



Editorial note: Certain information has been redacted from this judgment in compliance with the law.

THE HIGH COURT OF SOUTH AFRICA
FREE STATE PROVINCIAL DIVISION

Reportable: yes/no Circulate to other Judges: yes/no Circulate to Magistrates: yes/no

Case Number 3431/2022

In the matter between:

WELKOM RETIREMENT VILLAGE

Applicant

and

BEVERLEY-ANNE SHAHIA

1st Respondent

MATJHABENG LOCAL MUNICIPALITY

2nd Respondent

CORAM: BERRY, AJ

HEARD ON: 10 MARCH 2023

DELIVERED ON: This judgment was handed down electronically by email to the parties' representatives and by release to SAFLII. The date and time for hand-down is deemed to be 15h00 on 24 March 2023.

JUDGEMENT BY: BERRY, AJ

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

[1] The Applicant brought an Application in terms of Sec 4(1) of the Prevention of Illegal Eviction from Unlawful Occupation of Land, Act 19 of 1998 (PIE) to seek an Order evicting the 1st Respondent.

[2] All the formalities regarding service and notice as required by PIE were met.

[3] The Application was opposed and served before Court on 02 February 2023.

[4] I gave an ex-tempore Judgment and made the following Order.

- “1. The First Respondent and/or any other person occupying the immovable property, Unit Number [...], [...] Avenue, [...] Park, Welkom, is declared to be illegal occupiers.
2. The First Respondent and/or any other person occupying the immovable property, Unit Number [...], [...] Avenue, [...] Park, Welkom, is ordered to vacate the immovable property on or before 31 March 2023.
3. The First Respondent and/or any other person occupying the immovable property, Unit Number [...], [...] Avenue, [...] Park, Welkom, is ordered to remove all personal belongings, furniture and/or equipment on or before 31 March 2023.
4. The Sheriff of the Court for the District of Welkom is authorised, ordered, and directed to evict the First Respondent and/or any other person occupying the immovable property, Unit Number [...], [...] Avenue, [...] Park, Welkom, should the First Respondent and/or any other occupiers refuse and/or fail to comply with this Court Order.
5. The Sheriff is authorised to enlist the assistance of South African Police Services, should he/she deem it necessary to comply with this Court Order to evict the First Respondent and/or any other occupant from the immovable property, Unit Number [...], [...] Avenue, [...] Park, Welkom.
6. The First Respondent is ordered to pay the costs for the Condonation Application and this Application on party and party scale.”

[5] The Application for leave to appeal lies against this Order.

[6] I firstly deal with the salient matters raised in the main Application.

[7] The 1st Respondent applied for Condonation for the late filing of her papers.

- [8] Whilst the Applicant contested the Condonation Application fiercely on its papers, it was not pursued with any vigour in Court. The matter deals with the eviction of an elderly person, thus Condonation was granted.
- [9] The Applicant raised historical misconduct arising from the time when the 1st Respondent was chairperson of the Board.
- [10] I did not place too much weight on the historical conduct but did take cognisance of the history between the parties.
- [11] I did consider that after the 1st Respondent stopped serving on the Board, she opened a private account which was linked to the business account of the Applicant.
- [12] The 1st Respondent made one withdrawal from the Applicant's bank account.
- [13] When the board discovered this, they demanded that she hand the card over.
- [14] The 1st Respondent only handed the card over after she drew bank statements of the Applicant.
- [15] The 1st Respondent provided a letter from the bank indicating that the linking of the card to the Applicant's business account, was an error by the bank.
- [16] The mistake by the bank does not explain why the 1st Respondent withdrew money from the Applicant's account and why she accessed the bank statements.
- [17] The 1st Respondent did not serve on the board, and she was an ordinary resident of the retirement village at the time of this conduct.
- [18] The 1st Respondent referred a dispute to the Ombudsman where the parties reached a settlement agreement on 15 November 2018, which entailed that they

would obtain separate quotations for the thatch roof and that they would meet to determine a mutually acceptable premium the 1st Respondent would be liable for.

- [19] This never materialised.
- [20] The 1st Respondent did not agree with the amount levied by the Board and decided to pay an amount she deemed reasonable.
- [21] The parties signed an endowment agreement on 04 November 2011.
- [22] The 1st Respondent's main contention is that the settlement agreement signed at the Ombudsman, amended the endowment agreement.
- [23] The 1st Respondent's contention is that the Applicant could not terminate her residency relying on the endowment agreement on the basis that she did not pay the full levy, because the settlement agreement amended the endowment agreement.
- [24] Clause 11 of the endowment agreement provides that the Board has the right to terminate the Donor's occupation of the cottage in the event of the Donor breaching any terms and conditions thereof, or being guilty of misconduct which in the sole opinion of the Board, is detrimental to the wellbeing of the Board or the occupants of the cottages.
- [25] The 1st Respondent did not pay the full amount of the levy and failed to arrange to pay back the arrears as agreed at the Ombudsman.
- [26] This forced the Applicant to issue an Application in terms of Sec 56 of the Community Service Schemes Act.
- [27] The Applicant obtained judgment for the outstanding levies.

- [28] When the 1st Respondent did not satisfy the judgment, the sheriff attached movable assets at her residence.
- [29] The 1st Respondent's daughter then claimed that the furniture in the 1st Respondent's residence belonged to her.
- [30] The 1st Respondent admits that she does not pay the full amount levied and holds that she pays what she deems appropriate.
- [31] Clause 6 of the endowment agreement provides that the 1st Respondent is responsible for paying a monthly service charge to be determined by the Board.
- [32] The 1st Respondent persisted to only pay the amount she deems appropriate by the time the matter served before Court.
- [33] It is evident that the relationship between the Applicant's Board and the 1st Respondent has become intolerable.
- [34] On 31 July 2022 the arrears were R58 820.68. This is after the previous judgment debt was satisfied.
- [35] The dispute between the parties has been running for a long time and the relations between them has become unbearable.
- [36] This is exacerbated by the 1st Respondent's persistent refusal to pay the levy as determined by the board.
- [37] The conflict surrounding the insurance premium seems to be a rouse to frustrate the Board in the execution of their duties.

[38] The 1st Respondent's conduct has a direct impact on the ability of the Board to manage the retirement village to the benefit of all its occupants.

[39] The main grounds for the Application for leave to appeal are:

39.1 That the Court erred in not finding that the settlement agreement at the ombudsman did not vary the endowment agreement.

39.2 That the Court failed to consider that the obligations created in the settlement agreement is reciprocal and that the Applicant failed to obtain separate quotations for the thatched lapa and did not endeavour to reach an agreement with the 1st Respondent on the amount to be levied for the insurance.

39.3 That the Court erred in finding that the 1st Respondent did not pay her levies, as she paid it in part. As the parties have not reached agreement on the insurance premium, as agreed at the Ombudsman, the 1st Respondent was not in breach of the endowment agreement, as amended by the Ombudsman settlement agreement.

39.4 That the Court did not appreciate the import of the amendment the settlement agreement has on the endowment agreement.

39.5 That the Court erred in finding that the 1st Respondent's failure to pay the full amount levied, constitutes breach of contract.

39.6 The Court erred by not concluding that the failure to reach an agreement on the insurance premium does not constitute a breach of the agreement as the amount to be levied has not been agreed.

[40] The 1st Respondent contends that she has good prospects of success on appeal.

[41] The Applicant contends that the Application that the 1st Respondent did not make out a case in terms of section 17 of the **Superior Courts Act 10 of 2013**.

[42] Sec 17(1)(a) of the Superior Court's Act 10 of 2013 provides that leave to appeal may only be granted if the judge concerned is of the opinion that the appeal would have a reasonable prospect of success or if there are compelling reasons why leave should be granted.

[43] In **Matoto v Free State Gambling and Liquor Authority and Others**¹ the Court held:

"There can be no doubt that the bar for granting leave to appeal has been raised. Previously, the test was whether there was a reasonable prospect that another court might come to a different conclusion. Now, the use of the word 'would' indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against."

[44] In **S v Smith**² the Court dealt with reasonable prospects of success?

"What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial Court. To succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal."

[45] In **MEC for Health, Eastern Cape v Mkhitha and Another**³ the Court held:

"[16] 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 Court 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.

¹ (4629/2015) [2017] ZAFSHC 80 (8 June 2017).

² 2012(1) SACR 567 (SCA) par [7].

³ (1221/2015[2015] ZASCA 176(25 November 2016).

[17] 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 sound, rational basis to conclude that there is a reasonable prospect of success on appeal.”

[46] The bar has been raised for granting leave to appeal.

[47] The Appeal does not have any reasonable prospects of success.

[48] **ORDER**

The following order is made:

1. The Application for leave to appeal is dismissed with costs.

AP BERRY, AJ

APPEARANCES:

For the Applicant:

Adv. N Snellenburg SC

Instructed by:

Honey Attorneys

(Ref: CH DU PLESSIS/LM/I127621)

jacobs@honeyinc.co.za

BLOEMFONTEIN

For the 1st Respondent:

Adv. A Sander

Instructed by:

Kruger Venter Inc

(Ref: CK/TL/SB0097)

reception@krugerverterinc.co.za

BLOEMFONTEIN