

REPUBLIC OF SOUTH AFRICA

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

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

15 February 2022

DATE



SIGNATURE

CASE NO: 43344/21

In the matter between:

NTANDO ZWELIHLE MHLONGO

APPLICANT

and

DULA EDMEN FARRAQUE

FIRST RESPONDENT

ABSA BANK LIMITED

SECOND RESPONDENT

FIRST NATIONAL BANK LIMITED

THIRD RESPONDENT

JUDGMENT - LEAVE TO APPEAL

TLHAPI J

- [1] This is an opposed 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 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 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); 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 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).

- [4] The applicant seeks leave to appeal the whole judgment and order granted on 22 October 2021. Without rehashing the list of grounds, and also not disregarding their content. I extract what I view as the basis of discontent in seeking leave to appeal.

- [3] The applicant obtained two ex parte orders which followed very close on each other on 20 September 2021 and 22 September 2021. The date of return on which the first respondent had to show cause why the monies in dispute should

not be paid back to the applicant, 20 October 2021 coincided with the first respondent's application for re-consideration and these for convenience were heard together.

- [5] In the *ex parte* applications, brought on extreme urgency. The dispute revolved around the alleged purchase of tyres by the applicant from the first respondent for R35 462.00 and the alleged erroneous payment of a substantial sum of money, R3 546 620.00 by the applicant into the bank account of the first respondent. The first respondent's version in answer was that dispute was not about the tyres, but was about the re-sale of an Aston Martin vehicle to the applicant, which the first respondent had purchased from the applicant who acted as middleman for a third party. The facts are stated in the judgment.
- [4] I understand the grounds to be (i) that the version on the first respondent regarding the Aston Martin was not tenable and relevant to the issue of the erroneous payment made by the applicant and that the court erred in finding that there were never negotiations regarding the purchase of truck tyres and special reference was made to paragraphs [28] and [31] of the judgment (ii) that the court should have referred this dispute of fact to trial (iii) the court erred in allowing a further affidavit by the first respondent based on its finding that the applicant's reply had contained new evidence (iv) the court erred in dismissing the application.
- [5] Firstly, the court dealt extensively with the responsibility placed on a litigant who approaches a court *ex parte* seeking urgent relief, the duty to make full disclosure of even "adverse material that the absent respondent might put up in opposition to the order" sought; the duty to uphold the requirement of *uberrima fides*. The court found that the applicant had breached these requirements in "several material aspects". Secondly, the court found that new evidence had been introduced in the replying affidavit and, it gave reasons why it exercised its discretion to allow the first respondent to answer to those new facts, which were facts which were within the knowledge of the applicant when

the *ex parte* applications were launched and, which should have been disclosed in the founding papers. Thirdly, in as far as the referral to oral evidence is concerned, I reiterate the discretion exercised that the matter could be resolved on paper and no reasons or special circumstances prevailed for referral to oral evidence. In my view, there are no reasonable prospects or compelling reasons why the application should be granted.

[6] The following order is therefore made:

- (i) The application is dismissed with costs.



TLHAPI V V
(JUDGE OF THE HIGH COURT)

MATTER HEARD ON	:	04 FEBRUARY 2022
JUDGMENT RESERVED ON	:	04 FEBRUARY 2022
COUNSEL FOR THE APPLICANT	:	ADV P P FERREIRA
INSTRUCTED BY	:	ADRIAAN DU PLESSIS INC ATTORNEYS
COUNSEL FOR THE RESPONDENT	:	ADV J C van EEDEN
INSTRUCTED BY	:	VORSTER & BRANDT INC ATTORNEYS