

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case No: 66933/2011

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: YES/NO

DATE: 26 FEBRUARY 2024

In the matter between:

THE MUNICIPALITY OF THABAZIMBI

APPLICANT

and

HENDRIK JOHANNES BADENHORST

RESPONDENT

JUDGEMENT IN THE APPLICATION FOR LEAVE TO APPEAL

JOYINI AJ:

INTRODUCTION

[1] This is an application for leave to appeal against my whole Judgment and Court Order handed down on 18 December 2023 (“Judgment *a quo*”) in terms of Rule 49 of the Uniform Rules of Court read with Section 17 of the Superior Courts Act.¹ The notice for leave to appeal was filed with the Registrar of this Court on 8 January 2024.

¹ Act 10 of 2013

[2] The parties shall be referred to throughout this Judgment as follows:

(a) The Municipality of Thabazimbi, a municipality properly created in terms of the laws of the Republic of South Africa with its principal place of business at the Municipal Buildings, Rietbok Street 7, Thabazimbi, shall be referred to as 'the Applicant'.

(b) Mr Hendrik Johannes Bardenhorst, an adult male person born on 7 February 1963, who resides at B[...] [...], Thabazimbi, shall be referred to as 'the Respondent'.

BACKGROUND FACTS

[3] The Respondent was driving in his vehicle on 6 January 2011, when suddenly a piece of rock was flung up by Applicant's grass cutting trailer and penetrated his right eye, causing permanent blindness of his right eye. At the time of the incident, the Applicant's tractor with a lawnmower was driven by the Applicant's employee who was on duty and as such, acting within the scope of his employment. The Respondent instituted action against the Applicant for damages suffered as a result of the personal injuries sustained in an incident, that occurred on 6 January 2011 at Vander Bijl Street, Thabazimbi.

[4] At the time of the incident, the Respondent was a very successful professional hunter with his own hunting safari business. He catered mainly for American and some European clients, who all paid him in US dollars and Euros. Most hunting safaris booked with him was trophy hunts, which generated higher income. After the incident, he tried to carry on with the hunting business and even attempted to switch mainly to bow hunting, but he soon realised that he could not safely act as hunter even in that type of hunting safari. He earned some income during the years 2011 and 2012 but was without income from 2013, when he actively started seeking alternative employment.

[5] At the commencement of the previous proceedings, the parties informed the Court a

quo that the issue of liability was settled at 100% in favour of the Respondent and the Court Order to that effect is on Caselines 024-2. The general damages were also finalised on 3 March 2020, when an order was made for the payment of R336,000.00 for general damages plus interest at the mora interest rate of 10% per annum from date of service of summons (12/12/2011) to date of final payment.² The Court *a quo* was therefore only called upon to determine the quantum and in particular, the issues of past and future medical and related expenses, as well as past and future loss of earnings. The Court *a quo* decided in favour of the Respondent.

APPLICANT’S GROUNDS FOR LEAVE TO APPEAL

[6] The Applicant’s application for leave to appeal is pursued in terms of Rule 49 of the Uniform Rules of Court read with Section 17 of the Superior Courts Act.³ The grounds of appeal, upon which leave is sought, comprises 69 pages of the notice for leave to appeal⁴ which is divided into 138 paragraphs and subparagraphs.

RESPONDENT’S OPPOSITION TO THE APPLICATION FOR LEAVE TO APPEAL

[7] This application for leave to appeal is vehemently and vigorously opposed by the Respondent.⁵ The Respondent argues that the Applicant, in the notice for leave to appeal, did not set out the grounds for leave to appeal as required in terms of Rule 49(1)(b). He based his argument on *Songono v Minister of Law and Order*⁶ where the court held: “*The grounds of appeal must be clearly and succinctly set out in clear and unambiguous terms so as to enable the court and the respondent to be fully informed of the case the applicant seeks to make out and which the respondent is to meet in opposing the application for leave to appeal. This subrule is peremptory in this regard.*” The Respondent submitted that the Applicant’s voluminous application comprising

² Caselines 024-4 and 024-5.

³ Act 10 of 2013

⁴ Caselines 037-1 to 037-69

⁵ Caselines 039-1 to 039-20

⁶ 1996 (4) SA 384 (E) at 385 J to 386 A

69 pages⁷ does not adhere to the requirements of Rule 49(1)(b). He concluded his argument by paraphrasing what was said in the *Songono* case (*supra*) that a lengthy and rambling notice for leave to appeal filed *in casu* falls woefully short of what is required. He asked the Court to dismiss the Applicant's application for leave to appeal on this ground alone.

APPLICABLE PRINCIPLES/TESTS TO THE ADJUDICATION OF AN APPLICATION FOR LEAVE TO APPEAL AND ANALYSIS OF THE GROUND OF APPEAL REFERRED TO IN PARAGRAPH [6] ABOVE

[8] Rule 49 of the Uniform Rules of Court dictates the form and process of an application for leave to appeal and the substantive law pertaining thereto is to be found in section 17 of the Superior Courts Act 10 of 2013. The latter Act raised the threshold for the granting of leave to appeal, so that leave may now only be granted if there is a reasonable prospect that the appeal will succeed. The possibility of another court holding a different view no longer forms part of the test. There must be a sound, rational basis for the conclusion that there are prospects of success on appeal. The interpretation of the Rules and the Law has evolved in case law since 2013. In numerous cases, the view is held that the threshold for the granting of leave to appeal was raised with the inauguration of the 2013 legislation (Superior Courts Act 10 of 2013). The former assessment that authorization for appeal should be granted if "*there is a reasonable prospect that another court might come to a different conclusion*" is no longer applicable.

[9] The words in section 17(1) that: "*Leave to appeal may only be given...*" and section 17(1)(a)(i) that: "*The appeal would have a reasonable prospect of success*" are peremptory. "*If there is a reasonable prospect of success*" is now that: "*May only be given if there would be a reasonable prospect of success.*" A possibility and discretion were therefore, in the words of the legislation and consciously so, amended to a mandatory obligatory requirement that leave may not be granted if there is no

⁷ Caselines 037-1 to 037-69.

reasonable prospect that the appeal will succeed. It must be a reasonable prospect of success; not that another Court may hold another view.

[10] The Court *a quo* may not allow for one party to be unnecessarily put through the trauma and costs and delay of an appeal. In *Four Wheel Drive v Rattan N.O.* [2019 \(3\) SA 451](#) (SCA), the following was ruled by Schippers JA (Lewis JA, Zondi JA, Molemela JA and Mokgohloa AJA concurring): “[34] *There is a further principle that the court a quo seems to have overlooked — leave to appeal should be granted only when there is 'a sound, rational basis for the conclusion that there are prospects of success on appeal'. In the light of its findings that the Plaintiff failed to prove locus standi or the conclusion of the agreement, I do not think that there was a reasonable prospect of an appeal to this court succeeding that there was a compelling reason to hear an appeal. In the result, the parties were put through the inconvenience and expense of an appeal without any merit.*”

[11] In *MEC Health, Eastern Cape v Mkhitha*,⁸ the Supreme Court of Appeal held: “[16] *Once again it is necessary to say that leave to appeal, especially to this court, must not be granted unless there truly is a reasonable prospect of success. Section 17(1)(a) of the Superior Courts Act 10 of 2013 makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success; or there is some other compelling reason why it should be heard. [17] An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.*”

⁸ (1221/15) [2016] ZASCA 176 (25 November 2016); *S v Smith* 2012 (1) SACR 567 (SCA) para 7.

[12] In *Phiri v Phiri and Others*,⁹ the Court warned against an Applicant from marshalling grounds of appeal over the bar and reiterated the considerable and substantial presence of a cause for appeal: “[9] *An application for leave to appeal is in terms of Rule 49 of the Uniform Court. Rule 49(l)(b) of the Uniform Court Rules provide as follows: "When leave to appeal is required... application for such leave shall be made and the grounds thereof shall be furnished..." The use of the word "shall" denote that this sub rule is peremptory. The Applicant must set out the grounds upon which he seeks to appeal. In the matter of Songono v Minister of Law Order*,¹⁰ the Court held at 3851—386A that: "... the grounds of appeal required under Rule 49(l)(b) must ...be clearly and succinctly set out in clear and unambiguous terms so as to enable the Court and the Respondent to be fully and properly informed of the case which the Applicant seeks to make out and which the Respondent is to meet in opposing the application for leave to appeal. .. Rule 49(l)(b) must also be regarded as being peremptory. [10] In casu, the grounds tabulated in paragraph [2] supra, can hardly qualify to be grounds. In this regard the notice for leave to appeal is fatally defective and, on this ground, alone the application for leave to appeal should be dismissed. It does not help the Applicant to marshal grounds of appeal over the bar which have not been set out clearly and succinctly in the notice for leave to appeal, no matter how meritorious these might be, which is not the case in my view, otherwise, there is no need for the Rules; vide *Xayimpi v Chairman Judge White Commission (formerly known as Browde Commission* [\[2006\] 2 ALL SA 442 E](#) at 446i-j.”

[13] This finding was endorsed by a full bench in *Xayimpi v Chairman Judge White Commission*. In that matter the applicant had, instead of a notice setting out the grounds of appeal, filed a lengthy affidavit. The court considered that it was entitled to dismiss the application on that basis. It nevertheless considered the merits of the application and refused leave. The approach to the requirements of Rule 49 (1) (b) has

⁹ (39223/2011) [2016] ZAGPPHC 341 (14 March 2016).

¹⁰ *Songono v Minister of Law-and-Order* [1996 \(4\) SA 384](#) (E) at 3851-386A.

subsequently been followed in several judgments in this Division and other Divisions, in both civil and criminal cases.¹¹

[14] In *Hing and Others v Road Accident Fund*¹² which relied upon *Songono* case *supra* Binns-Ward J observed: “The application for leave to appeal had listed 65 grounds on which the judge a quo was alleged to have ‘erred and misdirected himself’. As the respondent’s counsel justifiably observed, a number of those grounds were so vaguely formulated as to be of little or no assistance in meaningfully defining the bases of the intended appeals. In any event it should have been apparent to the appellants that the learned acting judge could not possibly have intended his words to be taken literally. The effect of the notice of application for leave to appeal was to suggest that he had misdirected himself at every turn in making any findings adverse to their claims. In the context of his detailed and fully reasoned judgment, it could not reasonably have been assumed by the appellants or their legal representatives that by granting leave to appeal in the terms he did, the judge meant to be understood to be acknowledging that such wide-ranging error and misdirection on his part might reasonably be established on appeal. On the contrary, the manifestly indiscriminate formulation of the grounds on which the application for leave to appeal was brought brings to mind the observation of a US Appeals Court judge that when he sees ‘an appellant’s brief containing seven to ten points or more, a presumption arises that there is no merit to any of them’.¹³”

[15] Let me comment on an amendment to Rule 49 which came into effect after the judgments in *Songono* and *Xayimpi* referred to above were handed down. Rule 49 (3) was substituted by GN R472 of 12 July 2013. The sub-rule in its present form came into effect on 16 August 2013. Prior to its amendment and at the time when *Songono* and

¹¹ *S v Van Heerden* [2010 \(1\) SACR 599](#) (ECP) at para 4; *S v McLaggan* [2013 \(1\) SACR 267](#) (E) at para 6-7; *S v McKenzie* [2003 \(2\) SACR 620](#) (C) at 621e.

¹² 2014 (3) SA 350 (WCC).

¹³ MEC for Health, Eastern Cape and Another v Melane (2017/2015) [2022] ZAECHMHC 16 (14 June 2022) para 50.

Xayimpi were decided the sub-rule read as follows: “(3) *The notice of appeal shall state whether the whole or part only of the judgment or order is appealed against and if only part of such judgment or order is appealed against, it shall state which part and shall further specify the finding or fact and/or ruling of law appealed against and the grounds upon which the appeal is found.*” It is this sub-rule which was held to be peremptory and, by parity of reasoning, that Rule 49 (1) (b) is peremptory. Sub-rule (4), prior to the amendment, provided that: “*A notice of cross-appeal shall be delivered within ten days after delivery of the notice of appeal or within such longer period as may upon good cause shown be permitted and the provisions of these Rules will regard to appeals shall mutatis mutandis apply to cross-appeals.*” Sub-rule (3) in its present substituted form is identical in every respect to the erstwhile sub-rule (4). The present sub-rule (4) reads: “*Every notice of appeal and cross-appeal shall state:(a) what part of the order is appealed against; and (b) the particular respect in which the variation of the judgment or order is sought.*”

[16] The effect of the amendment therefore was to deal with the subject matter of the erstwhile sub-rule (3) in the new sub-rule (4). The judgments in *Songono* and *Xayimpi* must accordingly be read in this light. The basis upon which *Songono* held that the erstwhile sub-rule (3) was peremptory is to be found in the following passage of the judgment: “*Accordingly, insofar as Rule 49 (3) is concerned, it has been held that grounds of appeal are bad if they are so widely expressed that it leaves the appellant free to canvass every finding of fact and every ruling of the law made by the court a quo, or if they specify the findings of fact or rulings of law appealed against so vaguely as to be of no value either to the Court or to the respondent, or if they, in general, fail to specify clearly and in unambiguous terms exactly what case the respondent must be prepared to meet - see, for example, Harvey v Brown [1964 \(3\) SA 381 \(E\)](#) at 383; Kilian v Geregsbode, Uitenhage [1980 \(1\) SA 808 \(A\)](#) at 815 and Erasmus Superior Court Practice B1-356-357 and the various authorities there cited.*”

[17] This rationale applies, with equal force, to the proper interpretation of sub-rule (4). Accordingly, the subsequent amendment of Rule 49 has not altered the law regarding

compliance with its provisions. The effect is that where a party fails to comply with the peremptory requirements of Rule 49 (1) (b) inasmuch as they do not set out the grounds of appeal in clear, unambiguous and succinct terms, the court hearing the application may, on that basis, dismiss the application.

ANALYSIS OF THE OTHER GROUNDS OF APPEAL

[18] It is common cause that the grounds of appeal set out in the Applicant's notice for leave to appeal are excessively lengthy. That is, however, not the only respect in which they do not meet the requirements. These grounds are so vaguely formulated as to be of little or no assistance in meaningfully defining the bases of the intended appeal. No attempt is made to identify the factual findings which the Applicant seeks to challenge on appeal nor the findings of law. To say the least, these grounds of appeal are incomprehensible.

[19] There are various issues raised by the Applicant in the notice for leave to appeal that have no relation to the issues in dispute and the findings in that regard. The Applicant, in the notice for leave to appeal, in paragraph 136¹⁴ states that I erred in not inviting the Respondent, as *Dominus Litis*, to address the Court as to why the merits of the matter was only dealt with on 19 July 2017, after a period of approximately 5 years and 7 months after the summons were issued. According to the Applicant, there was no evidence led by the Respondent as *Dominus Litis* as to why the merits were only dealt with on or about 19 July 2017. This has no relation to any issue in dispute or any findings made. In any event, the Applicant also had all the remedies available and provided for in the Uniform Rules of Court to see to the finalisation of the litigation.

[20] It is also alleged, in paragraph 9,¹⁵ that I erred in not making a finding that the Respondent had failed to provide a copy of the Notice in terms of Section 3(4) of Act 40 of 2002 as same could not be located on CaseLines and furthermore that the copy of the judgment on merits is also not on CaseLines. The Notice in terms of Section 3(4) of

¹⁴ Caselines 037-67

¹⁵ Caseline 037-6

Act 40 of 2002 is no longer of any relevance as the Court has already made a finding on the merits as well as on the issue of general damages. What the Applicant alleges has no bearing on any of the disputes and/or findings.

[21] In paragraph 3¹⁶ of the Judgment *a quo*, I stated that the Respondent has complied with the requirements of the Institution of the Legal Proceeding Against Certain Organs of State Act, 40 of 2002 and also in paragraph 176,¹⁷ where I raised an issue as to why the Applicant's Counsel would enquire at this late stage as to the existence of a Section 3(4) Notice.

[22] The Order on the merits, dated 19 June 2017, is quite clear, in terms of which it is ordered that the Applicant is liable 100% for all the damages suffered by the Respondent as a result of the incident that occurred on 6 January 2011.¹⁸

[23] For the Applicant to look for the judgment in this regard is questionable. It is trite law that the order stands until it is rescinded. It is not the Applicant's case that such order has been rescinded.

[24] There is also the averment that I erred in not considering the Court Order of Nthambleni AJ, dated 3 May 2021 and it is not clear what the error is in this regard.¹⁹

[25] Also, the Applicant, in paragraph 133²⁰ alleges that I erred in not making findings that it was not bound by a Court Order of Strydom AJ and does not have to follow it, that the Court Order is not *stare decisis* and that I did not exercise my discretion. It is unclear what the error is and what should have been ordered instead. Also as is stated above, the Court Order stands until it is rescinded.

¹⁶ Caselines 036-2

¹⁷ Caselines 036-48

¹⁸ Caselines 024-2

¹⁹ Caselines 036-3, par 10

²⁰ Caselines 037-66

[26] Furthermore, the Applicant refers to constitutional issues in the application for leave to appeal but does not address the error made by me and what the correct finding would have been in this regard.²¹

[27] The Applicant furthermore makes allegations about improper discovery by the Respondent and documents not properly before the Court.²² This issue pertaining to the discovery of documents and the documents not available does not provide any basis for a ground of appeal. In fact, the Applicant, at this late stage, complains that there might be documents that were not discovered or not made available. The Rules of Court are quite clear and as such, the Applicant had all the remedies in terms of the Uniform Rules of Court at its disposal. If the Applicant was of the opinion that not all the relevant documents are before Court, it had recourse available to either obtain discovery or *subpoena* the witnesses. If the Applicant felt that it was prejudiced, it was for the Applicant to seek a postponement to cure such prejudice. The Applicant never asked for such postponement.

[28] As presiding Judge in the Court *a quo*, I found that sufficient documents were put before Court to make a finding in respect of the claims regarding past medical expenses, future medical expenses, past loss of earnings and future loss of earnings.

[29] On Rule 38(2) application and costs, the Applicant, in this regard, makes the averments as per paragraphs 45 to 50.²³ The application in terms of Rule 38(2) was not successful as the Court found it necessary to hear oral evidence. The costs order in this regard was indeed in the discretion of the Court. Having regard to the circumstances of the litigation, the costs order made is clearly correctly made.

²¹ Caselines 037-67, par 138

²² Caselines 037-2, paras 13, 14 and 15 and CL 037-59, paras 115 and 116

Caselines 037-16, paras 29, 30 and 31

Caselines 037-67, para 138

Caselines 037-21 paras 39.3, 39.4, 40, 41, 42, 43 and 44

Caselines 037-31, paras 51, 52 and 53

Caselines 037-42, paras 76, 77, 78 and 79

Caselines 037-45 to 037-48, paras 84, 85, 86, 87, 88 and 89

²³ Caselines 037-24 to 037-25

[30] In my view, it is not necessary to deal with each of the different grounds individually as listed in 138 paragraphs and sub-paragraphs of 69 pages of the Applicant's notice for leave to appeal. The analysis on the grounds of appeal and authorities referred to above are, one way or another, illustrating the point that the Applicant's notice for leave to appeal is indeed fatally and gravely defective. Some of the issues raised in the Applicant's notice for leave to appeal were addressed adequately in the Judgment *a quo*, and therefore, there is no need for repetition.

APPEAL COURT'S LIMITED ABILITY TO INTERFERE WITH THE TRIAL COURT'S FINDINGS

[31] The trial court bears the task of analysing and evaluating evidence. An appeal court is limited in its ability to interfere with the trial court's findings or conclusions, and may not do so simply because it would have come to a different finding or conclusion. The trial court has the advantage of seeing and hearing witnesses, which places it in a better position than a court of appeal to assess the evidence, and such assessment must prevail, unless there is a clear and demonstrable misdirection. This is a principle that is well established in our law.

[32] It is trite that a court on appeal should not interfere with the trial judge's findings/conclusions on primary facts unless it is satisfied that the trial court was plainly wrong.²⁴ The factual and credibility findings of the trial court are presumed to be correct unless they are shown to be wrong with reference to the record.²⁵ The Supreme Court of Appeal held as follows in *S v Pistorius*:²⁶ *"It is a time-honoured principle that once a trial court has made credibility findings, an appeal court should be deferential and slow*

²⁴ R v Dhlumayo & another 1948 (2) SA 677 (A) at 705-706.

²⁵ S v Francis 1991 (1) SACR 198 (SCA) at 204E-D.

²⁶ 2014 (2) SACR 315 (SCA) par [30].

to interfere therewith unless it is convinced on a conspectus of the evidence that the trial court was clearly wrong. R v Dhlumayo and Another 1948 (2) SA 677 (A) at 706; S v Kebana 2010 (1) All SA 310 (SCA) para 12.... As the saying goes, he was steeped in the atmosphere of the trial. Absent any positive finding that he was wrong, this court is not at liberty to interfere with his findings.”

[33] It is trite that the views of Courts may differ but that will not be necessarily interference with the judgment of the Court *a quo*. The vital way of thinking of the Courts of Appeal is that the trial Court experienced the hearing, the conduct of the parties and their Counsel and the evidence in all its forms and that interference will not be a given just for a difference in opinion by the Court sitting on appeal. The Supreme Court of Appeal reiterated this stance in its judgment on 31 July 2020 in *AM and another v MEC Health, Western Cape*.²⁷

[34] In *Bee v Road Accident Fund*,²⁸ the Court said the following with regard to an approach on appeal: “[46] *I start by emphasising two interrelated principles to be observed by an appellate court in an appeal against an award of damages. Firstly, the trial court’s factual findings are presumed to be correct in the absence of demonstrable error. To overcome the presumption, an appellant must convince the appellate court on adequate grounds that the trial court’s factual findings were plainly wrong. Bearing in mind the advantages enjoyed by the trial court of seeing, hearing and appraising the witnesses, it is only in exceptional circumstances that an appellate court will interfere with the trial court’s evaluation of oral evidence (R v Dhlumayo & another **1948 (2) SA 677** (A) at 705-706; Sanlam Bpk v Biddulph **2004 (5) SA 586** (SCA) para 5; Roux v Hattingh **[2012] ZASCA 132**; 2012 (6) 428 (SCA) para 12). [47] Second, where damages are a matter of estimate, an appellate court will not interfere with the trial court’s assessment unless there was a misdirection or unless there is a substantial variation between the trial court’s award and what the appellate court would have*

²⁷ (1258/2018) [2020] ZASCA 89; 2021 (3) SA 337 (SCA) (31 July 2020)

²⁸ (093/2017) [2018] ZASCA 52; 2018 (4) SA 366 (SCA) (29 March 2018)

awarded or unless the appellate court thinks that there is no sound basis for the award (Sandler v Wholesale Coal Supplies Ltd 1941 AD 194 at 200; AA Mutual Insurance Association Ltd v Maqula 1978 (1) SA 805 (A) at 809B-D)."

[35] In the matter of *Makate v Vodacom Ltd*,²⁹ the Constitutional Court, with reference to the well-known principles established in the matter of *R v Dhlumayo*,³⁰ held the following regarding the findings of the court *a quo*, (more specifically where findings on credibility were made) and the role of the Appeal Court in such instances: "*Ordinarily, appeal courts in our law are reluctant to interfere with factual findings made by trial courts, more particularly if the factual findings depended upon the credibility of the witnesses who testified at the trial. In Bitcon Wessels CJ said: '(T)he trial judge is not concerned with what is or is not probable when dealing with abstract business men or normal men, but is concerned with what is probable and what is not probable as regards to the particular individuals situated in the particular circumstances in which they were.'*"

[36] Importantly, the Constitutional Court further held in *Makate* judgment that: "[40] *But even in the appeal the deference afforded to a trial court's credibility findings must not be overstated. If it emerges from the record that the trial court misdirected itself on the facts or that it came to a wrong conclusion, the appellate court is duty-bound to overrule factual findings of the trial court so as to do justice to the case. In Bernert this court affirmed: 'What must be stressed here, is the point that has been repeatedly made. The principle that an appellate court will not ordinarily interfere with a factual finding by a trial court is not an inflexible rule. It is a recognition of the advantages that the trial court enjoys, which the appellate court does not. These advantages flow from observing and hearing witnesses as opposed to reading the cold printed word. The main advantage being the opportunity to observe the demeanour of the witnesses. But this rule of practice should not be used to tie the hands of the appellate courts. It should be used to assist, and not to hamper, an appellate court to do justice to the case before it. Thus, where there is a misdirection on the facts by the trial court, the appellate court is entitled*

²⁹ 2016 (4) SA 121 (CC)

³⁰ 1948 (2) SA 677 (A)

to disregard the findings on facts and come to its own conclusion on the facts as they appear on the record. Similarly, where the appellate court is convinced that the conclusion reached by the trial court is clearly wrong, it will reverse it.”

CONCLUSION

[37] The leave to appeal procedure ensures that the appeal process is not abused and that only meritorious cases proceed to appeal. Understanding the requirements for leave to appeal can save time and resources for litigants. It is essential to comply with the relevant rules and procedures when seeking leave to appeal to avoid the dismissal of the application. Failure to comply with these requirements may result in the dismissal of the application.

[38] In *Van Den Berg v Land and Agricultural Development Bank of South Africa and Others*,³¹ the Court held: “[14] *The grounds for appeal are out of context and fatally defective. The general arrangement of the grounds on which the applicant seeks leave to appeal is to criticise the judgment on an almost paragraph-by-paragraph and word-by-word basis without specifying what effect any asserted erroneous finding or conclusion has on the correctness of the substantive order. The disjointed approach in which the applicant has expressed his application for leave to appeal influences against the importance of interpreting the judgment of the court as a whole and in context. The first and second respondents are correct where they stated that the grounds on which the applicant seeks leave to appeal are not set out in precise, and succinct and unambiguous terms. It is difficult to distinguish what and on what basis the applicant seeks to impugn the substantive order made by the Court.* [15] In *Democratic Alliance v President of the Republic of South Africa and Others* (2124/ 2020) [2020] ZAGPPHC 326 (29 July 2020) at paragraphs [4] – [5] the Full Court held as follows: ‘...This dictum serves to emphasise a vital point: Leave to appeal is not simply for the taking. A balance between the rights of the party which was successful before the court a quo and the rights of the losing party seeking leave to appeal need to be established so that

³¹ (1955/2016) [2023] ZAFSHC 504 (22 December 2023).

the absence of a realistic chance of succeeding on appeal dictates that the balance must be struck in favour of the party which was initially successful.”(Accentuation added)

[39] In *Songono* case *supra*, Leach J said the following: *“It seems to me that, by a parity of reasoning, the grounds of appeal required under Rule 49 (1)(b) must similarly be clearly and succinctly set out in clear and unambiguous terms so as to enable the Court and the respondent to be fully and properly informed of the case which the applicant seeks to make out and which the respondent is to meet in opposing the application for leave to appeal.”* It is therefore trite that leave to appeal may also be dismissed if the grounds of appeal fail to comply with the requirements of Rule 49(1)(b), by being couched in ambiguous and vague terms.” The Applicant’s grounds of appeal, in *casu*, failed to comply with the requirements of Rule 49(1)(b) and as such, this is a legal basis to dismiss the application.

[40] It is common cause that section 17(1)(a)(i) has now “raised the bar for granting leave to appeal” requiring that the matter “would” have reasonable prospects of success, not merely that it “may” have such prospects.³² This has been confirmed by the SCA.³³ The Applicant is required to satisfy the test for leave to appeal under section 17(1) of the Superior Courts Act. In *casu*, the Applicant has failed the test for leave to appeal as set out in the 2013 Act. and as such, this is a legal basis to dismiss the application.

[41] The Applicant has tendered no compelling grounds for application for leave appeal to be granted. The Applicant has provided no basis to suggest that this Court’s assessment of the evidence was misdirected, nor has it shown that there are reasons

³² Acting National Director of Public Prosecution and Others v Democratic Alliance; In re Democratic Alliance v Acting National Director of Public Prosecution and Others 2016 ZAGPPHC 489 (24 June 2016) at paras 25, 29 (Full Court), citing *The Mont Chevaux Trust (IT2012/28) v Tina Goosen & 18 Others LCC 14R/2004* at para 6.

³³ *Mothuloe Incorporated Attorneys v The Law Society of the Northern Provinces & another* [2017] ZASCA 17 (22 March 2017) at para 18; *Notshokovu v S* [2016] ZASCA 112 (7 September 2016) at para 2: “[a]n appellant ... faces a higher and stringent threshold, in terms of the Act compared to the provisions of the repealed Supreme Court Act 59 of 1959.”

that would convince a court of appeal that this Court was wrong. As such, this is a legal basis to dismiss the application.

[42] In my view, after careful consideration of the Applicant's grounds for leave to appeal and the submissions from both parties, there is nothing that persuades me that this appeal would have a reasonable prospect of success. There are also no compelling reasons why leave to appeal should be granted. Therefore, the application for leave to appeal against the whole Judgment *a quo* and the Court Order cannot be sustained and as such, it stands to be refused. Firstly, because it is fatally flawed; and secondly, because there is no sound and rational basis for the conclusion that there are prospects of success on appeal. The Respondent has therefore successfully opposed the Applicant's application for leave to appeal. There is also no reason why the costs in this application should not follow the results.

ORDER

[43] In the circumstances, the following order is made:

- (a) The application for leave to appeal against the whole Judgment *a quo* and Court Order handed down on 18 December 2023 is refused;
- (b) The Applicant is ordered to pay costs on a party and party scale.

T E JOYINI

ACTING JUDGE OF THE HIGH COURT, PRETORIA

APPEARANCES:

Counsel for the Applicant:	Adv TC Kwindu
Instructed by:	JL Raphiri Attorneys Inc.
Counsel for the Respondent:	Adv PM van Ryneveld
Instructed by:	HW Theron Attorneys Inc.

Date of Hearing:	6 February 2024
Date of Judgment:	26 February 2024

This Judgment has been delivered by uploading it to the Court online digital data base of the Gauteng Division, Pretoria and by e-mail to the Attorneys of record of the parties. The deemed date and time for the delivery is 26th of February 2024 at 10h00.