

IN THE NORTH GAUTENG HIGH COURT, PRETORIA  
(REPUBLIC OF SOUTH AFRICA)

Case Number: 8444/2020

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
10/06/2021	
DATE	SIGNATURE

In the matter between:

**NIPRO MEDICAL SOUTH AFRICA (PTY) LTD**

**Plaintiff/ Applicant**

and

**EDISON RENAL AND DIALYSIS**

**CENTRE (PTY) LTD**

**Defendant/Respondent**

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**JUDGMENT : APPLICATION FOR LEAVE TO APPEAL**

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**MNYOVU, A J:**

[1] The applicant in the application for leave to appeal is the respondent and the respondent is the applicant in the original main application. For ease of reference, the parties are referred to as per the main application.

[2] The respondent seeks leave to appeal the whole order of this court handed down on 05 February 2021. Leave to appeal is sought to the Full Court of this Division on the grounds embodied in the notice of motion of application for leave to appeal.

[3] Leave to appeal is sought in terms of section 17(1) (a) (i) of the Superior Court's Act<sup>1</sup>(Superior Courts Act) which provides that leave to appeal may only be granted where the Judge or Judges concerned are of the opinion that the appeal have a reasonable prospect of success. As to the section 17(1) (a) (i) test in the *Mont Chevaux Trust (IT 2012/2) v Tina Goose & Others*, the Land Claims Court, per Bertelsman J outlined how the Superior Courts Act has raised the bar for granting leave to appeal-

"It is clear that the threshold for granting leave to appeal against a judgement 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 343 H. The use of the word "would" in the new statute indicates a measure of certainty that another court will differ from the court whose judgement is sought to be appealed against<sup>2</sup>.

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<sup>1</sup>Act 10 of 2013

<sup>2</sup> 2014 JDR 2325 (LCC) at para 6

[4] As such, in considering the application for leave to appeal, it is crucial for this Court to remain cognizant of the higher threshold that needs to be met before leave to appeal maybe granted. There must exist more than just a mere possibility that another court will not might, find differently on both facts and law. It is against this background that I consider the most pivotal grounds of appeal. I am to consider whether there is substance in the arguments advanced by the respondent that would justify leave to appeal.

[5] The matter was heard on 05 February 2021 in an unopposed motion court. The respondent has filed the opposing papers on 23 December 2020, the respondent was in default of appearance on 5 February 2021, the court considered the matter on the merits before it, in the absence of the defendant. After hearing and debated certain aspects of the matter with the counsel of the applicant and having read the papers filed on caselines. I granted the draft order marked "X".

[6] On 26 February 2021 the respondent filed application for judgement reasons for orders granted against defendant on 5 February 2021 followed by the application for leave to appeal.

[7] I filed the judgement reasons and the applicant filed its opposition for leave to appeal on the basis that a proper case was made out for summary judgement and the relief prayed for in the order.

[8] On 02 June 2021 during hearing of the leave to appeal Counsel for the Respondent submitted that the court erred by granting summary judgement against the respondent in that the defendant disclosed *bona fide* defences in its opposing affidavit to the plaintiff's application for summary judgement and jurisdictional

prescripts for an order granting summary judgement were therefore not present. The defendant's *bona fide* defences were *inter alia* that:

- 8.1 No Acknowledgment of debt between the parties, the defendant was under impression that there was a further new acknowledgement of debt to be signed by the parties.
- 8.2 Defendant is not liable to an amount of R 2 665 425. 68 whilst it is common cause on the papers that the defendant made payment of R250 000.00 to the plaintiff on 06 July 2020 which had to be deducted from this claim,
- 8.3 The plaintiff falsely represented to the defendant that should they pay R250 000 and place an order of the machines, the old acknowledgment of debt would be replaced by the new one, and the summons will be suspended. Under that assumption the defendant made the payment of R250 000 to the plaintiff.
- 8.4 The plaintiff placed the defendant under the above false pretence to obtain judgement, unknowingly, and to cause the defendant damages, the above misrepresentation constitutes fraud and that a non-variation clause is therefore not applicable.
- 8.5 As such the acknowledgement of debt is not enforceable against the defendant, is no longer competent in either fact or in law.
- 8.6 The plaintiff has deliberately misled the defendant's banking institution causing defendant's damages to a loss of R300 000 per month.
- 8.7 The defendant has counterclaim against plaintiff based on defamation and infringements of its constitutional right to the sum of R1 000 000.

8.8 The plaintiff's conduct of repossessing the goods is unconstitutional and is inconsistent with Sec 10 of the Constitution which gives right to dignity and Section 22 of the Constitution which gives right to freedom of trade, defendant was misled by the plaintiff, and the plaintiff caused damage to unfairly destroying defendant's business whilst the issues had not been tried, and therefore defendant is entitled to be released from the acknowledgement of debt.

[9] In the premises the applicant had not made out proper case in either fact or in law for summary judgement, the respondent has clearly established triable issues that can be decided in summary judgement. Applicant's application for summary judgement against the respondent should have been dismissed, the defendant be granted leave to defendant and the plaintiff be ordered to pay defendant's costs.

[10] The respondent contended that the applicant is not entitled to an order for cancellation of agreement, an order to return of any goods, payment of R2 665 425, 68, interest, or a writ of execution and costs, alternatively costs as between attorney and client.

[11] With regard to leave to appeal, the respondent submitted that the appeal would have a reasonable prospects of success and there are compelling reasons why the appeal should be heard, including conflicting judgements on the matter under the consideration.

[12] Counsel for the Applicant submitted that, respondent's alleged bona fide defences are baseless, and delaying the process by referring to the defences to the plea, defendant failed to disclose fully the nature of his defence in the plea, but pleading bare denials except to the three payments made to the plaintiff, there are no

triable issues nor does have any defences raised in the affidavit resisting summary judgement by the defendant.

[13] Counsel further submitted that there was no further agreement that was concluded between the parties, nor was there a new acknowledgement of debt, the whole agreement of acknowledgment of debt still stands, plaintiff has proven that the defendant has beached the acknowledgement of debt which breach is not denied by the defendant, therefore the plaintiff is entitled to cancel the acknowledgement of debt.

Plaintiff denies receiving payment of R250 000.00 from the defendant, Defendant's assumptions are not material facts, not sufficient, and not proven. Non –variation of fraud does not apply in this matter. There is no counter claim that was filed by the defendant to the plaintiff.

[14] In the premises, it is submitted that there is no reasonable prospect that another court would find for the defendant. The plaintiff moves for the order dismissing the application for leave to appeal with costs.

[15] Having heard the arguments and debated the same, I have considered the following: in terms of Rule 32 the purpose of summary judgement is to assist a plaintiff where a defendant who cannot set up a *bona fide* defence or raise an issue to be tried, enters appearance simply to delay the judgement, and also considered whether the defendant has established triable issues in its affidavit resisting summary judgement.

[16] I have come to the conclusion that the defendant did not sufficiently raised triable issues, the plaintiff agreed to accept R250 000 down payment against old debt and the payment of R150 000 going forward, based on the purchase of the 15 Surdial X machines from the plaintiff; and once defendant have a go ahead from the bank and

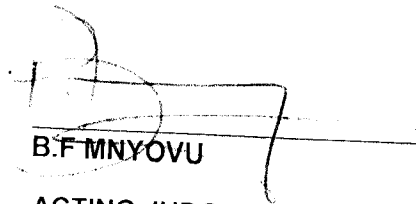
the R250 000 payment is done, both parties can draft the new Agreement of Acknowledgement of debt accordingly. However, Defendant did not fulfil the agreement as stated above, defendant indicated that he paid the R250 000.00 to the plaintiff, and ordered the goods, and concluded wrong assumptions without engaging the plaintiff going forward, that the summons will be suspended.

[17] The plaintiff denies that defendant paid the R250 000.00 as such there is no new agreement except the old acknowledgement of debt in place, since the fall of the negotiations between the parties on 02 July 2020 the defendant did not prove to this court what steps they have taken to fulfil the debt in the sum of R250 000.00, no proof of payment on papers except an allegation that they paid on the 06 July 2020 and negotiations with the bank.

[18] No merit in the arguments raised by the respondent. The appeal has no reasonable prospect of success and no compelling reasons that the appeal should be heard. I have judicially exercised my discretion and it is very unlikely that another court might find that the court exercised its discretion improperly.

[19] I therefore make the following order

17.1 the application for leave to appeal is dismissed with costs on an attorney and client scale

  
B.F. MNYOVU  
ACTING JUDGE OF THE HIGH COURT

**APPEARANCES:**

Counsel on behalf of Applicant	:	Adv. M Arroyo
Instructed by	:	Fritz Attorneys
Counsel on behalf of Respondent	:	Adv Reimer Schoeman
Instructed by	:	Ramulifho Incorporated
Date heard	:	02 June 2021
Date of Judgement	:	10 June 2021