IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / NO

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

(3) REVISED

2022.03.22 [redacted]

DATE SIGNATURE

CASE NUMBER: 48799/19

DATE: 22 February 2022

KOCH & KRUGER BROKERS CC	First Applicant
DEON KRUGER	Second Applicant
V	
THE FINANCIAL SECTOR CONDUCT AUTHORITY	First Respondent
THE OMBUDS FOR FINANCIAL SERVICE PROVIDERS	Second Respondent

HER LADYSHIP MRS JUSTICEOF APPEAL	Third Respondent
YVONNE MOKGORO N.O.	
THE FINANCIAL SERVICES TRIBUNAL	Fourth Respondent
GEORGE BABEN	Fifth Respondent
LUCILLE MIRIAM BABEN	Sixth Respondent

JUDGMENT

MABUSE J

[1] This matter came before me as an application for leave to appeal the order that I made in the written judgment that was handed down on 3 November 2021. The relevant order reads as follows:

"(1) The loss of investments suffered by the 5th and 6th respondents is attributed to the breach of contract caused by the applicants.

(2) The applicants are hereby ordered to pay the costs of this application."

[2] To recap paragraph 3 of the judgment of 3 November 2021 one reads follows:

"At the commencement of the application both counsel advocate Geyer (Mr Geyer) for the applicants and advocate Botes asked the court to determine first a point in limine which, in their unanimous view, would truncate the proceedings. That point in limine involved causation. The court was asked to determine whether the loss suffered by the

5th and 6th respondents, under the circumstances set out in the overview, was caused by the breach of agreement occasioned by the Applicants, as it was contended by the 5th and 6th Respondents, or by the intervention of South African Reserve Bank, as it was contended by the applicants".

It is for this reason that the court made the order at the end of the judgment. The same paragraph 3 sets out the Applicants' view.

[3] The parties are as fully described in the main judgment.

[4] I have set out in paragraph [5] of the main judgment that the parties that participate in this point *in limine* are the Applicants and the second despondent on the question of costs and the Babens.

[6] In the application for leave to appeal the Applicants have fully set out the grounds on which they contemplate challenging the order of the main judgment. For purposes of brevity, I do not plan to repeat those grounds of appeal in this judgment since the application for leave to appeal constitutes part of the appeal papers. I also did not plan to deal with those grounds singly.

[7] The application for leave to appeal was opposed by the Babens and Advocate F Botes SC appeared for them. As at the original hearing of the application, Adv Geyer SC appeared for the Applicants. There was no appearance for the Second Respondent at the stage of the application for leave to appeal.

[8] Here I wish to state what I have already stated before in many other applications of the same nature. The first question that falls to be considered is that of the criterion or test to be adopted in an application such as the present. For the purposes of this

application, the test is as set out in s 17(1)(a)(i) and (ii) of the Superior Court Act 10 of 2013 ("the Superior Court Act"). This section prescribes that:

"17(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 prospects of success; or

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

[9] The enquiry as to whether leave should be granted is twofold. A Court that adjudicates an application for leave to appeal under section 17(1)(a)(i) and (ii) will investigate firstly, whether there are any reasonable prospects that another Court seized with the same set of facts will reach a different conclusion. Should the answer be in the positive, the Court should grant the application for leave to appeal, but should the answer be in the negative, the next step in the enquiry is to determine whether there are any compelling reasons why the appeal should also be heard.

[10] Section 17(1) sets out a fixed threshold to grant leave to appeal. Accordingly, the Applicant must meet these stringent thresholds set out in s 17 of the Superior Court's Act to be successful with this application for leave to appeal. This threshold is, under the Superior Courts Act, even more stringent than it was under the old Supreme Court Act 59 of 1959. A demonstration of the stringent threshold can be seen in **S v Notshokove & Another [2016] ZA SCA 112 par 2 [7 September 2016]**, where Shongwe JA, as he then was, writing for the Courts, stated as follows:

"An applicant, 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."

Section 17(1) uses the words *"may only be given"* and thereafter sets out the circumstances under which a Judge or Judges seized with an application for leave to appeal may grant the application. In **South African Breweries (Pty) Ltd v the Commissioner of the South African Revenue Services (SARS) 2017 (2) GPPHC 340 (28 March 2017), par 5**, Hughes J, had the following to say about the applicable test:

"The test which was applied previously in applications of this nature was whether there were reasonable prospects that another Court may come to a different conclusion. See Commissioner of Inland Revenue V Tuck 1989 (4) SA 888 (T) at 899. What emerges from section 17(1) is that the threshold to grant a party leave to appeal has been raised. It is now only granted in the circumstances set out and decided from the word "only" in the said section."

See **The Mont Chevaux Trust v Tina Goosen & 18 Others 2014 JDR 2335 (LCC) at par [6]**. Bertelsmann J held as follows:

"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 & Others 1985 (2) SA 342 (T) at 342H. The use of the word "would" in the new statutes indicates a measure of certainty that another Court will differ from the Court whose judgment is sought to be appealed against."

[11] Apropos the rigidity of the threshold, Plasket AJA, as he then was, wrote in the judgment in which Cloete JA and Maya JA, as she then was, concurred in **S v Smith 2012 (1) SACR 567, 570 par 7**:

"What the test of reasonable prospects of success postulates is a dispassionate decision, based on facts and the law that the Court of Appeal could reasonably arrive at the conclusion different to that of the Trial Court. In order to succeed, therefore, the appellant must convince this Court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. 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, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal."

[12] Have the Applicants satisfied the test set out in section 17(1) of the Superior Courts Act 10 of 2013? To answer this question, one must consider what the parties' views are as set out in paragraph 3 of the main judgment, or to put it otherwise, one must consider the case of the 5th and 6th Respondents, called the Babens. The Babens' cause of action is based on a contract. In paragraph [22] of the main judgment I stated as follows:

"The Babens' version is set out in the answering declaration of facts of Lucille Miriam Babens (Ms Babens), the 6th Respondent, supported by the supporting declaration of facts of the 5th Respondent. The Babens oppose the Applicants' application. They contend that the factual allegations made by the Applicants in relation to their

dealings with DK are neither true nor are the legal conclusions based on such allegations. According to Ms Baben, relationship between the Babens and Deon Kruger was based on a contract. It was an express, alternatively tacit, and further alternatively implied term of the contract that DK would act with the necessary skill, care, and diligence in providing the Babens with financial service. According to the Babens it was an express, alternatively tacit term of the agreement that they wanted to invest in the low to no risk investment. "The words speak for themselves.

[13] The Applicants have raised in total thirty-four grounds on which they contemplate challenging the main judgment of the court. I have carefully considered those grounds. One important notable point in those grounds of appeal is that nowhere do the Applicants challenge the Babens' version that their case was based on a contract. This point was also raised by Mr Botes. Mr Geyer did not deal with it reply.

[14] In my view, in the absence of any challenge to the basis of the Babens' cause of action, there is no way in which another court seized with the same set of facts we arrived at a conclusion favourable to the Applicants. The Applicants have no prospects of , in my view, if leave to appeal is granted. That aside, there is no compelling reason the appeal should be heard. I have not been persuaded by the Applicants that they have any prospect of success, if leave to appeal is granted nor I have they me that there are any compelling reasons why the appeal should be heard.

In the premises the application for leave to appeal is hereby refused, with costs.

[redacted]

P M MABUSE

JUDGE OF THE HIGH COURT

Appearances

Counsel for Applicants:	Adv HF Geyer
Instructed by:	Bieldersmans Inc.
	c/o Couzyn Hertzog & Horak
Counsel for the Fifth & Sixth Respondents:	Adv FW Botes SC
Instructed by:	Cronje, De Waal, Skhosana Inc.
	c/o HW Theron Inc.
Date heard:	9 February 2022
Date of Judgment:	22 February 2022