



**IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION PRETORIA)**

**CASE NO: 39085/2016**

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

**SIGNATURE**

23 AUGUST 2022

**DATE**

**ERF 23 MAGALIESIG CC**

**APPLICANT**

And

**FIRSTRAND BANK LIMITED**

**FIRST RESPONDENT**

**SHERIFF, SANDTON NORTH**

**SECOND RESPONDENT**

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**JUDGMENT**

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**NDLOKOVANE AJ**

**INTRODUCTION**

[1.] The applicant applies for leave to appeal to the full bench of this honourable court, against the whole Judgment or order I granted on 29 April 2022, refusing the applicant a declaratory order that the sale in execution of the immovable property of the

applicant be declared unlawful and invalid as well as other ancillary relief, alternatively be set aside.

[2.] The applicant being disgruntled by the aforesaid orders I made in the written judgement granted on 29 April 2022, applies on grounds fully set out in its application for leave to appeal, to appeal against the said orders. I hasten to mention that these grounds will be dealt with below in my judgement and will not be reproduced here. The application is opposed by the respondent.

[3.] 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, Section 17(1) of the Superior Court Act 10 of 2013(the Act), provides for the grounds upon which leave to appeal may be considered.

[4.] Section 17(1) at relevant parts reads as follows:

*“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 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.”*

[5.] In the case of *The Mont Chevaux Trust v Tina Goosen & 18 Others* 2014 JDR 2335 (LCC) at para 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.”*

[6.] It is trite that the use of the word “would” in section 17(1)(a)(i) imposes a higher and stringent threshold, as compared to the repealed Supreme Court Act 59 of 1959.<sup>1</sup>

[7.] From the above, it is the applicant's case that there is a reasonable prospect that another court might come to a different conclusion and as such that leave to appeal should be granted. Whereas the first respondent submits that it stands by its submissions contained in the heads of argument it submitted also captured in my main judgement which is the subject matter herein. To the extent that it submits that I did no err in coming to the conclusion as set out in the main judgement.

### **FACTUAL BACKGROUND**

[8.] The salient factual background to this matter were succinctly captured in paragraphs 4-8 of the main judgement and will not be repeated in this judgement.

### **I now turn to deal with each of the grounds set out in the notice by the applicant**

[9.] In that I misdirected myself in finding that the applicant seeks to confer a retrospective effect on Rule 46(A). The applicant contends that it does not seek to confer a retrospective effect on the Rule. Instead the applicant states that the Rule, having come into operation before the sale had taken place, should have factored in the sale.

[10.] Secondly, the applicant contends that the Rule does not make substantive law but instead guides the procedure and as such, it was not in place when the property was declared specially executable and consequently does not demerit its applicability. In effect, it is at sale stage that the Rule guides the procedure, which involves setting the reserve price. The effect or applicability of the Rule comes in effect at the time the property is being sold and considering that at the time the subject matter property was

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<sup>1</sup> The Mont Chevaux Trust (IT2012/28) v Tina Goosen – unreported, LCC case no LCC14R/2014 dated 3 November 2014, cited with approval by the Full Court in the Acting National Director of Public Prosecution v Democratic Alliance (unreported, GP case no 19577/09 dated 24 June 2016) at para 25; Notshokovu v S unreported, SCA Case no 157/15 dated 7 September 2016.

sold, the Rule was operational, the process of the sale ought to have been guided or been within the confines of the Rule. Of importance, the applicant's core submission is that the critical time as to when the reserve price is to be considered was not at the time of Judgment but instead by the simple reason that Rule 46(A) had become operational when the subject matter property had not been sold and it intended to go out the sale of properties declared specially executable and that when the property was sold, the Rule had been operational for a year and a half.

[11.] The respondent in this application stands by its submission as in the main application and these are:

Auctioning of the property which is utilised by the applicant as residential property and in fact resides with her two minor children, without a reserve price was not compliant with the full bench decision of Mokebe,<sup>2</sup> wherein the court held that unless exceptional circumstances are placed before the court, by the bond holder, the property must be sold at a reserve price.

It is common cause that the property was indeed sold without a reserve price and was also sold below the market value and same has caused Ms. Jacqueline Motshegwa, irreparable prejudice. Further, Ms Lesiba counsel for respondent impressed that although the property is in the name of a close corporation, Ms Motshegwa is the only sole member thereof and utilises the property for residential purposes and in fact resides with her two minor children.

[12.] The first respondent in its Heads of Arguments submits that following Folscher judgement,<sup>3</sup> the immovable property owned by a Company or Close Corporation, or a Trust is not protected by the amended Rule requiring judicial oversight. The first respondent asserts that this is also the finding in Mokebe. On the 13 June 2022, the Supreme Court of Appeal of South Africa in the case of *Petrus Johannes Bestbier and Three Others Appellants v Nedbank Limited* considered whether Rule 46(A) applied

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<sup>2</sup> 2018(6) SA 492(GJ).

<sup>3</sup> 2011(4) SA 314(GP).

when property sought to be declared executable was owned by a Trust and was a primary residence of Trust beneficiaries.

*Bestbier* according to the applicant is a compelling reason why the appeal should be heard. There is a reasonable prospect of success that the Applicant will convince the Appeal Court that the residential property albeit owned by a trust does enjoy the protection afforded by Rule 46(A); the Applicant's argument was never retrospective but rather because Rule 46(A) and/or the Mokebe decision were extant, immediately prior to the sale in execution, a reserve price should have been set, therefore Leave to Appeal is sought either to the Supreme Court of Appeal or to the Full Bench of this court.

[13.] Having considered the arguments presented by the applicant in support of the contention that another Court might take a different view, I am of the view that there is a reasonable prospect another court would differ with me. Consequently, leave to appeal ought to be granted to the Full Court of this division and the costs of the application for leave to appeal, be costs in the appeal.



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**N NDLOKOVANE AJ**

**ACTING JUDGE OF THE HIGH COURT**

**GAUTENG DIVISION, PRETORIA**

*This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on Caselines by the Judge or his/her secretary. The date of this judgment is deemed to be 23 August 2022.*

## **Appearances**

Counsel for the Applicant:

Adv. Lesipa

Attorney for the Applicant:

Ledwaba Attorneys

Counsel for the First Respondent:

Adv. J Minaar

Attorney for the First Respondent:

Hammond Pole Majola Attorneys

Date of Hearing:

21 July 2022

Date of Judgment:

23 August 2022