

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

Case No: 61756/2018

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED

DATE:24/05/2023

In the matter between:

MASHEGO DUMISANI PROMISE

Applicant/Plaintiff

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA

Respondent/Defendant

JUDGMENT

PHOOKO AJ

INTRODUCTION

[1] This is an application for leave to appeal against a judgment and order of this court delivered on 20 January 2023. The order reads as follows:

(a) The Plaintiff's claim is dismissed.

(b) The Plaintiff is ordered to pay the costs of this action.

[2] The Applicant, Plaintiff in the main action had instituted an action for damages

against the Respondent/Defendant in the main action for injuries that he allegedly sustained when he was robbed and pushed out of an open door of a moving train that was travelling from Johannesburg to Pretoria on 25 April 2018. The aforesaid incident allegedly occurred when the train was approaching or about to enter Doornfontein train station. The action was dismissed on various grounds including that the Applicant was unable to persuade the trial court that he was injured at Doornfontein train station.

- [3] Aggrieved by the dismissal of his action, the Applicant launched this appeal against the judgment of the trial court.

GROUND OF APPEAL

- [4] The Applicant's grounds of appeal are inter alia that the trial court erred and misdirected itself when:

4.1 in the assessment of evidence and reaching a conclusion, relied on hearsay evidence in the form of medical records, and

4.2 it used the words "inconclusive and irrefutable", raising the bar for a standard of proof and therefore applied an incorrect test.

THE ISSUE

- [5] The issue to be determined is whether there are reasonable prospects that, if leave to appeal is granted, the appeal would succeed.

APPLICABLE LEGAL PRINCIPLE

- [6] It is now settled in our law that the threshold for the granting of leave to appeal has been raised in that leave to appeal may only be granted if the appeal would have a reasonable prospect of success.¹ The possibility of another court holding a different view no longer forms part of the test of whether to grant leave to appeal.²

¹ Section 17(1) (a) (i) of the Superior Courts Act, 10 of 2013 ("the Superior Courts Act").

² *The Mont Chevaux Trust v Tina Goosen & 18 Others* 2014 JDR 2325 (LCC) at para 6.

[7] It was held in *Mont Chevaux Trust v Tina Goosen & 18 Others* that “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 Consequently, “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”.⁴

[8] This is the yardstick for evaluating the submissions of the parties in ascertaining whether the evidence and/or submissions before this Court indicate that there is a reasonable prospect that the appeal, if leave to appeal is granted, will succeed.

APPLICANT’S SUBMISSIONS

[9] The Applicant’s submissions could be summarized as follows:

9.1 that the trial court considered hearsay evidence in the form of medical records when it evaluated the testimony of the Plaintiff. According to the Applicant, the trial court erred when it inter alia found that the Plaintiff contradicted himself because this was largely based on further particulars that were not led and canvassed during the trial.

9.2 the trial court applied an incorrect technique as outlined in *Stellenbosch Farmers’ Winery Group Ltd and Another Martell et Cie and Others*⁵ when it assessed the evidence of the Defendant’s witnesses as it failed to assess the candor and demeanor of witnesses.

[10] The Applicant further argued that the use of “conclusive and irrefutable” in the assessment of the evidence in civil proceedings indicates that the trial court expected proof higher than proof on a balance of probabilities.

[11] Based on the above, the Applicant submitted that there was a reasonable

³ Ibid.

⁴ *S v Smith* 2011 (1) SACR 567 (SCA) at para 7.

⁵ 2003 (1) SA SA 11 (SCA) at p 141-15D at para 5.

prospect of success on appeal, if leave to appeal is granted.

RESPONDENT'S SUBMISSIONS

[12] Counsel for the Respondent argued that the Applicant did not demonstrate that he meets the threshold for the granting of leave to appeal. Based on this ground alone, the appeal should be dismissed.

[13] In addition, counsel for the Respondent argued that even if the trial court were to disregard the medical records, it would still find that the Applicant had failed to prove that he sustained injuries at Doornfontein train station.

EVALUATION OF EVIDENCE AND SUBMISSIONS

[14] This court is not persuaded that it elevated the bar when it made use of the words conclusive and irrefutable in its judgment of 20 January 2023. Throughout the judgment, the trial court eloquently stated that the standard of proof in civil matters was proof on a balance of probabilities.⁶ In my view, counsel for the Applicant was being technical and selective in his reading of the judgment of the trial court. Accordingly, this ground has no merit.

[15] I am persuaded by counsel for the Respondent that the Applicant has failed to meet the requisite threshold for leave to appeal to be granted because the appeal would not have reasonable prospects of success in the substantive application. I have extensively dealt with this aspect in my judgment of 20 January 2023 and need not repeat it here save to indicate that the evidence and testimony of all witnesses before the trial court was far from supporting the Applicant's case in that he was injured at Doornfontein train station.

[16] The Applicant's case does not meet the requirements of any of the categories mentioned under section 17 of the Superior Courts Act, there being no reasonable prospects of success.

[17] There is no basis on which to find that the costs of the leave to appeal should

⁶ See Trial Court judgment at paras 12, 14, 16, and 88.

not follow the results.⁷

ORDER

[18] I, therefore, make the following order:

(a) The Appeal is dismissed.

(b) The Applicant is ordered to pay the costs of this application.

M R PHOOKO

**ACTING JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, PRETORIA**

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 24 May 2023.

APPEARANCES:

Counsel for the Plaintiff: Adv RM Mphela

Instructed by: Mashudu Muhanganezi Attorneys

Counsel for the Defendant: Adv SM Tisani

Instructed by: Diale Mogashoa Attorneys

Date of Hearing: 19 May 2023

⁷ *Neuhoff v York Timbers Ltd* 1981 (1) SA 666 (T).

Date of Judgment:

23 May 2023