

SOUTH AFRICA / JUDGMENT

Ixia Trading 532 (Pty) Ltd v Auto GP Motors (Pty) Limited (36584 /2020)

[2021] ZAGPJHC 614 (26 October 2021)

[2021] ZAGPJHC 614

COURT

South Gauteng High Court, Johannesburg

BEFORE

Nichols

CASE / FILE NUMBER

36584 /2020

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 36584 /2020

REPORTABLE:

NO
OF
INTEREST TO OTHER JUDGES: NO
REVISED.
NO

DATE:

26 October 2021
In

the matter between:

IXIA
TRADING 532 (PTY) LIMITED
(REG
NUMBER: 2002/011149/07)
Applicant
And
AUTO
GP MOTORS (PTY) LIMITED
(REG
NUMBER: 2014/102456/07)
Respondent

Coram: Nichols AJ

Heard: 22 October 2021 – The ‘virtual hearing’ by the Court was conducted as a videoconference on Microsoft Teams.

Delivered: 26 October 2021 – This judgment was handed down electronically by circulation to the parties’ representatives via email, by being uploaded to Caselines and by release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 26 October 2021.

JUDGMENT

(LEAVE TO APPEAL)

NICHOLS AJ:

Introduction

[1]

This is an application for leave to appeal by the respondent (in the main application), against the judgement and order delivered on 30 August 2021 (the judgment). Leave is sought to appeal to the Supreme Court of Appeal, alternatively a full court of this division. The application is opposed by the applicant (in the main application).

[2]

For the sake of convenience, I shall refer to the parties as they are cited in main application.

[3]

Full reasons have been provided for the judgment and will not be repeated. The order granted, provided as follows:

1 The Applicant’s cancellation of the Lease to Purchase Agreement concluded on 3 August 2018 is confirmed.

2 The Respondent and all persons in occupation by, through or under it shall vacate the property at 19 John Street, Selby (Erf 326, Selby, City of Johannesburg) (“the property”).

3 Should the Respondent and / or all persons occupying the property by, through or under it, not vacate the property within 15 days of the date of the order, the sheriff or his lawful deputy, is hereby authorised to evict the Respondent from the property.

4 The Respondent’s counter-application is dismissed.

5 The Respondent is ordered to pay the costs of the application and the counter-application on the scale as between attorney and own client.

[4]

Subsequent to the delivery of the judgment, the respondent filed a notice of application for leave to appeal setting out the grounds of appeal

The test in an application for leave to appeal

[5]

It is trite that leave to appeal must be sought in terms of s 16 and s 17(1) of the Superior Courts Act.[1] s 17(1) reads as follows:

‘Section 17(1)

- (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 16 (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.’

[6]

This test is much higher than the previous requirement for leave to appeal which required that there should be reasonable prospects that another court may come to a different conclusion. As stated by Bertelsmann J in the matter of *The Mont Chevaux Trust v Tina Goosen & 18 Others*[2]:

‘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.’[3]

[7]

The respondent is therefore required to satisfy this court that it has reasonable prospects of success on appeal and that based on the facts and the law another court will arrive at a conclusion different to that reached by this court.[4] As Plasket AJA said in Smith: ‘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.’[5]

[8]

Although the respondent’s notice of application for leave to appeal did not specify the sub-section of s 17 upon which it was premised, the heads of arguments which were submitted on behalf of the respondent recorded that the application was premised upon s 17(1)(a). Accordingly, the respondent is required to satisfy this court that it has reasonable prospects of success on appeal or that there are compelling reasons why the appeal should be heard.

[9]

The following reasons have been distilled from the application for leave to appeal as the respondent’s critical contentions for why the leave to appeal should be granted, namely:

- (a) The effect of Covid-19 and its impact on commercial interests should have been taken into account, particularly since it was known to one or both of the parties and was not foreseeable. As a result the respondent’s breach was not as a result of its own fault.
- (b) The respondent’s performance of its obligations in terms of the agreement should have been objectively evaluated. This would have resulted in the ineluctable conclusion that there was substantive performance by the respondent of an instalment sale agreement. Further, that in light of such substantial performance by the respondent, the cancellation of the agreement was not just and equitable in the circumstances. Regard should have also been taken of the improvements made on the property and the concomitant improvement lien considerations which may have arisen.
- (c) It was a material misdirection by this court when it overemphasised the nature of the agreement as a lease to purchase as opposed to an actual alienation of land in terms of the Alienation of Land Act 68 of 1981.

- (d) It was a further material misdirection by this court when it overemphasised the nature of the option to purchase and the failure to conclude, as contended by the respondent, that such option had been exercised at the commencement of the agreement.
- (e) The constitutional court principles as enunciated in the matters of *Beadica 231 CC* and *Others v Trustees, Oregon Trust and Others*[6] and *Botha v Rich N.O*[7] were misapplied.
- (f) The principle of *pacta sunt servanda* was escalated and overemphasized without consideration given to the global or local economic conditions; the infusion of the constitution in contractual relationships particularly where contractual terms are arbitrary.
- (g) It was material misdirection by this court when it found that a common cause fact or admitted fact was that the primary intention of the parties was to conclude a lease to purchase agreement as opposed to an instalment sale agreement.
- [10] The respondent also noted in the application for leave to appeal that it will seek leave to lead further evidence at the appeal. No reasons or grounds were advanced in the application for leave to appeal why the court hearing the appeal will be inclined to grant the respondent this indulgence.
- [11] In considering whether another court ‘would’ come to a different conclusion, I have taken into account the application for leave to appeal, the heads of argument filed and the oral submissions on behalf of the parties.
- [12] In the main application, the parties were *ad idem* that the crisp issue which required resolution was whether, despite demand in terms of the breach clause entitling the applicant to cancel the agreement, the enforcement of such cancellation would be contrary to public policy and therefore invalid. In reaching this consensus, the parties were in agreement that the majority of the facts in the matter were common cause. This was evidenced by the joint practice note submitted by the parties’ representatives and it was also readily discernible from the pleadings.
- [13] In order to adjudicate this dispute, I was required to determine whether the cancellation clause of the agreement concluded between the parties, entitled the applicant to cancel the agreement on non-payment of rental; whether there had in fact been non-payment of rental; and the circumstances and facts of the matter which militated against or obliged me to enforce the cancellation of the agreement. An additional consideration which was belatedly raised by the respondent but which was nevertheless taken into account, was whether the signed agreement embodied the actual terms of the agreement concluded between the parties.

[14]

In order to describe the thrust of the respondent's case, I can do no better than quote Mathopo JA in the matter of Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd[8], where he described the respondent's case in that matter as: 'In essence, the case advanced for the respondent is that the principle of pacta sunt servanda is not a sacred cow that should trump all other considerations.'[9]

[15] Mr Maphutha, on behalf of the respondent, essentially argued that the objective performance by the respondent is a critical consideration

which goes to the heart of establishing the respondent's contentions that the actual agreement between the parties is a sale

in terms of the Alienation of Land Act. He argued that the objective undisputed facts support this contention and the argument that substantial performance in terms of a sale agreement is sufficient reason for a court to decline to enforce a cancellation clause. This argument has been addressed in the judgment.

[16] The grounds of appeal which appear at para 9(a) and the latter portion of para 9(b) supra are based upon new arguments that were not foreshadowed by the pleadings or raised at the opposed hearing of the main application. This court was not asked to take judicial notice of Covid-19 and its impact on the commercial interests of the respondents. Mr Maphutha was unable to clarify whether the argument now advanced is that the court should have, *mero motu*, taken judicial notice of Covid-19 and its impact on the commercial interests on the respondent. It is also not clear to what extent the court should have done this and whether it is further contended that the court should have, during this consideration, fashioned a defence or reason for the respondent's failure to comply with its obligations in terms of the agreement. Similarly, it is unclear to what extent this court ought to have considered improvements to the property and a potential improvement lien failing a reliance thereon in the pleadings or during argument at the hearing of the application.

[17] Mr Hollander, on behalf of the applicant, argued that the respondent has no reasonable prospects of success on appeal. He also contended that the respondent has not adduced any compelling reasons for leave to be granted. He argued that the disputed and undisputed facts of this matter were correctly assessed and applicable and the relevant law was correctly applied.

[18]

There is no *numerus clausus* as to what constitutes a 'compelling reason' sufficient to justify leave to appeal being granted. However, the following are just a few reasons that have been accepted as compelling reasons by our courts. Conflicting judgments on the matter sought to be appealed; the proper interpretation of a section of legislation; that the case raises a discrete issue of public importance that will have an effect on future matters or that a point of law has been raised which will require resolution.[10] The respondent has not argued that its grounds of appeal fall within these identified categories, nor could it be contended that they do.

[19]

Mr Maphutha pointedly declined to elaborate on the additional evidence which would be adduced should leave to appeal be granted. In view of the fact that such application should properly be brought before the court hearing the appeal, I shall not overly concern myself with the merits of this proposal save to observe that the respondent would be required to comply with the requirements of s 19(b) of the Superior Courts Act when making such application before a court hearing the appeal. These requirements include furnishing a sufficient explanation for why the evidence was not advanced before the court a quo and that the evidence is materially relevant to the outcome. At a minimum, I would have expected the respondent to explain the reasons for not advancing this evidence in the main application and to aver that the evidence would be incontrovertible, conclusive and material to the issue in this matter.[11]

Conclusion

and order

[20] Having considered the arguments presented by the parties and in particular the respondent, I am not persuaded that there is a reasonable

prospect that another court would arrive at a different conclusion than that arrived at by this court. I am also not persuaded that compelling reasons have been proffered for the application to be granted.

[21] On the question of costs, I see no reason to deviate from the provision for attorney and own client costs as set out in clause 23 of the agreement.

[22] In the premises, the following order is made:

- (a) The application for leave to appeal is refused.
- (b) The respondent is ordered to pay the costs of this application on the scale as between attorney and own client.

T NICHOLS

ACTING JUDGE OF THE HIGH COURT

Appearances:

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[1] Act 10 of 2013

[2] 2014 JDT 2325 (LCC).

[3] The Mont Chevaux Trust para 6.

[4] S v Smith 2012

(1) SACR 567 (SCA) para 7.

[5] Smith para 7.

[6] Beadica 231 CC and Others v Trustees, Oregon Trust and Others 2020 (5) SA 247 (CC)

[7] Botha v Rich N.O 2014 (4) SA 124 (CC)

[8] (183/17)

[2017] ZASCA 176 (1 December 2017).

[9] Mohamed's Leisure Holdings para 12.

[10] Nova Property Group Holdings Ltd and Others v Cobbett and Another (MandG Centre for Investigative Journalism NPC as Amicus Curiae) [2016] 3 ALL SA 32 (SCA) paras 10, 11 and 12; Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre (Helen Suzman Foundation and Others as Amici Curiae) [2016] 2 ALL SA 365 (SCA) para 23.

[11] Simpson v Selfmed Medical Scheme 1995

(3) SA 816 (A) 825A-E.

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