IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

CASE NO.: 2178/18

Heard on: 19 May 2020

Delivered on: 28 May 2020

In the matter between:

JOYCOR ENTERPRISES (PTY) LTD	**APPLICANT**
and	
BENJAMIN PAUL DRAAI	**First Respondent**
KAREN ANN DRAAI	**Second Respondent**
RAYNARD VICARTO BRASS	**Third Respondent**
SHEREEZ GWENDOLENE BRASS	**Fourth Respondent**
THE REGISTRAT OF DEEDS KING WILLIAMS TOWN	**Fifth Respondent**
RAYNARD VICARTO BRASS N.O.	**Sixth Respondent**
SHEREEZ GWENDOLENE BRASS N.O.	**Seventh Respondent**

JUDGMENT

GQAMANA J

[1] This is an application for leave to appeal against my Order and judgment which was handed down on 3 March 2020. Only the third, fourth sixth and seventh respondents are contesting my judgment. The first and second respondents, the previous owners of the property in question have not participated in the present application.

[2] The factual matrix relevant hereto are well set out in the judgment. In brief, the applicant and the first and second respondents entered into an agreement of sale on 17 February 2017 in terms of which, the applicant purchased from them the property relevant hereto. Such agreement contained some suspensive conditions. It is those suspensive conditions which Mr Beyleveld argued that they were not fulfilled hence his submissions that there was no valid contract between the applicant and first and second respondents. The argument to a greater extent was a recitation of their defence in the main application.

[3] It was ardently argued by Mr Beyleveld SC that the applicant has not discharged the *onus* and there were no objective facts to support Mr Bester's view and that his evidence was hearsay. The argument was advanced that, absent an affidavit from the bank the applicant has not discharged the *onus.* Reliance was placed in ***Rees v Haris 2012 (1) SA 583 (GSJ)*** at 596, for the above argument. The principle enunciated therein is accepted. However in the instant matter, as correctly pointed out by Mr Buchanan SC that, it was not only Mr Bester's say so that there was fulfilment of the conditions but the first and second respondents unequivocally in their founding affidavit in the eviction application confirmed that the applicant ("Joycor") had complied fully with its obligations. In addition thereto it is also important not to lose sight on the fact that Mr Bester was the agent, the attorney and the conveyancer for the first and second respondents. It was his obligation and responsibility to ensure that the conditions had been fulfilled and on more than one occasion he confirmed under oath that all the suspensive conditions were fulfilled. Coupled with that, his letter (at page 70 of the index) sets out in detailed how the applicant complied with those conditions. There is no more evidence stronger than what is already presented by the applicant in the form of the confirmatory affidavits

from Mr Bester, his letter, the first and second respondents founding affidavit in the eviction application which all supports the Applicant's contention that all the suspensive conditions were fulfilled is required.

[4] Another fundamental point is that the validity of the first sale agreement was confirmed by Mageza AJ in his judgment in the eviction application. Again as correctly pointed out by Mr Buchanan SC that, the same sale agreement was in dispute in the eviction application and Mageza AJ made the finding in that regard and that finding stands.

[5] In relation to the contention that the Trust was a *bona fide* purchaser of the property, Mr Buchanan SC, correctly in my view argued that all the parties had knowledge of the sale agreement between the applicant and first and second respondents. Reliance on the advice from the first and second respondents erstwhile attorneys that such sale fell through does not alter the factual position that they were aware of the prior sale agreement.

[6] In terms of s 17 (1) of the Superior Courts Act 10 of 2013, leave to appeal may only be granted where the Judge concern is of the opinion that the appeal would have a reasonable prospects of success. The bar of the test that has now to be applied to the merits of the proposed appeal before leave should be granted is higher and stringent compared to the previous test under the now repealed Supreme Court Act 59 of 1959[1].

[1] See Notshokovu v S Unreported Case 157/15 dated 7 September 2016 at para2 and also The Mont Chevaux Trust (IT 2012/2018) v Tina Goosen, Unreported LCC Case No.: LCC14R/2014 dated 3 November 2014).

[7] Having considered all the submissions and the grounds upon which the present respondents seek to rely upon in this application for leave to appeal, I am not persuaded that there are reasonable prospects of success in an appeal.

[8] In the circumstances, I made the following order:

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

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N. GQAMANA

JUDGE OF THE HIGH COURT

REPRESENTATIVES

For the Applicant	: ADV R. G. BUCHANAN SC
Instructed by	: Greyvensteins Attorneys
For the 3rd, 4th, 6th and 7th Respondents	: ADV A. BEYLEVELD SC and MR BANDS
Instructed by	: Swarts Attorneys