

SOUTH AFRICA / JUDGMENT

Dirk Lotter Vervoer (Pty) Ltd v Sutherland Transport (Pty) Ltd - Application for Leave to Appeal (922/2022) [2023]

ZAFSHC 400 (17 October 2023)

[2023] ZAFSHC 400

COURT

Free State High Court, Bloemfontein

BEFORE

Naidoo

CASE / FILE NUMBER

922/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

FREE

STATE DIVISION, BLOEMFONTEIN

CASE

NO. 922/2022

In

the matter between

DIRK

LOTTER VERVOER (PTY) LTD

APPLICANT

and

SUTHERLAND

TRANSPORT (PTY) LTD

RESPONDENT

IN

RE:

SUTHERLAND

TRANSPORT (PTY) LTD

APPLICANT

versus

DIRK

LOTTER VERVOER (PTY) LTD

RESPONDENT

CORAM: NAIDOO J
HEARD

ON: 28 JULY 202
DELIVERED
ON: 17 OCTOBER 2023

JUDGMENT

- APPLICATION FOR LEAVE TO APPEAL

[1] This is an application by the applicant, Dirk Lotter Vervoer (Pty) Ltd, who was the respondent in the main application, for Leave to Appeal against the whole of the judgment, which was delivered on 19 January 2023. For convenience, I will refer to the applicant as “Dirk Lotter” and the respondent, Sutherland Transport (Pty) Ltd, who was the applicant in the main application, as “Sutherland”. Adv S Tsangarakis represented the applicant in this court and Adv P Zietsman SC, represented the respondent.

[2] The judgment was assailed, in summary, on the following grounds:

2.1 the court failed to appreciate the nature of the main application, being one for liquidation of Dirk Lotter on the basis that it was unable to pay its debts. The application by Sutherland was based on a “skeleton of averments” and therefore lacked bona fides;

2.2 the court did not deal with the load confirmation order at all in its judgment, whereas it was of utmost importance to do so, as it indicates the open account which Dirk Lotter relies on;

2.3 Sutherland reacted to an e-mail sent by Dirk Lotter’s attorney, even before the opposing affidavit was served, and had identified the issues between the parties. Sutherland’s attorneys indicated they held instructions to institute action for the (disputed) amount of R255 006,75 as well as interest, and that the costs of the present application will be argued. The latter-mentioned amount relates to standing charges in terms of the load confirmation order;

2.4 The court erred in dismissing the application to strike out, as the application for the liquidation by Dirk Lotter’s bookkeeper had not been finalized and could not be used as proof that it could not pay its debts’

2.5 the court erred in awarding punitive costs in respect of the application to strike out and of the application.

[3] The facts and background relevant to this were comprehensively set out in the judgment and I do not intend to repeat those details here. I point out for the purposes of reiterating the reasons for the judgment that the main application was a hybrid application, seeking an order for the liquidation of Dirk Lotter, alternatively payment by Dirk Lotter of the amount of R1 542 776.75. The application was served on 4 March 2022 and three days later, on 7 March 2022, Dirk Lotter paid to Sutherland the amount R1 288 330.00. Only thereafter, did Dirk Lotter engage with Sutherland and identify

issues between the parties. It did not deal at all with the issue of its payment of the aforesaid amount, save to indicate that the shortfall related to standing charges, on which Sutherland was not entitled to payment of interest. It was in respect of this amount that Sutherland indicated it would institute action against Dirk Lotter, together with interest. The payment of over R1.2 million clearly attracted interest, as it was taken that that Dirk Lotter acknowledged its liability to Sutherland in that amount.

- [4] Sutherland furthermore, specifically averred that payment of that amount by Dirk Lotter deprived it of its locus standi to proceed with the application for liquidation, hence it refrained from doing so. The court set out its reasoning in detail, leading to the judgment it handed down. The grounds upon which Dirk Lotter now seeks to assail the judgment, cannot in my view be sustained. Many of the submissions made in respect of this application were made during the hearing of the main application, and were dealt with in the judgment.
- [5] I mention that it would have been inappropriate for this court to deal with the issue of the load confirmation order, as that would have been the subject matter of the action that Sutherland indicated it would institute. This court was therefore, concerned only with the issue of the payment of interest on the amount that Dirk Lotter acknowledged itself to be liable to Sutherland for, and the striking out application which required final determination.
- [6] It is by now trite that Section 17 of the Superior Courts Act 10 of 2013 (the Act), regulates the test to be applied in an application for leave to appeal. The relevant provisions of section 17(1) provide as follows:

“(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;”

(my emphasis and underlining).

- [7] It is clear from section 17(I), set out above, that the situation is now somewhat different from the previous dispensation, where an applicant was merely required to show that there is a reasonable possibility that another court, differently constituted, would find differently to the court against whose judgment leave to appeal is sought. An applicant for leave to appeal is now required to convince the court that there is a reasonable prospect of success and not merely a possibility of success.
- [8] It is well established in our law that section 17 holds an applicant seeking leave to appeal to a higher threshold than previously, to convince a court to grant leave to appeal. In *The Mont Chevaux Trust v Tina Goosen + 18 2014 JDR LCC*, Bertelsmann J held that:

“It is clear that the threshold for granting leave to appeal against 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....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.”

Mont Chevaux has been followed in a number of decisions. See *Matoto v Free State Gambling and Liquor Authority* (4629/2015) [2017] ZAFSHC 80 (8 June 2017), *The Full Court in Acting National Director of Public Prosecutions and Others v Democratic Alliance* (19577/2009) [2016] ZAGPPHC 489 (24 June 2016) also cited Mont Cheveau with approval.

[9] All the points raised by Dirk Lotter were done after payment of the money to Sutherland. It was much later, when it was clear that Sutherland intended to proceed and recover interest on the amount paid, that the application was opposed. Notably, Dirk Lotter has, even now, failed to explain its payment of R1 288 330.00 to Sutherland, and simply ignores the fact that it would be liable for interest on that amount. I do not propose to deal further with the grounds of appeal, save to say that the reasoning of the court is abundantly clear from the judgment. In my view, there exists no reasonable prospect that another court would come to a different conclusion or find differently to this court.

[10] In the circumstances the following order is made:

The application for leave to appeal is dismissed with costs.

S NAIDOO J

On behalf of the Applicants: Adv S Tsangarakis Instructed by: Honey Attorneys 1st Floor Honey Chambers Northridge Mall Kenneth Kaunda Road Bloemfontein (Ref: A Prinsloo/fk/133404) On behalf of the Respondent: Adv P Zietsman SC Instructed by: McIntyre Van Der Post 12 Barnes Street Westdene Bloemfontein (Ref: BAD001/AD Venter/ljb)

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Prepared on 11 October 2026 · Esheria