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REPUBLIC OF SOUTH AFRICA
OFFICE OF THE CHIEF JUSTICE
(GAUTENG DIVISION, PRETORIA)

CASE NO: 3101/ 2015
13/12/17

In the matter between:

UNITA MAPULENG NOCWAKA OLIPHANT Applicant
(ID: [...])

and

FIRSTRAND BANK LIMITED Respondent

In re:

FIRSTRAND BANK LIMITED Plaintiff

and

UNITA MAPULENG NOCWAKA OLIPHANT
(ID: [...]) Defendant

JUDGMENT IN THE APPLICATION FOR LEAVE TO APPEAL

MOTEPE AJ:

Introduction

[1] The applicant brings an application for leave to appeal against the

judgment I delivered on 16 October 2017.

The test for the application for leave to appeal

[2] The test for an application for leave to appeal is governed by section 17(1) of the Superior Court Act.¹ It reads thus:

"17.(1) 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;

(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."

[3] Section 16(2)(a) reference in section 17(1)(b) in turn reads as follows:

"(2)(a)(i) When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.

(ii) Save under exceptional circumstances, the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs."

[4] It is apparent from the nature of the grounds raised by the applicant that the applicable test is section 17(1)(a)(i).

The appeal would have no prospect of success

[5] In argument, the applicant in essence re-argued her case in its entirety. In my judgment, I had found that the applicant's complaint that the notice in terms of section 129 of the National Credit Act² was sent to the wrong address lacked

¹ Act 10 of 2013

² Act No 34 of 2005

merit because the track and trace report does show that the notice was indeed addressed to her at [...] C. Street, Bloubastrand Extension 2, Randburg, 2153. The track and trace report does in fact show that the notice was delivered at the post office in whose jurisdiction the applicant resided. Her rhetorical question was why was the notice collected by one J James Greig from Milnerton in Cape Town? The answer to that question will only be speculative. Of relevance is that the notice was delivered to the applicant's post office. The fact that she did not collect it and was returned to sender and thereafter collected by Mr Greig does not affect the outcome of this case.

[6] In her application for leave to appeal, the applicant has impermissibly introduced new evidence that was not before me at the hearing of the application. I rejected this evidence. It was introduced in order to deal with my finding that the applicant's property was already sold to a third party on 10 November 2015 but that the applicant had not cited the new property owner. My finding was that this is a case where one cannot unscramble the egg.

[7] The applicant then introduced this new evidence to prove that the new owner is not “*innocent*” because the estate agent who purchased her property did so knowing very well that the applicant was still challenging the sale of her property. Relying on this new evidence, she referred me to the matter of *Vosal Investments (Pty) Ltd v City of Johannesburg and Others*³ in which the full bench of the South Gauteng Full Bench found that the owner of an immovable property is entitled to restoration of his property from a *bona fide* purchaser at a sale in execution.

[8] However, as counsel for the respondent correctly pointed out, this decision is distinguishable. Firstly, the Court found in that case that the judgment granted in favour of the City of Johannesburg was erroneously sought and granted.⁴ That is not the finding in *casu*. Secondly, in that case, when the rescission application was launched, the sale in execution to the new owner had already taken place but transfer had not yet been effected.⁵ That is not the case in *casu*. I may just add that thirdly, the new owner had been cited in that application. That is not the

³ 2010 (1) SA 595 (GSJ)

⁴ At para 15

case in this application.

[9] Because of the conclusion that I have reached, there is no need to consider further grounds. I am unconvinced that an appeal in this case would have prospects of success for reasons contained in my main judgment and in this judgment.

[10] There is a further ground on which this application should not be granted. The applicant's property was already sold to a third party more than two years ago. The new owner of the property has not been cited. It will be impermissible to grant a rescission of judgment and divest the new owner of her property when he or she is not even before Court.

[11] In the premises, I find that this is not a case that should unduly burden the Appeal Courts because in my view, it has no prospects of success.

[12] In the premises, the application for leave to appeal is dismissed with costs.

JA Motepe

Acting Judge of the High Court

Matter heard on: 7 December 2017

Judgment reserved on: 7 December 2017

Applicant representing herself

**Counsel for the respondent: Adv. M Riley Attorneys for the respondent:
Hack Stupel & Ross**