**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.

 **26 APRIL 2023** 

 DATE SIGNATURE

 CASE NUMBER: **31087/2019**

In the matter between:

RENOVGANATHIE KUNIE **APPLICANT**

and

NEDBANK LIMITED **RESPONDENT**

*In re:*

NEDBANK LIMITED **FIRST RESPONDENT**

SB GARANTEEE COMPANY (RF) (PTY) LTD **SECOND RESPONDENT**

LEBOHLANO TRADING 50 (PTY) LTD **THIRD RESPONDENT**

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 **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 withing 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 fact and in law in granting the order for the execution of the

immovable property prior to the respondent setting its version of fact,

alternatively allowing the respondent an opportunity to file an opposing

affidavit in order for the court to make a determination on the fact

common in cause or disputed;

2) erred in failing to consider a referral to mediation in terms of Rule 41A

presented at the hearing of the application;

3) erred in failing to apply the provision of Rule 46 and Rule 46A prior to

granting an order has breached the first respondent’s constitutional

rights as set out in Chapter Two of the Constitution of South Africa in

respect of:

3.1 Section 9(1) where everyone is equal before the law and has the

 right to equal protection and benefit of the law;

3.2 Section 10 where everyone has the inherent dignity and the right

 to have their dignity respected and protected;

3.3 Section 12(1)(a) where everyone has the right to freedom of

 security of the person, which includes the right not to be deprived

 of freed arbitrarily of without just cause; and

3.4 Section 25(1) no one may be deprived of property except in terms

 of law of general application, and no law may permit arbitrary

 deprivation of property;

 4.1 erred in failing to apply the provisions of Rule 46A(5)(c);

 4.2 erred in failing to allow the respondent to file an opposing

 answering affidavit prior to granting an order as specifically

 provided for in terms of rule 46A(6)(c); and

 4.3 failed to consider the provisions of Rule 46A(8) in order to bring

 the applicant’s unsubstantiated submission into line with the with

 the provisions of Rule 46 and 46A, specifically Rule 46A(f);

 5. erred in granting costs of the entire application of an attorney and

 own client scale where no opposing affidavit had at the time been

 file to oppose the application.

 [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]](#footnote-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]](#footnote-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

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]](#footnote-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]](#footnote-4)* . This standard was confirmed in

*Notshokovu v S[[5]](#footnote-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]](#footnote-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*

*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 as stated in Ramakatsa *supra.*

[7] The application was against an order declaring immovable property

executable granted as a result of a monitory judgment in favour of the respondent

exceeding R16 million in a summary judgement against the applicant. An attempt to

execute against the movable assets resulted in the *nulla bona* return. It is common

cause:

1) that the debt did not emanate from a mortgage loan agreement and that

the applicant’s liability stems from the fact that she stood surety and she is

therefore not a judgement creditor.

2) that the property concerned is a residential property and the primary

residence of the applicant.

[8] The respondent contended that the immovable property being identified was

the only asset capable of being realized to settle the debt and that the

respondent had no satisfactory alternative manner of settling the debt owned

to it. The respondent relied on Deeds Registry search and not bank

statements and a municipal valuation to establish what the respondent was

owing in respect of the immovable property, as a result no reserve price was

set having regard to the debt.

[9] Rule 46A places responsibilities on both the applicant being the debtor and

the respondent as creditor to place certain information at the disposal of the court

before granting an order of executability. Having revisited the application my reasons

and having regard to the submissions by both counsel I am of the view there are

prospects in the application and that another court may arrive at 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.

 

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**TLHAPI J**

**JUDGE OF THE HIGH COURT**

**GAUTENG DIVISION, PRETORIA**

**HEARD AND RESERVED ON: 13 SEPTEMBER 2022**

**DELIVERED ON: 26 APRIL 2023**

1. 1, 1989 (4) SA 888 (T) [↑](#footnote-ref-1)
2. 2014 JDR 2325 (LCC) para [6] [↑](#footnote-ref-2)
3. 2012 (1)SACR 567 (SCA) para[7] [↑](#footnote-ref-3)
4. 2016 (3) SA 317 (SCA) [↑](#footnote-ref-4)
5. (157/15) [2016] ZASCA (7 September 2016) para [2] [↑](#footnote-ref-5)
6. (724/20190 [2021] ZASCA 31 (31 March 2021) para [10] [↑](#footnote-ref-6)