



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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

CASE NO: 17769/2017

DATE 25/04/2022

SIGNATURE

In the matter between:

MKD PROPERTIES (PTY) LTD

Plaintiff / Respondent

and

VAW BELLEGGINGS (PTY)LTD

First Defendant / Applicant

(in Liquidation)

E J JANSE VAN RENSBURG, A N NDYAMARA and J M

NGOASHENG-PHOSHOKO N.N.O

THE REGISTRAR OF DEEDS, PRETORIA

Second Defendant

THE MASTER OF THE HIGH COURT, NORTH WEST

PROVINCE, MAHIKENG

Third Defendant

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

[1] This is an application for leave to appeal. Although in its notice the applicant asked primarily for leave to appeal to the Supreme Court of Appeal, in its Heads of Argument, it stated that upon reflection, if leave is to be granted, it should be

to the full court of this division, sitting in Pretoria. The applicant seeks to appeal the whole of the judgment and order of this court handed down on 19 November 2021 in terms of which I found in favour of the respondent herein in the following terms:

- “1. *The agreement of sale between the plaintiff and the first defendant entered into on 22 June 2016 is cancelled.*
2. *The first defendant is ordered to repay the purchase price of R3 800 000.00 (Three Million, Eight Hundred Thousand Rand) to the plaintiff.*
3. *The first defendant is ordered to repay the plaintiff all transfer costs related to the transfer of the immovable property from the names of the joint liquidators of the first defendant into the plaintiff’s name.*
4. *The plaintiff must take all necessary steps to effect the retransfer of the immovable property into the names of the joint liquidators of the defendant, upon payment of the purchase price stated above.*
5. *The first defendant is ordered to pay all transfer costs related to the retransfer of the immovable property from the plaintiff’s name into the names of the joint liquidators of the first defendant.*
6. *The first defendant shall pay the plaintiff’s costs of suit, including costs consequent upon the employment of two counsel, and including the costs of the urgent application.”*

[2] The judgment I gave is assailed mainly on the basis that I misunderstood the factual evidence and consequently arrived at the incorrect decision. The grounds are fully embodied in the applicant’s application for leave dated 10 December 2021. I caused directives to be issued for the filing of Heads of Arguments and this application will be settled on the basis of the said documents.

[3] This application is brought in terms of Rule 49 (1)(b) which provides that:

“when leave to appeal is required and it has not been requested at the time of judgment or order, application for such leave shall be made and the grounds thereof shall be furnished within 15 days after the date of the order appealed against. ...”. As such the application was brought within the time limits as regulated by Rule 49(1)(b).

- [4] The substantive law pertaining to applications for leave to appeal is encapsulated in **Section 17 (1) of the Superior Courts Act 10 of 2013**, and sets out the test as follows:

“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.”*
- (b) *The decision sought on appeal does not fall within the ambit of section 16(2)(a); 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.*

- [5] Section 17(1) clearly sets out that an applicant seeking leave to appeal is required to convince the court that there is a reasonable prospect of success and not merely a possibility of success in the appeal. In *Democratic Alliance v President of the Republic of South Africa and Others*¹ the Full Court held as follows:

“The test as now set out in s17 constitutes a more formidable threshold over which an applicant must engage than was the case. Previously the test was

¹ (21424/2020) [2020] ZAGPPHC 326(29 July 2020) paras [4] – [5].

whether there was a reasonable prospect that another court might come to a different conclusion. See, for example, Van Heerden v Cronwright and Others 1985(2) SA 342 (T) at 343 H. The fact that the Superior Courts Act now employs the word 'would' as opposed to 'might' serves to emphasise this point. As the Supreme Court of Appeal said in Smith v S 2012(1) SACR 567 (SCA) at para 7;

'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.'

[6] This dictum serves to emphasise a vital point: Leave to appeal is not simply for the taking. A balance between the rights of the party which was successful before the court *a quo* and the rights of the losing party seeking leave to appeal need to be established so that the absence of a realistic chance of succeeding on appeal dictates that the balance must be struck in favour of the party which was initially successful."

[7] The applicant contends that on the basis of a number of reasons elucidated on in its application for leave, which I do not deem necessary to repeat herein, there is a high probability of success in the appeal. This dispute revolves around the statements made by the auctioneer during the auction and in the brochure advertising the property that is the subject of this dispute in respect of the water dam in the said property. These statements, are what informed my judgment.

[8] The respondent in paragraph 56 of its Heads explains what took place at the auction neatly as follows: "*The facts that the right relating to the water was a tricky affair, counted against the first defendant, because the auctioneer made representations of fact as if there was nothing tricky about them*". The applicant holds a contrary view and state the misrepresentations were negligent and innocent, in the absence of the evidence by the Auctioneer the

court erred in finding that the representations were fraudulent. In the event that the applicant is correct, it might as well be that another court may arrive at a different conclusion.

For that reason, **I make the following Order:**

1. Leave to appeal to a full court of the Gauteng Division of the High Court, Pretoria, is granted.
2. Costs shall be costs in the appeal.



Mthimunye DP

Acting Judge of the High Court