



**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GQEBERHA**

CASE NO. 302/2017

In the matter between:

LINDA NIENABER N.O.

First Applicant/First Plaintiff

(in her capacity as executrix
of the estate of the late
Leonie Logie Kelbrick)

ANTONIUS GERHARDUS

VAN DEN BERG

Second Applicant/Second Plaintiff

MARGIE VAN DEN BERG

Third Applicant/Third Plaintiff

and

NELSON ATTORNEYS

First Respondent/First Defendant

PIERRE KITCHING ATTORNEYS Second Respondent/Second Defendant

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

RUGUNANAN J

- [1] The judgment and order of this court handed down on 18 January 2022 in which the applicants’/plaintiffs’ claims were dismissed with costs attracted an application for leave to appeal to the full court of this division.
- [2] The second defendant is not a party to these proceedings
- [3] The plaintiffs contend that wrongfulness as an element of delictual liability was not in issue and the court erred in concluding otherwise.
- [4] In support of their application they rely on *Oppelt v Head: Health, Department of Health Provincial Administration: Western Cape* 2016 (1) SA 323 (CC) at paragraph [53] where Molema AJ (writing for the majority) states:

‘In the face of an admitted legal duty of care, the applicant needed to show only that the legal duty was [negligently] breached.’
- [5] In argument, emphasis is laid on the fact that the first defendant (*qua* Charles Nelson) did not dispute the duty of care (and its broadened scope). Taken further, the plaintiffs contend that the court’s misdirected inquiry into wrongfulness was at the expense of not fully and adequately addressing the question of negligence relevant to which was the expert evidence by conveyancer Daryl Burman that had been erroneously rejected.
- [6] In summary, the judgment indicates that the court’s perception of the matter was that the scope of Nelson’s duty of care was ring-fenced by the terms of reference specifically pleaded by the plaintiffs and that it was not broadened by his admission of additional duties when he testified in

proceedings relating to a special plea. Paragraphs [17], [19], [20], [21] and [46] of the judgment indicates how the court dealt with the scope of the duty of care; and paragraphs [36] to [46] details the reasons for the rejection of Burman's evidence.

[7] The plaintiffs argue that the broadened scope rendered Burman's evidence (which related to the duties of a reasonable conveyancer), worthy of recognition in circumstances where the duty of care was not disputed by Nelson. Accordingly, another court applying itself to the negligence issue with regard to the broadened scope of the duty of care may conclude differently.

[8] Section 17(1)(a) of the Superior Courts Act 10 of 2013 provides:

‘(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;’

[9] Although the word ‘would’ contemplates an onerous duty on an applicant for leave to appeal to demonstrate ‘a reasonable prospect of success’, this does not have to be done as a measure of certainty. What is required of the judge whose judgment is sought to be appealed against, is to consider ‘objectively and dispassionately, whether there are reasonable prospects that another court may well find merit in arguments advanced by the losing party.’¹ It is accordingly unnecessary for a court when considering an application for leave to appeal to entertain doubt about the correctness of the judgment and order. All that is necessary is that there is a reasonable prospect that another court may arrive at a different conclusion. Put

¹ Per Smith J in *Valley of the Kings Thaba Motswere (Pty) Ltd and Another v Al Mayya International* [2016] 137 (ZACGHC) 137 (10 November 2016) at paragraph [4].

otherwise, leave to appeal stands to be granted even where a court is convinced of the correctness of the judgment and order but there is a prospect that another court may find differently.

[10] The plaintiffs seek leave to appeal against the entire order and judgment of the court.

[11] Although differing contentions on the merits of the application were made, I am minded to grant such leave.

[12] I do so on the basis essentially set out in this judgment – but do not limit such leave exclusively thereto as I consider that it will be unjust to preclude interference on appeal if it is found that the judgment and the order is obviously wrong in other respects.²

[13] In the result, the following order is made:

1. The first, second and third plaintiffs are granted leave to appeal to the full court of this division against the whole of the judgment and order of this court delivered on 18 January 2022.
2. The costs of this application shall be costs in the appeal.

M. S. RUGUNANAN

JUDGE OF THE HIGH COURT

² Compare *Qunta v Minister of Police* (CA 114/2012) [2013] ZAECHGHC 53 (5 June 2013) at paragraph [5].

APPEARANCES:

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Date heard:

08 September 2022

Date delivered:

22 November 2022