

**IN THE NORTH GAUTENG HIGH COURT, PRETORIA  
[REPUBLIC OF SOUTH AFRICA]**

15/04/16

CASE NUMBER 33071/2012

Not reportable

Not of interest to other judges

Revised

In the matter between:

MOLOKO HECTOR ETSANE      APPLICANT

And

ABSA BANK LIMITED      RESPONDENT

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**JUDGMENT**

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**MAVUNDLA. J,**

[1] The applicant, the defendant in the action, applies for leave to appeal to the Full Bench of this Division against the whole of the judgment and order granted by this Court against him on the 15 January 2016 in terms of which the applicant was ordered to pay:

- 1.1.      the respondent ( plaintiff in the action) the amount of R 3 834 183 . 08;
- 1.2.      That interest on the abovementioned amount at the rate of 9% per annum, calculated and capitalised monthly from 5 May 2014 to date of final payment, both dates inclusive;
- 1.3.      That the Defendant be and is ordered to pay all the Plaintiff's costs of the

action under case number 33071 / 2012, to be taxed on a scale as between attorney and client;

- 1.4. That the Defendant be and is ordered to pay costs of this application to be taxed on a scale as between attorney and client;
- 1.5. That the Defendant's following immovable property be and is declared specially executable:  
ERF [...] Silver lakes Township,  
Registration Division J. R.,  
Province Gauteng  
Measuring 1050 (One Thousand and Fifty) Square metres.

[2] The grounds upon which leave to appeal is sought are, *inter alia*, that this Court erred:

- 2.1. in finding that the settlement agreement which was made an order of court on the 20 May 2014 entitled the respondent to a monetary claims;
- 2.2. in finding that the respondent was entitled to an order declaring applicant's immovable property specially executable and directing the registrar to issue a warrant of execution against the applicant's immovable property, in the absence of a monetary judgment;
- 2.3. in not finding that the settlement agreement upon which the respondent's application was based, constituted a compromise between the parties;
- 2.4. in not applying the principles applicable to the application by the respondent in terms of Rule 41(4).
- 2.5. the respondent to the order.

[3] It is trite that in an application for leave to appeal, the question to be asked is whether there are reasonable prospects of success on appeal.<sup>1</sup>

[4] Even if the court believes in the correctness of its judgment, it should nonetheless grant leave to appeal, if there is a possibility that a court of appeal might conclude differently; *vide R v Kuzwayo*<sup>2</sup> *Westinghouse Brake & Equip v Bilger Engineering*.<sup>3</sup>

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<sup>1</sup> Vide section 17(1)(a) of the Superior Courts Act No 59 of 1959; *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 531 B-E.

<sup>2</sup> 1949 (3) 761 (AD) at 764-765;

[5] The Court must have regard to the importance of the matter to both parties, the grounds upon which leave to appeal is premised, and whether leave to appeal is bona fide and not frivolously sought, in the exercise of its discretion. If the granting of leave to appeal would expedite the resolution of the dispute between the parties, then the Court must be inclined to grant leave to appeal, bearing in mind whether there is a prospect of success that another court might find differently to the decision appealed against; *vide New Clicks South Africa (Pty) Ltd v Tshabalala-Msimang and Another; Pharmaceutical Society of South Africa v Minister of Health and Another*<sup>4</sup>.

[6] The Court must take into account the substantial importance of the matter to both parties<sup>5</sup> although not decisive in the consideration of whether to or not to grant leave to appeal<sup>6</sup>.

[7] I propose to, in the exercise of my discretion, grant leave to appeal in this matter, without traversing the submissions made on behalf of both parties, although I do bear these in mind. I take into account that the order granted by this court, invariably impacts negatively on the constitutional rights of the applicant to housing, in that, the declaration of his immovable property deprives both him and his family consisting of, *inter alia*, a minor child who is still of school going age in the area where the relevant immovable property is located. This as much came out in the main application upon which the order sought to appeal is premised.

[8] I further take into account the fact that the respondent, which is common cause, did not comply with the Court order obliging him to re-activate the account into which the applicant was supposed to effect his payments. It was submitted on behalf of the applicant that the respondent could not claim unless it had complied with this order, which put an end to the original *causa*. I am persuaded that there are reasonable prospect of success on appeal, that another Court might find that this Court misdirected itself on this issue and should have found that there was a compromise.

[9] It was further submitted on behalf of the applicant that the agreement which

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<sup>3</sup> 1986 (2) SA 555 (A D) at 564C-E.

<sup>4</sup> 2005 (3) SA 230 (CPD) at 236H-237A.

<sup>5</sup> *Westinghouse Brakes & Equip v Bilger Engineering* 1986 (2) SA 555 (A D) at 5601

subsequently caused a compromise, did not make provision for the respondent to claim the whole amount. In so far as the intention of the parties, it was submitted that there was a dispute of fact as to what the true intention of the parties was, which could not be resolved on affidavit and therefore warranting that the respondent's application should have been dismissed. I am persuaded that on this issue there are reasonable prospect of success on appeal and the latter court finding in favour of the applicant.

[10] In the result I make the following order:

1. That leave to appeal to the Full Bench of this Division is granted;
2. That costs of this application be costs in the appeal.

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N. M. MAVUNDLA  
JUDGE OF THE HIGH COURT

DATE OF HEARING : 12 / 04 / 2016  
DATE OF JUDGMENT : 15 / 04 / 2016  
APPLICANTS' ADV : ADV A. P. ELLIS  
INSTRUCTED BY : MURPHY KWAPE MARITZ ATTORNEYS  
RESPONDENTS' ADV : ADV R. RAUBENSHEIMER  
INSTRUCTED BY : TIM DU TOIT & INC

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<sup>6</sup> Vide *Janit v. Van Den Heever and Another* NNO (No 2) 2001 (1) SA (WLD) at 1065A-B.