

REPUBLIC OF SOUTH AFRICA



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

(1)	REPORTABLE: YES / (NO)
(2)	OF INTEREST TO OTHER JUDGES: YES / (NO)
(3)	REVISED.
	<div style="display: flex; justify-content: space-between;"> <div> <p>2014.04.03</p> <p>DATE</p> </div> <div> <p><i>[Signature]</i></p> <p>SIGNATURE</p> </div> </div>

Case No: 11699/2013

3/4/2014

In the matter between

SANDTON SQUARE PORTION 7 (PTY) LTD

Applicant

and

HALOWARE INVESTMENTS (PTY) LTD

Respondent

J U D G M E N T - Leave to Appeal

MAKGOKA, J:

[1] This is an application for leave to appeal against the whole of the judgment of this court and its consequential order, made on 7 February 2014, in terms of which it was declared that the applicant's cancellation of the agreement between the parties, was not valid. The application is opposed by the respondent.

[2] The test applicable whether or not to grant leave to appeal, is trite and well settled. It is whether there are reasonable prospects that another court, given the same set of facts, might arrive to a different conclusion. This common law test has now been codified in s 17 of the Superior Courts Act, 10 of 2013.

[3] At the commencement of the hearing of this application, I expressed my *prima facie* view that leave to appeal should be granted. For that reason, I invited counsel for the respondent to address me first. In my view, there are two issues. First, if it is accepted that clause 12 of the agreement between the parties constitutes a *lex commissoria*, it follows that an enquiry into the fairness or otherwise of its effect, is irrelevant. In my view there can be no serious debate that it is, and I did not understand counsel for the respondent to contend otherwise.

[4] The second issue is whether or not the respondent expressly relied on clause 12 as a *lex commissoria*. Having regard to the papers as a whole, I am satisfied that the applicant did. The whole of its case, both in the eviction application and in the application giving rise to the present one, has ever been that it cancelled the agreement because the respondent had failed to pay the levies. I am satisfied that this aspect was sufficiently canvassed in the papers.

[5] For the above reasons, and having had careful and detached regard to the judgment, the notice of application for leave to appeal, as well as the oral arguments, I am satisfied that indeed there are reasonable prospects that another

court might come to a different conclusion. I am therefore inclined to grant leave to appeal. Such leave should be to the Full Court of this division.

[6] In the result the following order is made:

1. The applicant (respondent) is granted leave to appeal to the Full Court of the Gauteng Provincial Division;
2. The costs of this application are costs in the appeal.



TM MAKGOKA
JUDGE OF THE HIGH COURT