

SOUTH AFRICA / JUDGMENT

Thondlana v ABSA Bank Limited (Leave to Appeal) (29241/2017) [2024] ZAGPPHC 1298 (3 December 2024)

[2024] ZAGPPHC 1298

COURT

North Gauteng High Court, Pretoria

BEFORE

Van der Merwe

CASE / FILE NUMBER

29241/2017

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IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG DIVISION,

PRETORIA

Case No: 29241/2017

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

NOT REVISED

DATE 3 December 2024

SIGNATURE

In

the matter between:

KUTALA
PENELOPE THONDLANA
APPLICANT
and
ABSA
BANK LIMITED
RESPONDENT
In

re: ABSA
BANK LIMITED
PLAINTIFF
KUTALA
PENELOPE THONDLANA
DEFENDANT
This judgment is made an
order of court by the Judge whose name is reflected herein, duly
stamped by the Registrar of the Court,
and is submitted
electronically to the parties/their legal representatives by email.
This judgment is further uploaded to the electronic
file of this
matter on Caselines by the Judge or his/her secretary. The date of
this order is deemed to be 3 December 2024.

JUDGMENT

VAN DER MERWE AJ

INTRODUCTION

- [1] This is an application for leave to appeal by the Applicant against the order in this matter delivered on 22 July 2024.
- [2] When the order was granted, a written judgment was prepared, and proper reasons were given.
- [3] The Applicant filed its application for leave to appeal on 20 August 2024. The Applicant's grounds of appeal are contained in the application for leave to appeal and the court need not traverse on the grounds.
- [4] The grounds of appeal are essentially that the court erred in not granting an application for a postponement in the matter. Secondly, that the court found that there were no facts placed before it that would demonstrate the Applicant's financial situation stands to improve and that the Applicant would be able to settle the arrears. It is also contended that the court erred in not suspending the warrant of execution for a period of three months.

APPLICATION FOR LEAVE TO APPEAL

- [5] It is trite that section 17 of the Superior Courts Act 10 of 2013 ("the Act") regulate the test to be applied in an application for leave to appeal. Section 17(1) reads as follows:

"17.

- (1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that –

- (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] An applicant applying for leave to appeal, is required to convince the court that there is a reasonable prospect of success and not merely a possibility of success. Section 17(1)(a)(i) of the Superior Courts Act, was dealt with in the decision of the Land Claims Court in the *Mont Chevaux Trust v Tina Goosen and 18 others* 2014 (JDR) 2325 (LOCC); 2014 JDR 2325 in which Bertelsmann J held that the use of the word “would” (as opposed to could) in the provisions as an indication that a threshold for leave to appeal has been raised. It was further held that the word “would” indicates a measure of certainty that another court would differ from the judgment appealed against.[1]

[7] In the matter of *Ramakatshe and others v African National Congress and another* (724/2019)

[2021] ZASCA 31 (31 March 2021), the following was held at paragraph 10:

“.....I am mindful of the decisions at high court level debating whether the use of the word “would” as opposed to “could”

possibly mean(sic) that the threshold for granting the appeal has been raised. If a reasonable prospect of success is established, leave to appeal should be granted. Similarly, if there are some other compelling reasons why the appeal should be heard, leave to appeal should be granted. The test for reasonable prospects of success postulates 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 other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist.”

[8] The Appellant’s main complaint relates to the exercise of the court’s discretion in not granting an application for postponement from the bar, without a substantive application being before court. During argument the Applicant contended that the court should have suggested that the matter stand down for the representative appearing on behalf of the Applicant, to draft an application for postponement. This contention is rejected.

[9] A further complaint and / or ground of appeal emanates from the findings of the court that, no compelling reasons were advanced that the Applicant will have alternative means to settle the amount owing. It is suggested in the application for leave to appeal that the court should have considered factors that were not placed before court on the day of the hearing. No compelling facts were placed before court to consider and the court exercised its discretion in ordering execution of the immovable property.

[10] It is now well-established that an Appellate Court will not likely interfere with the decision of a lower court exercising a discretion

when determining an issue, unless the discretion was not exercised judicially and properly. Put differently, when a lower court exercises a discretion in the true sense, it would ordinarily be inappropriate for an Appellate Court to interfere unless it is satisfied that this discretion was not exercised judicially, or that it had been influenced by wrong principles or a misdirection of the facts.[2]

[11] This court properly considered all of the facts placed before it in the exercise of its discretion. There were no facts placed before this court to indicate that this court did not exercise its discretion judicially in either refusing the application for a postponement, ordering the executability of the property, or not suspending the warrant of execution for a certain period.

[12] When one considers the prospects of success, on the grounds set out in the notice of appeal, this court is not satisfied that the Applicant has made out a proper case that the Applicant would have reasonable prospects of success on appeal.

[13] I therefore find that the Applicant did not demonstrate that it has prospects of success on appeal or that this matter raises any question of law or any matter of public importance, which would demand the attention of either the Full Court of this Division or the Supreme Court of Appeal.

[14] In the circumstances, I make the following order:

1. The application for leave to appeal is dismissed, with costs.

VAN DER MERWE, AJ ACTING JUDGE IN THE HIGH COURT
OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

Counsel for the Applicant: Mr T Faku Instructed by: T Faku Incorporated Counsel for
Respondent: Adv J Minnaar Instructed by: Hammond Pole Majola Inc. Date of hearing: 23
October 2024 Delivery of judgment: 3 December 2024

[1] Mont Chevaux Trust at par 6.

[2] See: Goss v Bennett (A5021/2022)

[2023] ZAGPJHC 556 (31 May 2023) at par 10.

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Prepared on 9 October 2026 · Esheria