IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number: 4796/22

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

28.03.2022

SIGNATURE **DATE**

In the matter between:

ALPHEUS MALEMA PHETO Applicant

(In the application for leave to appeal)

and

THE SHERIFF OF THE HIGH COURT, RANDBURG N.O. First Respondent

(Mr Amos Nkuna)

MERCEDES-BENZ FINANCIAL SERVICES

SOUTH AFRICA (PTY) LTD Second Respondent

(In the application for leave to appeal)

JUDGMENT

(APPLICATION FOR LEAVE TO APPEAL)

AC BASSON, J

[1] The applicant seeks leave to appeal against the whole of the order granted on 15 February 2022 and reasons for judgment delivered on 22 February 2022 in terms of which this court refused to grant an interim interdict, alternative a spoliation order.

Application for leave to appeal: Test

[2] 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;"*

[3] 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*

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

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

[4] I am not persuaded, having reconsidered the matter and having considered the written submissions filed on behalf of the parties, that there is a reasonable prospect of success that another Court *would* come to a different finding for the reasons set out in this court's written judgment.

Merits of the appeal

[5] I do not intend repeating the facts that gave rise to this application. Suffice to re-emphasis the following facts: (i) It is common cause that this court had previously (before this application) granted an order against the applicant for the return of the motor vehicle. (ii) In terms of a written agreement with the second respondent - after the court order directing the return of the motor vehicle – the parties agreed, *inter alia*, that the applicant would *temporarily* retain possession of the vehicle against the payment of certain sums. (iii) The applicant agreed to the express condition that, provided that the stipulated payments were timeously met, the second respondent will *stay* execution steps. (iv) The applicant agreed that the indulgence granted by the second respondent in terms of this agreement shall *not* be construed as a novation or abandonment of the judgment that it had already obtained. (v) It was specifically agreed to and acknowledged by the applicant that, should he defaults, the second respondent will have the right to immediately issue and execute a warrant of delivery in respect of the vehicle without being obliged to give any further notice to the applicant.

[6] The effect of the agreement between the parties were therefore merely to *suspend* the writ of attachment but strictly depending on the applicant's compliance with his payment obligations in terms thereof - which he failed to do.

[7] I am not persuaded that another court would find differently in respect of this court's ruling to refuse the interim interdict. A court will generally only grant a stay of execution where real and substantial justice requires such a stay or, put otherwise,

where injustice will otherwise be done. A court will also generally grant a stay of execution where the underlying *causa* of the judgment debt is being disputed or no longer exists, or when an attempt is made to use for ulterior purposes the machinery relating to the levying of execution. None of these exceptions apply to the facts of this matter. More in particular, in the present matter the judgment granted against the applicant is not (and was never) disputed. Furthermore, the subsequent agreement did not vary the terms of the judgment – the agreement merely *suspended* the attachment on condition that the applicant complied with his obligations in terms of the agreement.

[8] Subsequent to the breach of the agreement, the second respondent caused a *further* warrant of attachment to be issued, in terms of which the first respondent attempted to repossess the vehicle in the applicant's possession, which was mandated in terms of the agreement.

[9] The applicant takes issue with this court's judgment and submitted that only *one* writ of execution was issued (and not two). This is factually incorrect. The second writ of execution was issued by this court on 25 January 2022 and a copy thereof has been uploaded on Caselines. I am further in agreement with the submission that, whether or not a second writ of attachment was issued is, in any event, of no consequence. The agreement between the parties expressly states that execution of the order is held in abeyance pending the applicant's compliance with the conditions of payment. The writ of attachment was not nullified by the agreement: It was merely *suspended*.

[10] It follows that, as the underlying cause is not disputed, the applicant is not entitled to an order suspending the writ of attachment and the application had to fail.

[11] The applicant also takes issue with this court's finding that the applicant was not spoliated. My reasons for this finding are set out in the judgment and I am not persuaded that the applicant has reasonable prospects on appeal that another court *would* find differently in respect of this issue. Suffice to point out that, on the applicant's own version, he is still in possession of the motor vehicle. The mere threat of a dispossession is not enough for a mandament of spolie.

[12] The applicant lastly takes issue with this court's finding that the agreement entered into after the order was granted, does not constitute a new credit agreement which is subject to the National Credit Act ("NCA"). I do not intend repeating what is stated in this court's judgment.

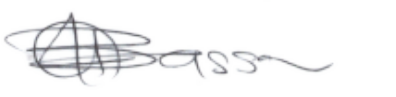
[13] I agree with the submission on behalf of the second respondent that there is simply no basis to contend that the agreement is a new credit agreement or subject to the NCA, as there was no credit advanced to the applicant in terms thereof. More in particular, the applicant's reliance on section 8 of the NCA that the agreement constitutes an instalment agreement is misplaced. The agreement relied on by the applicant does not constitute an instalment agreement. This is so because, in terms of the agreement, the second respondent did not sell the vehicle to the applicant – it merely allowed the applicant to *retain* possession of the vehicle subsequent to an order directing the return of the vehicle but conditional on the applicant making certain payments already due to the second respondent.

[14] I am, in conclusion, not persuaded that the applicant has reasonable prospects on appeal that another court would find differently in respect of this issue.

ORDER

[15] 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 28 March 2022.

Appearances

For the applicant
Adv M Molemoeng
Instructed by Molatsi Seleke Attorneys

For the second respondent
Adv AP Ellis
Instructed by Strauss Daly Inc