

SOUTH AFRICA / JUDGMENT

Blom and Others v Modiboa and Another (M364/2022) [2024]

ZANWHC 4 (5 January 2024)

[2024] ZANWHC 4

COURT

North West High Court, Mafikeng

BEFORE

FMM Reid

CASE / FILE NUMBER

M364/2022

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

SAFLII

Note: Certain

personal/private details of parties or witnesses have been redacted from this document in compliance with the law and SAFLII

Policy

IN THE HIGH COURT OF

SOUTH AFRICA

NORTH WEST DIVISION,

MAHIKENG

CASE NUMBER: M364/2022

Reportable: NO

Circulate to Judges: NO

Circulate to Magistrates:

NO

Circulate to Regional

Magistrates: NO

In the application for
leave to appeal between:.

CASPER-JEAN

BLOM

1st

Applicant

CHANDRE

VENTER

2nd

Applicant

	CITY OF MATLOSANA LOCAL MUNICIPALITY 3rd Applicant and LEBEKO JACOB MODIBOA 1st Respondent KEDINNETSE CYNTHIA MODIBOA 2nd Respondent AND In the application to
enforce the order between:	LEBEKO JACOB MODIBOA 1st Applicant KEDINNETSE CYNTHIA MODIBOA 2nd Applicant and CASPER-JEAN BLOM 1st Respondent CHANDRE VENTER 2nd Respondent CITY OF MATLOSANA LOCAL MUNICIPALITY 3rd Respondent In the principal matter
between:	This judgment is handed down by electronic means via email to the legal representatives of the parties. The date and time of the handing down of the judgment is deemed to be 5 January 2024 at 10h00

JUDGMENT**LEAVE TO APPEAL AND ENFORCEMENT APPLICATION**

FMM REID J:

Introduction:

[1] On 3 August 2023 the Court granted an eviction order (“the order”) to in favour of the applicants (the “Modiboa’s”) against the respondents (“Blom and Venter”). The

unsuccessful parties now apply for leave to appeal against the order, whilst the successful parties apply for the enforcement of the order pending appeal.

[2] For ease of reference and to avoid confusion, I will refer to the parties’ names rather than their respective citations.

[3] Two (2) applications serve simultaneously before this Court, namely the application for leave to appeal and the application to enforce the order. The issues for this Court to be determined are thus

two-fold:

3.1.

Whether leave to appeal should be granted against the order; and

3.2.

Whether the order should be enforced in terms of section 18(3) of the Superior Courts Act 10 of 2013 (“the enforcement application”) pending the application for leave to appeal and pending possible appeal proceedings.

[4] The order dated 3 August 2023 has the following effect (summarised by me):

i) The deed of sale entered into by and between the Modiboa’s and Blom and Venter in respect of the immovable property known as Erf 8[...] W[...] Extension 16 Township, Registration Division I.P. Province of North West measuring 1,204 square metres in extent and held by Deed of Transfer T[...], is declared to have been duly cancelled.

ii) Blom and Venter, and any person who is in occupation of the property through them, are evicted from the property known as Erf 8[...] W[...] Extension 16 Township, Registration Division I.P. Province of North West measuring 1,204 square metres in extent and held by Deed of Transfer T[...], also known as otherwise known as 1[...] O[...] Street, Wilkoppies, Klerksdorp.

iii) The eviction is to be executed within three (3) months after the

service of the order on Blom and Venter and any person who is in occupation through them have not vacated the property by the date set out in paragraph [ii] above.

iv) An order of costs is granted against Blom and Venter, individually and severally, one paying the other to be absolved.

[5] I firstly deal with the application for leave to appeal, where after I will address the application to enforce the order dated 3 August 2023.

Application for leave to appeal

[6] The granting of leave to appeal is governed by section 17(1)(a) of the Superior Courts Act 10 of 2013, which reads:

“(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 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...”

[7] After the enactment of section 17 of the Superior Courts Act, the test for the application for leave to appeal, has been set out as follows in *S v Kruger* 2014

(1) SACR 647 (SCA):

*“[2] Before dealing with the merits of the appeal, it is necessary at the outset to deal with the test applied by the high court in granting leave to appeal to this court. Despite dismissing the appellant's appeal, the high court concluded that it was 'possible' that another court might arrive at a different conclusion and that leave to appeal should not be 'lightly refused' where the person concerned is facing a lengthy sentence of imprisonment. This is an incorrect test. What has to be considered in deciding whether leave to appeal should be granted is whether there is a reasonable prospect of success. And in that regard more is required than the mere 'possibility' that another court might arrive at a different conclusion, no matter how severe the sentence that the applicant is facing. As was stressed by this court in *S v Smith* 2012*

(1) SACR 567 (SCA) para 7:

'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.”

- [3] The time of this court is valuable and should be used to hear appeals that are truly deserving of its attention. It is in the interests of the administration of justice that the test set out above should be scrupulously followed. In the present case it was not, and this court has had to hear an appeal in respect of which there was no reasonable prospect of success.”

(own emphasis)

- [8] This test whether to grant leave to appeal or not, was aptly set out in *Cook v Morrisson and Another* 2019 (5) SA 51 (SCA) as follows:

“[8] The existence of reasonable prospects of success is a necessary but insufficient precondition for the granting of special leave. Something more, by way of special circumstances, is needed. These may include that the appeal raises a substantial point of law; or that the prospects of success are so strong that a refusal of leave would result in a manifest denial of justice; or that the matter is of very great importance to the parties or to the public. This is not a closed list (Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd 1986

- (2) SA 555 (A) at 564H – 565E; Director of Public Prosecutions, Gauteng Division, Pretoria v Moabi 2017

- (2) SACR 384 (SCA) ([2017] ZASCA 85) para 21.”

- [9] In relation to the meaning of the words “reasonable prospects of success” it was held as follows by Snyman AJ in the Labour Court in *Scheepers v Transnet Bargaining Council and others* (Leave to Appeal)

[2023] JOL 59387 (LC):

- [15] As to the meaning of ‘reasonable prospects of success’, the Court in *Member of the Executive Council for Health, Eastern Cape v Mkhitha and Another* [2016] JOL 36940 (SCA) at paras 16 – 17 said the following: ‘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 given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success; or there is some other compelling reason why it should be heard. 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 a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.’”

- [10] The application of the test for leave to appeal has also been set out in more detail by Prinsloo J in *Hartley v SA Social Security Agency* (Leave to Appeal) [2023] JOL 59800 (LC) as follows:

“[15] The test is not whether there is a possibility that another court could come to a different conclusion, the test is whether there is a reasonable prospect that another court would come to a different

conclusion.

- [16] It is further trite that an applicant in an application for leave to appeal must convince the court a quo that it has reasonable prospects of success on appeal. Appeals should be limited to matters where there is a reasonable prospect that the factual matrix could receive a different treatment or where there is some legitimate dispute on the law.
- [17] In *Seatlholo and others v Chemical Energy Paper Printing Wood and Allied Workers Union and others*, (2016) 37 ILJ 1485 (LC) at para 3. This Court confirmed that the test applicable in applications for leave to appeal is stringent and held as follows: ‘The traditional formulation of the test that is applicable in an application such as the present requires the court to determine whether there is a reasonable prospect that another court may come to a different conclusion to that reached in the judgment that is sought to be taken on appeal. As the respondents observe, the use of the word “would” in s 17(1)(a)(i) is indicative of a raising of the threshold since previously, all that was required for the applicant to demonstrate was that there was a reasonable prospect that another court might come to a different conclusion (see *Daantjie Community and others v Crocodile Valley Citrus Company (Pty) Ltd and another* (75/2008) [2015] ZALCC 7 (28 July 2015). Further, this is not a test to be applied lightly – the Labour Appeal Court has recently had occasion to observe that this court ought to be cautious when leave to appeal is granted, as should the Labour Appeal Court when petitions are granted. The statutory imperative of the expeditious resolution of labour disputes necessarily requires that appeals be limited to those matters in which there is a reasonable prospect that the factual matrix could receive a *Woolworths Limited v Matthews* [1999] 3 BLLR 288 (LC) different treatment or where there is some legitimate dispute on the law (See the judgment by Davis JA in *Martin and East (Pty) Ltd v NUM* (2014) 35 ILJ 2399 (LAC), and also *Kruger v S* 2014 (1) SACR 369 (SCA) and the ruling by Steenkamp J in *Oasys Innovations (Pty) Ltd v Henning and another* (C 536/15, 6 November 2015).’
- [18] In deciding this application for leave to appeal, I am also guided by the dicta of the Supreme Court of Appeal where it held in *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and others* 2013 (6) SA 520 (SCA) at para 24 that: ‘...The need to obtain leave to appeal is a valuable tool in ensuring that scarce judicial resources are not spent on appeals that lack merit. It should in this case have been deployed by refusing leave to appeal.’”

Grounds of appeal

- [11] First ground of appeal: Retention right.

It is argued on behalf of Blom and Venter that the court erred in not taking into account that Blom and Venter had a retention right in possessing the property until they have been remunerated in accordance with the retention right.

11.1. The Modiboa's, in terms paragraph 9.1.3 of the contract of sale, are entitled to retain all payments made by Blom and Venter, until damages suffered by the Modiboa's have been calculated. It is argued on behalf of the Modiboa's that retention right does not arise prior to the calculation of damages that is to be deducted from the deposit.

11.2. In paragraph

[16] of the order, I found that Blom and Venter have paid a total amount of R1,452,000.00 (One Million Four Hundred and Fifty Two Thousand Rand) in relation to the purchase of the property, which they will be entitled to receive as the amount that they have

paid as the purchase price in terms of the contract of sale.

11.3. A right of retention is a right exercised in terms of the common law and thus entails application of a legal question and legal position that may be interpreted differently by another court.

[12] Second ground of appeal: material breach:

It is argued on behalf of Blom and Venter that the court erred in paragraph [12] of the judgment that reads as follows:

“12. It is common cause that the respondents were not able to secure payment of the balance of the purchase price. As such, there was a material breach of contract by the respondents. In response to the material breach, the applicants elected to cancel the contract.”

12.1. Blom and Venter claim that the court erred in finding that there was a material breach of contract in not securing the balance of the purchase price. Clause 2.1.4 of the purchase agreement states that the balance of the purchase price must be secured within 12 months “or such further extended period as may be agreed in writing”.

12.2. The parties agreed in writing that the term for securing a bond, in paragraph 3 of the further Addendum is a period of 12 months “or such further time needed to obtain the bond for the balance of the purchase price”. The argument of Blom and Venter is thus that there was no specified period by which the balance of the purchase price had to be secured and that the period of securing a bond for the purchase price was “open ended” with no specific time period agreed upon.

12.3. Whether a party is entitled to cancel a contract on a material breach, and whether a material breach has indeed occurred, is a legal question that may be interpreted differently by another court.

[13] Third ground of appeal: is eviction just and equitable:

It is argued on behalf of Blom and Venter that the eviction mitigates against the provisions of section 4(7) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, that provides that “A Court may grant an order for eviction if it is in the opinion that it is just and equitable to do so.”

13.1. It is argued on behalf of Blom and Venter that it is not just and equitable to evict them, on the basis that they have paid an amount of R1,452,000.00 (One Million Four Hundred and Fifty Two Thousand Rand) towards a property of which the initial purchase price was R1,600,000.00 (One Million Six Hundred Thousand Rand). The ground of appeal is that the Court should have included a retention right to form part of the order.

13.2. In *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others* 2012 (6) SA 249 (SCA) in paragraph [12] the Supreme Court of Appeal found that “... In considering whether eviction is just and equitable the court must come to a decision that is just and equitable to all parties” with reference to *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2005

(1) SA 217 (CC).

13.3. The question of whether it is just and fair, is a value judgment and another court might come to a different conclusion in these circumstances.

[14] Having considered the grounds for appeal, as well as the reasoning set out above, I hold the view that it would be in the interest of justice to grant leave to appeal. It is reasonably foreseeable that another court may come to another conclusion than I did.

[15] The issues do not deal with novel issues, or conflicting issues of law, but mostly interpretational issues of a legal nature. On this basis I deem it appropriate that leave to appeal be granted to the full court of this Division.

Application to enforce the court order

[16] Section 18 of the Superior Courts Act regulates the legislative requirements to determine whether a judgment should be executed or suspended, pending the appeal process.

[17] Section 18 of the Superior Courts Act reads as follows:

“18 Suspension of decision pending appeal

- (1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.
- (2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.

- (3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.
- (4) If a court orders otherwise, as contemplated in subsection (1)-(i) the court must immediately record its reasons for doing so;
- (ii) the aggrieved party has an automatic right of appeal to the next highest court;
- (iii) the court hearing such an appeal must deal with it as a matter of extreme urgency; and
- (iv) such order will be automatically suspended, pending the outcome of such appeal.
- (5) For the purposes of subsections (1) and (2), a decision becomes the subject of an application for leave to appeal or of an appeal, as soon as an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules.”
- [18] The first proverbial “hurdle” for the Modiboa’s is to show that exceptional circumstances exist which would justify the court to enforce the judgment pending the appeal process. The second proverbial “hurdle” is that the Modiboa’s should prove, on a balance of probabilities, that they will suffer irreparable harm should the judgment not be enforced, and thirdly the Modiboa’s have to prove that Blom and Venter will not suffer irreparable harm if the judgment is enforced.
- [19] The Supreme Court of Appeal recently illustrated these requirements in the matter of Knoop N.O and Another v Gupta (Execution) 2021
- (3) SA 135 (SCA) as follows:

“[2] At common law, unless the court in the exercise of a discretion ordered otherwise, an application for leave to appeal and an appeal pursuant to leave being granted suspended the operation of the order. It was not open to the successful party to execute on, or otherwise act pursuant to, that order. This common-law rule and the power to grant an execution order are now expressly embodied in s 18(1), read with s 18(3), of the Superior Courts Act 10 of 2013 (the SC Act). The grant of leave to execute is constrained by the requirements that it may only be granted if there are exceptional circumstances; if the applicant will suffer irreparable harm if it is not granted; and if the grant will not cause the respondent to suffer irreparable harm. A further safeguard against the risk of harm being caused by an execution order is the automatic right to an urgent appeal given by s 18(4). Pending such an appeal, the statute expressly provides in s 18(4)(iv) that the operation of the suspension order is itself suspended. This case illustrates what can go awry when a court attempts to override that statutory provision...”

(footnotes omitted)

- [20] In as far as the determination of “exceptional circumstances” are concerned, the Supreme Court of Appeal held as follows in the Knoop matter:

“[46] Courts have always eschewed any attempt to lay down a general rule as to what constitutes exceptional circumstances. The reason is that the enquiry is a factual one. There is a helpful summary in MV Ais Mamas: Seatrans Maritime v Owners, MV Ais Mamas, and Another 2002

- (6) SA 150 (C) at 156E – 157F that has been endorsed both by this court and by the Constitutional Court (see: S v Liesching and Others 2019
- (4) SA 219 (CC)). In the context of s 18(3) the exceptional circumstances must be something that is sufficiently out of the ordinary and of an unusual

nature to warrant a departure from the ordinary rule that the effect of an application for leave to appeal or an appeal is to suspend the operation of the judgment appealed from. It is a deviation from the norm. The exceptional circumstances must arise from the facts and circumstances of the particular case.”

(some footnotes omitted)

- [21] The above emphasis that the Modiboa’s, in order to succeed, is to prove (a) that exceptional circumstances exist to enforce the judgment under appeal (b) that the Modiboa’s will suffer irreparable harm should the judgment not be enforced pending appeal, and (c) that Blom and Venter will not suffer irreparable harm should the judgment be enforced pending appeal.
- [22] The Modiboa’s argue that they will suffer irreparable harm if Blom and Venter continue to occupy the property for an indefinite period without paying any occupational rent. Blom and Venter argue that they will be at risk of irreparable harm should they abandon their retention right and vacate the property without receiving payment of the amount paid towards the purchase price.
- [23] I do not find that any of the parties will suffer irreparable harm should the execution of the court order be stayed, pending the appeal process. The defences raised by both parties are commercial of nature and can be addressed through civil actions of damages, should they so wish.
- [24] No exceptional circumstances have been shown to exist for the order to be implemented pending the appeal. In addition, the onus of proving that irreparable harm will be suffered should the order not be implemented pending the appeal, has not been acquitted.
- [25] For the reasons set out above, I hold the view that another court may come to a different conclusion than this Court did in the order dated 23 August 2023 and that there is a reasonable prospects of success on an appeal. This mitigates against granting an order to execute the order under appeal.
- [26] On this basis the application to enforce the court order cannot succeed and must be dismissed.

Cost

[27] The normal rule is that the cost of both the applications for leave to appeal, as well as the application to enforce the court order, should be reserved to be dealt with on appeal.

[28] I find no reason to deviate from this rule and the costs of both the applications for leave to appeal, as well as the application to enforce the court order is reserved to be decided on appeal. Should the applicants not proceed with the appeal, the cost of both the applications are to be paid by the applicants being CASPER-JEAN BLOM and CHANDRE VENTER the one paying the other to be absolved.

Order:

[29] In the premise, I make the following order:

(i) Leave to appeal is granted to the full court of this Division.

(ii) The application to enforce the court order dated 3 June 2023 is dismissed.

(iii) Costs of both the applications for leave to appeal, and the application to enforce the court order, are reserved to be decided on

appeal. Should the applicants not proceed with the appeal, the cost of both the applications are to be paid by the applicants being CASPER-JEAN BLOM and

CHANDRE VENTER the one paying the other to be absolved.

FMM REID

JUDGE OF THE HIGH COURT

NORTH WEST DIVISION MAHIKENG

DATE OF HEARING:

1 NOVEMBER 2023

DATE OF JUDGMENT: 5 JANUARY 2024

APPEARANCES:

FOR APPLICANTS: ADV K CHWARO INSTRUCTED BY: DC KRUGER ATTORNEYS 29 NORTH STREET MAHIKENG TEL: 018 381 1680 EMAIL: REF: DC KRUGER FOR 1ST AND 2ND

RESPONDENTS: ADV AW VIVIERS INSTRUCTED BY: VAN COLLER BLOM INCORPORATED BUFFELSDOORN ROAD KLERKSDORP TEL: 018 468 8830 EMAIL: chandre@vcbinc.co.za C/O

LABUSCHAGNE ATTORNEYS 19 CONSTANTIA DRIVE RIVIERA PARK TEL: 018 381 5008 REF: G LABUSCHAGNE

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZANWHC/2024/4.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/blom-and-others-v-modiboa-unknown-topic-anwhc-2024>

Prepared on 11 October 2026 · Esheria