

REPUBLIC OF SOUTH AFRICA



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

Case Number: 10296/2022

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

10 November 2023 _____

DATE

SIGNATURE

In the matter between:

CHRISTOPHER HOWE COLE

Applicant

and

TALACAR HOLDINGS (PTY) LTD

Respondent

JUDGMENT

Mia, J

- [1] This court granted an application on 17 July 2023 in favour of the respondent, Talacar Holdings (Pty) Ltd (Talarcar), ordering the applicant, Mr. Cole, to comply with an agreement for the sale of immovable property. The applicant seeks leave to appeal and raised approximately six grounds on which he contended leave to appeal ought to be granted against the whole of the judgment and order of this court to the Supreme Court of Appeal, alternatively to a Full Court of this Division.

- [2] The first ground raised the question of the validity and enforceability of the agreement relied upon by Talacar. It was submitted that this ground was dispositive of the issue, and Talacar relied upon the validity of the agreement, which the court did not determine. The second ground relied upon was that the agreement was void, and this, too, was not determined. On this basis, the appellant contended that the application for leave to appeal should succeed.
- [3] The third ground relied upon the view held by the applicant that the agreement had been terminated and the parties entered into a new agreement. This version was disputed by Talacar. The applicant also contended that it was incorrect to consider that the “voetstoets” clause was applicable whilst the respondent had inserted clause 20.1 into the agreement to cater to his specific need. Counsel argued that clause 20.1 superseded the voetstoets clause specifically placing reliance on *Lodhi 2 Properties Investments CC and Another v Bondev Developments and Another (Pty) Ltd*¹. In the consideration of the decision relied upon, clause 20.1 as the specifying clause, prevailed over the “voetstoets clause”.
- [4] The fourth ground relied upon, holds that the specific clause trumps the general clause. It was submitted that Talacar’s case collapsed as Mr. Cole was entitled to cancel the agreement and the cancellation was not limited to structural defects but included defects unacceptable to the purchaser. It was argued that the application and the grounds of appeal referred to the Mr. Cole’s unique requirements, as mentioned by Ms Rossen, having regard to the value of property. Mr. Cole’s ability was raised for the first time in the appeal as a ground on which there was a defect in the property.
- [5] The context in which the agreement was signed is imperative however the answering affidavit did not raise the question that the property held defects because of the applicant’s ability. The context of the agreement is evident from the facts placed before the court. On the facts evinced in the answering affidavit, I am not persuaded there is a possibility that another court could come to a different conclusion.

¹ 2007(6) SA 87 SCA

[6] The fourth ground was expanded into the fifth and related to materiality. The applicant reserved the right to terminate the agreement “*on account of structural defects or defects (in the house) that were unacceptable to me.*”. Considering the application based on the Plascon-Evans test, it is was argued that that the applicant’s case would be considered and determined by another court with a different outcome.

[7] Counsel submitted that the matter met the criteria in terms of s17(1)(a)(ii) of the Supreme Court Act in that there is a reasonable prospect of success that another court could arrive at a different conclusion. I had regard to the decision relied upon in *Ramakatsa and Others v African National Congress and Another*, where the Supreme Court of Appeal stated that whilst a court may be:

“[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 of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist.”

[8] Counsel for the respondent, Talacar submitted that the appellant did not satisfy the test for leave to appeal at the higher standard. On the grounds

raised and the submissions, the applicant did not satisfy the court that there is a “sound, rational basis for the conclusion that there are prospects of success on appeal”². This test, it was submitted was applied in *Four Wheel Drive v Rattan NO.*³ I have considered whether there is some other “compelling reason” for leave to appeal under section 17(a)(ii), which would include an “important question of law or a discreet issue of public importance that [would affect] future disputes”. I am not persuaded that such reasons are present, and no such compelling grounds were raised in the application for leave to appeal. In any event the determination on the merits was clear from the judgment and did not favour the applicant. On the established principles, the appellant failed to establish that there were any disputes of fact.

- [9] The reasons appear from the judgment, I am not persuaded that the applicant's points *in limine* held merit. There were no real disputes of fact. The imperfections that the applicant relied upon were explicitly designed to meet his needs. The alleged imperfections were evident from the outset, during the first and second visit to the property, and changes that were required to meet his particular needs would have been evident at the outset.
- [10] The submission by counsel for the respondent that the applicant relied upon a report to suggest such cracks was never produced. In the context of the applicant having visited the property on more than one occasion accompanied by persons who were acquainted with his needs, there was no indication by the structural engineers or anyone else that the applicant's needs made the property unsuitable or imperfect. He informed Ms Rossen that he elected to proceed with the transaction after the inspections.
- [11] Counsel points out that the appellant for the first time raised the imperfections he relied upon in his answering affidavit. They were never previously disclosed. The applicant also referred to defects in the house and not the features he was not satisfied with outside the house, which were evident from his first visit. Significantly, counsel submitted that the applicant was aware the house did not have a lift when he signed the agreement. The various

²S v *Smith* 2012 (1) SALR 567 (SCA) at para 7

³ 2019 (3) SA 451 (SCA) at para 34

contradictions it was argued are fatal and demonstrate the contrived nature of the appellant's case.

[12] The applicant raised new facts in the appeal, indicating the imperfections were due to the property not being suitable due to his immobility. This aspect was not canvassed in the answering affidavit and was not linked to clause 20.2. Where it features strongly, it would have been expected that the particular aspect would have been made provision for.

[13] I have considered the submissions made on behalf of the applicant and the respondent. I am not persuaded that the applicant has met the standard required and I am not persuaded that there is an important question of law or a discreet issue of public importance that will affect future disputes. The reasons I handed down in the judgment remain applicable. The new issue raised does not change my view for the reasons indicated above.

[14] Consequently, I grant the following order:

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

S C MIA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

For the Applicant: H Epstein SC & S Tshikila
instructed by Smiedt & Associates

For the Respondent: W H Pocock
instructed by Di Siena Attorneys

Heard: 15 September 2023

Delivered: 10 November 2023