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IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION: PRETORIA)

Date: 19 September 2024

Case number: 11029/2020

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED

DATE: 19 SEPTEMBER 2024

SIGNATURE

In the matter between:

SB GUARANTEE COMPANY RF (PROPRIETARY) LIMITED

(REGISTRATION NUMBER: 2006/021576/07) PLAINTIFF / RESPONDENT

And

MOHAMED IRSHAAD HASSEN

(IDENTITY NUMBER: 9[...])

DEFENDANT / APPLICANT

JUDGMENT

MINNAAR AJ.

[1] On 4 September 2023, I delivered an *ex temporae* judgment in the opposed motion court. In terms of the order, summary judgment was granted for payment of R833 528.31 together with interest and costs. In terms of the provisions of Rule 46A of the Uniform Rules of Court, the defendant's

immovable property was also declared executable and a reserve price in the amount of R500 000.00 was set.

[2] Albeit the defendant delivered an answering affidavit, and heads of argument in the summary judgment proceedings, counsel for the defendant had not been briefed to represent the defendant on the merits. The counsel that appeared on behalf of the defendant was only briefed to seek a postponement.

[3] The representation and subsequent absence of the defendant's legal representatives is fully dealt with in the judgment. Of importance, is the email sent by the offices of S S Ntshangase Attorneys, in which it was stated that in the absence of postponement, the client (referring to the defendant) has advised that the plaintiff may proceed with summary judgment.

[4] Through his attorneys, S S Ntshangase Attorneys the defendant launched an application for leave to appeal on 19 September 2023. This is the same firm of attorneys representing the defendant in delivering his plea, affidavit opposing summary judgment and heads of argument in the summary judgment proceedings.

[5] The grounds in the application for leave to appeal are that the court erred in not granting the postponement sought by the defendant, the court ignored the settlement negotiations between the parties and the court should not have mulcted the defendant with costs.

[6] From the correspondence between the parties, it is evident that on 6 December 2023, S S Ntshangase Attorneys delivered a notice of withdrawal of attorneys of record. Since then the defendant has been self-represented.

[7] The application for leave to appeal was eventually set down for hearing on Friday 2 August 2024. On this day, the defendant was assisted by his father ("Mr Hassen Snr"). In the interest of justice, and since the defendant is self-

represented and no objection was raised by the plaintiff on this issue, the court allowed Mr Hassen Snr to assist the defendant in presenting his case.

[8] The defendant requested a postponement to seek legal representation. Having heard from both parties on the postponement, the application was postponed to Friday 16 August 2024 and the wasted costs occasioned by the postponement were reserved.

[9] On Friday 16 August 2024, the court was informed, through Mr Hassen Snr, that the defendant attempted to obtain legal representation but to no avail. In the meantime, the defendant has uploaded heads of argument in the application for leave to appeal. Mr Hassen Snr, with confirmation from the defendant, indicated that they are ready to argue the application for leave to appeal.

[10] In the defendant's heads of argument, the defendant elaborated on the grounds of appeal. The defendant requested that his heads of argument be read as an extension of the application for leave to appeal.

[11] In the heads of argument the defendant elaborated on the ground that the request for a postponement was not granted and emphatically stated that he never gave an instruction that, in the absence of a postponement, the plaintiff could proceed with summary judgment. Reference is further made to advance settlement negotiations at the time the judgment was granted and it is alleged, premised hereon, that the court was not aware of all the facts when the judgment was granted.

[12] On the merits of the application for summary judgment and the defences raised, read with the provisions of Rule 32 and Rule 46A of the Uniform Rules of Court, none of these facts or allegations could have impacted the order that was granted or would have resulted in a different outcome.

[13] Applications for leave to appeal are dealt with in terms of the provisions of Rule 49 of the Uniform Rules of Court read with sections 16 and 17 of the Superior Courts Act 10 of 2013 (“the Superior Courts Act”).

[14] Section 17(1) of the Superior Courts Act provides the test applicable to applications for leave to appeal. Section 17(1) reads 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) 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.”

[15] Section 17(1)(a)(i) of the Superior Courts Act was dealt with in the decision of the Land Claim Court in *The Mont Chevaux Trust v Tina Goosen & 18 Others* 2014 (JDR 2325 (LCC); 2014 JDR 2325 in which Bertelsmann J held that the use of the word “*would*” (as opposed to *could*) in the provisions is an indication that the threshold for leave to appeal has been raised. It was further held that the word “*would*” indicates a measure of certainty that another court will differ from the judgment appealed against.¹

¹ *Mont Chevaux Trust* at par 6. See further *Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others* (1957/09) [2016] ZAGPPHC 489 (24 June 2016) par 25

[16] On the rigidity of the threshold, Plaskett AJA (as he then was) in which Cloete JA and Maya JA (as she then was) concurred, wrote the following *S v Smith* 2012 (1) SACR 567 (SCA) ([2011] ZASCA 15) at paragraph 7:

'What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that the Court of Appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this Court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that 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.'

[17] Under section 17(1)(a)(ii) of the Superior Courts Act the Court determining an application for leave to appeal ought to enquire whether there is a compelling reason for the appeal to be heard.² The enquiry is factual and, therefore, each application ought to be decided on its own facts.

[18] Other considerations beyond the abovementioned statutory provisions would include where the material case is of substantial importance to the appellant and where the decision sought to be appealed against involves an important question of law³ or where required by the interests of justice.⁴

[19] Considering my judgment, read with the application for leave to appeal, supplemented by the defendant's heads of argument, I conclude that, although subjectively to the defendant the case might be of substantial importance, the application lacks any semblance of prospect of success, let alone reasonable prospect of success.

² Erasmus, Superior Court Practice (2021) A2-56 to 57

³ Erasmus, Superior Court Practice (2021) A2-56 to 57

⁴ *City of Tshwane v Afriforum* 2016 (6) SA 279 (CC) par 40

[20] No other compelling reason is advanced as to why the appeal should be heard and the interest of justice is not implicated. Neither is a valid important question of law raised.

[21] As the provisions of section 17(1)(a) of the Superior Courts Act clearly demand, the application must be dismissed, as leave to appeal may only be given when the Court believes that the intended appeal “would have” a reasonable prospect of success. The defendant has failed to make out a case that another Court would reach a different conclusion or outcome to the judgment *in casu*.

[22] On the approach as to costs, it was held in *Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO and Others* 1996 (2) SA 621 (CC) at paragraph 3:

“The Supreme Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer, and the second that the successful party should, as a general rule, have his or her costs. Even this second principle is subject to the first. The second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs. Without attempting either comprehensiveness or complete analytical accuracy, depriving successful parties of their costs can depend on circumstances such as, for example, the conduct of parties, the conduct of their legal representatives, whether a party achieves technical success only, the nature of the litigants and the nature of the proceedings. I mention these examples to indicate that the principles which have been developed in relation to the award of costs are by their nature sufficiently flexible and adaptable to meet new needs which may arise in regard to constitutional litigation. They offer a useful point of departure. If the need arises the rules may have to be substantially adapted; this should however be done on a case by case basis. It is unnecessary, if not impossible, at this stage to attempt to formulate comprehensive rules regarding costs in constitutional litigation.”

[23] I can see no basis upon which another Court would differ from the costs order made in my judgment.

[24] There is no basis upon which the plaintiff should be out of pocket in opposing this application for leave to appeal and as such the plaintiff is entitled to the costs of this application on the scale as between attorney and client.

[25] Consequently, I make the following order:

1. The application for leave to appeal is dismissed with costs on the scale as between attorney and client.

Minnaar AJ
Acting Judge of the High Court
Gauteng Division, Pretoria

Heard on	: 16 August 2024 (virtually)
For the Defendant (Applicant)	: In person, assisted by Mr Hassen Snr.
Instructed by	: In person
For the Plaintiff (Respondent)	: Adv. M Rakgoale
Instructed by	: Vezi & De Beer Inc.
Date of Judgment	: 19 September 2024