



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

Case Number: 2021/44429

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

4 October 2024



In the matter between:

OLIVIER CHARLES ZOUZOUA

Applicant

And

INVESTEC BANK LIMITED

Respondent

JUDGMENT

Mdalana-Mayisela J

[1] This is an application for leave to appeal to the Supreme Court of Appeal, alternatively to the Full Court of this Division, brought by the applicant against the whole order granted by this court on 6 September 2023 and the reasons thereof furnished on 4 April 2024. The application is opposed by the respondent.

[2] The application is based on the following grounds:

[2.1] The court erred in dismissing the application to strike out and failed to appreciate a self-contained sanction in Rule 35(12) that automatically comes into effect upon non-compliance with the provisions of this Rule;

[2.2] The court misdirected itself on the facts of the matter in respect of the further advance fees that were charged by the respondent and that were not agreed to by the applicant;

[2.3] The court erred in law in finding that the second advance was not reckless and was not in contravention of the National Credit Act; and

[2.4] The court erred in law in failing to consider the factors required by Rule 46A of the Uniform Rules of Court when making the order declaring a primary residence specifically executable.

[3] The applicant submitted that the appeal would have a reasonable prospect of success. The test for leave to appeal is stated in section 17(1)(a) of the Superior Courts Act 10 of 2013 ("the Superior Courts Act"), which provides that:

"(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 compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.

[4] In *S v Smith*¹, the Supreme Court of Appeal explained that “*what the test of reasonable prospects 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, 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 categorized as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal*”.

[5] I now turn to deal with the grounds for the application for leave to appeal. Rule 6(15) of the Uniform Rules of Court regulates the striking out of matter from an affidavit. It provides that the court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client. The application must be on notice and supported by affidavit in terms of subrule (11). It must clearly indicate the passages to which objection is taken and set out the grounds of objection shortly.

[6] The applicant’s notice in terms of Rule 6(15) is defective because it is not supported by affidavit as required by subrule (11). On this basis alone it must fail. Furthermore, subrule (15) provides that the court may not grant the application unless it is satisfied that the applicant will be prejudiced if the application is not granted. The applicant has failed to show under oath that he will be prejudiced if the application is not granted. In the premises, the application to strike out was correctly dismissed.

[7] The applicant contended that further advanced fees were not agreed to between the parties. This contention is incorrect on the following basis. The further advanced fees are provided for in the loan agreement concluded by the parties in April 2007 and amended in writing and signed by the parties in September and October 2008 (“the loan agreement”). In terms of the loan agreement the respondent advanced the first amount of R848,000.00 for the purchase of a vacant stand. On 25 April 2007, a first

¹S v Smith 2012 (1) SACR 567 (SCA) at (7).

continuing covering mortgage bond was registered over the property as security for the first advance. A second amount of R2,2 million was advanced to the applicant in terms of the loan agreement in 2008 for the construction of a home on the vacant land. A second continuing covering mortgage bond was registered over the property as the security for the second advance. The further advanced fees were for administrative duties and requirements, such as inspection and valuation reports. Those fees are provided for in clause 5,5 special conditions of the loan agreement signed by the applicant on 18 September 2008. Accordingly, this ground must also fail.

[8] The applicant contended that the court erred in finding that the second advance was not reckless. He argued that when the second amount for the construction of the home was advanced, the credit facility was in arrears. This contention is not true. The statement of account attached to the founding affidavit and marked annexure "FA5" confirms that the applicant settled the first advance for the vacant land before the second advance was made. On the 20th of June 2008, the account balance was R0.31. This ground must also fail.

[9] The applicant argued that the court failed to consider the factors provided in Rule 46A in declaring a primary residence specially executable. The parties filed a joint practice note in the main application stating issues that were common cause, and issues in dispute. Those issues were confirmed in court during the hearing of the main application. In relation to the factors provided in Rule 46A, the issues in dispute were the value of the property and whether the applicant would become destitute if the order is granted and executed.

[10] I have dealt with the aforesaid issues in my main judgment, and I do not intend to repeat same herein. I have also considered other factors provided in Rule 46A, although not specifically mentioned in my main judgment, when I determined whether to set a reserve price and the amount thereof. The respondent provided the court with the relevant information in its papers for consideration of those factors. The fact that the court did not specifically mention each and every single factor is not to say that the court did not consider the factors².

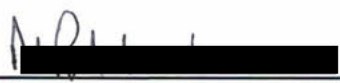
² Rex v Dhlumayo and Another 1948 (2) SA 677 (A) at 706.

[11] In conclusion, I am of the opinion that the appeal would have no reasonable prospect of success. There is no other compelling reason why the appeal should be heard. The applicant has failed to meet the requirements of section 17(1)(a) of the Superior Courts Act. In the premises, this application must fail.

ORDER

[12] The following order is made.

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


MMP Mdalana-Mayisela
Judge of the High Court
Gauteng Division

(Electronically delivered by uploading on Caselines and emailing to the parties)

Date of Judgment: 4 October 2024

Counsel for the Applicant: Adv M De Olivier
Instructed by: ENS Africa attorneys

Counsel for the respondent: MB Mhango
Instructed by: Bazuka and Company Incorporated