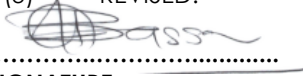




**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA**

**Case Number: 19260/2021**

|   |                                 |
|---|---------------------------------|
| (1)   | REPORTABLE: NO                  |
| (2)   | OF INTEREST TO OTHER JUDGES: NO |
| (3)   | REVISED.                        |
|  | <u>12.5.2022</u>                |
| <b>SIGNATURE</b>  | <b>DATE</b>                     |

In the matter between:

**MYSTICAL ICE TRADING 50 CC**

Applicant  
(Respondent in the application  
for leave to appeal)

and

**RIETFontein View Estate (Pty) Ltd**  
(Registration No: 2018/329172/07)

Respondent  
(Applicant in the application for  
leave to appeal)

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**JUDGMENT: APPLICATION FOR LEAVE TO APPEAL**

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**AC BASSON, J**

## Introduction

[1] The respondent applies for leave to appeal the judgment handed down on 2 February 2022. I will refer to the parties as they were before the court in the application for default judgment. The application is for leave to appeal to the Full Bench of this Division, alternatively the Supreme Court of Appeal.

## Application for leave to appeal: Test

[2] Section 17 of the Superior Courts Act<sup>1</sup>, 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*<sup>2</sup>, 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 new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.”

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<sup>1</sup> Act 10 of 2013.

<sup>2</sup> 2014 JBR 2325 (LCC).

[4] The respondent submitted that there exists no sound, or rational basis upon which to conclude that the respondent has any reasonable prospects or a realistic chance of success on appeal.

This appeal

[5] It is clear that this entire application hinges on the incorrect understanding by the respondent of the applicant's cause of action.

The court's refusal to grant condonation for the late delivery of the rescission application

[6] This court refused condonation for the late delivery of the rescission application. The respondent is however silent on the issue of condonation, which it had to apply for regarding the late delivery of the application for rescission. The respondent also advances no reasons as to why another court *would* conclude differently on the issue of condonation for the late filing of the rescission application.

[7] The principles applicable to applications for condonation are fully dealt with in the judgment and need no repetition.<sup>3</sup>

[8] In the judgment it is pointed out that the respondent was made aware of the judgment when the sheriff attempted to execute the warrant of execution as far back as 7 January 2021. The warrant was *personally* served on Mr. Malunga (the deponent to the founding affidavit in the application for rescission). No reasonable explanation was tendered as to why the respondent did nothing for a period of approximately 8 months after he became aware of the writ of execution up until such time when he instituted the rescission application.

[9] The respondent's explanation for the late delivery of the rescission application is flimsy and fails to cover the entire period of the delay and is also far from reasonable.

[10] In light of the foregoing, I am not persuaded that another court *would* conclude differently on the issue of condonation.

The respondent's failure to disclose a *bona fide* defence to the applicant's claim

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<sup>3</sup> See paras [13] and [14].

[11] This issue is fully dealt with in the judgment. To restate: The sale of property agreement ("*the agreement*") entered into between the parties constitutes a binding agreement. The terms and conditions contained in the agreement are *not* ambiguous and the parties have expressly reached consensus in respect thereof. The common law principle of *pacta sunt servanda* is an established principle of our common law which, in lay terms, means that agreements must be honoured by the parties.

[12] The applicant's claim and cause of action are premised upon the respondent's non-compliance with the terms and conditions of the agreement.

[13] It is common cause between the parties that the respondent failed to pay the full purchase price in respect of certain units purchased by the respondent as recorded in clause 3.1 of the agreement.

[14] As a result of the respondent's failure to adhere to the terms of the agreement and its consequent material breach, the applicant initiated action proceedings and obtained judgment by default in the sum of R999 095.28 constituting the *outstanding balance* of the amount due towards the *full purchase price* as recorded in the agreement and reflected in the statement of account delivered to the respondent. The VAT amount of the property transaction is R880 434.89 and is less than the total amount claimed in respect of the *outstanding purchase price* and other costs. It is clear that it is *not* the VAT which is claimed in the summons and for which default judgment was granted.

[15] Despite having admitted to receiving the summons in the action, and receiving two warrants of execution from the sheriff, the respondent, did nothing until the application to declare the immovable properties executable was served.

[16] The applicant was therefore entitled to claim specific performance, and judgment by default was correctly granted.

[17] I am not persuaded that the respondent discloses a *bona fide* defence, and I am not persuaded that another court *would* come to a different conclusion: The respondent manifestly misconstrues the applicant's cause of action: Firstly, the respondent relies on a misplaced perception that the applicant issued a summons for the payment of VAT in terms of the sale of property agreement. Secondly, the respondent alleges that the

applicant contravened section 20 of the Value-Added Tax Act<sup>4</sup> in that a tax invoice was purportedly not issued within 21 days of the date on which the transaction was concluded.

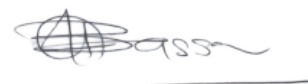
[18] These submissions are dealt with in the judgment and need not be repeated. Suffice to point out that I am not persuaded that another court *would* come to another conclusion. The sale of property agreement specifically records that Mr. Malunga is representing a company to be formed under the name of Rietfontein View Estate (Pty) Ltd (the respondent) who would be the purchaser in terms of the agreement. The fact that the VAT invoice was provided to the respondent prior to it being incorporated is accordingly not irregular. But more importantly, clause 3.1 of the agreement records expressly that the purchase price is *VAT inclusive*.

[19] Nowhere in the respondent's founding or answering affidavit is it alleged that payment of the entire purchase price (including VAT) was made as agreed in the sale of property agreement. In fact it is conceded that the full purchase price was not paid.

[20] Under the circumstances, I am not persuaded that the respondent has reasonable prospects of success on appeal.

#### Order

[21] The application for leave to appeal is dismissed with costs.



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**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

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<sup>4</sup> Act 89 of 1991

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 12 May 2022.

Appearances

For the applicant

Adv L Kotze

Instructed by Snyman de Jager Attorneys

For the respondent

Adv ME Manala

Instructed by Lamola Attorneys