IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE: 59810/2020

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

16 SEPTEMBER 2021
DATE

Jehapi
.....
SIGNATURE

In the matter between:

ESTELLE BOOYSEN	**FIRST APPLICANT**
ESTEMARI BOOYSEN	**SECOND APPLICANT**
And	
JACOBUS CORNELIUS VAN EEDEN N.O **(In his capacity as duly appointed Executor** **In the estate of Late GERT PETRUS** **ALBERTUS BOOYSEN)**	**FIRST RESPONDENT**
JACOBUS CORNELIUS VAN EEDEN **(in his personal capacity)**	**SECOND RESPONDENT**

CHARL VAN BRUGGEN ATTORNEYS	**THIRD RESPONDENT**
THE MASTER OF THE HIGH COURT OF SOUTH AFRICA	**FOURTH RESPONDENT**

APPLICATION FOR LEAVE TO APPEAL-JUDGMENT

TLHAPI J

[1] This is an 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 reasons 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 to similar applications 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 judgment the applicant seeks to appeal against. In *Mont Chevaux Trus 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). This standard was confirmed in *Notshokovu v S* (157/15) [2016] ZASCA (7 September 2016) at paragraph [2] where it was stated:

".....An appellant on the other hand faces a higher and stringent threshold

in terms of the Act compared to the provisions of the repealed Supreme Court Act 59 of 1959…."

[4] This was an application brought in the urgent court and the relief sought is mirrored in paragraph two of the judgment. The grounds of appeal relate to the entire judgement. However, in my consideration as to whether the application should be granted or not, I shall state those grounds which I view to be relevant. I also have regard to the submissions and arguments on behalf of the applicant by Mr Du Plessis and Ms Crone for the respondent in this application for leave to appeal. Both Mr Du Plessis and Ms Crone further filed heads of argument. The grounds of appeal are:

"1. The court was requested to only consider and grant interim relief and therefore addressed on the interim relief sought as set out in the draft order annexed hereto as "X";

2. The court however considered the entire application, on all papers, on the merits, which was never argued and which the Honourable Court was not called upon to determine and dismissed the main application on the merits thereof, without it having been an aspect to consider, especially in the light of the absence of a final replying affidavit;

3. The court incorrectly found that the first applicant does not have locus standi to bring the application and that the second applicant is not properly before court;

4. In so finding the court relied on an obiter dictum by de Vos J during the November proceedings;

5. The application was neither dismissed by de Vos J nor was it finalized

at the point in time;"

[5] In my view the points *in limine* raised by the first respondent could not be considered without straddling across the merits. Paragraph [23] to [31] deal with a determination of these points *in limine*. I don't see how another court would find that the orders sought in the draft order marked "X", where the facts were also mentioned in paragraph [8] of the judgement, should have been granted in the interim, without first dealing with the points *in limine*. I am of the view that another court would not, on the facts, find that the first applicant had *locus standi* to bring the application as an interested party in the deceased estate where Prinsloo J's order had not been confirmed by the Constitutional Court.

[6] Another court would not find that the second applicant was properly before the court, she, having withdrawn as a party and having tendered wasted costs. I also do not see how another court would find that the mere fact that a nil balance has now been discovered in the estate bank account motivates an issue to be considered in this application. The judgment does not in my view constitute an impediment to the second respondent, who is the daughter of the deceased and an heir in the deceased estate, from addressing her complaints regarding the conduct of the executor and his administration of the deceased estate. Paragraph [23] of the judgment dealing with the application of section 36 of the Administration of Estates Act 66 of 1965 sets out the manner in which the second respondent is to engage the process.

[7] In as far as the striking of the urgent application from the roll is concerned, paragraph [30] and [31] of the judgement quoted De Vos J's additional reasons wherein I expressed why I did not view those reasons given as *obiter* statements, because they actually dealt with the merits of the application before him, and even if indeed they are *obiter* my findings on the other points *in limine* should prevail.

[8] Consequently, I do not find that there are reasonable prospects of success in the appeal.

[9] In the premises the following order is made:

1. The application for leave to appeal is dismissed with costs.

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Tlhapi

TLHAPI V V

(JUDGE OF THE HIGH COURT)

MATTER HEARD ON	:	**09 SEPTEMBER 2021**
JUDGMENT RESERVED ON	:	**09 SEPTEMBER 2021**
ATTORNEYS FOR THE APPLICANTS	:	**VOGEL INC.**
ATTORNEYS FOR THE RESPONDENTS	:	**CRONE ATTORNEYS**