

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 34744/2022

DOH: 12 July 2023

1.REPORTABLE: **NO**/YES
2.OF INTEREST TO OTHER JUDGES: **NO**/YES
3.REVISED.

.....**27 JULY 2023**

JULY 2021
SIGNATUREDATE

In the matter of:

THE BODY CORPORATE OF MIONETTE

Applicant

and

STEPHINA LEKGANYANE

Respondent

JUDGEMENT - LEAVE TO APPEAL

THIS JUDGEMENT HAS BEEN HANDED DOWN REMOTELY AND SHALL BE CIRCULATED TO THE PARTIES BY WAY OF EMAIL/ UPLOADED ON CASELINES. ITS DATE OF HAND DOWN SHALL BE DEEMED TO BE 27 JULY 2023

Bam J

A. Introduction

1. This is an application for leave to appeal the order of this court of 29 March 2023. The applicant's grounds for leave to appeal are set out in its Notice of Appeal and amplified in its Heads of Argument. I do not necessarily repeat them in this judgment. The applicant bases its application on the provisions of section 17 (a) (i) and (ii) of the Superior Courts Act¹. It says, there are reasonable prospects that another court would reach a different outcome. It further contends that there are compelling reasons why the appeal should be heard as envisaged in Section 17 (a) (ii). The application is opposed by the respondent who asserts that the application is without merit.

B. The Law

2. Section 17 (1) (a) (i) and (ii) of the Superior Court Act, reads:

'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...'

¹ Act 10 of 2013.

3. The true meaning of the test has been espoused by Superior Courts from time to time and from which it is said, an assessment of prospects of success envisages a dispassionate evaluation of the facts and law and establishing whether another forum would come to a different finding. In *Smith v S*, the test was articulated thus:

'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. 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.'²

4. In clearing the doubt of higher threshold, the same court in *Ramakatsa and Others v African National Congress and Another* said:

'...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. Compelling reason would of course include an important question of law or a discreet issue of public importance that will have an effect on future disputes. However, this Court correctly added that 'but here too the merits remain vitally important and are often decisive'. I am mindful of the 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 other compelling reasons why the appeal should be heard, leave to appeal should be granted. ...'³ (citation omitted)

² (475/10) [2011] ZASCA 15; 2012 (1) SACR 567 (SCA) (15 March 2011), paragraph 7.

³ (724/2019) [2021] ZASCA 31 (31 March 2021), paragraph 10.

C. Merits

5. At the outset, the applicant's heads targeted what it called the centre of this court's judgement, namely:

- (i) Whether a party may rely on an automated report to demonstrate that the sale of the immovable property of the debtor will result in payment to the creditors;
- (ii) Whether the considerations and or permutations that ordinarily apply in Rule 46A sales should apply in sequestration proceedings to determine that the sale of the debtor's immovable property will result in a distribution to the creditors; and
- (iii) To what extent are parties bound by concessions made in a joint practice note.

6. The applicant, I should say, chose to disregard that the overall import of the judgement and its reliance on previous superior court's judgements, including the Constitutional Court's dicta in *Stratford and Others v Investec Bank Limited and Others*⁴ and that court's guidance on how courts should approach the question of the belief that the sequestration will be to the advantage of the general body of creditors. As a consequence of its choices, the applicant ended up revisiting its case to amplify it on the question of the automated report and how other courts have made use of it, without delving into the merits of those cases. It also seeks to introduce new arguments about replacement of non paying members with paying members in a Body Corporate.

⁴ (CCT 62/14) [2014] ZACC 38; 2015 (3) BCLR 358 (CC); 2015 (3) SA 1 (CC); (2015) 36 ILJ 583 (CC) (19 December 2014), paragraphs 44-45.

7. The judgement of this court need not be repeated. It sets out the reasons the values in the automated report are highly unlikely. It takes into account the present slumping economy, the risks that a purchaser faces and in forced sales, which do not wait for markets to correct property prices, and the pressure that all these elements put on property prices, with the result that, in the court's mind, the chances of obtaining the amounts illustrated in the automated report are dim if not improbable, making it unlikely that the general body of creditors may receive a dividend as opposed to contributing towards costs. As a result of confining the judgement to the automated report, the applicant suggests that the case involves important principles of law. Far from it, the recommended approach in evaluating the question of advantage to creditors on the facts before a court has long been settled by the Superior Courts, including the Constitutional Court. In short, what appears to be important questions of law is borne out of the applicant's choices in identifying what the judgment centres on, which is inaccurate.
8. The applicant further posits an argument about the extent to which an agreement set out in a joint practice is binding to a party. Exactly what role an agreement between the parties on a joint practice note has on the court's enquiry into the question of the belief as to whether sequestration will be to the advantage of creditors, is not mentioned by the applicant. What is undoubted however, is that such agreement cannot usurp the court's function of applying its mind to the facts, including those agreed to by the parties and the law and reaching a conclusion on whether the belief

that the sequestration of the debtor's estate is to the advantage of the general body of creditors.

9. I reached the conclusion that the belief that the sequestration will be to the advantage of the creditors is not borne out by the facts. My reasoning is fully set out in the judgement. The application has no prospects of success and falls to be dismissed.

D. Order

10. The application for leave to appeal is dismissed with costs.

NN BAM
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION,

PRETORIA

Date of Hearing: 12 July 2023

Date of Judgement: 27 July 2023

Appearances:

Applicant's Counsel: Adv J.C Prinsloo

Instructed by: Theron and Henning Attorneys

Pretoria

Respondent's Counsel:

Adv L.M Maake

Instructed by:

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