

REPUBLIC OF SOUTH AFRICA



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

CASE NO. 15086/2016

DOH: 04 NOVEMBER 2022

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|---|--|
| 1. REPORTABLE: NO / YES | |
| 2. OF INTEREST TO OTHER JUDGES: NO / YES | |
| 3. REVISED. | |
| SIGNATURE | 17 November 2022 DATE |

In the matter of:

THOKOZANI NONGAUZA

APPLICANT

AND

FIRST RAND BANK LIMITED

FIRST RESPONDENT

LAVESHAN CHETTY

SECOND RESPONDENT

BOITUMELO MAHLOKO

THIRD RESPONDENT

THE REGISTRAR OF DEEDS,

JOHANNESBURG

FOURTH RESPONDENT

THE SHERIFF, JOHANNESBURG

WEST

FIFTH RESPONDENT

JUDGEMENT - LEAVE TO APPEAL

THIS JUDGEMENT HAS BEEN HANDED DOWN REMOTELY AND SHALL BE CIRCULATED TO THE PARTIES BY WAY OF EMAIL/ UPLOADED ON CASELINES. ITS DATE OF HAND DOWN SHALL BE DEEMED TO BE 17 NOVEMBER 2022

Bam J

A. Introduction

1. This is an opposed application for leave to appeal to the Full Court of this Division. The application was brought by the applicant, Mr Thokozani Nongauza, against the order handed down by this court on 21 February 2022, with reasons having been furnished on 21 September 2022.
2. In terms of the order of February 2022, I dismissed the applicant's application to rescind the default judgment granted by this court in January 2017.
3. The only respondent who participated in these proceedings is the first respondent. In the circumstances, I use the word respondent as reference to the first respondent.

B. Grounds for Appeal

4. The grounds on which the application is brought are set out in the applicant's notice of application for leave to appeal. I see no need to repeat the grounds. What is apparent is that the applicant states that the court erred in refusing to grant the rescission.
5. However, during the hearing of the application for leave to appeal, counsel for the applicant, on several occasions, appeared to be advancing new defences which were never pleaded in the applicant's application. Be that as it may the main ground advanced by the applicant is that the court erred in accepting the bank's version, in circumstances where a clear dispute of fact existed. The dispute in this regard has to do with the loan amount of R890 000, which the applicant disputes in his founding affidavit. The applicant's version is that the loan is R435 000. He rejects the bank's version that he took further loans, increasing the amount to R890 000. The applicant's attack, so it is said, is buttressed by the fact that the bank had attached neither the loan agreement nor had it pleaded anything about the terms pertaining to proving the balance outstanding. In the circumstances, the applicant says this court erred in accepting the bank's version without the benefit of oral testimony.
6. There are further grounds pertaining to the description of the property that is the object of the mortgage loan but these are of no moment as the property is properly described by the bank in several of its papers.

C. The Law

7. In terms of section 17 of the Superior Court Act¹ 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; and
- (b) the decision sought on appeal does not fall within the ambit of section 16(2)(a).'

8. In interpreting the test, the SCA in *MEC for Health, Eastern Cape v Mkhitha and Another* noted:

'Once again it is necessary to say that leave to appeal, especially to this court, must not be granted unless there truly is a reasonable prospect of success. Section 17(1)(a) of the Superior Courts Act 10 of 2013 makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success; or there is some other compelling reason why it should be heard.

An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal...'²

¹ Act 10 of 2013.

² (1221/2015) [2016] ZASCA 176 (25 November 2016) at paras 16,17 and 18.

9. For a further exposition of the applicable test, see *S v Zuma and Another; Thales South Africa (Pty) Limited v KwaZulu-Natal Director of Public Prosecutions and Others*³.
10. Although I could find no merit in many of the applicant's grounds, I am persuaded that there is prospect that another court would reach a different conclusion on the ground cited in paragraph 5 of this judgement. I have taken into account the severe consequences of the judgement and the reality that the applicant is likely to lose his primary residence. Although this is the legal consequence of execution against an immovable, where, as in this case, there is a prospect that another court would come to a different conclusion, leave to appeal must be granted. I accordingly conclude that the application for leave to appeal must succeed.

D. ORDER

11. The following order is made:

- (i) Leave to appeal is granted.

A handwritten signature in blue ink, consisting of a large, stylized 'N' and 'B' intertwined, positioned above a horizontal line.

NN BAM J

JUDGE OF THE HIGH COURT,

GAUTENG DIVISION, PRETORIA

³(CCD30/18, D12763/18) [2019] ZAKZPHC 76 (29 November 2019).

APPEARANCES

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Instructed by :

:

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Fourth Respondent

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Fifth Respondent