

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

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

20946/2016**28 February 2023**

DATE

Senari

SIGNATURE

QUINTON LEE DUNN**PLAINTIFF / RESPONDENT**

and

MINISTER OF POLICE AND OTHERS**DEFENDANT / APPLICANT**

JUDGMENT - LEAVE TO APPEAL

TLHAPI J

[1] This is an application for leave to appeal premised on section 17 of the Superior Courts Act 10 of 2013, (“the Act”). For completeness, section 17 (1) of the Act is set out below:

“Section 17(1)

(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 reasonable prospect of success; or

(ii) there is some other compelling reasons why the appeal should be heard, including conflicting judgments on the matter under consideration;

(b) the decision sought on appeal does not fall withing the ambit of section 16(2); 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.”

[2] The test applied previously to similar applications was whether there were reasonable prospects that another court may come to a different conclusion, *Commissioner of Inland Revenue v Tuck*¹ . The threshold of reasonable prospects has now been raised by the use and meaning attached to the words ‘only’ in 17(1) and ‘would’ in section 17(1)(a)(i). Therefore, on the entire judgement there should be

1, 1989 (4) SA 888 (T)

some certainty that another court would come to a different conclusion from the judgement the applicant seeks to appeal against. In *Mont Chevaux Trust v Tina Goosen and 18 Others*² :

“It is clear that the threshold for granting leave to appeal a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see *Van Heerden v Cronwright & Others* 1985 (2) SA 342 (T) at 343H. The use of the word “would” in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against”

[3] In *S v Smith*³ a more stringent test is called for in that an applicant must convince a court, on proper grounds that there are prospects of success which are not remote, a mere possibility is not sufficient. Therefore, where the applicant has satisfied either of the two identified requirements in the Act, leave to appeal should be granted, *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others*⁴ . This standard was confirmed in *Notshokovu v S*⁵ where it was stated:

“.....An appellant on the other hand faces a higher and stringent threshold in terms of the Act compared to the provisions of the repealed Supreme Court Act 59 of 1959....”

[4] in *Ramakatsa and Others v African National Congress and Another*⁶ Dlodlo JA stated:

“Turning the focus to the relevant provisions of the Superior Courts Act[5] (the

² 2014 JDR 2325 (LCC) para [6]

³ 2012 (1) SACR 567 (SCA) para[7]

⁴ 2016 (3) SA 317 (SCA)

⁵ (157/15) [2016] ZASCA (7 September 2016) para [2]

⁶ (724/20190 [2021] ZASCA 31 (31 March 2021) para [10]

SC Act), leave to appeal may only be granted where the judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there are compelling reasons which exist why the appeal should be heard such as the interests of justice [6]. The Court in *Curatco*[7] concerning the provisions s 17(1)(a)(ii) of the SC Act pointed out that if the court unpersuaded that there are prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal, Compelling reason would of course include an important question of law or a discreet issue of public importance that will have the effect on future disputes. However, this Court correctly added that 'but hereto the merits remain vitally important and are often decisive'.[8] I am mindful of decisions at high court level debating whether the use of the word 'would' as opposed to 'could' possibly means that the threshold for granting the appeal has been raised. If a reasonable prospect of success is established, leave to appeal should be granted. Similarly, if there are some compelling reasons why the appeal should be heard, leave to appeal should be granted. The test of reasonable prospect of success postulates a dispassionate decision based on the facts and the law, that a court of appeal should be heard, leave to appeal could reasonably arrive at a conclusion different to that of the trial court. In other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist, [9]" (my underlining)

[5] For convenience I shall refer to the parties as they appeared at trial. Briefly summarised the defendant raised the following grounds of appeal, that:

- a) there was a misdirection 'in finding that the plaintiff lost a contract /tender on the ground of having a pending criminal case despite the plaintiff's witness

having testified that the policies of LONMIN only exclude contractors who have been convicted and not those with pending criminal charges’.

- b) there was a misdirection in granting an order that the defendant was liable for the plaintiff’s ‘past loss of earnings emanating from the loss of the contract between the plaintiff and LONMIN. In doing so the honourable court with respect departed from a well established principle that the defendant cannot be held liable for the unintentional interference in the contractual relationship of the parties, particularly where it had no knowledge of the contact and/or its terms’.

[6] The Defendant’s main contention is that they did not have knowledge of the contract between the Plaintiff and Lonmin at the time of the arrests; it was not foreseeable that the arrest would disrupt the contractual relationship between the plaintiff and Lonmin, hence they could not be held liable for the plaintiff’s past loss of earnings.

[7] Without reiterating the merits in this matter, I find them to be distinguishable from those in *Minister of Safety and Security v Scot and Another 2014 (6) SA 1 (SCA)*, which is the authority relied upon by the defendant. While there is similarity in the fact that in both matters the claim against the Minister and Police was for damages as a result of the unlawful arrest and detention. In this matter it was also found that the three arrests of the plaintiff were malicious. That is where the similarity ends.

[8] In the Scot matter there was a further claim by the company ScotttCo Pty Ltd for loss of contractual income and profits, which did not succeed for reasons which

are not relevant to this matter. The claim in this matter is not for loss of contractual profits by PPS. The contractual relationship between PPS and LONMIM were not pertinent to the claim by the plaintiff who sued in his personal capacity for the loss of earnings which was occasioned by the malicious unlawful arrest. (my underlining)

[9] Having said the above, I am of the view that the defendants have not made out a case that there are grounds for success in the appeal.

[13] In the result the following order is granted:

1. The application is refused and defendants are ordered to pay costs of the Plaintiff.



TLHAPI J
JUDGE OF THE HIGH COURT

APPEARANCES

FOR THE APPLICANT

: ADV. K K MALOMA

INSTRUCTED BY

: STATE ATTORNEY

FOR RESPONDENTS

: ADV. S G MARITZ

INSTRUCTED BY

: LOURENS & SCHWARTZ
ATTORNEYS INC.

HEARD ON

: 03 February 2023

DATE OF JUDGMENT

: 28 February 2023