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

CASE NO: 2022 / 031631

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

DATE
SIGNATURE

In the application by

PRIOSTE, MARIA DA CONCEICAO FREITAS	Applicant
and	
EDELSTEIN FABER GROBLER INC	First Respondent
GROBLER, RONEL	Second Respondent

JUDGMENT

MOORCROFT AJ:

Summary

Application for leave to appeal – Reasonable prospects of success

Mandate – Instruction – Not irrevocable

Order

[1] In this matter I make the following order:

1. *The application for leave to appeal is dismissed.*
2. *The applicant is ordered to pay the respondents' costs.*

[2] The reasons for the order follow below.

Introduction

[3] This is an application by the applicant for leave to appeal to the Full Court of the Gauteng Division, Johannesburg against a decision[1] I handed down on 8 June 2023.

[4] Section 17(1)(a)(i) and (ii) of the Superior Courts Act provides that leave to appeal may only be given where the judge or judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.

[5] An appellant must convince the court of appeal that the prospects of success are not remote but have a realistic chance of succeeding. A mere possibility of success is not enough. There must be a sound and rational basis for the conclusion that there are reasonable prospect of success on appeal.

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1 *Prioste v Edelstein Farber Grobler Inc and Another* [2023] ZAGPJHC 666

[6] In *Ramakatsa and others v African National Congress and another* [2] Dlodlo JA dealt with the authorities[3] as follows:

> *"[10] Turning the focus to the relevant provisions of the Superior Courts Act (the SC Act), leave to appeal may only be granted where the judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there are compelling reasons which exist why the appeal should be heard such as the interests of justice. This Court in Caratco[4], concerning the provisions of s 17(1)(a)(ii) of the SC Act pointed out that if the court is unpersuaded that there are prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal. Compelling reason would of course include an important question of law or a discreet issue of public importance that will have an effect on future disputes. However, this Court correctly added that 'but here too the merits remain vitally important and are often decisive.' I am mindful of the decisions at high court level debating whether the use of the word 'would' as opposed to 'could' possibly means that the threshold for granting the appeal has been raised. If a reasonable prospect of success is established, leave to appeal should be granted. Similarly, if there are some other compelling reasons why the appeal should be heard, leave to appeal should be granted. The test of reasonable prospects of success postulates 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. In other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance*

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2 *Ramakatsa and others v African National Congress and another* [2021] JOL 49993 (SCA), also reported as *Ramakatsa v ANC* [2021] ZASCA 31.

3 See *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and Others* 2013 (6) SA 520 (SCA) para 24, *KwaZulu-Natal Law Society v Sharma* [2017] JOL 37724 (KZP) para 29, *Lakaje N.O v MEC: Department of Health* [2019] JOL 45564 (FB) para 5, *Member of the Executive Council for Health, Eastern Cape v Mkhitha and another* [2016] JOL 36940 (SCA) para 16, *Nwafor v Minister of Home Affairs* [2021] JOL 50310 (SCA), 2021 JDR 0948 (SCA) paras 25 and 26; *Lephoi v Ramakarane* [2023] JOL 59548 (FB) para 4, *S v Smith* 2012 (1) SACR 567 (SCA) para 7, *Shinga v The State and another (Society of Advocates (Pietermaritzburg Bar) intervening as Amicus Curiae); S v O'Connell and others* 2007 (2) SACR 28 (CC), *South African Breweries (Pty) Ltd v Commissioner of the South African Revenue Services* [2017] ZAGPPHC 340 para 5, *The Acting National Director of Public Prosecution v Democratic Alliance* [2016] ZAGPPHC 489, JOL 36123 (GP) para 25. See also Van Loggerenberg *Erasmus: Superior Court Practice* A2-55.

4 The reference in footnote 7 is to *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* 2020 (5) SA 35 (SCA), [2020] ZASCA 17.

> *of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist."*[5]

The mandate, or instruction

[7] I turn to the facts and the applicable law. The applicant and her husband instructed the respondents to see to the transfer of immovable property and to pay the balance of the proceeds into the applicant's bank account. The applicant's husband subsequently changed the instruction and as a result his 50% share of the proceeds were paid directly to him.

[8] The applicant claimed the amount of money that was paid to her former husband from the transferring attorneys. She chose not to claim from her former husband who was the recipient of the money.

[9] The language used in the instruction documents do not create an irrevocable instruction to the attorney nor is it the applicant's case that she was entitled to payment because of a cession or an underlying tripartite agreement in terms of which the attorneys bound themselves to pay the money into her bank account and not to accept an instruction from her husband to change the details of the recipient account.

The attorneys would of course not be bound by an agreement between the applicant and her former husband unless they undertook obligations in terms of the agreement. They would also not be bound to give effect to a cession unless they undertook obligations on behalf of one or more parties.

[10] The applicant's counsel argued that the instruction documents constitute a mandate rather than an instruction. In my view on the facts and in the context of the meaning of the words in this case the distinction is a semantic distinction only.

Conclusion

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[5] Footnote 9 in the judgment reads as follows: "*See Smith v S [2011] ZASCA 15; 2012 (1) SACR 567 (SCA); MEC Health, Eastern Cape v Mkhitha [2016] ZASCA 176 para 17.*"

[11] I am of the view that the intended appeal would not have a reasonable prospect of success.

[12] For the reasons set out above I make the order in paragraph 1.

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J MOORCROFT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **16 OCTOBER 2023**.

COUNSEL FOR THE APPLICANT:	H P WEST
INSTRUCTED BY:	ST ATTORNEYS
COUNSEL FOR RESPONDENTS:	R SHEPSTONE
INSTRUCTED BY:	FAIRBRIDGES WERTHEIM BECKER ATTORNEYS
DATE OF ARGUMENT:	12 OCTOBER 2023
DATE OF JUDGMENT:	16 OCTOBER 2023