REPUBLIC OF SOUTH AFRICA

THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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

[redacted]

15 February 2022

DATE SIGNATURE

CASE: 46214/2018

In the matter between:

LUDWE MBASA BIYANA	APPLICANT
And	
NEDBANK LIMITED	RESPONDENT

JUDGMENT - LEAVE TO APPEAL

TLHAPI J

[1] This is an application for leave to appeal premised on section 17(1) of the Superior Courts Act 10 of 2013, ("the Act") which section is set out in its entirety below:

"Section 17(1)

(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 prospect of success; or

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

(b) the decision sought on appeal does not fall withing the ambit of section 16(2); 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."

[2] Previously the test applied to similar applications was whether there were reasonable prospects that another court may come to a different conclusion, *Commissioner of Inland Revenue v Tuck* 1989 (4) SA 888(T). The threshold of reasonable prospects has now been raised by the use and meaning attached to the words 'only' in 17(1) and 'would' in section 17(1)(a)(i). Therefore on the entire judgement there should be some certainty that

another court would come to a different conclusion from the judgement the applicant seeks to appeal against. In *Mont Chevaux Trus v Tina Goosen and 18 Others* 2014 JDR 2325(LCC) at para[6] : "It is clear that the threshold for granting leave to appeal 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 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"

[3] In *S v Smith* 2012 (1) SACR 567(SCA) at para 7, a more stringent test is called for in that an applicant must convince a court, on proper grounds that there are prospects of success which are not remote, a mere possibility is not sufficient. Therefore, where the applicant has satisfied either of the two identified requirements in the Act, leave to appeal should be granted, *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* 2016 (3) SA 317 (SCA). This standard was confirmed in *Notshokovu v S* (157/15) [2016] ZASCA (7 September 2016) at paragraph [2] where it was stated:

"…….An appellant 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…."

[4] I have considered the grounds upon which the applicant relies together with his submissions and arguments and those of counsel for the respondent.

[5] The having heard the parties on condonation. It is granted.

[6] The applicant seeks leave to appeal the whole of the judgment and order in the rescission application as handed down by me on 20 September 2021 and, an application for leave to appeal the summary judgment granted by Maumela J on 3 September 2019. In my view it is not necessary to deal with the contention by the applicant that I am competent to also consider the Maumela J judgment. This application concerns the rescission application as I did **not** sit in adjudication of the summary judgment application. (my emphasis).

[7] I have again considered the submissions and arguments in this application which in my view, were the same as those argued in the rescission application. My judgment gives a clear background of what transpired in the absence of the applicant and I reiterate the following from paragraph 14:

"By 18 December 2018 the only outstanding issue was that relating to compliance with the section 129 letter. The applicant did not object to such a postponement sine die nor did the applicant insist that the application for summary judgment be finalized at that stage. It is not clear from the transcript if the court in addition to the pleadings before it considered the supplementary affidavit. What is clear is that Maumela J was made aware of its existence and it appears that he considered the content of the file before him because he made comments on the reserve price and his notes. Now, instead of speculating on what transpired at the hearing from the transcript, the applicant should have requested reasons for the judgment and launched its application for leave to appeal."

[8] The cases referred to in the judgment are applicable and I do not find that there are reasonable prospects of success in the appeal or that another court would find differently.

[9] In the result the following order is given:

(1) The application for leave to appeal is dismissed with costs.

[redacted]

TLHAPI V V

(JUDGE OF THE HIGH COURT)

MATTER HEARD ON	:	31 JANUARY 2022
JUDGMENT RESERVED ON	:	31 JANUARY 2022
FOR THE APPLICANT (In Person)	:	Mr LUDWE MBASA BIYANA
COUNSEL FOR THE RESPONDENT	:	ADV P S A J JACOBSZ
INSTRUCTED BY	:	HACK, STUPEL & ROSS ATTORNEYS