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

CASE:35045/2018

REPORTABLE:YES/NO

OF INTEREST TO OTHER JUDGES:YES/NO

REVISED

DATE: 19 March 2021

In the matter between:

THEUNS JACOBUS MOOLMAN

APPLICANT

and

NYATHI MEATS CC (REG NO: [...])

FIRST RESPONDENT

PETRUS JOHANNES ROSSOUW

SECOND RESPONDENT

JUDGMENT

TLHAPI J

[1] This is an opposed application for leave to appeal premised on section 17(1) of the Superior Courts Act 10 of 2013, ("the Act") which section is set out in its entirety below:

"Section 17(1)

(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-

(a) (i) the appeal would have reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

(b) the decision sought on appeal does not fall within the ambit of section 16(2); and

(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties."

[2] Previously the test applied was whether there were reasonable prospects that another court may come to a different conclusion, *Commissioner of Inland Revenue v Tuck* 1989 (4) SA 888(T). The threshold of reasonable prospects has now been raised by the use and meaning attached to the words 'only' in 17(1) and 'would' in section 17(1)(a)(i). Therefore on the entire judgement there should be some certainty that another court would come to a different conclusion from the judgement the applicant seeks to appeal against. In *Mont Chevaux Trust v Tina Goosen and 18 Others* 2014 JDR 2325(LCC) at para [6]:

"It is clear that the threshold for granting leave to appeal a 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 & 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”

[3] In *S v Smith* 2012 (1) SACR 567(SCA) at para 7, a more stringent test is called for in that an applicant must convince a court, on proper grounds that there are prospects of success which are not remote, a mere possibility is not sufficient. Therefore, where the applicant has satisfied either of the two identified requirements in the Act, leave to appeal should be granted, *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* 2016 (3)SA 317 (SCA).

[4] Without rehashing argument of the previous hearing, I find that the main ground for appeal among other grounds, is based mainly on the contention that the court erred in not referring the matter to trial as contemplated in Rule 6 (5)(g), having found that the matter could not be decided on the papers and where there existed a *bona fide* dispute of fact. The alleged acknowledgment of indebtedness was erroneously ignored by the court was another ground and further, that the court erroneously found that the letter of demand was not served on the registered address of the respondent and that such rendered the application that the first respondent be liquidated irregular.

[5] Part of the evidence was that the cattle were seen being loaded onto a vehicle by a neighbour and evidence that there were witnesses to the delivery on the first respondent. This coupled with the apparent acknowledgement were issues which raised disputes of fact and which constituted grounds for referral to trial. On these grounds I find that there are prospects in the appeal.

[6] The following order is therefore made:

- (i) The application for leave to the Full Court of this Division, is granted and costs shall be in the appeal.

TLHAPI VV

(JUDGE OF THE HIGH COURT)

MATTER HEARD ON	:	15 FEBRUARY 2021
JUDGMENT RESERVED ON	:	15 FEBRUARY 2021
ATTORNEYS FOR THE APPLICANTS	:	STARBUCK ATT.
ATTORNEYS FOR THE RESPONDENTS	:	PRINSLOO BEKKER ATT.