


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)

CASE NUMBER: 16460-2015

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE:
(2)	OF INTEREST TO OTHERS JUDGES:
(3)	REVISED
(4)	
17 OCTOBER 2017	
DATE	SIGNATURE

In the matter between

DUNSTEYN PRODESEER (EDMS) BKP

AND

METCHASH

Defendant

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LEAVE TO APPEAL JUDGMENT

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Molahlehi J

- [1] This application for leave to appeal against the judgment of this court delivered on 25 August 2017 in terms of which the plaintiffs claim was dismissed with costs. The court further entitled judgment in favor of the defendant in relation to the counter claim and ought not the plaintiff to pay to the defendant amount of R169 692.00.

judgment in favour of the defendant about the counterclaim. In this respect, the court ordered the plaintiff to pay to the defendant amount of R169 692.00.

- [2] The matter concerned the claim for specific performance for the payment of the outstanding rental due by the defendant.
- [3] The defendant had opposed the claim on the ground that it was entitled to refuse to pay because the leased property was damaged by a fire which started in the store next door.
- [4] The case of the defendant was that the lease agreement is deemed to have been cancelled in terms of the provisions of the lease agreement.
- [5] The plaintiff's case, on the other hand, was that the damage caused by the fire was not of such a nature as to justify the cancellation of the lease agreement and thus the defendant was the bound by the provisions of the lease agreement to pay for the rental.
- [6] In dismissing the claim, the court found that contrary to the plaintiff's claim the damage to the store occupied by the defendant was not minimal. It found that the damage caused by the fire to the area occupied by the defendant had become no longer beneficial for use for the business of the defendant. It was for this reason that

the court found the lease agreement to be deemed to be cancelled in terms of clause 4.1 of the lease.

[7] The plaintiff has raised several grounds for leave to appeal which I do not deem necessary to repeat in this judgment because the same appears on record in terms of the notice of leave to appeal.

[8] An application for leave to appeal is now governed by the provisions of s17 (1) of the Superior Court Act 10 of 2013 which provides that leave to appeal may not be given unless the learned judge/s are of the opinion that there is reasonable prospect of success.

[9] In dealing with the provisions of s 17 of the Act, Erasmus in Superior Court Practice notes that the legislature has included in the traditional test for determining leave to appeal the word “would.” The word had elevated the test for leave to appeal to a higher standard than it was before the Act was passed.<sup>1</sup> In *Notshokovu v S*,<sup>2</sup> the Supreme Court of Appeal held that the appellant faced a higher and significant threshold in terms of s17 of the Act.

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<sup>1</sup> See *Mont Chevaux Trust (IT 2012/28) v Tina Goosen*, Unreported Land Claims Court case number LCC14R/2014 dated 3 November 2014. This case also cited with approval by the full court in *The Acting National Director of Public Prosecutions v Democratic Alliance* – unreported case number 19577/09 dated 24 June 2016 at paragraph 25.

<sup>2</sup> unreported case number 157/15 date 7 September 2016.

[10] It appears the purpose of elevating the standard in the leave to appeal in the Act is to address the ever increasing caseload of the appeal courts. It has now placed a heavy burden on the applicant not to rely on a mere possibility that another court may reach a different conclusion that would suffice. In terms of the standard the court should if not satisfied that there is a real reasonable prospect of success refuse to grant leave to appeal.

[11] Considering the above, my judgment and the submissions made on behalf of both parties I am not persuaded that another court, faced with the same facts would reasonably arrive at a decision deferent to that of this court.

[12] Accordingly, I find that the application for leave to appeal stands to fail.

Order

[13] The application for leave to appeal is dismissed with costs.



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E Molahlehi

Judge of the High Court of

South Africa; Johannesburg

**Appearances:**

For the Applicant: Adv APJ Els

Instructed by: Couzyn Hertzog and Harak Attorneys

For the Respondent: Adv Riley

Instructed by: Gattoo Attorneys

Heard on: 13 October 2017

Order on: 17 October 2017.