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

CASE NO: 2021/6114

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

DATE
SIGNATURE

In the matter between

DZUNI PROPERTIES CC	**First Applicant**
NGOBENI, CHARLES	**Second Applicant**
and	
ITALITE INVESTMENTS (PTY) LTD	**First Respondent**

In re the matter between:

ITALITE INVESTMENTS (PTY) LTD	**Applicant**
and	
DZUNI PROPERTIES CC	**First Respondent**
NGOBENI, CHARLES	**Second Respondent**

JUDGMENT

MOORCROFT AJ:

Summary

Application for leave to appeal - section 17(1)(a)(i) of Superior Court Courts Act, 10 of 2013 – No reasonable prospects of success on appeal – application dismissed

Order

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

1. *The application for leave to appeal is dismissed;*
2. *The applicants (respondents in the main application) are ordered to pay the costs of the application on the scale as between attorney and client.*

[2] The reasons for the order follow below.

Introduction

[3] This is an application for leave to appeal in terms of section 17(1)(a)(i) of the Superior Courts Act, 10 of 2023 against a decision[1] handed down by me on 23 May 2023.

[4] I refer to the parties as they were referred to in the judgment in the main application.

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[1] *Italite Investments (Pty) Ltd v Dzuni Properties CC and another* [2022] JOL 56098 (GJ).

[5] Section 17(1)(a)(i) and (ii) of the Superior Courts Act, 10 of 2013 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. Once such an opinion is formed leave may not be refused. Importantly, a Judge hearing an application for leave to appeal is not called upon to decide if his or her decision was right or wrong.

[6] In *Ramakatsa and others v African National Congress and another*[2] Dlodlo JA placed the earlier authorities in perspective. He said:

> *"[10] … 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*

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[2] *Ramakatsa and others v African National Congress and another* [2021] JOL 49993 (SCA) See also *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); *S v Smith* 2012 (1) SACR 567 (SCA) par. [7], *Mont Chevaux Trust (IT 2012/28) v Tina Goosen* 2014 JDR 2325 (LCC) par. [6], *The Acting National Director of Public Prosecution v Democratic Alliance* JOL 36123 (GP) par. [25], *S v Notshokovu* 2016 JDR 1647 (SCA) par. [2], *KwaZulu-Natal Law Society v Sharma* [2017] JOL 37724 (KZP) par. [29], *South African Breweries (Pty) Ltd v Commissioner of the South African Revenue Services* [2017] ZAGPPHC 340 par. [5], *Lakaje N.O v MEC: Department of Health* [2019] JOL 45564 (FB) par. [5], *Nwafor v Minister of Home Affairs* [2021] JOL 50310 (SCA) paras [25] and [26]; *Lephoi v Ramakarane* [2023] JOL 59548 (FB) par. [4], as well as Van Loggerenberg and Bertelsmann *Erasmus: Superior Court Practice* A2-55.

exist."[3]

Condonation for the late filing of the notice of appeal

[7] The judgment in respect of which leave to appeal is sought was handed down on 10 October 2022. It was published on CaseLines on that day, and circulated by electronic mail to the email addresses of the parties' that were on record. The application for leave to appeal was filed on 23 November 2023 after the expiry of the 15-day period in Rule 49(1)(b). The respondents failed to apply for condonation but allege in the notice of application for leave to appeal that the judgment only came to their notice on 17 November 2022.

[8] I am mindful of the fact that there were computer problems in the first half of October 2022 and that it is possible that the judgment did not, in fact, come to the notice of the respondents. It is regrettable that there is no application for condonation but in the interest of justice (so as not to prejudice the respondents) and because of the uncertainty I deal with the matter on the basis that the application was timeously made.

[9] The applicant's counsel addressed me on other perceived shortcomings in the notice of application for leave to appeal. There was no prejudice to the applicant arising from these perceived shortcomings and I do not deal with them.

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[3] 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."*

The grounds of appeal

[10] The grounds of appeal are set out as follows in the notice of application for leave to appeal:

1. The Learned Judge erred in dismissing the respondents' application for postponement in that the second respondent was not legally represented and when he became legally represented the legal representatives needed to place all materials available before court and this was denied, further that denying a postponement under these circumstances amounted to denying respondents legal representation, a right which is constitutionally protected, further that the application for a postponement was not formally

opposed by the applicant in the main application as there was no opposing papers.

2. The learned judge's denial of a comprehensive application for a postponement amounted to denying the respondents a proper hearing and as such a decision therefrom amount to a default judgment in circumstances where the respondents had appointed legal representation and had placed themselves on record.

3. The Learned Judge also failed to take into account or misdirected himself in not appreciating that the enforcement of contractual terms is subject to a prior inquiry which takes into account public policy, fairness, reasonableness and good faith section 9(2) of the Constitution and substantive equality, consequently made an order evicting the respondents from a business premises, a decision which is not business-like.

[11] I dealt in the judgment with the application for a postponement in paragraphs 4 to 9 of the judgment, and specifically with the merits of the application in paragraph 8.

[12] The main application was served on 15 February 2021 and notice of intention to oppose was delivered on 17 February 2021. The answering affidavit was delivered on 8 June 2021 and the replying affidavit on 30 June 2021. The applicant filed heads of argument on 5 August 2021 and the respondents' heads of argument followed on 18 May 2022, nine months later. The application was argued in October 2022.

[13] The legal principles applicable to an application for a postponement have been

dealt with in a number of decisions[4] and need not be repeated here. The judicial discretion was exercised judicially and on the correct facts as presented by the parties, and on the correct legal principles.[5] I may add that the respondents argued that the application for a postponement was not formally opposed as the applicants elected not to file an answering affidavit. This argument is wrong – the applicant did oppose the application and elected not to file an answering affidavit because it had no opportunity to do so.

[14] The respondents also argued that I misdirected myself in failing to take into account that the enforcement of contractual terms is *"subject to prior enquiry."*

[15] I dealt with the agreement and the breach in paragraphs 10 to 15 of the judgment. The interpretation of contracts in the constitutional era was dealt with by the Constitutional Court in, inter alia, *Barkhuizen v Napier*[6] and *Beadica 231 CC and Others v Trustees, Oregon Trust and Others.*[7] The respondents have not identified any grounds for refusing to enforce the contract.

[16] I am of the view that there no reasonable prospects of success on appeal and I therefore make the order set out in paragraph 1 above. The agreement between the parties provides for payment of costs on the attorney and client scale[8] and it is appropriate to provide for costs on this scale.

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4 See *Murphy v SA Railways & Harbours and Another* [3] 1946 NPD 642, *Myburgh Transport v Botha t/a SA Truck Bodies* 1991 (3) SA 310 (NmS), *Shilubana and Others v Nwamitwa (National Movement of Rural Women and Commission for Gender Equality as Amici Curiae)* 2007 (5) SA 620 (CC), *Mokhethi and Another v MEC for Health, Gauteng* 2014 (1) SA 93 (GSJ) and *Grootboom v National Prosecuting Authority and Another* 2014 (2) SA 68 (CC).

5 Compare *Giddey NO v J C Barnard and Partners* 2007 (5) SA 525 (CC).

6 *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

7 *Beadica 231 CC and Others v Trustees, Oregon Trust and Others* 2020 (5) SA 247 (CC).

8 Clause 26.5 (Caselines 001-69).

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 **25 JULY 2022**

COUNSEL FOR THE APPLICANT:	W WANNENBURG
INSTRUCTED BY:	FOURIE VAN PLETZEN INC ATTORNEYS
ATTORNEY FOR RESPONDENTS:	N RALIKHUVHANA
INSTRUCTED BY:	KATLEGO RALIKHUVHANA MOKGOLA ATTORNEYS
DATE OF THE HEARING:	25 JULY 2023
DATE OF ORDER:	25 JULY 2023
DATE OF JUDGMENT:	25 JULY 2023