IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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

12 October 2023
DATE SIGNATURE

CASE NUMBER: 51585/2021

In the matter between:

SHAILENDRA RAMESH MAHARAJ, NO FIRST APPLICANT

TUMELO MOTSISI, NO SECOND APPLICANT

and

GLADSTONE REUBEN, N.O FIRST RESPONDENT
THE MASTER OF THE HIGH COURT PRETORIA SECOND RESPONDENT

SUMMARY: Civil Procedure- *Leave to Appeal- Whether or not there are reasonable prospects of success- Test applicable for leave to appeal.*

ORDER

HELD: There is no reasonable prospect of success. Application for leave to appeal dismissed with costs including costs of Counsel, one paying the other to be absolved.

JUDGMENT

MNCUBE, AJ:

INTRODUCTION:

[1] The applicants, Mr Maharaj NO and Mr Motsisi NO have lodged an application for leave to appeal the judgment granted by this court on 20 March 2023. The first respondent, Mr Reuben NO is opposing this application for leave to appeal on the ground that there are no reasonable prospects of success.

GROUNDS OF APPEAL:

[2] The applicants contend that this court erred in the following manner-

(1) In holding that there was no evidence that the Master's decision (second respondent) could be reviewed under the provisions of section 6 (2) (e) (iii) of PAJA when the Master took into account irrelevant considerations.

(2) By holding that there was no evidence that the Master's decision was influenced by a material error of law and failed to apply section 6 (2) (d) of PAJA. The court ought to have found that the Master's decision have been materially influenced by an error of law.

(3) By holding that it is an applicable principle of trust law that all Trustees must act jointly for and on behalf of the Trust which was a misstatement of the law.

(4) In accepting that the Master had acted correctly in applying a misstated principle in law.

(5) In interpreting clause 13.5 of the Trust Deed to mean that the removal of a Trustee requires a two thirds majority vote of all the trustee.

(6) In failing to find that the Master's decision was not rational and in failing to review and set aside the Master's decision.

(7) In assessing the evidence incorrectly and ought to have applied Plascon Evans properly.

(8) In finding that the decision **of Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund 2010 (2) SA 498 (SCA)** was distinguishable.

(9) In finding that Mr Reuben (first respondent)'s reason for not attending the meeting of 14 July 2020 was a valid reason and by not attending the Trustees' meeting it amounted to repudiation of Mr Reuben's duties as a Trustee.

(10) In applying company law principles.

(11) In finding that objectively there was no basis to remove Mr Reuben.

(12) In awarding Mr Reuben his costs.

THE APPLICABLE LEGAL PRINCIPLES:

[3] An application for leave to appeal is governed by section 17 (1) (a) of the Superior Courts Act 10 of 2013 which provides-

'(1) 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;'

[4] The threshold for granting leave to appeal has been raised by the Superior Courts Act 10 of 2013. See **Mont Chevaux Trust v Tina Goosen and 18 Others 2014 JDR 2325 (LCC)** para 6[1]. It is trite that in considering an application for leave to appeal, the Court must be alive to the provisions of section 17 (1) of the Superior Courts Act. The test is whether the applicant has a reasonable prospect of success which is not merely a fairly arguable case, therefore an applicant for leave to appeal must convince the court on proper grounds that there is a realistic chance of success on appeal. See **R v Baloi 1949 (1) SA 523 (A)** at 524. What section 17 postulates is that a judge must be of the opinion that an appeal would have a reasonable prospect of success or there is some other compelling reasons why the appeal should be heard.[2]

[5] In **Fusion Properties 233 CC v Stellenbosch Municipality [2021] ZASCA 10** (29 January 2021) para 18 it was held '*Since the coming into operation of the Superior Courts Act, there have been a number of decisions of our courts which dealt with the requirements that an applicant for leave to appeal in terms of ss 17 (1) (a) (i) and 17 (1) (a) (ii) must satisfy in order for leave to be granted. The applicable principles have over time crystallised and are now well established. . . It is manifest from the text of s 17 (1) (a) that an applicant seeking leave to appeal must demonstrate that the envisaged appeal would either have a reasonable prospect of success or, alternatively, that 'there is some compelling reason why an appeal should be*

[1]It was held '*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 statute indicates a measure of certainty that another court will differ from the court will differ from the court whose judgment is sought to be appealed against'*

[2]See MEC For Health, Eastern Cape v Mkhitha and Another (1221/2015) [2016] ZASCA 176 (25 November 2016) para16.

heard.' Accordingly, if neither of these discrete requirements is met, there would be no basis to grant leave'

[6] In **Valley of the Kings Thabe Motswere (Pty) Ltd and Another v A L Mayya International**[3] it was held '*There can be little doubt that the use of the word "would" in section 17 (1) (a) (i) of the Superior Courts Act implies that the test for leave to appeal is now more enormous. The intention clearly being to avoid our Courts of Appeal being flooded with frivolous appeals that are doomed to fail. . . It seems to me that a contextual construction of the phrase "reasonable prospect of success" still requires of the judge, whose judgment is sought to be appealed against, to consider, objectively and dispassionately, whether there are reasonable prospects that another court may well find merit in arguments advanced by the losing party.*'

[7] In respect to what constitutes reasonable prospects, the Supreme Court of Appeal in **S v Smith 2012 (1) SACR 567 (SCA)** para 7 stated '*What the test of reasonable prospects of success postulates is 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*.' What this postulates is an impartial position in which the court reflects that it may have erred in its judgment either on the facts or the application of the law.

SUBMISSIONS:

[8] All submissions and cited case law have been considered. In summary, the main contention on behalf of the applicants is that there are reasonable prospects of success on appeal as this court erred in not reviewing and setting the second respondent's decision and not directing for the removal of the first respondent. Counsel for the applicants argued that the second respondent disregarded the merits and on the basis the matter should have been reviewable. The contention was that in this court applied an incorrect test in the PAJA and that clause 13.5 of the Trust Deed which deals with the removal of a trustee and therefore the authority used by the court was incorrect. Counsel argued that this court should have reviewed the master's order on the basis that he improperly applied the law on the finding he made therefore the decision was reviewable. The contention was that Trustees must be place in a position where they are able to make decisions. One of the grounds for leave to appeal is that the first respondent repudiated his duties consequently his removal was justifiable.

[3][2016] ZAECGHC 137 para 4.

[9] Counsel for the applicants submitted that a subjective test was applicable to the trustees. He further submitted that by looking at probabilities, the court erred in its judgment. The contention was that the court erred in applying the company law instead of the trust law consequently there are reasonable prospects of success of the appeal to the full bench of this Division. He submitted that leave be granted and the costs be costs in the appeal. Counsel placed reliance on the case of **Ramakatsa and Others v African National Congress and Another (724/2019)[2021] ZASCA 31 (31 March 2021)** para 10 where it was held *'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, 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. . However, this Court correctly added that 'but here too the merits remain vitally important and are often decisive.'*

[10] Counsel for the first respondent conceded that the test for leave to appeal as articulated by the applicants was correct. She submitted that there are no reasonable prospects of success of the appeal. The contention was that the first respondent was not given notice as outlined in the judgment and that the second respondent correctly found that the first respondent was incorrectly removed. Counsel for the first respondent argued that there was no quorum and it was incorrect to add an item on the Trustees' meeting agenda without giving notice to the Trustees. Counsel remarked that the applicants wanted the court to apply a business interpretation on the applicants' actions. The contention was that it was for the first time (on the grounds for leave to appeal) that an allegation has been made that the first respondent repudiated his duties.

[11] Counsel for the first respondent agreed with the finding by this court that no proper notice of the removal of the first respondent was given and has placed reliance to the case of **Meier and Others v Du Toit N O and Others (20736/2021) [2023] ZAWCHC 36 (27 February 2023).** In that case, the applicant's case was that she was unlawfully removed as a trustee in her absence without notice of her intended removal having been given to her. The Court found in that case that the removal of the applicant as a trustee was invalid for a number of reasons including the fact that the applicant was entitled to be informed of the intention to remove her.

In that matter at para 45, the Court held that tension or enmity between trustees is not necessarily a basis for the removal of a trustee from office. Counsel for the first respondent argued that the issue of costs follow the cause.

EVALUATION:

[12] The current matter came before me on an opposed roll in which the applicants sought an order in terms of section 6 of PAJA to review the decision of the second respondent on the ground of irrationality as well as an order directing that the first respondent be removed as a trustee of the Prime Skill Development Trust. Clearly, the relief that the applicants sought from this court consisted of two levels. Counsel for the applicants submitted that I looked at probabilities and failed to apply properly the **Plascon Evans** thereby erred is with respect a simplistic view. Paragraph [29] of the judgment reflects that I was alive to the **Plascon –Evans**[4]. It had to be recalled apart from the factual disputes that one of the relief that the applicants was seeking was an order directing that the first respondent be removed.

[13] This determination could not be made in a vacuum but rather by looking at the facts within the context of the contention that proper notice was given to the first respondent. This called for the determination whether or not there was justification for the removal of the first respondent. This in turn required, in my view a holistic assessment of all facts. It was never the contention that the first respondent repudiated his duties or at the very least this issue was never ventilated. The applicants placed emphasis on the correctness of their actions (in giving a notice to the first respondent who reacted and took issue with the calling of the meeting as well as taking the resolution to remove). Their actions had to be assessed within the ambit of the Trust Deed and legal principles. It is most unfortunate that on the one hand the applicants urged the court to apply a business interpretation to the Trust Deed and then take issue when that is done in order to determine whether there was justification for the removal of the first respondent in the usage of the Trust Deed.

[14] In my judgment, in respect of the relief sought to review the decision of the second respondent (the first level), on the facts I found no basis to make a finding of irrationality. Instead I made the finding that the second respondent's decision clearly demonstrated that he

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[4] which provides that an applicant who seeks final relief using motion proceedings must, in the event of a dispute, accept the version set out by the opponent unless the opponent's allegations in the opinion of the Court are not bona fide disputes of facts or are far-fetched or untenable to the extent that the Court is justified in rejecting the allegations on the papers.

scrutinised relevant clauses in the Deed of Trust and interpreted the clauses of the Deed of Trust rationally[5]. This finding was made while being mindful that an objective test had to be applied (where the determination is made whether a decision is rational and connected to the purpose that empowers the action). The contention that the second respondent incorrectly applied the law was not persuasive hence there was no basis to review the decision.

[15] The reasons for the finding was addressed in the judgment, there is nothing further to add. The crux of the matter was that the second respondent had to assess the decision to remove the first respondent based on the information at his disposal. In my view, it had to be clear that there was irrationality on the part of the second respondent which would then propel the court to review and set aside the decision. In instances where the court is not persuaded thereof, the right to review and set aside the decision (applying the test for rationality within the ambit of section 6(2) (f) (i) and (ii) of PAJA), the competency of the court to review the decision falls away. Applying the stringent test for appeal as compounded in section 17 of the Superior Courts Acts, I am not persuaded that there are reasonable prospects of success in an appeal. On the enquiry whether there are compelling reasons to entertain the appeal or leave to appeal, facts must be considered. I dealt with the facts in the judgment of the 20 March 2023. I am not persuaded that there are compelling reasons.

[16] In respect of the second relief that the applicant sought (the second level), it was important to have regard to the contention made on behalf of the applicants that the June 2020 resolution was a round robin which required a majority. I found that round robin resolutions can be done by circulating the written resolutions by way of an email then allowing the resolution to be signed on separate printed documents and then sent back to the company to form a composite signed round robin resolution. However, this was not done in this matter. It appeared that the applicants sought an order from this court to determine whether the decision to remove the first respondent based on the facts was correct. This is the very exercise that this court embarked on and made a decision (reasons are articulated in the judgment). There is numerous case law on the restrain that must be exercised when a court considers the removal of a Trustee. The contention that this court applied an incorrect test with special reference to the company law is misplaced in my respectful view. It has to be recalled that the contention made

[5]See Shidiack v Union Government [Minister of the Interior] 1912 AD 642 at 651 where Innes ACJ (as he was then) held '*Now it is settled law that where a matter is left to the discretion or the determination of a public officer, and where his discretion has been bona fide exercised or his judgment bona fide expressed, the court will not interfere with the result.*'

on behalf of the applicants was that they gave a proper notice to the first respondent who opted not to attend the meeting which prompted the applicants to apply a round robin resolution. All the judgment aimed to demonstrate was the fact that reliance on the round robin resolution was incorrectly applied on the facts of this matter. In simpler terms, the first respondent's version was more persuasive.

[17] There was a contention that the first respondent failed in his fiduciary duties and the argument advanced during the hearing in the opposed application was that the conduct of the first respondent fell short of what is reasonable for a Trustee. The contention further was that the applicants were justified in resolving to remove the first respondent as a Trustee was addressed on the judgment. On the contention made on behalf of the applicants that the first respondent failed in his fiduciary duties towards the Trust was not ventilated and I will not add anything to that. The contention that I erred in finding that objectively there was no basis for the removal of the first respondent was addressed in the judgment and I will not add anything further. I am not persuaded that after assessing the versions and the facts that this finding constituted a misdirection because what the applicants aimed to achieve was to rely on the notice given to the first respondent which reflected one item on the agenda yet took a resolution which was never part of the agenda.

[18] Even if it can be submitted the dismissal of the review of the second respondent's decision was incorrect, this was interlinked with the second relief (second level) which called for a direction to be made for the removal of the first respondent. I am not persuaded that the finding made on the second portion of the relief sought by the applicants (for the direction that the first respondent be removed as the trustee) was incorrect resulting in another court finding differently. I am not persuaded that I erred in the exercise of the discretion to award costs against the applicants. It has not been demonstrated that there was an incorrect exercise of the discretion on costs. On applying the trite approach of restraint by an Appeal Court[6], I am not persuaded that another court will reach a different finding on costs.

CONCLUSION:

[19] Having applied the test for reasonable prospect of success as compounded in **S v Smith** supra, having considered the grounds for leave to appeal and all the submissions made, dispassionately assessing all of these factors, I am not persuaded that another court would rule

[6]See Hotz and Others v University of Cape Town 2018 (1) SA 369 (CC) para 25 and para 28.

differently. Consequently, it follows that the applicants failed to persuade this court that there are reasonable prospects of success on appeal or that there are compelling reasons why an appeal should be heard. In instances where the opinion of a judge is that there is no reasonable prospect of success, it stands that the application for leave to appeal must be dismissed. In conclusion, the applicants' application for leave to appeal is hereby dismissed.

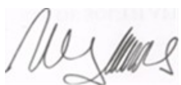
COSTS:

[19] The last aspect to be addressed is the issue of costs. Awarding of costs is at the discretion of the court which must be exercised judicially[7]. In the exercise of my discretion I am of the view that costs must follow the cause. Consequently, the applicants must pay costs including the costs of counsel.

ORDER:

[20] In the circumstances the following order is made:

[1] There is no reasonable prospect of success, the application for leave to appeal is dismissed with costs including costs of counsel.



MNCUBE AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

<u>Appearances</u>:

On behalf of the Applicants : Adv. A. Bishop
Instructed by : Lester Hall, Fletcher Inc. Attorneys

[7]See *Affordable Medicines Trust and Others v Minister of Health and Others 2006 (3) SA 247 (CC)* it was held 'The award of costs is a matter which is within the discretion of the Court considering the issue of costs. It is a discretion that must be exercised judicially having regard to all the relevant consideration.'

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Date of Judgment	: 12 October 2023