 (1) SA 267 (LP) at [4]

[7] Most importantly, the approach is now also developed that if the inquiry into whether the appeal would not have a reasonable prospect of success, the court must now inquire whether it is in the interest of justice that the appeal should be heard, the respondent is opposing this application on the grounds that the court extensively dealt with and explained why the declaratory order was granted and substantiated with legal authorities, the applicants grounds and reasons lack substance, illogical and are not sustained by any legal authority. Therefore, it is in interest of justice to inquire whether the appeal should be heard.

[8] The applicants now seek leave to appeal the impugned judgement and order to the Full Court or to the Supreme Court of Appeal.

[9] The liberal approach to grant leave by courts is **discouraged as being inconsistent with s17** of the Act. For instance, in Mothule Inc Attorneys v The Law Society of the Northern Provinces and Another⁶ the Supreme Court of Appeal stated as follows regarding the trial court's liberal approach on granting leave to appeal:

"It is important to mention my dissatisfaction with the court a quo's granting of leave to appeal to this court. The test is simply whether there are any reasonably prospects of success in an appeal. It is not whether a litigant has an arguable case or mere possibility of success."

Reasonable prospect of success

[10] The court is criticised from its whole judgement in that it is erroneous in law or facts, the contention that the court incorrectly applied section 21 (1) (c) of the Superior Courts Act 10 of 2013 in finding that the applicant has satisfied the requirements for declaratory relief, and failed to consider and / or apply the legal principles and requirements under substantive law in relation to the relief sought by the applicant. This contention is wrong and misleading.

⁶(213/16) [2017] ZASCA 17 (22 March 2017)

[11] The declaratory relief granted in favour of the respondent was because of the administration error to the sale of the property and the uncertainty of the ownership of the property being occupied by the respondent for the considerable amount of years, which the respondent bought from the municipality, property was fraudulently transferred by the third applicant to first and second applicant, as such they became title holders of the property in question. The respondent being the interested party in an existing future and or contingent right and obligation in the property in question, the court was satisfied with the facts presented to it that led to the granting of the declaratory order in favour of the respondent. In that view, the court applied a correct legislation in terms of section 21 (1) (c) of the Superior Courts Act 10 of 2013

[12] The court is further criticized in that when it regarded its decision to grant an order as an exercise of discretionary power, it misdirected itself as there was no discretion to be exercised in this regard as the matter involved the determination of a substantive right of ownership to the property, in my view this application was not for the determination of a substantive right of ownership but for the declaratory order, which the court exercised its discretion in support with legal authorities in the impugn judgement.

[13] The court is criticized for disregarding that the eviction order granted against the respondent on 04 November 2019 in favour of the 1 and 2nd applicant. The judgment of Eviction order does not deal with prayers in the notice of motion in my impugn judgement, this court is not convinced that there judgment of the eviction order has similar facts to my impugn judgement and the judgements are conflicting. The third applicant is not party to the eviction application, the parties are not the same, the relief sought is not the same, the facts are different and all facts under the application did not serve before the eviction order.

[14] Based on the above, the appellants failed to convince this court on proper grounds that they have prospects of success on appeal and these prospects are not remote but have a realistic chance of succeeding. More was required to be established than there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There was no sound, rational basis for the conclusion that there are prospects of success on

appeal. This court finds that there are no reasonable prospects of success on appeal, the applicants have therefore, not satisfied the requirements of Section 17(1)(a)(i).

Compelling reason to grant leave to appeal?

[15] In an attempt to satisfy the requirements of Section 17(1)(a)(ii) of the Superior Courts Act, the applicants in their arguments of application for leave to appeal, submitted that because of the misdirection, vagueness, and self-contradiction by this court and conflicting judgements, and the matter is of interest in the Constitutional court it is of utmost importance that the leave to appeal be granted. It is my view that there is nothing sinister about this order and it is a flexible remedy which can assist in clarifying issues of law expeditiously, hence enquiry is needed.

[16] It is trite that the absence of a reasonable prospect of success is a relevant factor in considering whether, despite this absence, another “compelling reasons” exist justifying the granting of leave to appeal⁷.

[17] As alluded in paragraph 13 and in support of the respondent’s answering affidavit⁸, the order of this court effectively maintained the status quo of the respondent whose application was to seek the declaratory order in the notice of motion, the applicants had not even described what “compelling reasons” would be in its favour which would justify the granting of leave to appeal in these circumstances.

[18] Having perused the correspondence letter from the Constitutional court dated 25 July 2023 with regard to the outcome of this appeal relating to ownership of the property, it is of utmost important to clarify that it is my view that my impugn judgement was not in relation to determination of ownership of the property, but for declaratory order, which speaks for itself and does not infringe on the rights of the public.

⁷Minister of Justice and Constitutional Development v South African Litigation Centre 2016 (3)SA 317 (SCA) at par [24]

⁸Respondent’s Answering Affidavit

[19] Accordingly, it is for these reasons that the courts are discouraged as being inconsistent with s17 of the Act.

[20] In the circumstances, the applicants have failed to provide the compelling reasons why the court should grant leave to appeal, and have failed to identify conflicting judgements with similar facts but with different conclusion.

Conclusion

I therefore find that none of the requirements for the granting of leave to appeal have been satisfied, having reached this conclusion, I also find no reason why costs should not follow this event.

Order

The following order is made:

The application for leave to appeal is refused with costs, such costs to include the costs of counsel, where employed.

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B F MNYOVU

Acting Judge of the High Court
Gauteng Division, Pretoria

DATE APPLICATION HEARD: 15 APRIL 2024

DATE JUDGEMENT DELIVERED: 15 JULY 2024

APPEARANCES:

For the First and Second Applicant:	Adv D T Skosana
Attorneys for First and Second Applicant:	S Ngomane INC
For the Third Applicant:	Adv A R Coetsee
Attorneys for the Third Applicant:	Prinsloo Bekker Attorneys
For the Respondent	J G Van Den Berg
Attorneys for the Respondent	Ramapuputla Attorneys Inc