



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO.

DATE 25 NOVEMBER 2022 SIGNATURE

Case Number: 9179/2017

In the matter between:

ZELDA LYNN HOLTZMAN

First Plaintiff

THE EXECUTOR IN THE ESTATE OF THE LATE

ALAN DUNNE N.O.

Second Plaintiff

and

SIGN AND SEAL TRADING 32 (PTY) LIMITED

First Defendant

BULLET PROOF INVESTMENTS (PTY) LIMITED

Second Defendant

INTO SA TSHWANE (PTY) LIMITED

Third Defendant

RALPH MICHAEL ERTNER

Fourth Defendant

JUDGMENT

BESTER, AJ

1. This is an application for leave to appeal against my judgment and order dated 26 September 2022 in terms of which I made the following order:
 - 1.1 It is declared that the plaintiffs are entitled to 37,5% of the net proceeds held in trust by attorneys Cliffe Dekker Hofmeyr after payment of all or any amounts due to SARS.
 - 1.2 It is ordered that payment of 37.5% of the net proceeds minus the deduction of all amounts due to SARS provided for in paragraph 1 above is to be made to the plaintiffs within ten (10) days of the final determination of the liability to SARS.
 - 1.3 The first and second defendants are ordered to pay interest on the aforesaid amount 10.5% per annum *a tempore morae* from 6 February 2017 to date of final payment.
 - 1.4 The first and second defendants are ordered to pay the plaintiffs' costs of suit, including all reserved costs orders and the costs of the interdict application in the Western Cape High Court, Cape Town under case number 24144/2016.
2. The first and second defendants brought an application for leave to appeal.
3. The test for leave to appeal is set out in section 17 (1) of the Superior Courts Act 10 of 2013 ("**the Act**"), which provides that leave to appeal may only be given where the judge or judges concerned are of the opinion that: (a (i) the appeal would have a reasonable prospect of success; or (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration; (b) the decision sought on appeal does not fall within the ambit of section 16 (2) (a); and (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between

the parties.

4. I did not understand Mr Elliott SC, who appeared for the applicants in the application for leave to appeal, to argue that the application arises on the basis of any provision other than section 17(1)(a).
5. Reasonable prospects of success has previously been defined to mean that there is a reasonable possibility that another court may come to a different decision.¹ In **Acting National Director of Public Prosecutions and Others v Democratic Alliance in re: Democratic Alliance v Acting National Director of Public Prosecutions and others**², Ledwaba DJP, writing for the full court, considered the test as contemplated in section 17 of the Act and suggested that the inclusion of the word “would” indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.
6. The test for leave to appeal has therefore become more stringent than what was previously the case. In the earlier judgment of Bertelsmann J in **The Mont Chevaux Trust v Tina Goosen & 18 Others** 2014 JDR 2325 (LCC) the learned judge arrived at the same conclusion at paragraph 6 of his judgment:

“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, see *Van Heerden v Cronwright & Others* 1985 (2) SA 342 (T) at 343H. 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.’ [6] ‘In order to succeed, therefore, the appellant must convince this Court on proper grounds that he has prospects of success on appeal 5 and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.”

¹ *Van Heerden v Cronwright and others* 1985 (2) SA 342 (t) AT 343I.

² *Acting National Director of Public Prosecutions and Others v Democratic Alliance in re: Democratic Alliance v Acting National Director of Public Prosecutions and Others* (19577/09) [2016] ZAGPPHC 489 (24 June 2016) at para 25.

7. Mr Elliot SC's primary submission was that the Court erred in not placing adequate weight on the unchallenged evidence of Mr McAllorum that ninety nine percent of the loan payments made by Tara to the first defendant were to cover the bond instalments of the first defendant. In developing his argument, he submitted that the Court erred in finding that Mr McAllorum lacked personal knowledge regarding the role of Blend in conducting the daily operations of the company including the management of its financial affairs and how it disbursed funds on behalf of the first defendant.
8. The fact that Mr McAllorum may have spent time on the phone talking to Blend, albeit the Court was not told who precisely of Blend he communicated with, makes no difference in my view. It did not have the effect of transforming his evidence on the issue into direct primary evidence of a witness with personal knowledge of the matters.
9. While Mr Corbett SC did not object at trial that this evidence constituted inadmissible hearsay, I understood his argument to be that even if admitted, the weight to be attached to this evidence was so negligible that it did not assist the defendants in discharging the onus of proving that the entitlement of the plaintiffs to 37.5% percent of the net proceeds available for distribution by the first defendant stood to be reduced by payment of the first defendant's debts which it alleged included the repayment of R2 118 589.46 to Tara on the strength of a loan account in the first defendant.
10. The case of the defendants in establishing the existence of the loan amount by Tara required evidence not only from Mr McAllorum, but someone with personal knowledge of the disbursement of the loan amount on its behalf for and on behalf of the first defendant.
11. The difficulty I have is twofold.
12. Firstly, no representative from Blend was called to shed light on the financial affairs of the first defendant and how these were dealt with including any payments received from Tara. The Court was not favoured with an explanation

for the defendants' failure to do so save for the one to which I return to below.

13. The deficiencies in the evidence of Mr McAllorum were therefore not cured, but in any event, direct evidence of a witness with personal knowledge was required to address the long list of payments Tara is said to have made to the first defendant and how those were disbursed. This evidence was particularly important in that the defendants only presented bank statements from TARA but not bank statement from the first defendant to show the receipt of the loan sums said to have been made by Tara and how they were dealt with (including if indeed the payments were made to Nedbank). Mr McAllorum could not possibly have had personal knowledge of these matters since he was at all times in Dublin, left the management of the financial affairs to Blend and I did not hear him to testify that he considered the bank statements of the defendant regularly and was familiar with them. This evidence could presumably have been led by someone from Blend who was directly involved in the affairs of the first defendant and who had access to its bank accounts but in the absence of the evidence from such a witness, the documentary evidence in the form of the first defendant's bank statements became more critical.
14. The absence of evidence from Blend was explained on the basis they no longer possessed records but this does not excuse the importance of someone with personal knowledge shedding light on the daily role and function of Blend in taking charge of the financial affairs of the first defendant. The loss of records of Blend presumably also did not mean that the bank records of the first defendant could not be procured, given that the bank would have held them at all times.
15. When viewed in this light the evidence of Mr McAllorum did not assist the defendants in discharging the onus that they attracted. The evidence of Mr Edwards too did not assist. By his own admission the financial statements were too qualified for any real value to be placed on them and he certainly was not in a position where it can be said that he had personal knowledge of the disbursement of the loan amount Tara is alleged to have made.

16. For all of these reasons I am of the view that there are no reasonable prospects of success on appeal with the result that I make an order in the following terms:

The application for leave to appeal is dismissed with costs.

DATED ON THIS THE 25th DAY OF NOVEMBER 2022

BESTER AJ

FOR THE PLAINTIFF: P CORBETT SC

INSTRUCTED BY: VAN RENSBURG & CO

FOR THE FIRST AND SECOND DEFENDANTS: G ELLIOT SC

INSTRUCTED BY: THOMSON WILKS ATTORNEYS

DATE OF JUDGMENT: 25 November 2022