HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 33442/21

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

…… 26 January 2024 ……

SIGNATURE **DATE**

In the matter between:

RESIDUAL DEBT SERVICES LIMITED	Applicant
[PREVIOUSLY REGISTERED AS AFRICAN BANK LIMITED AND THE AFRICAN BANK LIMITED]	

and

COMPANY UNIQUE FINANCE (PTY) LTD	1st Respondent
THE CHIEF REGISTRAR OF DEEDS	2nd Respondent
THE PRUDENTIAL AUTHORITY	3rd Respondent
THE MINISTER OF FINANCE	4th Respondent

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

BARIT, AJ

[1] In this application for leave to appeal the Applicant (who was the First Respondent, in the Court *a quo*), Company Unique Finance (Pty) Ltd ***("CUF")*** is applying for leave to appeal against the judgment and order made on 20 January 2023. The application is only in respect of paragraphs [2] to [7] of that order. The successful party in the Court *a quo*, Residual Debt Services Ltd ***("RDS")***, opposes this application.

[2] The application of CUF is for leave to appeal to the Supreme Court of Appeal.

[3] CUF states the following reasons why the application for Leave to Appeal should be successful:

"Another Court will reasonably come to a different conclusion and/or

There are compelling reasons that the judgment be vacated on appeal." [1]

[4] CUF further states, in their application that:

[1] Par "2" of "The First Respondent's Heads of Argument in it's Application for Leave to Appeal" dated 8 September 2023

"In the circumstances, it will be submitted that his Lordship should provide the direction contemplated in Section 17(6)(a)(i) of the Superior Courts Act, 10 of 2013, in granting the appropriate leave to appeal." [2]

[5] Residual Debt Services Ltd (under curatorship). At its incorporation in 1975 the Applicant had the name The African Bank Ltd. It subsequently changed its name to African Bank Ltd and on 4 April 2018, it again changed its name to Residual Debt Services Ltd (RDS). RDS's registration number, as a public company, being 1975/002526/06.

[6] The First Respondent is Company Unique Finance (Pty) Ltd, a Company with registration number 1994/002755/07 duly incorporated in accordance with the company laws of South Africa.

[7] The Second Respondent in the Court *a quo* is the Chief Registrar of Deeds, a public official appointed in terms of section 2 (1) of the Deeds Registry's Act 47 of 1937.

[2] Par "6" of "The First Respondent's Heads of Argument in it's Application for Leave to Appeal" dated 8 September 2023

[8] The Third Respondent in the Court *a quo* is the Prudential Authority, in its official capacity as such with offices at SARB building, 370 Helen Joseph Street, Pretoria Gauteng.

[9] The Fourth Respondent in the Court *a quo* is the Minister of Finance in his official capacity as such.

The Substance of the Matter

[10] In 1998, in terms of *"The Transaction Agreement"*, CUF was appointed to manage what was known as the *"Ring-Fenced Business"*, which consisted of the entire book debt of RDS. Subsequently on 20 November 2003 an agreement was concluded for the transfer of the ring-fenced business to CUF.

[11] In summation, with effect from 25 October 2004, and in terms of the provisions of Section 54(3)(a) and (d) of the Banks Act, all the assets of RDS, which consisted of the *"Ring-Fenced Business"* (such as properties, securities, mortgage bonds, rights of mortgagees) were transferred and become invested in CUF.

[12] This was approved and consented to by the Registrar of Banks and the then Minister of Finance. It was done in terms of section 54 of the

Banks Act 94 of 1990. This would result in the transfer of the Ring-Fenced business from RDS to CUF.

[13] From the details brought to this Court the crux of this matter can best be stated as follows. A *"ring-fenced"* extensive number of properties was transferred by RDS to CUF. The properties ended up in two lists, both being part and parcel of the *"ring-fenced"* total listings. One of those two listings was registered in terms of the legal requirements. The second listing, though acquired by CUF as part of the "ring-fenced" business, was never registered as such in terms of the legal registering requirements. However, factually, both listings are part of CUF.

[14] Further, RDS maintains all the properties of the ring-fenced business fall within the agreement. Hence, RDS is not asking for anything - no debt, no money. Just that CUF do what they are supposed to. This will make legal the *de facto* position. Its effect is not to acquire the assets. This has been already achieved.

[15] What RDS stated, and asked for in the Court *a quo,* is that CUF must legally register all the properties on the second list so as to legally regularise the factual situation according to the *"ring-fenced"*

agreement. CUF in turn is saying that they do not want the second listing of properties.

[16] (CUF), maintains that their *"prospects of success"*, if the application of appeal is granted, and the matter is heard by the Supreme Court of Appeal, are high.

Judgment of the Court *a quo*

[17] The judgment as delivered on 20 January 2023, has the following order:

> *"That the Arbitration Appeal Award be made an order of this Court.*
>
> *That the immovable properties as listed in annexure "FA22.1" to "FA22.8" to the founding affidavit of the Applicant were transferred to the First Respondent on 25 October 2004 in terms of Section 54 of the Banks Act 94 of 1990.*
>
> *That all the rights and obligations of the Applicant as mortgagee, and the mortgage bonds as listed in annexure "FA23.1" to "FA23.3" to the founding affidavit were transferred*

to the First Respondent on 25 October 2004 in terms of Section 54 of the Banks Act 94 of 1990.

That an addition to the removable properties and mortgage bonds as listed in annexures "FA22" and "FA23" to the founding affidavit, all other removable properties, and the rights and obligations of the Applicant as mortgagee in respect of any mortgage bonds registered in any Deeds Registry in South Africa on 25 October 2004 were transferred to the First Respondent on 25 October 2004 in terms of the Section 34 of the Banks Act 94 of 1990.

Directing the Chief Registrar of Deeds (Second Respondent) to cause the title deeds of the immovable properties of the mortgage bonds, as listed in annexures "FA22" and FA23" to the founding affidavit to the extent that they remain registered in the name of the Applicant, and any other immovable property and mortgage bonds which were on 25 October 2004 registered in the name of the Applicant to the extent that they remain registered in the name of the Applicant (including in one of its former names), to be endorsed in the respective Deeds Registries to reflect that the right, title and interest of the Applicant in those immovable properties and the rights and

obligations of the Applicant arising from the mortgage bonds were transferred to the First Respondent on 25 October 2004 in terms of Section 54 of the Banks Act of 1990.

That the Chief Registrar of Deeds (Second Respondent) to issue a Circular to the Registrars of Deeds falling under his control and rubber stamps the same or similar wording and to the same effect as appears from annexures "FA17" and "FA18" to the founding affidavit (of the Applicant) but to the relation to the lists of removable properties and mortgage bonds annexed to the founding affidavit as annexures "FA22" and "FA23" and any other immovable property and mortgage bonds which were on 25 October 2004 registered in the name of or in favour of the Applicant (including in the name of one of its former names).

The First Respondent to pay the costs of the Applicant on a party and party scale."

The Legal Primciple

[18] CUF in its Heads of Argument for Leave to Appeal, has made reference to section 17(1)(a) and has provided several references in respect thereto.

[19] Section 17(1)(a) of the Superior Courts Act 10 of 2013 ***("the Act")*** states that:

"Leave to appeal may only be given where the judge or judges concerned are of the opinion that - the appeal would have a reasonable prospect of success (Section 17(1)(a)(i)) or; there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration. (Section 17(1)(a)(ii))".

[20] The Supreme Court of Appeal has held in the matter of ***MEC for Health, Eastern Cape v Ongezwa Mkhitha & The Road Accident Fund***,[3] that the test for granting Leave to Appeal is as follows (para 16-17):

"Once again it is necessary to say that Leave to Appeal, especially to this Court, must not be granted unless there truly is a reasonable prospect of success. Section 17(1)(a) of the Superior Courts Act 10 of 2013 makes it clear that Leave to Appeal may only be granted where the Judge concerned is of the opinion that the Appeal would

[3] MEC for Health, Eastern Cape v Ongezwa Mkhitha and The Road Accident Fund [2016] ZASCA 176 (25 November 2016).

have a reasonable prospect of success, or there is some other compelling reason why it should be heard". (my underlining)

"An application for leave to appeal must convince the court on proper grounds that the applicant would have 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 a sound rational basis to conclude that there "would be a reasonable prospect of success on appeal". (my underlining)

[21] This is apparently in contrast to a test under the previous Supreme Court Act, 1959 that Leave to Appeal is to be granted where a reasonable prospect was that another court might come to a different conclusion. ***(Commissioner of Inland Revenue v Tuck)***.[4]

[22] In the matter of ***Fusion Properties 233 CC v Stellenbosch Municipality*****,**[5] it was stated:

"Since the coming into operation of the Superior Courts Act there have been a number of decisions in our courts which dealt with the requirements that an applicant for leave to appeal in terms of Section 17(1)(a)(i) and 17(1)(a)(ii) must satisfy in order for leave to be

[4] Commissioner of Inland Revenue v Tuck; 1989 (4) SA 888 (T) at 890 B-C.

[5] Fusion Properties 233 CC v Stellenbosch Municipality [2021] ZASCA 10 (29 January 2021) (para 18).

granted. The applicable principles have over time crystallised and are now well established. Section 17(1) provides, in material part, that leave to appeal may be granted 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...

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

[23] In ***Chithi and Others***; in re: ***Luhlwini Mchunu Community v Hancock and Others***,[6] it was held:

"[10] The threshold for an application for leave to appeal is set out in section 17(1) of the Superior Courts Act, which provides that leave to appeal may only be given if the judge or judges are of the opinion that the appeal would have a reasonable prospect of success..."

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[6] Chithi and Others; in re: Luhlwini Mchunu Community v Hancock and Others [2021] ZASCA 123 (23 September 2021) ("para 18").

[24] Reading Section 17 (1) (a) of the Act one sees that the words are: *"Leave to Appeal may only be given where the Judge or Judges concerned are of the opinion that - the appeal would have a reasonable prospect of success".* (my underlining)

[25] Bertlesmann J, in the ***Mont Chevaux Trust v Goosen and Eighteen Others***,[7] stated the following:

"It is clear that the threshold for granting leave to appeal against the judgment of a High Court has been raised by the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court may come to a different conclusion, see Van Heerden v Cromwright and Others (1985) (2) SA 342 (T) at 343 H".

[26] In a recent case, in this division, Mlambo JP, Molefe J, Basson J, cautioned that the higher threshold should be maintained when considering applications for leave to appeal. ***Fairtrade Tobacco Association v President of the Republic of South Africa***,[8] the court stated:

[7] Mont Chevaux Trust v Goosen and Eighteen Others (2014 JDR) 2325 (LCC) at para 6.

[8] Fairtrade Tobacco Association v President of the Republic of South Africa (21686/2020) [2020] ZAGPPHC 311.

"As such, in considering the application for leave to appeal, it is crucial for this Court to remain cognizant of the higher threshold that needs to be met before leave to appeal may be granted. There must exist more than just a mere possibility that another court, the SCA in this instance, will, not might, find differently on both facts and law. It is against this background that we consider the most pivotal ground of appeal".

[27] In ***S v Smith***,[9] the court stated that:

"Where 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 applicant must convince this court on proper grounds that the prospects of success of appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established then that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. <u>There must, in other words, be a sound rational basis for the conclusion that there are prospects of success on appeal</u>." (my underlining)

[9] **S v Smith** 2012 (1) SALR 567 (SCA) [para 7].

The Contentions of CUF

[28] The contentions and issues taken up by CUF basically involve the following:

(a) Cost to CUF to take transfer;

(b) Prescription factor;

(c) The obligations;

(d) *Res judicata;*

(e) Relief in terms of section 54(3) of the Banks Act.

RDS's Response to the Contentions

[29] The thrust of RDS's response, is that the Trial Court was correct in its findings:

(a) Firstly, ownership of the properties had already vested in CUF by operation of law.

(b) Secondly, CUF was mischaracterizing the release as being a claim for money.

[30] In summation RDS quotes paragraph 4.2.3 of section 54,[10] which stated:

> *"All securities (including all sureties and real securities) advantages and disadvantages attached to or ancillary to the debtors book referred to in paragraph 4.2.1 <u>are transferred to Company Unique.</u>"* (CUF emphasis)

[31] Further, RDS states that[11]:

> *"Transfer of ownership had already occurred when the transfer of the ring-fenced business was authorized by the Minister in terms of the Banks Act."*[12]

<u>General</u>

[32] Other factors brought into this application (even though not mentioned specifically in this judgement) were taken into account for purposes of this judgement. It must be mentioned that many of those factors were inter-related with aspects of the main thrust of the application, or alternatively took the matter no further.

[10] The 2003 Transaction Agreement
[11] Para 4,8 of RDS's Heads of Argument in Opposition for Leave to Appeal
[12] See Application in terms of section 54 of the Banks Act, 94 of 1990 at para 4.2.1

Summing up

[33] The circumstances of this matter are unique. This Court is therefore faced with pondering whether the application by CUF is an attempt to have a second bite of the cherry, or satisfying justice in the light of the complexity of the circumstances. Further, looking at the whole matter, one can *inter alia* state that there is novelty in the issues and also a lack of any precedents to follow. CUF in their Heads of Argument claim that: "*There is no judicial authority"*[13].

[34] The test applied by the Supreme Court of Appeal in ***S v Smith***,[14] neatly sums up the position in which this Court has found itself with respect to the application by CUF. The question based on S v Smith is whether there is, *"a sound rational basis for the conclusion that there are prospects of success on appeal."*

[35] Having heard both counsels and having carefully read the papers, I come to the conclusion that there is a reasonable prospect that another Court would come to a different conclusion.

[36] CUF, in this application, have requested that the matter, should the application succeed, be sent to the Supreme Court of Appeal. CUF,

[13] CUF Heads of Argument 8 September 2023 at para 11
[14] **S v Smith** 2022 (1) SALR 567 (SCA) [para 7]

state that the matter is of considerable importance to the parties, and in addition has stated that, it *"will be of benefit to the general public."*

[37] I am of the view that the matter is of importance to the parties involved in the matter, but can see no merit in the statement that it will be *"of benefit to the general public".* Hence, the desire by CUF that same be directed directly to the Supreme Court of Appeal is misplaced.

[38] In this I refer to Harms, writing in *"Civil Procedure in the Supreme Court"* [15]*,* where it is stated:

> *"In granting leave to appeal, it is essential to direct which court of appeal is to hear the appeal. The court granting leave to appeal – whether the court of first instance or the Supreme Court of Appeal – must, unless it is satisfied that the question of law or fact and the other considerations involved in the appeal are of such a nature that the appeal requires the attention of the Supreme Court, direct that the appeal be heard by the full court. <u>The court must consider the issue irrespective of the wishes of the parties</u>."*
>
> (my underlining)

[15] Harms, Civil Procedure in the Supreme Court C1-23

[39] The guidance of Harms leads me to believe that the correct Court to which this matter should be directed is the Full Bench of this Division.

Order

[40] I therefore make the following order:

1. The First Respondent is granted leave to appeal to the Full Court of the Gauteng Division, against the judgment of 20 January 2023.

2. The costs of this application will be costs in the appeal.

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Barit AJ

Date Heard: 20 September 2023

Date of Judgment: 26 January 2024

Appearances

For the Applicant: Advocate Maritz S.C.

Instructed by MacRobert Attorneys

For the Respondents: Advocate Mundell S.C.

Instructed by Marie-Lou Bester Inc