REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

Case No: 20/39151

(1) REPORTABLE: No

(2) OF INTEREST TO OTHER JUDGES: No

(3) REVISED.

…….....……..... ……..……

SIGNATURE **DATE**

In the matter between:

MAPONYA MOTOR CITY PROPERTIES (PTY) LTD	First Applicant
MAPONYA MOTORS PROPERTY HOLDINGS (PTY) LTD	Second Applicant
MAPONYA MOTORS PROPERTY HOLDINGS (PTY) LTD N.O.	Third Applicant

and

HAMILTON, JOHN GARRY N.O.	First Respondent
HAMILTON, CHERYL N.O.	Second Respondent
LUTZ, NILS JOHN N.O.	Third Respondent
LECUONA, MASON EBEN N.O.	Fourth Respondent
LECUONA, HELEN N.O.	Fifth Respondent

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 10h00 on
29 March 2022

JUDGMENT

INGRID OPPERMAN J

Introduction

[1] This is an application for leave to appeal to the Full Court of the High Court of the Gauteng Division, Johannesburg against the whole of a judgment and order delivered on 12 October 2021 brought in terms of section 17(1)(a) of the Superior Courts Act, 10 of 2013 as amended ('*the Superior Courts Act*').

[2] This judgment should be read with the 12 October 2021 judgment ('*the main judgment*'). The parties are referred to as in the main judgment and all abbreviated descriptions used herein are defined in the main judgment.

The Test for leave to Appeal

[3] Section 17(1)(a) of the Superior Courts Act provides that the test to be applied in determining whether leave to appeal should be granted is whether the judge is:

> "of the opinion that (i) the appeal would have a reasonable prospect of success; or (ii) there is some other compelling reason why the appeal should be heard….."

[4] In *The Mont Cheveaux Trust v Tina Goosen & 18 Others* 2014 (JDR) 3225 (LCC), his Lordship Bertelsmann J, explained that section 17(1)(a)(i) of the Superior Courts Act postulates a higher test than that previously applied under the common law. This is because the Legislature has used the phrasing "*the appeal <u>would</u> have*

a reasonable prospect of success". The following is said in this regard at paragraph [6]:

> '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 … 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.'

[5] This approach has been endorsed by the full Court of this Court, and in a number of other cases in this division.[1]

[6] The new standard requires, not that another Court may come to a different finding, but rather that the Court be satisfied (with a measure of certainty) that another Court will come to a different finding.

Core arguments

[7] Although the applicants in the application for leave to appeal did no abandon any of the grounds formulated in the notice of application for leave to appeal, Mr Mundell SC, representing the applicants, focussed on certain specific grounds which he submitted makes it clear that leave to appeal should be granted.

[8] The first is that the finding by this court that the shares agreement did not contain a term that the Hamilton and Galt Trusts would pledge in favour of Maponya Holdings their respective shareholdings in Maponya Properties, once acquired, is incorrect, as it is common cause on the papers before the court that such a term

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[1] Most recently in *Coetzee N.O. and others v RMB Private Bank Limited* [2021] JOL 50671 (GP); See also: Madisha and others v Mashawana (Leave to Appeal) [2020] JOL 49356 (GP) at para 4; and Nedbank Limited v Houtbosplaas (Pty) Ltd and another (Leave to Appeal) [2020] JOL 47739 (GP).See also *Acting National Director of Public Prosecution and Others v Democratic Alliance in Re: Democratic Alliance v Acting National Director of Public Prosecutions and others* 2016 JDR 1211 (GP) at para 25 (19577/09) [2016] ZAGPPHC at para 25. The test was not interfered with on the further appeal to the Supreme Court of Appeal – See *Zuma v Democratic Alliance and Others* 2018 (1) SA 200 (SCA) at p227 D-G [57].

existed. Mr Mundell argued that the cession document was attached to the particulars of claim and thus incorporated by reference into the founding affidavit and that the Hamilton and Galt Trusts had attached it to the answering affidavit. What was disputed, he argued, was not whether the shares agreement contained a term requiring the Trusts to pledge their shares but rather whether, although it was a term of the shares agreement, the Maponya entities had signed the cession document.

[9] In my view, no other court would come to the conclusion that on these papers, it was undisputed that such a term existed. The existence of the term is dealt with extensively in the judgment[2]. What still hasn't been addressed in any manner or form is, if one assumes that the concessions to the relief in the action in some unexplained manner gave rise to consensus on the pleaded terms of the shares agreement, then what is to be done with the Trusts' case in the trial (pleadings and evidence) that the Trusts had performed all their obligations in terms of the shares agreement and that the only outstanding obligation was the transfer of the shares to them.

[10] The further argument advanced during oral argument of the application for leave to appeal is that the discussion under the heading '**The obligation no longer enforceable'** [3] boils down to what in essence amounts to a form of *mora creditoris*. This is not mentioned by name at all in the judgment. What is dealt with under that heading is quite obviously the considerations applicable to the exercise of a discretion[4] when declaratory relief is claimed which this court found it would exercise against the applicants had it found the term existed. Herein lies another difficulty: No argument was advanced that this discretion was erroneously exercised, instead it

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[2] Paragraphs [15] to [49]

[3] Paragraphs [54] to [69]

[4] This is mentioned by name in paragraph [58]

was contended that what this court did was apply the principles of *mora creditoris* to the facts. Be that as it may, there does not appear to be a debate that the court enjoyed the power to exercise the discretion assuming the existence of the term. However, in the absence of a misdirection, irregularity or grounds on which a court, acting reasonably could have exercised such discretion, another court would, in my view, not find differently[5].

Conclusion

[11] In the decision of *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and Others*[6], Wallis JA observed that a court should not grant leave to appeal, and indeed is under a duty not to do so, where the threshold which warrants such leave, has not been cleared by an applicant in an application for leave to appeal. In paragraph [24] he held as follows:

> "[24] For those reasons the court below was correct to dismiss the challenge to the arbitrator's award and the appeal must fail. I should however mention that the learned acting judge did not give any reasons for granting leave to appeal. This is unfortunate as it left us in the dark as to her reasons for thinking that enjoyed reasonable prospects of success. Clearly it did not. Although points of some interest in arbitration law have been canvassed in this judgment, they would have arisen on some other occasion and, as has been demonstrated, the appeal was bound to fail on the facts. **The need to obtain leave to appeal is a valuable tool in ensuring that scarce judicial resources are not spent on appeals that lack merit**. It should in this case have been deployed by refusing leave to appeal." (emphasis added)

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[5] *See Crompton Street Motors CC t/a Wallers Garage Service Station v Bright Idea Projects 66 (Pty) Limited t/a All Fuels* 2021 (11) BCLR 1203 (CC)

[6] 2013 (6) SA 520 (SCA)

[12] I have considered the extensive application for leave to appeal and hold the view that the applicants have not met this standard. The grounds have been answered in the main judgment.

Order

[13] I therefore grant the following order:

The application for leave to appeal is dismissed with costs to include the costs consequent upon the employment of two counsel, one of which is a senior counsel, where so employed.

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I OPPERMAN
Judge of the High Court
Gauteng Local Division, Johannesburg

Counsel for the Applicants: Adv ARG Mundell SC

Instructed by: Webber Wentzel

Counsel for the Respondents: Adv A Sawma SC and Adv F Hobden

Instructed by: Ramsden Small Fernandes Inc

Date of hearing: 3 March 2022
Date of Judgment: 29 March 2022