

REPUBLIC OF SOUTH AFRICA



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

27017/2020

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

03 March 2023

DATE

Senari

SIGNATURE

RAFT CRETE CC

APPLICANT

and

PRO TEAM CONSTRUCTION (PTY) LTD

FIRST RESPONDENT

EYAL MARINBERG

SECOND RESPONDENT

JUDGMENT - LEAVE TO APPEAL

TLHAPI J

[1] This is an opposed application for leave to appeal premised on section 17 of the Superior Courts Act 10 of 2013, ("the Act"). For completeness, section 17 (1) of the Act is set out below:

"Section 17(1)

(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 reasonable prospect of success; or

(ii) there is some other compelling reasons 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); 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."

[2] It is contended that the court *a quo* erred on the following grounds:

1) erred in not finding that annexures R1 and R2 were quotations which were accepted by the first respondent;"

2) erred in finding that the proposal to pay was privileged and not admissible;

- 3) erred in finding that the claim was illiquid and could not be pursued in motion proceedings;
- 4) erred in finding that the applicant had failed to prove the standard rates and estimates were reasonable;
- 5) erred in finding that the quotation of the applicant was not accepted by the first respondent;
- 6) as an alternative to granting judgment in favour of the applicant erred in not referring the matter to oral evidence;
- 7) erred in not rejecting the version of the first respondent which lacked detail in the answering affidavit in light of the admitted payment and payment proposals by the second respondent .

[3] The test applied previously to similar applications was whether there were reasonable prospects that another court may come to a different conclusion, *Commissioner of Inland Revenue v Tuck*¹ . The threshold of reasonable prospects has now been raised by the use and meaning attached to the words ‘only’ in 17(1) and ‘would’ in section 17(1)(a)(i). Therefore, on the entire judgement there should be some certainty that another court would come to a different conclusion from the judgement the applicant seeks to appeal against. In *Mont Chevaux Trust v Tina Goosen and 18 Others*² :

“It is clear that the threshold for granting leave to appeal 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

¹, 1989 (4) SA 888 (T)

² 2014 JDR 2325 (LCC) para [6]

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”

[4] In *S v Smith*³ a more stringent test is called for in that an applicant must convince a court, on proper grounds that there are prospects of success which are not remote, a mere possibility is not sufficient. Therefore, where the applicant has satisfied either of the two identified requirements in the Act, leave to appeal should be granted, *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others*⁴. This standard was confirmed in *Notshokovu v S*⁵ where it was stated:

“.....An appellant on the other hand faces a higher and stringent threshold in terms of the Act compared to the provisions of the repealed Supreme Court Act 59 of 1959....”

[5] in *Ramakatsa and Others v African National Congress and Another*⁶ Dlodlo JA stated:

“Turning the focus to the relevant provisions of the Superior Courts Act[5] (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 [6]. The Court in Curatco[7] concerning the provisions s 17(1)(a)(ii) of the SC Act pointed out that if the court unpersuaded that there are prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal, Compelling

³ 2012 (1)SACR 567 (SCA) para[7]

⁴ 2016 (3) SA 317 (SCA)

⁵ (157/15) [2016] ZASCA (7 September 2016) para [2]

⁶ (724/20190 [2021] ZASCA 31 (31 March 2021) para [10]

reason would of course include an important question of law or a discreet issue of public importance that will have the effect on future disputes. However, this Court correctly added that 'but hereto the merits remain vitally important and are often decisive'. [8] I am mindful of 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 compelling reasons why the appeal should be heard, leave to appeal should be granted. The test of reasonable prospect of success postulates a dispassionate decision based on the facts and the law, that a court of appeal should be heard, leave to 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 chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist, [9]" (my underlining)

[6] In order to succeed in the appeal there must be prospects of success which must be shown to exist and not be remote and as stated in Ramakatsa *supra*.

[7] Having read the papers and considered the arguments of both counsel I come to the conclusion that there is a reasonable prospect that another court would come to a different conclusion.

[8] In the result the following order is granted:

1. The application for leave to appeal is granted to the Full Court of this Division with costs to be costs in the appeal.



TLHAPI J
JUDGE OF THE HIGH COURT

APPEARANCES

FOR THE APPLICANTS

: ADV. APJ ELS

INSTRUCTED BY

: KRONE & ASSOCIATES

FOR THE RESPONDENTS

: ADV. C VAN DER MERWE

INSTRUCTED BY

: FLUXMANS INC

HEARD ON

: 10 February 2023

DATE OF JUDGMENT

: 03 March 2022