


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No: 20/28515

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED YES/NO
	
SIGNATURE	DATE 2/05/2023

In the matter between:

THE ROCK FOUNDATION PROPERTIES CC
ESTHER NYARWAI NDEGWA

First Applicant
Second Applicant

and

DOSVELT PROPERTIES (PTY) LIMITED
ELI NATHAN CHAITOWITZ

First Respondent
Second Respondent

Neutral Citation: *The Rock Foundation Properties CC and Other v Dosvelt Properties (Pty) Limited and Other* (Case no: 28515/ 2020) [2023] ZAGPJHC 408 (02 May 2023)

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 14h00 on 2 May 2023

JUDGMENT

INGRID OPPERMAN J

[1] This is an application for leave to appeal against a judgment handed down by this court on 21 December 2022. This judgment should be read with the 21 December 2022 one (*'the judgment'*).

[2] Leave to appeal is sought against the whole of the judgment. The parties are referred to as in the judgment and all abbreviated descriptions used herein are defined in the judgment.

[3] Mr C van der Merwe, who was not the counsel who argued the matter, raised arguments in this application for leave to appeal which, although in part raised in the heads of argument drafted by him for the main hearing, were not persisted with (or more accurately, raised at all) by Mr Amojee during his address.

[4] Relying primarily on paragraphs [10], [23] and [34] of *Roshcon*,¹ Mr van der Merwe argued that a careful analysis of the terms of the agreements and particularly as they were cross-referenced between the agreements, reveals the extraordinary nature of the agreements and exposes a loan and not an investment all of this constructed to avoid the application of the NCA. He emphasized that one is to consider all the agreements. This, coupled with the fact that the property was allegedly not

¹ *Roshcon (Pty) Ltd v Anchor Auto Body Builders CC and Others*, 2014 (4) SA 319 (SCA)

purchased at market value but at half the value, revealed, so the argument ran, the real nature of the agreements.

[5] This court dealt with the market value of the property in paragraph [59] of the judgment. Crucially, at the time of the conclusion of the agreements, default judgment had been granted against Ms Ndegwa in favour of ABSA. Ms Ndegwa was attempting to stay the sale in execution and the market value must, of course, be viewed in that context.

[6] Mr Simon SC pointed out how this argument was at variance with the version of Ms Ndegwa as set out in her founding affidavit². I agree, it is. The common cause version reveals a shared intention of an investment but at worst for the respondents, and applying the *Plascon Evans* rule, the suite of agreements must be accepted to be what they purport to be – a sale, a lease, and an option to purchase – not a loan, as that is the version of Mr Chaitowitz supported by the content of the suite of agreements. It is common cause that both Ms Ndegwa and Mr Chaitowitz used nominees for reasons of tax efficiency and the structures had investment flexibility to accommodate investors. Nothing sinister is to be inferred from this but more importantly, nothing sinister is alleged under oath. Mr Chaitowitz says that he was not prepared to loan Ms Ndegwa any money because on her track record, she was a bad payer. All of this is dealt with in the judgment.

[7] In the decision of *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and Others*³, Wallis JA observed that a court should not grant leave to appeal, and indeed is under a duty not to do so, where the threshold which warrants such leave,

² Paragraphs [43] and [132]

³ 2013 (6) SA 520 (SCA)

has not been cleared by an applicant in an application for leave to appeal. He held as follows:


“[24] For those reasons the court below was correct to dismiss the challenge to the arbitrator's award and the appeal must fail. I should however mention that the learned acting judge did not give any reasons for granting leave to appeal. This is unfortunate as it left us in the dark as to her reasons for thinking that enjoyed reasonable prospects of success. Clearly it did not. Although points of some interest in arbitration law have been canvassed in this judgment, they would have arisen on some other occasion and, as has been demonstrated, the appeal was bound to fail on the facts. **The need to obtain leave to appeal is a valuable tool in ensuring that scarce judicial resources are not spent on appeals that lack merit.** It should in this case have been deployed by refusing leave to appeal.” (emphasis added)

[8] It has been suggested that the legislature has deemed it appropriate to raise the bar by providing in section 17 of the Superior Courts Act 10 of 2013 that what an applicant in an application for leave to appeal should show is that the appeal ‘*would*’ have reasonable prospects of success not ‘*might*’. It has also been suggested that the legislature did no such thing and in fact simply restated the test which had application prior to the amendment. I will assume for purposes of this application, and in favour of the applicants, that the lower test has application.

[9] Mr van der Merwe valiantly argued that leave to appeal ought to be granted. I have not been persuaded and accordingly make the following order:

The application for leave to appeal is dismissed with costs which costs are to be paid by the Rock Foundation Properties CC (*the Rock Foundation*) and Esther Nyarwai Ndegwa (*Ms Ndegwa*) jointly and severally, the one paying the other to be absolved, which costs are to

include the costs of senior counsel and the costs of two counsel,
where so employed.


LOPPERMAN
Judge of the High Court
Gauteng Division, Johannesburg

Counsel for the applicants: Adv C van der Merwe

Instructed by: Kaveer Guinness Inc

Counsel for the respondents: Adv S Symon SC

Instructed by: Paul Friedman & Associates

Date of hearing: 24 March 2023

Date of Judgment: 2 May 2023