REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: Yes / No
(2) OF INTEREST TO OTHER JUDGES: Yes / No

17/11/2022
DATE

SIGNATURE

CASE NO: 2021/6604

In the matter between:

NEDBANK LIMITED	Plaintiff / Respondent
and	
UPHUHLISO INVESTMENTS AND PROJECTS (PTY) LIMITED	First Defendant / Applicant
MPELO NICOLUS SIKHWATHA	Second Defendant / Applicant
BETHUEL ZAMI SIKHWATHA	Third Defendant / Applicant
AYANDA MATTHEWS NTLABATHI	Fourth Defendant / Applicant

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

This judgment is deemed to be handed down upon uploading to the electronic court file.

Gilbert AJ:

1. The defendants seek leave to appeal the whole of my judgment delivered on 22 September 2022.

2. The defendants as applicants have delivered an extensive application for leave to appeal and further submissions were made by counsel during the hearing.

3. Summarised, the main grounds relied upon as to why I had erred and so why I should be of the opinion that the appeal would have a reasonable prospect of success are:

    3.1. I misdirected myself in applying a legal principle in the summary judgment proceedings that was not an issue that had been identified by the parties in their joint practice note;

    3.2. that in any event the legal principle that I applied – which is to consider the divergence between the plea and the affidavit resisting summary judgment and what was to be made thereof, particularly that the defendant cannot raise defences in the resisting affidavit that are not pleaded, and which has been termed the ‘divergence principle’ in these proceedings - is in any event incorrect;

    3.3. that, leaving aside the application of the divergence principle, I erred in various respects in finding that the four defences raised

by the defendants in their resisting affidavit and as identified in the joint practice note do not raise genuine triable issues.

4. Section 17(1)(a)(i) of the Superior Courts Act provides that leave to appeal may only be given where the judge is of the opinion that the appeal 'would' have reasonable prospects of success. This is in (apparent) contrast to the test under the previous Supreme Court Act, 1959 that leave to appeal is to be granted where a reasonable prospect was that another court 'might' come to a different conclusion.[1]

5. The Supreme Court of Appeal in *Notshokovu v S*[2] held that an appellant "*faces a higher and stringent threshold, in terms of the present Superior Courts Act compared to the provisions of the repealed Supreme Court Act".*

6. To similar effect is *Acting National Director of Public Prosecutions and others v Democratic Alliance in re: Democratic Alliance v Acting National Director of Public Prosecutions and others*[3] where the full court of this Division held that the Superior Courts Act had "*raised the bar for granting leave to appeal*", referring with approval to the following oft-cited passage from the judgment of Bertelsmann J in *Mont Chevaux Trust v Goosen:*[4]

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[1] See, for example, *Commissioner of Inland Revenue v Tuck* 1989 (4) SA 888 (T) at 890B/C.

[2] [2016] ZASCA112 (7 September 2016), para 2.

[3] [2016] ZAGPHC489 (24 June 2016), at para 25.

[4] 2014 JDR 2325 (LCC).

"*It is clear that the threshold for granting leave to appeal against the 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 and 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.*"

7. Subsequent to *Notshokovu v S* but without reference thereto, Dlodlo J for the Supreme Court of Appeal in *Ramakatsa and Others v African National Congress and Another*[5] said that:

> *"I am mindful of the decisions at high court level debating whether the use of the word 'would' as opposed to 'could' possibly means that the threshold for granting the appeal has been raised.*[6] *If a reasonable prospect of success is established, leave to appeal should be granted. Similarly, if there are some other compelling reasons why the appeal should be heard, leave to appeal should be granted. The test of reasonable prospects of success postulates 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 other words,*

[5] [2021] ZASCA 31 (31 March 2021), para 10.

[6] My footnote: see the cited cases in the discussion on this topic in *Pollak: The South African Law of Jurisdiction* (Juta) loose-leaf (2021) at 192A, 192B.

the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist." (my emphasis).

8. I proceed on a basis favourable to the defendants that a more stringent test need not be satisfied (i.e. that there need not a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against) but rather that I am to be persuaded that there is a sound rational basis to reach a conclusion that there are prospects of success on appeal.

9. It is so that the parties have identified in their joint practice note four issues to be determined. Those four issues are clearly an identification of the genuine triable issues that the defendants asserts to avert summary judgment. That the parties did not delineate in their joint practice note the legal principles that are to be applied generally by a court in the context of summary judgment proceedings in ascertaining whether the defences advanced by the defendant raise genuine triable issues (i.e. as *bona fide* defences as envisaged in the Rule 32) does not mean that the court cannot apply those legal principles. The court is called upon to decide the four issues raised by the parties in their joint practice note in the context of summary judgment proceedings. A court cannot decide in a vacuum whether genuine triable issues are raised. It follows that

the court will do so applying the principles generally applicable to summary judgment proceedings

10. The two authorities relied by the defendants - *Mighty Solutions t/a Orlando Service Station v Engen Petroleum Limited and Another* 2016 (1) SA 621 (CC)[7] and *Mtokonya v Minister of Police* 2018 (5) SA 22 (CC)[8] - do not support the defendants' proposition that when considering the issues that have been identified in the joint practice note (whether factual issues or legal issues in the sense of questions of law), the court is precluded from relying on the legal principles that apply generally to the sort of legal proceedings at hand. Just as the court will apply the principles applying generally in leave to appeal proceedings in terms of section 17(1)(a)(i) of the Superior Courts Act when determining whether there is a reasonable prospect of success so too the court will apply the principles applying generally to summary judgment proceedings in terms of the amended Uniform Rule 32 when determining whether leave to defend is to be granted.

11. The defendants' second primary submission is that even should I not have erred in having regard to a legal principle not specifically spelt out in the joint practice note, the legal principle that I applied – described as 'the divergence principle - "*does not exist in law*", is not supported by the wording of Rule 32

[7] Para 63.

[8] Para 15.

and is inimical to the defendants' constitutional right to a fair trial as it precluded them from raising defences that were not pleaded.

12. The defendants' submission that there is no such legal principle is unsustainable. *Vukile Property Fund Limited v True Ruby Trading 1002 CC t/a PostNet and Another*[9] and *Nogoduka-Ngumbela Consortium (Pty) Limited v Rage Distribution (Pty) Limited t/a Rage*[10] are authorities for the principle. The defendant's counsel did not disagree but submitted that those judgments are wrong, and so I erred in following those authorities.

13. As I am not of the view that those judgments are clearly wrong, I am bound by those judgments. Indeed, as appears from my judgment, I am of the view that the judgments are correct. Of course should I be of the opinion that there is a reasonable prospect that an appeal court may come to a different decision on the recognition of the divergence principle notwithstanding that I am bound by those authorities, leave to defend should be granted. However, I am not of the opinion that a sound rational basis has been advanced as to why the divergence principle may be found to be wrong. The further authorities cited in my judgment[11] in their tenor are supportive of the recognition and application of the principle, particularly in the context of preserving scarce judicial resources that are not to be expended on trials where no genuine

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[9] Case No. 2020/9705, 21 May 2021.

[10] [2021] ZAGPJHC 568 (19 October 2021).

[11] For example, *Raumix Aggregates (Pty) Ltd v Richter Sand CC and Another; and similar matters* 2020 (1) SA 623 (GJ).

triable issues are raised. I have reasoned in my judgment why the recognition and application of the divergence principle serves that purpose.[12]

14. The recognition of the divergence principle is consistent with, and is supported by, the wording of the amended Rule 32.[13]

15. I am not of the opinion that a sound rational basis has been made out that an appeal court may find that the divergence principle is unconstitutional in infringing on the defendants' right to a fair trial. In any event, notwithstanding the divergence between the defences raised in the resisting affidavit and the plea, I went on to consider the defences raised, recognising that the granting of summary judgment remains a discretionary remedy.[14]

16. The defendants do not complain that they were taken by surprise by the application of the divergence principle. This is not surprising. Apart from the unreported judgments have already stated this principle, *Erasmus Superior Court Practice*, which was referenced by the defendants' counsel in his heads of argument for the summary judgment proceedings, deals extensively with the issue.[15]

17. Insofar as the defendants submit that I erred in finding that the four defences advanced by them do not give rise to genuine triable issues, nothing was

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[12] See, for example, paragraph 23 of my judgment.

[13]See, for example, paragraph 29 of my judgment.

[14] See paragraph 68 of my judgment.

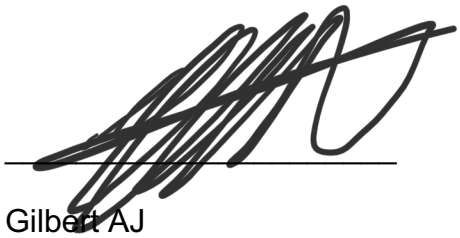
[15] (Juta) 2nd edition (2022).. The relevant section is at RS18, 2022, D1-416B to 416D.

identified in either the application for leave to appeal or during argument that causes me to be of the opinion that there exists a sound rational basis that another court may come to a different conclusion.

18. The defendants' counsel submitted that nonetheless the recognition and application of the divergence principle is of such importance in the context of a fair trial that the leave to appeal should nevertheless be granted, particularly to the Supreme Court of Appeal. As already stated, no sound rational basis has been made out that an appeal court may come to a different decision. Leave to appeal is not to be granted to enable an appeal court to confirm a principle where there is no sound rational basis advanced why that principle may be wrong. In any event, as stated, I did consider, and rejected, the defences raised by the defendants. If a consideration of the divergence principle is deserving of the attention of an appeal court, this is not the appropriate case for that exercise.

19. The financing agreement between the parties expressly provides for costs on an attorney and client scale.

20. An order is made that the application for leave to appeal is dismissed, with costs on an attorney and client scale.



Gilbert AJ

Date of hearing:	15 November 2022
Date of judgment:	17 November 2022
Counsel for Applicants (First to Fourth Defendants):	P Mbana
Instructed by:	Mdyesha Ndema Attorneys
Counsel for the Respondent (Plaintiff):	L Acker
Instructed by:	Van Deventer Dlamini Inc