

SOUTH AFRICA / JUDGMENT

Du Plessis and Others v Pieterse and Others (9912/23) [2024] ZALMPPHC 127 (9 September 2024) [2024] ZALMPPHC 127

COURT

Limpopo High Court, Polokwane

BEFORE

Sikhwari

CASE / FILE NUMBER

9912/23

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REPUBLIC OF SOUTH

AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

(LIMPOPO DIVISION,

POLOKWANE)

CASE

NO: 9912/23

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO THE

JUDGES: YES/NO

(3) REVISED.

DATE: 09/09/2024

SIGNATURE:

In

the matter between:

GERHARDUS
JACOBUS DU PLESSIS
1ST
APPLICANT
JOHN
HENRY KEYSER
2ND
APPLICANT
BRAVOROX
27 (PTY) LTD
3RD
APPLICANT
PIXIE
DUST TRADING 67 (PTY) LTD
4TH
APPLICANT
HOHN
HENRY KEYSER N.O
5TH
APPLICANT
MARTHA
ETRESIA KEYSER N.O
6TH
APPLICANT
JOHANNES
JACOBUS DEALE N.O
7TH
APPLICANT
and
SUSANNA
KATRINA PIETERSE
JOHANNESN
ALBRECHT PIETERSE N.O
1ST
RESPONDENT
2ND
RESPONDENT
SUSSANA
KATRINA PIETERSE N.O
3RD
RESPONDENT
In

re: SUSANNA
KATRINA PIETERSE
1ST
APPLICANT
JOHANNESN
ALBRECHT PIETERSE N.O
2ND
APPLICANT
SUSSANA
KATRINA PIETERSE N.O.
3RD
APPLICANT
and
GERHARDUS
JACOBUS DU PLESSIS
1ST
RESPONDENT
JOHN
HENRY KEYSER
2ND
RESPONDENT
BRAVOROX
27 (PTY) LTD
3RD
RESPONDENT
COMPANIES
AND INTELLECTUAL
PROPERTIES
COMMISSION
4TH
RESPONDENT
PIXIE
DUST TRADING 67 (PTY) LTD
5TH
RESPONDENT
HOHN
HENRY KEYSER N.O
6TH
RESPONDENT
MARTHA
ETRESIA KEYSER N.O
7TH
RESPONDENT
JOHANNES
JACOBUS DEALE N.O
8TH
RESPONDENT

JUDGMENT**[LEAVE TO APPEAL]**

This judgment is delivered electronically by way of dispatching same to email addresses of the parties' legal representatives and publishing same on SAFLII. The date of delivery of this judgment is deemed to be 9 September 2024.

SIKHWARI AJ

- [1] For the sake of convenience, I will refer to the parties as cited in this application for leave appeal above. On 7 November 2023, this court heard an urgent application brought by the respondents in these application for leave to appeal who were the applicants in the main matter. This court granted an order in favour of the respondent except prayer 3 of their notice of motion which I refused to grant. The essence of the orders granted on 7 November 2023, in my *ex tempore* judgment was that of an interdict setting aside certain decisions which were taken by the first and second applicants directors of the third applicant on 20 October 2023 are set aside or suspended pending final adjudication of certain two matters relating to the dispute over the management of the third applicant. The first and second applicants are the majority directors / shareholders of the third applicant.
- [2] Aggrieved by the order of this court, the applicants filed an application for leave to appeal. It is trite law that application for leave to appeal is regulated in terms of Section 17 of the Superior Courts Act 10 of 2013, which provides that:
- 17.(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;
- (b) the decision sought on appeal does not fall within the ambit of section 156(2)(a); 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."
- [3] Courts have interpreted the above new provisions of the Act in several decisions and distinguished same from the previous test of "reasonable prospects of success" on appeal. The use of the word "would" in section 17 (1) (a) of the Act above in the new test has risen the bar to a very higher standard in that the test now is that the applicant for leave to appeal must demonstrate some level of certainty that the appeal may succeed, NOT that it may succeed, NOT that it is arguable, NOT that another court may arrive at a different decision.

- [4] The new test in terms of section 17 (1) (a) of the Act was first confirmed, and explained thoroughly, in the case of *The Mont Chevaux Trust (IT2012/28) v Tina Goosen & 18 Others* 2014 JDR 2325 (LCC) at para 6, where Bertelsman 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, 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."

- [5] The *Mont Chevaux Trust* test on leave to appeal was later followed by the court as good current law in the case of *Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others*, (19577/09) [2016] ZAGPPHC 489 (24 June 2016) at para 25, the full court of the Gauteng Division in Pretoria, per Ledwaba DJP, Pretorius J and Mothle J (as he then was) held that:

"The Superior Courts Act has raised the bar for granting leave to appeal ..."

- [6] In the case of *Fair-Trade Independent Tobacco Association V· President of the Republic of South Africa and Another* (21688/2020)

[2020] ZAGPPHC 246 (24 July 2020) at para 6, the full court of the Gauteng Division in Pretoria per Mlambo JP, Molefe J and Sasson J considered the above-stated decisions on interpreting section 17 (1)

- (a) of the Act, and correctly held that:

"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 grounds of appeal."

- [7] The aforesaid new test was further confirmed as good current law by the Supreme Court of Appeal (SCA) in respect of section 17 (1) (a) of the Act in the case of *Smith v S* 2012 (1) SACR 567 (SCA) at para 7, where Plasket AJA held that:

"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 categorized as hopeless. There must, in other words, be a sound, rational basis for the

conclusion that there are prospects of success on appeal."

[8] In another case of MEC of Health, Eastern Cape v Mkhitha and Another (1221/2015) [2016] ZASCA 176 (25 November 2016, at paragraphs 16 and 17, Schippers AJA reaffirmed the SCA's disapproval to the granting of leave to appeal where the new threshold of a higher test was not met when the unanimous judgment of the SCA held that:

"[16] 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.

"[17] 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 prospect of success on appeal."

[9] The court was informed by the fact that the first and second applicants took certain resolutions in a meeting held on 20 October 2023 in which the minority directors / shareholders were not invited. This factor is common cause. The reason for not inviting the respondents at the meeting of 20 October 2023 was solely that the said directors/ shareholders are conflicted. The proper course should have been to invite them and let them declare their conflict or simply by excused by a resolution of the third respondent, but not by the dictates of the first and second respondents. The latter approach which was preferred by the applicants was grossly irregular and / or unlawful and/ or irrational in the circumstances.

[10] The court has not closed the door of the applicants to have their litigation against the debtors of the third applicant herein. The court has simply emphasized and upheld the rule of law in that it has left the door open for the directors or shareholders of the third applicant to convene a proper meeting which complies with the law; and then take proper and lawful resolutions within the parameters of the Companies Act.

[11] In the premises, this court is of the view that the appeal has no reasonable prospects of success and / or does not meet the threshold as stated in Section 17 of the Superior Courts Act 10 of 2013, as amended. This application for leave to appeal has to fail, with costs on party and party scale, on Scale C, against the first, second, fifth, sixth and seventh applicants in the application for leave to appeal, jointly and severally with the one paying the other to be absolved.

[14] Accordingly, the following order is made:

1. That the application for leave to appeal is dismissed.

2. The first, second, fifth, sixth and seventh applicants in the application for leave to appeal are ordered to pay costs of this application on Scale C (of party and scale), jointly and severally with the one paying the other to be absolved.

MS SIKHWARI

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA,

LIMPOPO DIVISION,

POLOKWANE

APPEARANCES:

For Applicant

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Instructed by

Burger & Vennote

c/o Swanepoel, Steyn & Spruyt

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Heyns and Partners Attorneys

c/o Kirk Twine Attorneys

Date of hearing :

03 May 2024

Date of

Judgment:

09 September 2024

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Prepared on 11 October 2026 · Esheria