IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO 39127/2018

DELETE WHICHEVER IS NOT APPLICABLE

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

22.02.2022 [redacted]

DATE SIGNATURE

In the matter between:

MILILE MPAMBANISO **APPLICANT/ PLAINTIFF**

and

JAMES DAVISON **FIRST RESPONDENT/ DEFENDANT**

SQUIRREL BENEFIT ADMINISTRATORS (PTY) LTD **SECOND RESPONDENT/ DEFENDANT**

JUDGMENT: LEAVE TO APPEAL

BASSON J

[1] This is an application for leave to appeal against this Court's judgment dated

13 December 2021.

[2] This application is brought on two grounds: Firstly, this Court's finding that the applicant (the plaintiff) abandoned his alternative claim. Secondly, the factual finding that the applicant failed to prove that his agreement was concluded with the first respondent.

Application for leave to appeal: Test

[3] Section 17 of the Superior Courts Act[1], deals *inter alia* with applications for leave to appeal, and section 17(1) states as follows:

> "*(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 a 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;"*

[4] The criterion of "*a reasonable prospect of success*" as is stated in section 17(1)(a)(i) of the Superior Courts Act, have been interpreted as requiring that a Court considering an application for leave to appeal must consider whether another Court "*would*" (not "*might*") come to a different conclusion. In the matter of the *Mont Chevaux Trust v Goosen and 18 Others*[2], Bertelsman J, explained what the threshold is for granting leave to appeal as follows:

> "*[6] It is clear that the threshold for granting leave to appeal against 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 and Others 1985 (2) SA 342 (T) at 343H. The use of the word 'would' in the*

[1] Act 10 of 2013.
[2] 2014 JBR 2325 (LCC).

new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against."

First ground of appeal

[5] There is no merit in the argument that this Court erred in its finding that the applicant had withdrawn his alternative claim and I reiterate what this Court held:

"[4] The alternative claim, however, became moot shortly after the commencement of the trial. In his evidence Mpambaniso expressly disavowed any reliance on his alternative claim against SBA. He explained that the alternative claim was introduced out of caution on the advice of his legal representatives, but that it is no longer his case that the agreement was concluded with SBA. At the commencement of his cross-examination he again confirmed that he no longer asserted (in the alternative) that the agreement was concluded with SBA and that he accepted that he cannot raise an objection should the defendants request the Court to dismiss his alternative claim with costs. The alternative claim was accordingly abandoned resulting in it no longer being an issue for adjudication."

[6] This applicant's submission that he did not abandon his alternative relief is not borne out by the record of the proceedings. The applicant left no doubt in the mind of this Court that he no longer relied on his alternative claim.[3] He expressly abandoned his alternative claim and even went as far as to concede the Court may dismiss his alternative claim.

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[3] *Hepner v Roodepoort-Maraisburg Town Council* 1962 (4) SA 772 (A): *"There is authority for the view that in the case of a waiver by conduct, the conduct must leave no reasonable doubt as to the intention of surrendering the right in issue (Smith v Momberg, 12 S.C. 295; Victoria Falls and Transvaal Power Co v Consolidated Langlaagte Mines Ltd., 1915 AD 1 at p. 62) but in Martin v De Kock, 1948 (2) SA 719 (AD) at p. 733, this Court indicated that that view may possibly require reconsideration. It sets, I think, a higher standard than that adopted in Laws v Rutherfurd, 1924 AD 261 at p. 263, where INNES, C.J., says:*

'The onus is strictly on the appellant. He must show that the respondent, with full knowledge of her right, decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it.'

The second ground of appeal

[7] The applicant takes issue with this Court's findings on the merits. I do not intend to refer to all the findings made by this Court. I have read the applicant's submissions and I am not persuaded that there is a reasonable prospect of success that another Court *would* come to a different finding for the reasons set out in this judgment.

Order

[8] In the event, the following order is made:

The application for leave to appeal is dismissed with costs.

A.C. BASSON

JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 22 February 2022 ~~2021~~.

Case number : 39127/2018

APPEARANCES:

FOR THE PLAINTIFF : ADV N G LOUW

INSTRUCTED BY : BORNMAN BRINK INC

FOR THE DEFENDANTS : ADV B H SWART SC

INSTRUCTED BY : PIERRE MARAIS ATTORNEY