HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Not reportable
Not of interest to other Judges

CASE NO: 31159/2009

In the matter between: 9/12/2016

ALLAUDDIN HABIB THOBANI	Applicant
and	
STANDARD BANK OF SOUTH AFRICA LTD	First Respondent
SHERIFF OF THE SOUTH GAUTENG HIGH COURT: JOHANNESBURG	Second Respondent
THE REGISTRAR OF THE SOUTH GAUTENG HIGH COURT	Third Respondent
REGISTRAR OF DEEDS: PRETORIA	Fourth Respondent
PAUL BOTTOMLEY	Fifth 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 judgment and order of this Court (per Goodey AJ) handed down on 28 October 2014. In the absence of the learned acting Judge, the Deputy Judge President has requested me to hear the application. The application, by the applicant, Mr Thobani, is opposed by the first respondent, Standard Bank (the bank). The rest of the respondents do not take part in the application. Ms *Hassim* SC appears for Mr Thobani, while the bank is represented by Mr Reineke. It is necessary to state the brief background.

[2] During 2002 Mr Thobani concluded a loan agreement (the agreement) with the bank. The agreement was secured by a first mortgage bond registered in favour of the bank over Mr Thobani's immovable property (the property) subject to the bank's standard terms and conditions. On 16 July 2004 the bank obtained judgment against Mr Thobani as a result of his failure to comply with the terms of the agreement. The property was declared to be especially executable. A number of developments followed thereafter. Among others, the parties concluded certain payment arrangements, and a second mortgage bond was registered over the property in favour of the bank. As Mr Thobani was still unable to meet his financial obligations, the bank, on 5 September 2008, obtained a writ of execution against the property. On 21 April 2009 the property was sold at an auction to the fifth respondent, Mr Bottomley.

[3] During May 2009 Mr Thobani launched an application in this court to set aside the writ of execution, referred to above, contending that it was null and void. Ancillary thereto, he sought consequential orders for the setting aside of the sale in execution and the transfer of the property into the name of Mr Bottomley. The thrust of the application was that the rights acquired by the bank by virtue of the judgment obtained in 2004 had become novated by the agreements which the parties concluded subsequent to the granting of that judgment. That application came before Goodey AJ on 30 November 2010. Mr Thobani appeared in person and made an oral application for the postponement of his application. The learned Judge, at the end of a short *ex tempore* judgment, dismissed 'the application with costs.'

[4] From the order, it is not clear whether the application which was dismissed is the one for a postponement or the main application. This is one of the difficulties in this application. In the course of the judgment, it seems that the learned Judge was focussed on the reasons for refusing the postponement, and *per incuriam*, omitted to deal with the merits of the main application. Just before he made that order, the learned Judge made the following remarks:

'Now we [have] an application in May 2009. We have a history about that. It is accepted for purposes of this matter that you did not know about the date in December. It is also taken into account that you had family problems and you had to go overseeas, but at the end of the day the balancing act must be [exercised] and it is a year now. You want a three month further period.

Now with your visits overseas, if you could not have sold the property within a year since the 1[st] December, tomorrow it is exactly a year, how would you be able to sell it over a Christmas period, in a matter of three months? But that not being the case, this matter must come to an end. You had more than enough time and unfortunately the judgment is and the order I make is that:

1. The application is dismissed with costs.'

[5] From what is stated above, the learned Judge clearly meant to dismiss both the postponement application and the main application. This is also the understanding of both counsel who appeared in the present application (for leave to appeal) and on which basis the application was argued.

[6] In his notice of application for leave to appeal, Mr Thobani complains about the refusal of his application for a postponement. That can be disposed of summarily. I have no doubt that the learned Judge properly exercised a discretion in this regard. There does not appear to be any capriciousness about the manner in which that aspect was considered. There is therefore no basis to interfere with that decision. However, Mr Thobani also joins issue with the fact that the court dismissed his main application. Understandably, he does not state why that decision is wrong, simply because the court did not state any reasons for that decision.

[7] In *Mphahlele v First National Bank of SA Ltd* 1999 (2) SA 667 (CC); 1999 (3) BCLR 253 (CC) para 12, the Constitutional Court stated that furnishing reasons in a judgment 'explains to the parties, and to the public at large which has an interest in courts being open and transparent, why a case is decided as it is. It is a discipline which curbs arbitrary judicial decisions.'

See also *Strategic Liquor Services v Mvumbi NO and Others* 2010 (2) SA 92 (CC); 2009 (10) BCLR 1046 (CC) para 17 and *Stuttafords Stores (Pty) Ltd and others v Salt of the Earth Creations (Pty) Ltd* 2011 (1) SA 267; 2010 (11) BCLR 1134 (CC).

[8] In *Stuttafords*, the Constitutional Court referred with approval the remarks made by former Chief Justice, Corbett CJ, in an address at the first orientation course for new judges under the new constitutional dispensation:

'The true test of a correct decision is when one is able to formulate convincing reasons (and reasons which convince oneself) justifying it. And there is no better discipline for a judge than writing (or giving orally) such reasons. It is only when one does so that it becomes clear whether all the necessary links in a chain of reasoning are present; whether inferences drawn . . . are properly drawn; whether the relevant principles of law are what you thought them to be; whether or not counsel's argument is as well founded as it appeared to be at the hearing (or the converse); and so on.'

[9] The decision in the present case (to dismiss the main application) lacks the hallmarks referred to by the Constitutional Court. The parties have no basis to know why the application was dismissed. It must be recalled that Mr Thobani raised a pertinent point of law – novation. Whether that point was well-taken or misplaced, could only appear from the reasons of the court. In the absence of such reasons, it is difficult to see how, and on what basis, the order dismissing the main application can be justified. Counsel for the bank, Mr *Reineke,* urged me to consider that there is, in any event, no merit to the point of novation relied on by Mr Thobani in the main application. By this, counsel effectively invited me to sit as an appeal court in the judgment of Goodey AJ, which is, of course, impermissible.

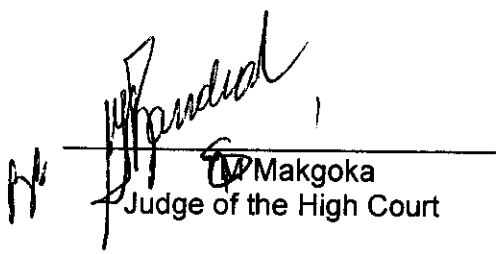
[10] The common law test in an application for leave to appeal has always been whether there are reasonable prospects that another court, given the same set of facts, might arrive to a different conclusion. That test has been codified by s 17(1)(a)(i) and(ii) of the Superior Court Act 10 of 2013, in terms of which leave to appeal may only be given where a judge is of the opinion that the appeal would have reasonable prospect of success, or that there is some compelling reason why the appeal should be heard.

[11] I take a view, primarily on the basis that Mr Thobani's main application was dismissed without reasons, that there is a compelling reason for the appeal to be heard. I am therefore inclined to grant leave to appeal. I agree with Ms *Hassim* SC that there is nothing that warrants the attention of the Supreme Court of Appeal in the issues raised here. The Full Court of this Division should hear the appeal.

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

1. The applicant, Mr Thobani, is granted leave to appeal to the Full Court of this Division against the order made by Goodey AJ on 30 November 2010, dismissing the applicant's application to set aside the writ of execution dated 5 September 2008, and the ancillary relief thereto;

2. The costs of this application are to be costs in the appeal.



TP Makgoka
Judge of the High Court

APPEARANCES:

For the Applicant:	S Hassim SC Instructed by: Badal Inc., Johannesburg VFV Attorneys, Pretoria
For the First Respondent:	M Reineke Instructed by: Ramsay Webber, Johannesburg Andrea Rae Attorney, Pretoria

No appearances for the Second, Third, Fourth and Fifth Respondents.