

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

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

03 October 2022
DATE


SIGNATURE

CASE NO: 84994/2019

In the matter between: -

CLIVE MALCOLM ELLISON

Applicant

And

MARHINUS JACOBUS DEWALD BREYTENBACH N.O.

First Respondent

RICHRD HICKEN N.O.

Second Respondent

(In their capacity as Joint Trustees of
CLIVE MALCOLM ELLISON)

CITY OF TSHWANE

Third Respondent

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on CaseLines by the Judge or her Secretary. The date of this judgment is deemed to be 03 October 2022.

JUDGMENT APPLICATION FOR LEAVE TO APPEAL

INTRODUCTION:

[1] This is an application for leave to appeal against a judgment and order I made on 17 June 2022. The of the court reads as follows:

- “1. The first respondent is evicted from the premises situated at 25 Dam Road, Waterkloof, Pretoria (“**the premises**”).*
- 2. The first respondent is to vacate the premises within 30 days of the date of this order.*
- 3. The sheriff and his/her lawful deputy is authorised and directed to take such steps as are necessary to evict the first respondent from the premises in the event that the first respondent does not vacate the premises within 30 days from the date of this order.*
- 4. The first respondent is to pay the costs of this application on the attorney and client scale.*

5. *The first respondent's counter-application is dismissed with costs on an attorney and client scale."*

GROUNDS OF APPEAL

[2]The applicant is premised on the grounds as listed in the Application for Leave to Appeal dated 7 July 2022.

LEGAL PRINCIPLES

[3] Section 17(1) of the *Superior Courts Act*, 10 of 2013 provides as follows:

"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] In the present instance, the applicant failed to set out specifically the ground in terms of section 17 of Act 10 of 2013, upon which it relies to seek that leave to appeal should be granted.

[5] As to the test to be applied by a court in considering an application for leave to appeal, Bertelsmann J in *The Mont Chevaux Trust v Tina Goosen & 18 Others* 2014 JDR 2325 (LCC) at para 6 stated the following:

‘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 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

[7] In *Fair-Trade Independent Tobacco Association v President of the Republic of South Africa and Another*² the Full Court of this Division observed that:

“As such, in considering the application for leave to appeal it is crucial for this Court to remain cognizant of the higher threshold that needs to be met before leave to appeal may be granted. There must exist more than just a mere possibility that another court, the SCA in this instance, will, not might, find differently on both facts and law. It is against this background that we consider the most pivotal grounds of appeal.”

[8] The applicant and the respondent on request by this court had filed written Heads of Argument in order to facilitate the virtual hearing of the matter.

[9] Having read the papers and having carefully heard counsel I come to the conclusion that there is a reasonable prospect that another court would come to a different conclusion on the order of the court.

¹ *S v Smith* 2012 (1) SACR 567 (SCA) at para 7.

² Case no: 21688/2020 [2020] ZAGPPHC 311 (24 July 2020) at [6].

ORDER

[10] Consequently I make the following order:

10.1 Leave to appeal is granted to the Full Court of the Gauteng Division with costs.



COLLIS C

JUDGE OF THE HIGH COURT

GAUTENG DIVISION

APPEARANCES

Counsel for Applicant	: Adv. CB Ellis
Instructed by	: Jacobson and Levy Inc. Attorneys
Counsel for Respondents	: Adv. L Hollander
Instructed by	: Serfontein, Viljoen and Swart Attorneys
Date of Hearing	:07 September 2022
Date of Judgment	:03 October 2022