

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

CASE NO: 38117/2020

Heard on: 4 April 2023

Delivered on: 17 April 2023

In the matter between:

MANDI LOMDARD

Applicant

and

McDONALD'S WINGTIP

Respondent

In re

MANDI LOMBARD

Plaintiff

and

McDONALD'S WINGTIP

Defendant

JUDGMENT

VUMA AJ

[1] Mandi Lombard ("the applicant") seeks leave to appeal to the Supreme Court of Appeal against the whole judgment and order delivered by me on 14 April 2022, on

the grounds that I erred both in fact and in law and in one or more of the respects as will appear below-herein.

[2] The applicant contends that the appeal would have a reasonable prospect of success as contemplated by section 17(1)(a)(i) of the Superior Courts Act 10 of 2013 ("the SCA Act"). The applicant further contends that there are other compelling reasons why the appeal should be heard as contemplated by section 17(1)(a)(ii) of the Act.

[3] It is trite that an application for leave to appeal a decision from a single Judge of the High Court is regulated by Rule 49 of the Uniform Rules of Court. The substantive law pertaining to application for leave to appeal is dealt with in section 17 of the Superior Courts Act 10 of 2013.

[4] The applicant's grounds of appeal are found in her Notice of Application for Leave to Appeal.

[5] Of note the applicant contends, *inter alia*, the following points:

5.1 That in respect of the disclaimer notice, the Court erred insofar as she found amongst other things that:

5.1.1. the respondent /defendant's disclaimer notice did not contravene the provisions of section 49 of the Consumer Protection Act 68 of 2008 and that it absolved the defendant from wrongfulness;

5.1.2. the notice is not ambiguous; and

5.1.3. the disclaimer notice was applicable to the area where the plaintiff/applicant fell.

- 5.2. That the Court erred in concluding that on probabilities, the area where the plaintiff/applicant fell was not wet, in light of the object proven facts;
- 5.3. That the Court erred in concluding that on probabilities, the area where the plaintiff/ applicant fell was safe, in light of the objective facts;
- 5.4. That the Court failed to exercise a proper judicial discretion as to the credibility of Ms Matseke and Ms Ncube, in that they were found to be credible witnesses, to such an extent that another court would 'not' interfere with the findings made; and
- 5.6. That the court erred in not finding that the indemnification clause is against public policy with reference to Regulation 44(3)(a) of the consumer Protection Act 68 of 2008 ("*the CPA*"), read with sections 48 and 49 of the CPA, in regard to which there are conflicting judgments.

[6] In regard to the argument why leave should be granted to appeal to the Supreme Court of Appeal "(SCA)", the applicant submits the following reasons:

- 6.1. The type of disclaimer relied on by the respondent has no place in our constitutional dispensation and specifically within the legal framework created by the CPA;
- 6.2. There are conflicting judgments on whether these types of clauses ought to stand and this aspect has not been properly addressed by the SCA;
- 6.3. The previous decisions on this aspect were prior to the enactment of the CPA and insofar as there were judgments dealing with a disclaimer clause post-CPA,, those judgments did not address this specific

question and is therefore not binding on this Court; and

- 6.4. The prospects of an appeal succeeding, whilst of significant importance, are not decisive in determining whether it is in the interests of justice for leave to appeal to be granted. The question about indemnification clauses in the context of the CPA is of general public importance, and it would be in the interests of justice to grant leave to appeal.

[7]. The applicant thus contends that the appeal would have a reasonable prospect of success and that leave to appeal to the SCA be granted and that costs be ordered to be costs in the appeal.

[8] The respondent opposes the application and contend that the Court correctly dismissed the plaintiff's claim with costs, arguing that the applicant's leave to appeal should be refused for, *inter alia*, the following reasons:

- 8.1 The balance of probabilities does not favour the applicant's version and further that the applicant did not discharge the requisite onus to prove her case.

- 8.2. There are no reasonable prospects of success that another court would come to a different conclusion and thus the application for leave to appeal falls to be dismissed with costs.

[9] The principles governing the question whether leave to appeal should be granted are well established in our law. Such principles have their origin in the common law and they entail a determination as to whether reasonable prospects of success exist that another court, considering the same facts and the law, may arrive to a different conclusion to that of the court whose judgment is being impugned. The principles now find expression in section 17 of the Superior Court Act 10 of 2013

[10] It has also been generally accepted that the use of the word "would" in section 17 of the Act added a further consideration that the bar for the test had been raised with regard to the merits of the proposed leave to appeal before relief can be granted. The Act widened the scope in which leave to appeal may be granted to include a determination of whether "there is some compelling reason why the appeal should be heard."

[11] In my view, and having considered both parties' arguments and the impugned judgment and the order, the applicant has not succeeded to make out a case for leave to appeal. I am of the further view that no compelling reasons have been established to justify why leave to appeal should be granted to the SCA.

[12] In the premises I make the following order:

ORDER:

1. Leave to appeal is dismissed with costs.

Livhuwani Vuma

Acting Judge Gauteng Division, Pretoria

ALA Heard on: 4 April 2023

ALA Judgment handed down on: 17 April 2023

Appearances

For Applicant: Adv. HP Wessels

Instructed by: Van der Merwe & Associates

For Respondent: Adv. L Segeels-Ncube Instructed by:

Clyde & Co. Attorneys