

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 32975/2018

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

**5 November 2021**

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In the matter between:

**DALY, BRIGITTE**

First Applicant

**FOULKES – JONES, CARIN INGRID**

Second Applicant

**DALY, PATRICK FREDERICK**

Third Applicant

and

**HARTOG, GAVIN**

First Respondent

**STANDARD BANK OF SOUTH AFRICA LTD**

Second Respondent/  
Third Party

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**JUDGMENT IN THE APPLICATION FOR LEAVE TO APPEAL**

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**Mdalana-Mayisela J**

1. This is an application for leave to appeal lodged by the first respondent against the whole judgment and order I made on 2 June 2021. In that judgment I made the following order:

*“(34.1) The respondent (Hartog, Gavin) is ordered to pay to the first and second applicants jointly and severally in totality:*

*34.1.1 the sum of R1,401,288.66;*

*34.1.2 interest on the mentioned amount with effect from 5 June 2018 at the prescribed rate of 3.5% per annum above the repurchase rate as determined from time to time by the South African Reserve Bank, and as published in the Government Gazette to date of final payment;*

*34.2 The respondent (Hartog, Gavin) is ordered to pay the applicants costs of suit, inclusive of the costs consequent upon the engagement of senior counsel;*

*34.3 The respondents counter application against Standard Bank (third party) is dismissed with costs.”*

2. I have considered the grounds of appeal as set out in the first respondent's notice of application for leave to appeal dated 1 July 2021. I have also considered the written submissions that were filed by the parties for and against the leave to appeal.
3. Among the grounds of appeal the first respondent states that it applied for the application to be referred to trial in that real and genuine bona fide dispute of fact exists on the papers, and that the Court erred in not making any finding as to the referral of the matter to trial. There is no merit in this submission

because there is no genuine bona fide dispute of fact which was not capable of resolution on paper.

4. The other ground of appeal is that the Court erred in not finding that the second respondent was negligent, and thereby acted wrongfully by not following the provisions of the FIC Act. I am also not satisfied that there is any merit in this ground of appeal.
5. The other grounds of appeal relates to the Court having erred in not rejecting the bank's evidence set out in the answering affidavit, not making any finding in respect of any of the hearsay, opinion and speculation allegation raised in the affidavits, having failed to provide any reasons as to why the application to refer the matter to trial was refused, the finding that there was no sufficient evidence before the Court to establish a delict, and that the Court has not given an indication as to what facts were not before Court. I am of the view that all these grounds of appeal have no merit.
6. The test in respect of leave to appeal is one postulated in section 17(1)(a) of Superior Courts Act 10 of 2013 ("Superior Court's Act"). I need not repeat the provisions of section 17(1) herein save to state that the test is whether the appeal would have a reasonable prospect of success; or whether there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.

7. It seems to me that the Court hearing the leave to appeal must satisfy itself as to whether another Court would come to a different conclusion. The mere possibility is not sufficient because section 17(1) has now postulated a higher test than one that was applied at common law. Section 17(1) has qualified the test that the Court must apply when considering whether leave to appeal should be granted.
  
8. I am not satisfied that this leave to appeal meets the threshold postulated by section 17(1) of Superior Courts Act. I am of the view that the grounds of appeal relied on do not meet the standard set by section 17(1) of Superior Courts Act. There are no reasonable prospects of success on appeal at all. I also cannot find any compelling reason why the appeal should be heard. There are no conflicting judgments that are under consideration.
  
9. In the light of the fact that the leave to appeal does not bear prospect of success, it follows that it should be dismissed.
  
10. Accordingly, I make the following order:
  - 10.1 the application for leave to appeal is dismissed with costs inclusive of the costs of the employment of senior counsel.

**MMP Mdalana-Mayisela J  
Judge of the High Court  
Gauteng Division**

**(Digitally submitted by uploading on Caselines and emailing to the parties)**

Date of delivery: 5 November 2021

Appearances:

For the Applicants: Advocate AG Sawma SC

Instructed by: Walter Swanepoel Attorney

For the Respondent: Adv GH Meyer

Instructed by: Fluxmans Attorneys

For third party: Adv KD Iles

Instructed by: Van Hulsteyn Attorneys