

SOUTH AFRICA / JUDGMENT

Marais and Another v Klopper N.O. and Others - Leave to Appeal (4786/2019)

[2023] ZAFSHC 408 (26 October 2023)

[2023] ZAFSHC 408

COURT

Free State High Court, Bloemfontein

BEFORE

Mthimunya, AJ

CASE / FILE NUMBER

4786/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

FREE

STATE DIVISION, BLOEMFONTEIN

Case

no: 4786/2019

Reportable: YES/NO

Of

Interest to other Judges: YES/NO

Circulate

to Magistrates: YES/NO

In

the matter between:

ZELNA
MARAIS
1ST
APPLICANT
PETRUS
JACOBUS DELPORT
2ND
APPLICANT
and
WOUTER
KLOPPER N.O.
1ST
RESPONDENT
DANIEL
FRANCOIS PRINSLOO N.O.

2ND
RESPONDENT
ADRIE
WIESNER HECHTER N.O.
3RD
RESPONDENT

CORAM: MTHIMUNYE, AJ
HEARD

ON: 14 AUGUST 2023

JUDGMENT

BY: MTHIMUNYE, AJ

DELIVERED ON: 26 OCTOBER 2023

[1] This is an application for leave to appeal to the full bench of the Free State Division of the High Court against part of the order and judgement of my sister Mahlangu AJ handed down on 6 March 2023. In the assailed judgement, Mahlangu AJ found in favour of the Respondents (Plaintiffs in the main action) in the following terms:

“1. ...

2. The Plaintiffs’ claim is granted.
3. The second defendant is ordered to pay the plaintiffs an amount of R235 875.00.
4. The second defendant is ordered to pay the plaintiffs’ costs on an attorney and client scale.”

[2] The judgment of Mahlangu AJ is assailed mainly on the basis that she erred in finding that the respondents had proven their claim against the applicants in the amount of R235 875.00; that the second applicant is therefore liable for payment thereof on the basis of the second undertaking for the first applicant’s failure to comply with the second Deed of Sale agreement; that the respondents are entitled to agent’s commission; and further awarding costs against the second defendant on an attorney and client scale. The grounds are fully enunciated in the applicant’s application for leave dated 27 March 2023.

[3] The brief background of the matter is that on 4 March 2016 the respondents entered into a sale of property agreement (“the first agreement”) with the first applicant. On 2 June 2018 the second applicant signed an undertaking that he would take over the obligations of the first applicant in relation to the first agreement. The first applicant failed to comply with the first agreement and the respondents cancelled it on 17 October 2018. On 3 November 2018 the respondents entered into the second agreement with the first applicant, pursuant to which the second applicant issued an undertaking similar to the one relating to the first agreement. The first applicant failed to comply with the second agreement and so did the second applicant in respect of his undertaking. The respondents then instituted action

against the first and second applicants for recovery of contractual damages allegedly suffered as a result of the applicants' breach of contract. Mahlangu AJ found in favour of the respondents, which finding is the subject of this application.

- [4] The applicants contend that the respondents failed to prove the essentialia of their claim on the preponderance of probabilities and did not prove such damages. They argue that consequential damages can only be claimed if the parties actually or presumptively contemplated that such damages would result from breach of a particular contract, such contemplation must be ascertained at the time the contract is concluded. Further, the applicants argue that the agent's commission was not part of the initial agreement between the parties and as such, the first applicant cannot be held liable for consequential damages of the second sale. In this regard, the applicants contend that the judgment of Mahlangu AJ contradicts the test for quantification of damages as applied in our law.
- [5] In opposing this application, the respondents submit that their claim was proven by the evidence of Mr Deon Rossouw and Pieter Muller, whose evidence was never disputed by the applicants. In fact, the applicants did not even cross-examine Mr Muller, who testified as a qualified expert. As the end of this evidence the Respondents closed and so did the applicants, without leading any evidence. The respondents aver that by so doing, the applicants accepted Mr Muller's evidence, which stood uncontested and was also accepted by the court. Further, it was submitted that the respondents had a duty to mitigate their damages when the applicants defaulted hence they procured the services of an expert agent to market the property, which then gave rise to the commission which the first applicant was then held responsible for. The respondents argue that to avert liability in respect of the commission, the applicants would have to prove that the steps taken by the respondents to mitigate the

damage were not reasonable.

- [6] The substantive law pertaining to applications for leave to appeal is encapsulated in Section 17 (1) of the Superior Courts Act 10 of 2013, and sets out the test as follows:

"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] Section 17(1) clearly sets out that an applicant seeking leave to appeal is required to convince the court that there is a reasonable prospect of success and not merely a possibility of success in the appeal. In *Democratic Alliance v President of the Republic of South Africa and Others* (21424/2020) [2020] ZAGPPHC 326 (29 July

2020) at para [4]- [5] the Full Court held as follows:

“The test as now set out in s17 constitutes a more formidable threshold over which an applicant must engage than was the case. Previously the test was whether there was a reasonable prospect that another court might come to a different conclusion. See, for example, Van Heerden v Cronwright and Others 1985(2) SA 342 (T) at 343 H. The fact that the Superior Courts Act now employs the word ‘would’ as opposed to ‘might’ serves to emphasise this point. As the Supreme Court of Appeal said in Smith v S 2012(1) SACR 567 (SCA) at para 7;

‘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. The applicant must show that another court “would” come to a different conclusion in its favour’.

[8] This dictum serves to emphasise a vital point: Leave to appeal is not simply for the taking. A balance between the rights of the party which was successful before the court a quo and the rights of the losing party seeking leave to appeal need to be established so that the absence of a realistic chance of succeeding on appeal dictates that the balance must be struck in favour of the party which was initially successful.”

[9] The essence of this appeal is on the application of legal principles in that the applicants contend that the assailed judgment contradicts the test for quantification of damages as applied in our law. In the event that the applicants are correct, it might as well be that another court would arrive at a different conclusion, and as such I am persuaded that this application for leave must succeed.

Consequently, I make the following Order:

1. Leave to appeal to a full bench of the Free State Division of the High Court is granted.
2. Costs shall be costs in the cause.

D. P. MTHIMUNYE, AJ

For the Applicant: Adv J Ferreira Instructed by Noordmans Inc. Bloemfontein
For the Respondents: Adv. F.G. Janse Van Rensburg Instructed by: J G Kriek & Cloete Attorneys
Bloemfontein

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Prepared on 14 October 2026 · Esheria