IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO. D11087/2014

In the matter between:

ROSANNE NOELLA NARANDAS **APPLICANT**

and

MARCO ROSARIO ACCOLLA **RESPONDENT**

This judgment was handed down electronically by circulation to the parties' representatives by email, and released to SAFLII. The date and time for hand down is deemed to be 09h30 on 20 August 2020.

ORDER

The following order is issued:

The application for leave to appeal is dismissed with costs.

JUDGMENT

Steyn J:

[1] This is an application for leave to appeal against a judgment delivered on 3 June 2020. The notice for leave to appeal was filed on 25 June 2020, and contained the following grounds of appeal:

'(a) The Learned Judge erred in not applying the Cautionary Rules applicable to a single witness, in the assessment and evaluation of the Applicant in respect of his testimony, as being both credible and/or reliable, and more credible than that of the Respondent.

(b) The Learned Judge erred in finding that the material and relevant evidence of the Applicant was credible with direct reference to the E -mail he sent to the bank official, as being factually found on “frustration” with the Bank, and not in corroboration of the Respondent’ version that same corroborates that an agreement of loan would be made with the Respondent, including paying her interest.

(c) The Learned Judge erred in not finding that this statement by the Applicant, was nothing more than a random statement made, when this statement had been made unconditionally, not without any reservation and/or retraction.

(d) The Learned Judge erred in not finding that the probabilities on this evidence is more probable that same was indeed the intentions of the Parties, as agreed, as per the Respondent’s version, as opposed to the Applicant’s version, on this particular evidence.

(e) The Learned Judge erred in not having due regard that the content of such E-Mail, was another example of false statements made by the Applicant, not only to the Respondent, but also to other Third Parties. Yet another example of an admitted lie on his part, which many untruths were not given sufficient and due weight by the Learned Judge.

(f) The Learned Judge in the evaluation of such testimony failed to have due regard that the Applicant had every reason to lie on this score. If he admits that this statement was factually true, his version would immediately fail. Put differently, he could not do anything else but testify that this “false “statement was exclusively found on alleged “frustration” in an attempt to escape its damning consequences for him.

(g) The Learned Judge erred in not finding that there was a complete lack of any facts testified about, by any of the witnesses, to corroborate that the Applicant should be regarded as credible and reliable in this regard, more so than the Respondent.

(h) The Learned Judge erred in not finding, on the evidence presented, that this could not, on the probabilities, have been a random reason advanced, without same being factually true, having due regard to the legion of reasons available to him to vent his “frustration” in this regard. The probabilities militate against this particular statement being a random factual lie, which the Learned Judge erred in not finding in her evaluation of the testimony of the Applicant, that same be accepted as corroboration and evidencing that same provided credible and reliable weight in respect of the Respondent ’s version.

(i) The Learned Judge in not having sufficient and due regard that on the Applicant's version, he was an admitted liar, fraudster, thief, forgerer and utterer for extended periods of time. The Applicant admitted he was dishonest, misappropriated many millions of Rands belonging to the Close Corporation (N&R), all at his own instance. He admitted he committed all these crimes, implicates the Respondent without any independent, acceptable proof and lays claim to the funds of the Respondent, as his part of these alleged criminal proceeds. No evidence was presented evidencing any involvement of the Respondent in these criminal activities, as the documentation relied on fails to show that same is the most probable inference, as the content supports the Respondent's version, yet the Learned Judge failed to have due regard to same at all and/or sufficiently.

(j) The Learned Judge erred in attaching to much weight to the evidence presented by the Respondent concerning the issue of interest payable by the Applicant , having due regard to the fact that same was not a once-off business discussion, but rather ongoing discussions between a couple in a relationship, a very informal , general series of discussions of being compensated for the costs of advancing a substantial loan to the Applicant , after all , the Applicant's version is that he was wealthy and could readily pay his 50% share of the purchase price , yet for reasons not probable , did not pay for his share. The evidence of the Respondent on the issue of interest, if not satisfactory to the Learned Judge, should not have resulted in the rejection of her entire version, particularly to the loan agreement itself.

(k) The Respondent was honest and truthful in her testimony concerning the amounts paid in terms of the purchase price, as well as other amounts, even to her to her own detriment ,having only recently discovered that she was mistaken on certain facts, yet the Learned Judge made an adverse credulity and reliability against the Respondent, when same were reasonable, acceptable and satisfactory explanations for these contradictions between her testimony and the Affidavits deposed to by her, having only recently had access to all such documentary information. The criticism of the Respondent in this regard by the Learned Judge was not warranted on a proper evaluation of all the testimony presented. The fact remains that same was her belief at the time, which subsequently was established by her to be incorrect, but not because she had lied and/or been dishonest in her Affidavits and testimony.

(l) The Learned Judge placed undue emphasis on the fact that the Respondent bore the onus to prove all the terms of the oral loan agreement as detailed in her Affidavits filed, with direct reference to all payments made, when it was common cause what

payments had been made, i.e. that the Applicant had likewise not disagreed on the amount paid by the Parties equally as a deposit in his Affidavits filed in these proceedings. These statements under oath were likewise factually inaccurate, yet no criticism is levelled at him in this regard by the Learned Judge in the evaluation of the evidence, whilst terminal for the Respondent in the discharge of her onus, on a balance of probabilities.

(m) The Learned Judge failed to have sufficient regard to the fact that the Respondent unequivocally denied any involvement in the admitted, self- confessing, unlawful and/or criminal conduct of the Applicant, which denial in the absence of being without merit, ought to have shifted the probabilities in favour of the Respondent, as opposed to the Applicant.

(n) Same was material and relevant to the overall credibility and reliability of the Respondent, as being evidence as being an honest businesswoman, as opposed to the admitted, dishonest businessman on the part of the Applicant, yet same was not afforded sufficient weight by the Learned Judge. These facts militate against the finding of the Learned Judge that the Applicant was a credible witness and that his version should not have been rejected.'

[2] Applications for leave to appeal are governed by section 17 of the Superior Courts Act 10 of 2013 (the Act). Section 17 provides for leave to appeal to be granted where the presiding judge is of the opinion that the appeal would either have a reasonable prospect of success, or there is some other compelling reason why the appeal should be heard.

[3] In consideration of this application, this court shall be mindful of the test that should find application, ie to determine whether there are reasonable prospects of success that another court might come to a different conclusion. In *S v Smith* 2012 (1) SACR 567 (SCA) para 7, Plasket AJA defines the concept of reasonable prospects of success as:

'What the test of reasonable prospects of success postulates is 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 order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other

words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.' (My emphasis, original footnote omitted).

[4] For the sake of convenience, I will refer to the parties as they are in the main judgment.

[5] When the matter was argued, Mr *Alberts*, for the respondent, submitted that this court had placed undue emphasis on the fact that the respondent bore the onus to prove the terms of the agreement. Mr *Thatcher SC* opposed the application and submitted that the approach adopted by this court was in line with the authorities and that this court was not misdirected on the facts.

[6] It was evident during the submissions made that it is necessary to focus on the distinction between a legal burden (bewyslas) and evidentiary burden ('weerleggingslas') in a civil trial. The authors of the textbook *Principles of Evidence*[1] define these two concepts as follows:

'The burden of proof or true onus "refers to the obligation of a party to persuade the trier of facts by the end of the case of the truth of certain propositions". But the evidentiary burden "refers to one party's duty to produce sufficient evidence for a judge to call on the other party to answer". . . .' (Original footnotes omitted).

[7] The evidentiary burden is sometimes called the burden of adducing evidence in rebuttal.[2] The credibility of the witness of a party that has to discharge a legal burden of proof is decisive in instances where the probabilities are equal.

[8] This court has dealt with all of the evidence that was presented and the credibility findings in relation to the respondent, which were not challenged when the application was heard. Simply put, in paras 28 to 30 of the main judgment, this court dealt with the respondent's credibility and found that she did not impress as a credible witness. In light of the credibility findings, annexure 'RNN1' is of no consequence. It most certainly cannot assist the respondent in discharging the burden of proof, which rested upon her. In the same vein, the alleged dishonesty of the applicant cannot assist her in reaching a finding that she had discharged the burden that rested on her to prove the existence of any agreement.

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[1] PJ Schwikkard et al *Principles of Evidence* 4 ed (2016) at 602.
[2] *Mohunram & another v National Director of Public Prosecutions & another* (*Law Review Project as Amicus Curiae)* 2007 (2) SACR 145 (CC).

[9] Having considered all of the grounds listed and the submissions made by both parties during the application, I am not persuaded that the respondent has demonstrated that there are reasonable prospects of success.

[10] In the light of the aforegoing reasons, I am of the view that the application for leave to appeal does not meet the threshold set for the relief sought. There are neither reasonable prospects of success on appeal, nor is there any other compelling reason justifying the matter receiving the attention of a court of appeal.

Order

[11] The following order is issued:

The application for leave to appeal is dismissed with costs.

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Steyn J

APPEARANCES

Counsel for the applicant : Mr SM Alberts

(Respondent in the main trial)

Instructed by	:	MB Pedersen Suite 1C 1st Floor Lincoln House 30 Dullah Omar Grove Email: admin@durban-law.co.za REF: MB Pedersen
Counsel for the respondent	:	Mr GR Thatcher SC
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Date of Hearing	:	18 August 2020
Date of Judgment	:	20 August 2020