

REPUBLIC OF SOUTH AFRICA



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

CASE NUMBER: 2021/20055

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: NO
2.OF INTEREST TO OTHER JUDGES: NO
3.REVISED NO

Judge Dippenaar

In the matter between:

MSHENGU TRANSPORT CC

Applicant

And

WESBANK, A DIVIISON OF FIRSTRAND BANK LTD

Respondent

LEAVE TO APPEAL JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 19th of October 2022.

DIPPENAAR J:

[1] The applicant applies for leave to appeal against the whole of the judgment and order granted by me on 1 August 2022.

[2] My judgment is comprehensive and I stand by the reasons set out therein. The grounds and defences advanced by the applicant did not illustrate good cause for the granting of rescission against the default judgment granted in favour of the respondent on 25 June 2021. I dismissed the applicant's rescission application together with the ancillary relief sought, together with a costs order. The dismissal of the ancillary relief does not feature in this application, which is aimed at the dismissal of the applicant's rescission application.

[3] In its application for leave to appeal, the applicant raised challenges to the findings that it was not in wilful default and that it had not illustrated that it was impossible to comply with its obligations under the instalment sale agreement concluded between the parties, which formed the basis of its defence to the respondent's claim. It was argued that good cause had been shown for granting the rescission application.

[4] It must be considered whether there is a sound and rational basis for the conclusion that there are prospects of success on appeal¹, considering the higher threshold test² envisaged by s17 of the Act and whether a reasonable prospect exists that another court would come to a different finding.

¹ Four Wheel Drive Accessory Distributors CC v Rattan NO 2019 (3) SA 451 (SCA) at para 34

² Acting National Director Public Prosecutions and Others v Democratic Alliance [2016] ZAGPPH 489 (24 June 2016) at para 25

[5] I have considered the papers filed of record and the grounds set out in the applicant's application for leave to appeal as well as the parties' extensive arguments for and against the granting of leave to appeal. I have further considered the submissions made in their respective heads of argument and the authorities referred to by the respective parties.

[6] Central to this application is the applicant's contention that there is a reasonable prospect that another court would come to a different finding and would grant the rescission application together with the ancillary relief sought as envisaged by s17(1)(a) (i) of the Superior Courts Act³ ("the Act"). It was further argued that there is a compelling reason to grant leave to appeal as envisaged by s 17(1)(a)(ii) of the Act, given the circumstances of persons during the National State of Disaster.

[7] Reliance was placed on *Freestone Property Investments (Pty) Ltd v Remake Consultants and Another*⁴ ("*Firestone*") in support of the contention that the applicant has illustrated a bona fide defence in relation to the impossibility of performance contended for. In my view *Freestone* is distinguishable, given that it related to a commercial lease where the ability of lessors to comply with their contractual obligations under commercial leases were considered. The present matter relates to a luxury vehicle, not a delivery vehicle utilised by the applicant, of which the respondent was the owner. In any event, even insofar as *Firestone* may be applicable, reading the judgment in context does not avail the applicant, given that it remained in arrears throughout⁵.

[8] Considering all the facts in this matter, the applicant did not put up sufficient facts to conclude that another court would find that the applicant has met the necessary threshold for the defence of impossibility of performance. It is common cause that the agreement between the parties does not contain a *force majeure* clause⁶.

³ 10 of 2013

⁴ 2021 (6) SA 470 (GJ) paras [22]-[25], [39]

⁵ Para[32]

⁶ *Peters, Flamman and Co v Kokstad Municipality* 1919 AD 427

[9] In applying the relevant principles to the facts and each of the grounds advanced in the notice of leave to appeal and in argument, I conclude that the appeal would not have a reasonable prospect of success nor that there are any compelling reasons to grant leave to appeal as contemplated in s17(1)(a) of the Act.

[10] It follows that the application must fail. There is no basis to deviate from the normal principle that costs follow the result.

[11] I grant the following order:

The application for leave to appeal is dismissed with costs.

**EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG**

APPEARANCES

DATE OF HEARING	: 18 October 2022
DATE OF JUDGMENT	: 19 October 2022
APPLICANT'S COUNSEL	: Adv HC Van Zyl
APPLICANT'S ATTORNEYS	: Saltzman Attorneys
RESPONDENT'S COUNSEL	: Adv. K Meyer
RESPONDENT'S ATTORNEYS	: CF Van Coller Inc