

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 2019/003137

(1)	REPORTABLE: YES / ☒ NO
(2)	OF INTEREST TO OTHER JUDGES: YES / ☒ NO
(3)	REVIEWED: ☒ YES / ☐ NO
25 June 2025 DATE	
 SIGNATURE	

In the application between:-

KHAMBULE: MILLICENT SINDISIWE

Applicant

And

ABSA BANK LIMITED

Respondent

JUDGMENT

Raubenheimer AJ:

Introduction

- [1] The applicant applied for leave to appeal the order of 30 January 2025 in terms of which I granted summary judgment in favour of the respondent and declared the immovable property preferentially executable and issued a writ

for the attachment of the property which preferential executability and issuing of the writ was suspended until 1 August 2025.

[2] The basis for the application is that the court erred in:

- 2.1 Concluding that the applicant had entered into a second loan agreement and registered a mortgage bond over the property declared preferentially executable as security for the loan and making payments in reducing the bond;
- 2.2 Finding that the defence raised by the applicant does not amount to a *bona fide* defence;
- 2.3 Granting summary judgment where there were non-compliance with the peremptory requirements of Rule 32;
- 2.4 Disregarding allegations of fraud in the granting of the loan and the registration of the bond;
- 2.5 Not realising that the summary judgment application is a thinly veiled attempt at depriving the applicant of her right of access to justice.

[3] Applicant has brought this application with reference to Section 17 (1) of the Superior Courts Act, 13 of 2010.

The criteria for leave to appeal

[4] The criteria is found in Section 17(1)(a) of the Superior Courts Act 10 of 2013 ("the Act") which states that:

- (i) *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;*
- (ii) *there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.*

[5] The test to be applied by the court when considering an application for Leave to Appeal is that the judge must be persuaded that there is a sound rational basis to conclude that should leave be granted the Appeal would have a reasonable prospect of success, or there exists some other compelling reason why the appeal should be heard. The presence of a mere possibility of success, an arguable case or one that is not hopeless does not meet the threshold.¹

[6] The threshold has indeed been raised by the replacing the word “may” with “would”²

[7] The use of “would” instead of “may” and the inclusion of the word “only” on the one hand imports a more stringent test³ but brings about a higher measure of certainty.⁴

[8] In assessing the reasonable prospects if success the court takes a dispassionate approach based on the facts and the law on whether the court of appeal could reasonably come to a different conclusion. The prospects should not

¹ MEC for Health, Eastern Cape v Ongezwa Mkhitha and The Road Accident Fund (1221/2015) [2016] ZASCA 176 (25 November 2016). Fusion Properties 233 CC v Stellenbosch Municipality [2021] ZASCA 10 (29 January 2021). Fairtrade Tobacco Association v President of the Republic of South Africa (21686/2020) [2020] ZAGPPHC 311.

² Acting National Director of Public Prosecutions and Others v Democratic Alliance in Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others [2016] ZAGPPHC 589 (24 June 2016) Chithi and Others: in Re: Luhlweni Mchunu Community v Hancock and Others [2021] ZASCA 123 (23 September 2021) Seathlolo v Chemical Energy Paper Printing Wood and Allied Workers Union (2016) 37 ILJ 1485 (LC).

³ Gopaul and Another v Lutcham and Others (13185/2016D) [2019] ZAKZDHC 5 (17 May 2019) Notshokovu v S [2016] ZASCA 112.

⁴ The Mont Chevaux Trust (IT2012/28) v Tina Goosen & 18 Others. Matoto v Free State Gambling and Liquor Authority and Others (4629/2015) [2017] ZAFSHC 80 (8 June 2017)

be remote, not a mere possibility and not amount to a case that is arguable on appeal but have a realistic chance of succeeding.⁵

[9] Where the court is unpersuaded about the existence of reasonable prospects of success it must still enquire into whether there is a compelling reason to entertain the appeal.⁶

[10] Compelling reason would be the following: an important question of law or a discreet issue of public importance that will have an effect on future disputes. The merits of the case is important in deciding whether there are other compelling reasons.⁷

[11] The increased threshold serves to support the integrity and efficiency of the judicial process and ensures that appellate courts deal with matters of substantial merit and potentially different outcome.⁸

Discussion

[12] During argument the applicant did not persist with all of the grounds for appeal. She limited her argument to the contention that her denial of entering into the second loan agreement and the subsequent denial of registering a bond over the immovable property as security for the loan coupled with her denial of paying regular amounts over an extended period in reduction of the bond constitutes a triable issue that should have been referred to trial where she would have had the opportunity to confront the evidence presented by the respondent to the contrary.

[13] Her contention is based solely on the fact that the respondent did not produce the original loan agreement or the original bond. It is trite that the

⁵ S v Smith 2012 (1) SACR 567 (SCA) para 7. S v Kruger 2014 (1) SACR 647 (SCA) Ramakatsa and Others v African National Congress and Another (724/2019) [2021] ZASCA 31 (31 March 2021).

⁶ Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd [2020] ZASCA 17; 2020 (5) SA 35 (SCA).

⁷ Caratco (n 6 above).

⁸ Boerdery v CCMA and Others (Application for Leave to Appeal) (JR2187/2020) [2025] ZALCJHB 198 (20 May 2025)

respondent can use secondary evidence to prove the existence of a contract for summary judgment purposes.⁹

[14] The applicant conceded during argument that the respondent would be entitled to summary judgment on the strength of the secondary evidence but submitted that on account of her denial of entering into the second loan agreement the defence is arguable on appeal. This does not meet the criteria contained in Sect 17(1)(a)(i).

[15] What her contention furthermore loses sight of is the provisions of the 2006 Mortgage Bond with bond number B 091311/06 which the respondent relied on in its application for summary judgment.

[16] This Bond was registered in the Deeds Office in Johannesburg on 26 October 2006. The Bond document evidences that it is based on a Power of Attorney granted by the applicant on 16 October 2006 to the conveyancer who appeared before the Registrar of Deeds on the date of the registration of the Bond and that the Registrar of Deeds inspected the power of attorney.

[17] Any power of attorney required for a registration action in the Deeds Registry must contain a preparation certificate and signed by an attorney, notary or conveyancer preparing such power of attorney.¹⁰

[18] The Bond document was furthermore prepared by a conveyancer who signed the preparation certificate on the bond document in his capacity as the preparer of the document.¹¹

[19] In appending his signature to a preparation certificate the conveyancer accepts responsibility for the correctness of the information contained in the bond

⁹ ABSA Bank Limited v Zalvest 20 (Pty) Ltd 2014 (4) SA 119 (WCC).

¹⁰ Regulation 44(1) of the Regulations in terms of the Deeds Registries Act 47 of 1937.

¹¹ Section 15 Deeds Registries Act.

document or power of attorney and that the information has been correctly transferred from the power of attorney to the bond document.¹²

[20] The existence of the Bond registered in the Deeds registry constitutes sufficient evidence of the existence of a loan agreement entered into by the applicant for summary judgment purposes. The applicant provides no explanation for the power of attorney that she granted to the conveyancer that appeared before the Registrar of Deeds save to contend that it is part of the fraud perpetrated against her. This is a wholly unsubstantiated and untenable contention.

[21] By stating that the mere denial of the applicant is sufficient grounds for the matter to be referred to trial the applicant does not establish a sound rational basis that the appeal would have reasonable prospects of success should leave be granted.

[22] Based on the registered Bond document the prospects are remote. It does not even rise to the level of an arguable case on appeal.

[23] Save for raising the Constitutional point of denial of access to justice the applicant did not advance any other compelling reason why the application for leave should be granted.

[24] The aspect of summary judgment and access to justice have been comprehensively dealt with in *Joob Joob Investments v Stocks Mavundla Zak Joint Venture*¹³ and *Mkize v Umvoti Municipality*.¹⁴ None of the mentioned cases decided that summary judgement deprives a litigant of access to justice.

¹² Regulation 44A(e) of the Regulations in terms of the Deeds Registries Act.

¹³ 2009 (5) SA 1 (SCA)

¹⁴ 2010 (1) SA 509 KZP

[25] No other compelling reasons as defined in *Ramakatsa and Others v African National Congress and Another*¹⁵ was raised by the applicant.

Conclusion

[26] The applicant have not satisfied the test for application for leave to appeal as she could not provide sound rational reasons why the appeal has reasonable prospects of success. Neither did she advance any compelling reason why leave should be granted.

[27] The application for leave to appeal is dismissed with costs.


E Raubenheimer

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Electronically submitted

Delivered: This judgment was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **25th day of June 2025**

COUNSEL FOR THE APPLICANT: Adv Nkosi instructed by Social
Economic Rights Institute

FOR THE RESPONDENT: Adv Amojee instructed by Strauss
Daly Inc

DATE OF ARGUMENT: 10 June 2025

DATE OF JUDGMENT 25 June 2025

¹⁵ (n 5 above).

