

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

Case No: A96/2020

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED.

17/7/24

In the matter between:

SIVALINGUM KANNIAH

First Applicant

NIRMALA KANNIAH

Second Applicant

and

BLUE WATER CREEK HOMEOWNERS ASSOCIATION

Respondent

JUDGMENT – LEAVE TO APPEAL

Manamela AJ

- [1] This is an application for leave to appeal to the Supreme Court of Appeal (“the SCA”) in terms of section 17(1)(a)(i) and section 17(1)(a)(ii) of the Superior Courts Act 10 of 2013 (“the Superior Courts Act”) alternatively to a full bench of the Gauteng Division, which appeal was heard on 29 November 2023. The

appeal is against the whole judgment and order of this Court handed down 9 January 2023 in the following terms, that –

- “1. The First and Second Respondent’s appeal in terms of section 57(1) of the Community Schemes Ombud Services Act, 9 of 2011 (“the CSOS Act”) is set aside;*
- 2. The Adjudicator’s Order dated 17 October 2019 is made an order of Court, that – The First and Second Respondent is ordered to –*
 - 2.1. Build a splay on Erf 2[...] Blue Creek Homeowner’s Association as requested by the Respondent’s Directors, which is 3x3mm, in accordance with safety requirements according to road reserve widths, within 60 days of date of this order.*
 - 2.2. Pay to the Respondent the fins and penalties as charges in accordance with the MOI and the Rules.*
 - 2.3. Henceforth comply with the Memorandum of Incorporation and the Rules and Aesthetic Guidelines made in terms thereof.*
- 3. The First and Second Respondent are liable for costs on attorney and client scale.”*

[2] The background facts are as stated in the judgment.

[3] Before I could deal with this application, I have to add a fourth order in terms of Rule 42(1)(b) is that *“4. The counter-claim is dismissed”*. Evidently this court omitted to include an order relating to the failure by the applicants to seek condonation, when it was clearly dealt with. Although not stated as a ground of appeal, in the judgment under paragraph 37 – 41 I have dealt with

the counter-application being a review launched by the first and second applicant, without making a pronouncement of the order for the dismissal of this counter-claim. In light of that, I confirm the order made out during the hearing of this application that in terms of Rule 42(1)(b) of the Uniform Rules of Court, the order granted is varied by expressly adding paragraph 4 thereto that –

“4. The counter-application is dismissed.”

[4] The application for leave to appeal is opposed. The applicants, in this application for leave to appeal, were the unsuccessful parties, the Respondent in the court *a quo*.

[5] For an application for leave to appeal to succeed the applicants has to comply with the provisions of Section 16 (1) (a) (i), read with Section 17 (1) (a) (i) and/or section 17 (1) (a) (ii) of the Superior Courts Act 10 of 2013 and in terms of Rule 49 (1)(b) of the Uniform Rules of Court. Section 17 (1) (a) of the Superior Courts Act 10 of 2013 (“the Act”) states that:

“Leave to appeal may only be given where the judge or judges concerned are of the opinion that - the appeal would have a reasonable prospect of success (Section 17 (1) (a) (i)) or; there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration. (Section 17 (1) (a) (ii))”.

[6] It is trite law that leave to appeal must only be granted if the judge is of the opinion that there are reasonable prospects of success on appeal as contemplated in section 17(1)(a)(i) of the Superior Court Act¹. The applicants placed further reliance on section 17(1)(a)(ii), which provides that there must be compelling reasons why the appeal should be heard, including conflicting judgments on the matter under consideration.

¹ Act 10 of 2013 (as amended)

[7] In *Fusion Properties 233 CC v Stellenbosch Municipality*², it was stated that –

“Since the coming into operation of the Superior Courts Act there have been a number of decisions in our courts which dealt with the requirements that an applicant for leave to appeal in terms of Section 17 (1) (a) (i) and 17 (1) (a) (ii) must satisfy in order for leave to be granted.

The applicable principles have over time crystallised and are now well established. Section 17 (1) provides, in material part, that leave to appeal may be granted 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....

Accordingly, if neither of these discrete requirements is met, there would be no basis to grant leave”.

[8] The applicants contends that this Court erred in not considering and dealing with that - the Applicants’ opposition, and that the applicants complied with the Memorandum of Incorporation, Rules and Aesthetic/Architectural Guidelines; that the applicants complied with the building plans approved the respondent and local council, that the respondent would not have approved by the building plans had the building plans not been in accordance with Aesthetic/Architectural Guidelines and Rules; the Respondent conveyed to the Applicants in writing that the building plans were approved and thereby prevented to claim otherwise.

² [2021] ZASCA 10 (29 January 2021) (para 18)

- [9] The applicants further contends that the court erred in finding that the basis of the Appellant's opposition is unclear, that the Respondent made out a case for the relief sought, that the Adjudication Order dated 17 October 2019 should stand, in granting the order that the Applicants appeal in terms of Section 57(1) of the Community Schemes Ombud Service Act 9 of 2011 is set aside; in granting the order that the Adjudication Order dated 17 October 2019 is made an order of this Court. The applicants further contend that the Court made a contradiction it found that the Applicants appeal in terms of Section 57(1) of CSOS Act lapsed and that the adjudication order has taken effect (under paragraph 30 of the judgment), on the one hand, and that the Applicants had an opportunity to resume the appeal (under paragraph 35 of the judgment).
- [10] The Applicants further contended that the court conceded in the judgment that section 56(2) of the CSOS Act kicks in when there is failure to comply with the Adjudication order (under paragraph 34 of the judgment) and supported that the Respondent had to register the adjudication order with the Registrar of the Court in terms of section 56(2), to enforce same.
- [11] The Applicants argues that the Respondent's application was ill-founded and unnecessary, and that the Adjudication Order dated 17 October 2019 should have been set aside and the penalties imposed on the Applicants' levy account was unlawful and should be removed.
- [12] The Respondent's opposition of this application is premised on the fact that the applicants have failed to meet the higher threshold that is required to be met in terms of section 17(1)(a)(i) before leave to appeal may be granted. It is also evident that the Respondent correctly argues that the grounds to appeal provided by the applicants are vague and misguided.
- [13] The Respondents correctly points out that this court was never tasked to deal with the merits of the adjudication.

- [14] To reiterate the facts briefly, the first and second applicants were informed of their right to appeal the adjudication order in terms of section 57(1) of CSOS Act, in terms of which an appeal had to be filed within 30 days after date of delivery of the adjudication order. The adjudication order was served on the parties on 1 November 2019, and only on 25 March 2020, the applicant's eastwhile attorneys, filed a notice of appeal, electronically serve on 3 April 2020. On 6 April 2020, the respondent's attorneys issued a correspondent notifying the applicants' of the lateness of their appeal, in accordance with section 57(2) of CSOS Act. The first and second applicant's appeal was due on 1 December 2019.
- [15] Evidently, the first and second applicants failed to file a condonation application and also failed to prosecute the appeal which led to the respondent launching an application setting aside the late appeal and enforcing the order granted by the adjudicator, which I duly confirmed.
- [16] In my consideration of this application, I have taken all of the above purported grounds into consideration, even if I may not have specifically dealt therewith herein, as they are generally speculative. The crux of the ground is that I have not considered the facts of the case, and that I did not deal with the merits of the case. I am not convinced that a party who has failed to timeously launch an appeal and/or to seek condonation for being late will have any prospects of success in another court, it is therefore unlikely that another court will come to a different conclusion. The timeframe set-out under Section 57 have simply not been complied with.
- [17] An application for leave to appeal must convince the court on proper grounds that the applicant would have a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound rational basis to conclude that there "would be a reasonable prospect of success on appeal. The applicants are also not convinced that another court will come to a different conclusion as they used the phrase *"there is a possibility that another court may come to a different conclusion on appeal"*.

[18] In *MEC for Health, Eastern Cape v Ongezwa Mkhitha & The Road Accident Fund*,³ the SCA held that the test for granting leave to appeal is as follows (para 16-17):

“Once again it is necessary to say that Leave to Appeal, especially to this Court, must not be granted unless there truly is a reasonable prospect of success. Section 17 (1) (a) of the Superior Courts Act 10 of 2013 makes it clear that Leave to Appeal may only be granted where the Judge concerned is of the opinion that the Appeal would have a reasonable prospect of success, or there is some other compelling reason why it should be heard”.

[19] In *The Mont Chevaux (IT2012/28) v Tina Goosen & 18 Others*,⁵ the Land Claims Court, Bertelsmann J outlined how the Section 17(1)(a)(i) of the Superior Courts Act had raised the bar for granting leave to appeal –

“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.”⁶

[20] There must exist more than just a mere possibility that another court will (not might) find differently on both facts and law⁴. I find that there is no possibility that another court would come to a different finding than what I have, in that regard the application for leave to appeal has to fail.

Accordingly, the following order is made –

³ [2016] ZASCA 176

⁴ *Fair Trade Tobacco Association v President of the Republic of South Africa and Others* 2020 (6) SA 513 (GP)

1. The order granted on 9 January 2023 is varied to include a paragraph 4 as follows:

'The counter application is dismissed'

2. The application for leave to appeal is dismissed
3. The applicants' in this application for leave to appeal are ordered to pay the respondent's costs on attorney and client scale.

P N MANAMELA
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of hearing: 29 November 2023

Judgment delivered: 17 July 2024

APPEARANCES:

Counsels for the Applicant: Adv. NG Louw

Attorneys for the Applicant: JV Rensburg Kinsella Inc Attorneys

The first and second Respondents: Appeared In Person