



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case no: 773/2022

In the matter between:

SAVANNAH COUNTRY ESTATE

HOMEOWNERS ASSOCIATION

APPLICANT

and

ZERO PLUS TRADING 194 (PTY) LTD

FIRST RESPONDENT

MARIO BROWN PRETORIUS

SECOND RESPONDENT

UNIVERSITY OF PRETORIA

THIRD RESPONDENT

Neutral citation: *Savannah Country Estate Homeowners Association v Zero Plus Trading 194 (Pty) Ltd and Others (773/2022) [2024]*
ZASCA 40 (4 April 2024)

Coram: PONNAN, MABINDLA-BOQWANA and GOOSEN JJA, and
TOLMAY and BLOEM AJJA

Heard: 6 March 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, published on the Supreme Court of Appeal website, and released to SAFLII. The date and time for hand-down is deemed to be 11h00 on 4 April 2024.

Summary: Procedure – application for special leave to appeal in terms of s 16(1)(b) of the Superior Courts Act 10 of 2013 – difference between 'special leave' to appeal and 'leave' to appeal – applicant seeking special leave to appeal against any decision of a high court in terms

of s 16(1)(b) to satisfy the Supreme Court of Appeal not only that there are reasonable prospects of success, but some additional factor or criterion – applicant failed to demonstrate such additional factor or criterion – matter struck from the roll.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Janse van Nieuwenhuizen, Basson and Molefe JJ, sitting as court of appeal):

The matter is struck from the roll with costs.

JUDGMENT

Bloem AJA (Ponnan, Mabindla-Boqwana and Goosen JJA, and Tolmay AJA concurring)

[1] This is an application for special leave to appeal and, if granted, the determination of the appeal itself. On 23 March 2023, the two judges who considered the application referred it for oral argument in terms of s 17(2)(d) of the Superior Courts Act 10 of 2013 (the Superior Courts Act).

[2] In 2013, the applicant, as plaintiff, instituted action in the Gauteng Division of the High Court, Pretoria (the high court) against fourteen defendants. Only the applicant and three respondents, who were cited as the first, second and third defendants, participate in this application. Accordingly, no reference is made in this judgment to the remaining respondents against whom no relief is sought.

[3] The applicant is Savannah Country Estate Homeowners Association (Savannah), a non-profit company. The first respondent is Zero Plus Trading 194 (Pty) Ltd (Zero Plus); the second respondent is Mario Brown Pretorius, a businessperson and Zero Plus' chief executive officer (Mr Pretorius); and the third respondent is the University of Pretoria (the University).

[4] In its particulars of claim, Savannah alleged that during 2005 or 2006, Zero Plus caused a secure estate, the Savannah Country Estate, to be established. In 2007, Zero Plus caused the property known as Erf 445 Savannah Country Estate Extension 5 Township (Erf 445) to be transferred to Savannah. On 24 April 2007 Savannah, unlawfully represented by Mr Pretorius, sold Erf 445 to Zero Plus.

[5] Savannah alleged that the sale of Erf 445 to Zero Plus was unlawful and in conflict with the provisions of s 228 of the Companies Act 61 of 1973,¹ in that, at the time of the sale, Savannah had 280 members, but none of them received notification of when the decision was taken to sell Erf 445 to Zero Plus. Savannah claimed the following relief:

- ‘1. Declaring the sale agreement dated 27 April 2007 between [Savannah] and [Zero Plus] unlawful, null and void *ab initio*.
2. Setting aside the registration of the Erf 445 Savannah Country Estate Extension 5 township.
3. Ordering [Zero Plus] to sign all documents necessary to set in motion the process of transfer of Erf 445 Savannah Country Estate Extension 5 to [Savannah].
4. Further and/or alternative relief,
5. Costs of suit.’

[6] Zero Plus and Mr Pretorius delivered special pleas and a plea over. They pleaded that Erf 445 was transferred to Zero Plus on 9 July 2007, whereafter it was improved with 106 sectional title units. Only their third special plea is presently relevant. It provides:

- ‘1. Erf 445 is zoned for and has been developed with 100 sectional title units, most of which have been sold by [Zero Plus].
2. The common property forming part of the sectional title development on Erf 445 has

¹ Section 228 of the Companies Act 61 of 1973 was repealed by the Companies Act 71 of 2008 with effect from 1 May 2011. The section was in operation when Erf 445 was sold by Savannah to Zero Plus on 24 April 2007. Section 228(1)(b) provided that directors of a company did not have the power, save by special resolution of its members, to dispose of the whole or the greater part of the assets of the company.

been transferred to the body corporate of the sectional title development.

3. [Zero Plus] is no longer the owner of any of the common property or of most of the sectional title units which form part of Erf 445 and accordingly it is an impossibility for [Zero Plus] to comply with the relief sought in the particulars of claim.’

[7] The University pleaded that during November 2007, it purchased 32 sectional title units from Zero Plus for a purchase price of R24 053 200. Accordingly, the University pleaded that:

‘it is ... impossible for the First Defendant to restore the 32 sectional title units ... to the Plaintiff, as the Third Defendant is the registered owner of the said units.’

[8] In its replication, Savannah alleged that the defence of impossibility of performance cannot succeed because Mr Pretorius, when he concluded the sale agreement with Zero Plus, unlawfully represented Savannah, thereby rendering the sale agreement between Savannah and Zero Plus unlawful and invalid. It alleged that the subsequent purchasers cannot benefit from an unlawful sale agreement.

[9] The parties held a pretrial conference on 8 April 2019. The relevant paragraphs of the pretrial minute read as follows:

- ‘6.1 The Parties agree to separate the first and second defendants’ special plea as contained in paragraphs 3.1 to 3.3 of the first and second defendants’ plea, as read with paragraph 6.3 of the third defendant’s plea, from the remainder of the issues in dispute. In addition, the Parties agree that the separated issue and the remainder of the special pleas raised by the defendants be dealt with on the first day of the trial.
- 6.2 The Plaintiff reserves its rights to lead oral evidence in respect of the separated issue and the remainder of the special pleas.
- 6.3 The Plaintiff proposes that, should the separated issue and the remainder of the special pleas not be determined so as to dispose of the matter, the remainder of the matter (the main merits) proceed to trial.’

Before the high court

[10] Aside from the pleadings, the high court also had regard to the various title deeds of the property in question, a conveyancer's certificate and the sectional title register on Erf 445, which was opened on 15 May 2009, as being part of the facts which were common between the parties. It upheld the special plea and the defence of impossibility of performance and found that, in terms of s 13 of the Sectional Titles Act 95 of 1986 (the Sectional Titles Act), the legal effect of the registration of the sectional plan was that Erf 445 and the buildings thereon were deemed to be divided into sections and common property in accordance with the sectional plan, resulting in the land being moved out of the township register and into a sectional title register.

[11] The high court dismissed the action on the basis that it was unable to find that the sale of Erf 445 to Zero Plus was unlawful and therefore null and void. The following order was issued:

- '17.1 The first and second defendants' third special plea is upheld with costs, including the costs consequent upon the employment of senior counsel.
- 17.2 The third defendant's plea as per paragraph 6.3 is upheld with cost, including the costs consequent upon the employment of senior counsel.
- 17.3 The plaintiff's claim is dismissed with costs, including the costs consequent upon the employment of senior counsel.'

[12] The high court dismissed Savannah's application for leave to appeal. This Court granted it leave to appeal to the full court of the North Gauteng Division of the High Court, Pretoria (the full court).

Before the full court

[13] The full court considered the pleadings and the information contained in the conveyancer's certificate and annexures thereto. The latter documents reveal that on 15 April 2003, Zero Plus became the owner of portion 23 of the farm

Zwartkoppies 364 (portion 23). On 10 March 2004, the local authority approved the development of the Savannah Country Estate. In accordance with the approval, portion 23 was developed in five phases. The property forming the subject matter of this appeal was developed as part of the fifth phase.

[14] Erf 445 was re-zoned from 'special' to 'residential'. Zero Plus accordingly made an application on 22 June 2006, in terms of s 100 of the Town-planning and Townships Ordinance 15 of 1986, to amend the zoning in accordance with its decision. Erf 445 should have been excluded from the category of common property. Due to an error, such exclusion was at no stage prepared or lodged with the local authority. The local authority approved the application for zoning on 30 March 2007. The above error was discovered after the approval of the zoning application. Savannah's only two directors at the time, Mr Pretorius being one, decided to rectify the error by transferring the property back to Zero Plus. The transfer took place on 9 July 2007. The sectional title units were then developed whereafter Zero Plus sold some of them to third parties. Zero Plus sold 32 of those units to the University.

[15] The full court found that, upon the establishment of the township on which the sectional title scheme was developed, the property was removed from the farm register in the deeds office and entered into the township register, resulting in the farm ceasing to exist. It found that, since Zero Plus is no longer the owner of the property, it was impossible for Zero Plus to comply with the relief sought by Savannah. The full court found that the grounds of appeal were misguided. It found that, based on the common cause facts and the application of legal principles to those facts, the appeal had to be dismissed.

Before this Court

[16] It must now be determined whether Savannah has made out a case for

special leave to be granted to it to appeal against the order and judgment of the full court.

[17] A distinction is drawn in s 16 of the Superior Courts Act between leave and special leave to appeal. Section 16(1)(b) of the Superior Courts Act² provides that, subject to s 15(1) thereof, the Constitution and any other law, ‘an appeal against any decision of a Division on appeal to it, lies to the Supreme Court of Appeal upon special leave having been granted by the Supreme Court of Appeal’. This means that an appeal against the decision of the full court in this matter would only be available to Savannah upon the grant of special leave by this Court.

[18] Corbett JA had occasion in *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd (Westinghouse)*, to deal with the distinction between ‘leave’ and ‘special leave’ as it appeared in s 20(4) of the Supreme Court Act 59 of 1959, the predecessor of s 16(1) of the Superior Courts Act. The learned Judge said the following:

‘I have no doubt that the terms "special leave" and "leave" were chosen with deliberation by the lawgiver and that they were intended to denote different concepts. It may be accepted that the normal criterion of reasonable prospects of success applies to both the "special leave" of s 20 (4) (a) and the "leave" of s 20 (4) (b). . . In my view, however, the word "special" in the former subsections denotes that some additional factor or criterion was to play a part in the granting of special leave.’³

² Section 16(1) of the Superior Courts Act reads as follows:

‘(1) Subject to s 15(1), the Constitution and any other law —

(a) an appeal against any decision of a Division as a court of first instance lies, upon leave having been granted

—
(i) if the court consisted of a single judge, either to the Supreme Court of Appeal or to a full court of that Division, depending on the direction issued in terms of s 17(6); or

(ii) if the court consisted of more than one judge, to the Supreme Court of Appeal;

(b) an appeal against any decision of a Division on appeal to it, lies to the Supreme Court of Appeal upon special leave having been granted by the Supreme Court of Appeal; and

(c) an appeal against any decision of a court of a status similar to the High Court, lies to the Supreme Court of Appeal upon leave having been granted by that court or the Supreme Court of Appeal, and the provisions of s 17 apply with the changes required by the context.’

³ *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* [1986] ZASCA 10; 1986 (2) SA 555 (AD) at 561C-F.

[19] In *National Union of Metalworkers of South Africa and Others v Fry's Metals (Pty) Ltd*,⁴ this Court, referring to *Westinghouse*, held that the criterion for the granting of special leave to appeal is not merely that there is a reasonable prospect that the decision of the court a quo will be reversed – but whether the applicant has established some additional factor or criterion. Examples of the additional factors or criteria were given:

‘One is “[w]here the matter, though depending mainly on factual issues, is of very great importance to the parties or of great public importance”. No doubt every appeal is of great importance to one or both parties, but this court must be satisfied. . . that the matter is objectively of such importance to the parties or the public that special leave should be granted. We emphasise that the fact that applicants have already enjoyed a full appeal before the LAC will normally weigh heavily against the grant of leave. And the demands of expedition in the labour field will add further weight to that.’

[20] In *Stu Davidson and Sons (Pty) Ltd v Eastern Cape Motors (Pty) Ltd*,⁵ the regional court dismissed the plaintiff’s claims. It successfully appealed to the Eastern Cape Division of the High Court. The defendant, thereafter appealed to this Court against the decision of the full court, with the special leave of this Court. In the majority judgment, reference was also made to *Westinghouse*. It was found that what was required in an application for special leave to appeal, in addition to attempting to demonstrate that the court a quo was wrong, was some additional factor or criterion. Lewis JA, writing for the majority, stated that the fact that two judges of this Court gave special leave to appeal does not mean that the judges hearing the appeal ‘[were] not required to consider whether [they] actually should be entertaining the appeal at all’. It was found that the appeal had no merit, which meant that ‘there [were] no reasonable prospects of success, much less special circumstances’. The Court considered the following factors as

⁴ *National Union of Metalworkers of South Africa and Others v Fry's Metals (Pty) Ltd* [2005] ZASCA 39; [2005] 3 All SA 318 (SCA); 2005 (5) SA 433 (SCA); (2005) 26 ILJ 689 (SCA); 2005 (9) BCLR 879 (SCA); [2005] 5 BLLR 430 (SCA) para 43.

⁵ *Stu Davidson and Sons (Pty) Ltd v Eastern Cape Motors (Pty) Ltd* [2018] ZASCA 26 paras 2 and 3.

to why special leave to appeal should perhaps not have been granted:⁶

‘[T]he amount in issue is minimal. There is no legal question to be determined. There is no factual dispute that requires reconsideration. There is no reason why an appellate court should determine any matter arising from the first appeal further. Again, it is trite that where there has been no manifest denial of justice, no important issue of law to be determined, and the matter is not of special significance to the parties, and certainly not of any importance to the public generally, special leave should not be granted.’

[21] In the light of the above authorities, I now deal with Savannah’s application for special leave to appeal. In the notice of motion,⁷ Savannah described the application as one for leave to appeal (as opposed to special leave to appeal) against the order and judgment of the full court.

[22] The founding affidavit in support of the application stated that it was ‘an application for special leave to appeal in terms of the provisions of Section 16(b) ...’. The correct reference ought to have been s 16(1)(b). The deponent then dealt with the background of the litigation and the factual matrix, the alleged flaws in the judgment and the grounds of appeal. Six paragraphs were devoted to the prospects of success on appeal. It was submitted that Savannah had ‘at least a reasonable prospects of showing that the special plea of impossibility was not competent and ought to have been dismissed by the Court a quo’. It was also submitted that ‘the interests of justice support the grant of leave to appeal’. There was no reference to special leave to appeal under either the heading of prospect of success or interests of justice. Savannah has thus failed, in its founding affidavit, to show any additional factor or criterion in support of an application for special leave to appeal.

⁶ Ibid para 19; See also *Integrity Forensic Solutions CC v Amajuba District Municipality* [2023] ZASCA 124 para 9.

⁷ The notice of motion contained not only the relief sought by Savannah, but also the factual basis, consisting of 25 paragraphs, upon which that relief is sought.

[23] Savannah's counsel conceded this. When faced with these difficulties, counsel suggested that it may be prudent for Savannah to apply for the hearing to be postponed with the necessary tender of costs. The purpose of the postponement, so we were informed, would be to enable Savannah to amend its notice of motion and deliver supplementary affidavits to seek special leave to appeal.

[24] In that regard, it would be for Savannah to demonstrate, among other things, that the requirements for special leave could be satisfied. It would serve no purpose to postpone the application if the envisaged appeal lacked merit.

[25] The substantive relief sought against the respondents is set out in prayers 1, 2 and 3, which are quoted in paragraph 5 above. On the pleadings, Savannah has not made out any case against the University for the relief sought in those prayers. But, even if the relief sought in those prayers was granted, it would not affect the University since no relief is specifically sought against it in those prayers. It accordingly has no prospects of success on appeal against the University, let alone showing any special circumstances required for it to succeed. This was conceded on behalf of Savannah at the hearing before us.

[26] After the sectional title register had been opened in 2007, Zero Plus sold and transferred some of the units in the development scheme to the purchasers thereof, 32 units having been sold and transferred to the University. In terms of s 36(1) of the Sectional Titles Act,⁸ a body corporate for that scheme was deemed to have been established with effect from the date on which the first person became the owner of a unit in the scheme. The first purchaser and the developer

⁸ Section 36(1) of the Act was amended with effect from 7 October 2016. As at 2007 it read as follows: 'With effect from the date on which any person other than the developer becomes an owner of a unit in a scheme, there shall be deemed to be established for that scheme a body corporate of which the developer and such person are members, and every person who thereafter becomes an owner of a unit shall be a member of that body corporate.'

then became members of that body corporate. Every person who thereafter became an owner of a unit also became a member of that body corporate. The body corporate thereafter became solely responsible for the control, management, administration, use and enjoyment of the sections⁹ and of the common property in the scheme.¹⁰

[27] Since the sale of Erf 445 from Savannah to Zero Plus, the registrar of deeds has registered the sectional plan and has opened a sectional title register in respect of Erf 445, which entitled Zero Plus to sell units. Thus far, Savannah has not sought to assail any of those approvals. It follows that as things presently stand, Savannah can hardly obtain the relief it seeks. This must mean that Savannah is not out of the starting blocks. It has shown no prospects of success on appeal.

[28] Savannah has inexplicably not sought to amend its particulars of claim when it had sufficient opportunity to do so. In one of their special pleas, Zero Plus and Mr Pretorius pointed out that Savannah had failed to join the body corporate of the development scheme, all the owners of the sectional title units and the mortgage bondholders. On delivery of that plea, during September 2013, Savannah should have investigated whether it was necessary to amend its particulars of claim in the light of the registration of the sectional plans and the opening of the sectional title register. The same opportunity presented itself after the University had delivered its plea during February 2014, wherein it pleaded that Zero Plus sold 32 sectional title units to it.

[29] In its heads of argument, the University indicated that Savannah had intimated on at least two occasions during pretrial conferences, which were held on 4 September 2015 and 17 May 2016, that it was considering amending its

⁹ In s 1 of the Act, 'section' means a section shown as such on a sectional plan.

¹⁰ *Eden Village (Meadowbrook) (Pty) Ltd and Another v Edwards and Another* 1995 (4) SA 31 (AD) at 40H-I.

particulars of claim. However, no amendment of the particulars of claim was ever sought. It is furthermore pointed out that at a pretrial conference, which was held on 8 April 2019, Savannah proposed that, should the special plea of impossibility of performance ‘not be determined so as to dispose of the matter, the remainder of the matter (the main merits) proceed to trial’. Savannah was accordingly prepared to commence with the trial on the merits on the pleadings in their current form. On those pleadings, Savannah would have been unable to secure any relief against any of the respondents.

[30] In all the circumstances, given that there is no merit at all in the appeal, there are no reasonable prospects of success, much less special circumstances. A postponement of the application will serve no purpose. The application for special leave to appeal must accordingly fail and Savannah should be ordered to pay the respondents’ costs.

[31] In the result, the matter is struck from the roll with costs.

G H BLOEM
ACTING JUDGE OF APPEAL

Appearances

For the appellant:	H H Cowley with him J Mnisi
Instructed by:	Matojane Malungana Inc, Randburg SMO Seobe Attorneys Inc, Bloemfontein
For the first and second respondents:	L Putter SC
Instructed by:	Jacobs Roos Fouche Inc, Pretoria Bezuidenhouts Inc, Bloemfontein
For the third respondent:	J P Vorster SC
Instructed by:	Tim Du Toit & Co Inc, Pretoria Rossouws Attorneys, Bloemfontein.