IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1)	REPORTABLE:
(2)	OF INTEREST TO OTHER JUDGES:
(3)	REVISED.

DATE _____ SIGNATURE _____

CASE NO: 17594/2018

In the matter between:

BODY CORPORATE OF LA MON VILLA First Plaintiff

(SS NO 108/2012; 173/2012; 518/2012; 776/2012)

MELROSE GARDENS INVESTMENTS (PTY) LTD Second Plaintiff

(Registration Number: 2008/025246/07)

And

NIYAKHA GROUP (PTY) LTD Defendant

(Registration Number: 2005/004953/07)

JUDGMENT

MBONGWE, J:

INTRODUCTION

[1] This is an application for leave to appeal to the Full Bench of this division or alternatively, the Supreme Court of Appeal against the whole of the judgment and order of this court that was handed down on 18 July 2022. In the said judgment the court upheld an exception raised by the respondent/defendant to the applicants'/plaintiff's particulars of claim; the basis for the exception being that the particulars of claim lacked the necessary averments to sustain a cause of action against the respondent/defendant.

SUMMARY OF THE FACTS

[2] It is important to describe the relationship or connectivity between the two plaintiffs, amongst themselves, and that between each of them with the defendant. This is to enable an understanding of the nature of dispute(s), the merits or demerits of the exceptions and amendments of the particulars of claim, with particular focus on the most recently amended particulars of claim pursuant to a notice to amend dated 14 May 2021.

[3] The first plaintiff is the body corporate charged with the administration and management of the sectional title scheme situated at 5341 6th Road, Montana, Pretoria, commonly known as La Mon Villa. The units at the core of these proceedings form part of this sectional title scheme.

[4] The second plaintiff is a company with limited liability registered in terms of the company laws of the Republic of South Africa. The second plaintiff is the owner of 21 units in Block M and another 21 units in Block N within the sectional title scheme. These units were initially owned and rented out by a property rental business enterprise belonging to the defendant.

[5] The defendant is also a registered company with limited liability registered as such in terms of the company laws of the Republic of South Africa. The defendant was the developer of the entire sectional title scheme.

[6] Upon completion of the development of the scheme, the defendant established a property rental business for the purpose of renting out the units it owned within the scheme. On or about 11 September 2014 the second plaintiff purchased the property rental business of the defendant, including the units rented out by it, as a going concern. Each sale agreement (''the Agreements'') between the second plaintiff and the defendant contained a '*voetstoots*' clause in relation to the subject units sold.

[7] It is necessary to state that the second plaintiff is alleged to have been cited in the present proceedings as an interested party, ostensibly by virtue of its ownership of the units it had bought from the defendant. Notably also is the fact, according to the plaintiff, that the second plaintiff is the funder of the first plaintiff in these proceedings

THE RELIEF SOUGHT AND BASIS THEREOF

[8] The appellants sought payment of delictual damages against the respondent arising from its alleged failure of the duty of care owed to the applicants and the community at large by its alleged intentional construction of defective units and the development common area within the sectional title scheme which is administered, managed and maintained by the first applicant. The respondent was alleged to have failed to render a proper and workmanlike performance in the construction and development of certain units in the sectional title scheme.

[9] The first applicant attached two sale agreements that were concluded by the second applicant and the respondent in the purchase of the units concerned. Further attached to the papers are two reports jointly obtained by the applicants and which point out structural defects in the units and in the development of communal area, an amount in the order of R2,082,255-00 is claimed by the applicants as the expense the first applicant is to incur to cure the defects and effect the repairs necessary to bring normality to the

conditions. The first applicant alleged that it is its responsibility to administer, maintain and effect repairs in the scheme – hence the claim.

DEFENDANT'S EXCEPTIONS

[10] Throughout the exchange of pleadings between the parties the respondent had filed no less than three exceptions to the applicants' particulars of claim, and each had occasioned an amendment of the applicants' averments in the particulars of claim, being the notices of exceptions dated 22 May 2018, 31 October 2018 and 01 March 2021.

COURT FINDINGS AND THE JUDGMENT

[11] The prominent issues raised in the respondent's/defendant's exceptions and which the court found had not been demonstrated by the plaintiffs/applicants were, firstly, that neither the plaintiffs nor the first plaintiff had *locus standi* to institute the claim for damages against the respondent/defendant and, secondly, that the plaintiffs or first plaintiff has not disclosed a cause of action against the defendant/respondent.

[12] For the plaintiffs to successfully rely on the defendant's alleged defective performance, the applicants had to produce the written building construction agreement and refer therein to the relevant specifications of the building work undertaken by the defendant and to demonstrate any deviation or unauthorised deviation therefrom by the defendant and it was detrimental and resulted in the defective structure (positive defective performance). This would have been followed by an allegation and demonstration that the defendant had failed to exercise the duty of care and, by so doing, had caused damages to the plaintiff in the amount claimed.

[13] There was factually no building contract between the applicants or first applicant and the respondent relating to the construction of the units concerned. Nor was there a contract for the building and development of the common property between the plaintiffs and the defendant. In fact, the defendant had built the units as an enterprise of his own to renting them out through a company he had established. The second applicant had been conducting the rental business through his company which was bought

from him as a going concern by the second plaintiff. Each of the relevant sale agreements of the sale of the business, including the units in particular, contained a *voetstoots* clause which deprived the second plaintiff of any right to claim damages on the basis of any construction defect in the units. Thus neither of the plaintiffs, least of all the first plaintiff had the *locus standi* nor the legal ground to institute the action against the defendant. The plaintiff's claim stood to be dismissed or the defendant's exceptions had to be upheld.

[14] There are no provisions in the Sectional Titles Schemes Management Act 8 of 2011 entitling the applicants to claim delictual damages against the respondent nor does the common law lend any such right to the applicants particularly on the facts of this case.

[15] The applicant's criticism of the court's findings *per se* does not entitle them to the grant of leave to appeal. In fact, it is in exceptional circumstances that a court hearing an appeal would interfere with the findings of the court of first instance (*see R v Dhlumayo and Another* 1948 (2) SA 677 (A). The applicable principle was reiterated by the court in the following terms:

> "*In truth the matter was approached as if an appeal lies against the reasons for judgment. It does not. Rather, an appeal lies against the substantive order made by the court. Western Johannesburg Rent Board and Another v Ursula Mansions (Pty) Ltd* 1948 (3) SA 353 (A) at 355."

PRINCIPLES REGULATING THE GRANTING OF LEAVE TO APPEAL

[16] The criteria for granting leave to appeal are contained in the provisions of sections 17(1) and 16(2)(a)(i) of the Superior Courts Act 10 of 2013, ('the Act'). In terms of section 17(1) the court may only grant leave to appeal where it is convinced that:

(a) the appeal would have a reasonable prospect of success; or

(b) there is some other compelling reason why the appeal should be heard, including the existence of conflicting decision on the matter under consideration; or

(c) the decision on appeal will still have practical effect (section 16(2)(a)(i), and

(d) where the decision appealed against does not dispose of all the issues in the case, and the appeal would lead to a just and prompt resolution of all the issues between the parties.

[17] In *Zuma v Democratic Alliance* [2021] ZASCA 39 (13 April 2021) the court held that the success of an application for leave to appeal depends on the prospect of the eventual success of the appeal itself. In The *Mont Chevaux Trust v Tina Goosen and Others* 2014 JDR 2325 LCC the court held that section 17(1)(a)(i) requires that there be a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against before leave to appeal is granted.

> "*An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be sound, rational basis to conclude that there is a reasonable prospect of success on appeal.''* (See: *MEC For Health, Eastern Cape v Mkhitha and Another* [2016] ZASCA 176 (25 November 2016).

CONCLUSION

[18] The merits in the plaintiff's case and grounds of appeal fall outside the circumstances defined in section 17 of the Superior Courts Act and there is nothing exceptional in the case requiring a consideration and a pronouncement by the Supreme Court of Appeal. The application for leave to appeal consequently stand to be dismissed.

COSTS

[19] The respondent has succeeded in its opposition of the application for leave to appeal and is therefore entitled to an order for costs.

ORDER

[20] Following the conclusion in this judgment, the court makes an order that:

1, The application for leave to appeal is dismissed.

2. The applicants are to pay the costs of the application.

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M P N MBONGWE

JUDGE OF THE HIGH COURT

GAUTENG DIVISIOIN, PRETORIA.

APPEARANCES:

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THIS JUDGMENT WAS ELECTRONICALLY TRANSMITTED TO THE PARTIES ON …… APRIL 2023.