

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 51140/2018

DATE: 2019-12-09

10

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

DATE

SIGNATURE

In the matter between

M J BEKKER

Applicant

and

PRIDE MILLING COMPANY

Respondent

JUDGMENT (LEAVE TO APPEAL)

20 **STRIJDOM, AJ:** The Court proceeds with the *ex tempore* judgment in this application.

1. In this matter the applicant seeks leave to appeal to the full court of the High Court of South Africa, Gauteng Division against the judgment of this Court handed down on 4 November 2019, specifically the

granting of the respondent's application and the dismissal of the applicant's counter-application with costs.

3. In broad terms the following are the major misdirections alleged to have been committed:

3.1 The learned judge erred in not adequately considering the factors as compiled by Pincus, AJ in *Lane N.O. v Olivier Transport* 1997 (1) SA 383 (C) at page 386 D - 387 B.

10 3.2 The learned judge erred in the interpretation of the remark by the learned Judge Sutherland in the matter of *Engen Petroleum Limited v Goudis Carriers (Pty) Ltd (In Liquidation)* 2015 (6) SA 21 (GJ) where the learned judge remarked the following, and I quote:

20 "The scope for the discretion is itself a cue to limitation. It is exercised in the favour of the ensnared creditor only if by so doing the general body of creditors is not disadvantaged by a diminution of assets to divvy up among them."

3.3 The learned judge erred in finding on a conspectus of the evidence before the Court that the primary test was to establish whether the general body of creditors would not be disadvantaged by the dispositions and that little weight should be attached to the hardship of

the applicant and that the focus ought to be on the body of the creditors.

3.4 The learned judge erred in finding that the applicant should pay the costs of the main application and the counter-application.

4. It was submitted by counsel for the applicant that the appeal has reasonable prospects of success.

5. There are now three requirements for the granting of leave to appeal pursuant to section 17(1) of the Superior Court Act 10 of 2013 namely that there is a reasonable prospect of success; that the amount is not trifling and is a matter of substantial importance to one or both of the parties concerned and further that a practical effect or result can be achieved by the appeal.

6. What the test of reasonable prospects of success postulates is a dispassionate decision based on the facts and the law. That the Court of Appeal could reasonably arrived at a conclusion different to that of the trial court. In order to succeed therefore the applicant must convince the Court on proper grounds that he has prospects of success on appeal and that these prospects are not remote but have a realistic chance of succeeding.

7. More is required to be established than that there is a mere possibility of success, that the case is arguable

on appeal or that the case cannot be categorised as hopeless. There must be a sound rational basis for the conclusion that there are prospects for success on appeal.

8. In the present matter when the facts were examined there were a number of considerations which militated against another court coming to a different conclusion.

9. In respect of all the grounds of appeal raised my judgment deals extensively with the facts and law as presented by the parties and how the Court arrived at each conclusion on the contentions raised by the applicant in the application for leave to appeal.

10. On all these issues there is in my view no prospect of another court arriving at a different conclusion. The matter has no prospect of success deserving neither the Supreme Court of Appeal or the full court of this division.

11. In the result the application for leave to appeal is dismissed with costs.

20

- - - - -

MR VAN DER MERWE: As the Court pleases M'Lord.

MR VOSTER: May it please you M'Lord.

COURT: The court will adjourn.

COURT ADJOURNS

[13:29]

- - - - -

.....

SRIJDOM AJ

JUDGE OF THE HIGH COURT

DATE: