



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/ NO
Of interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No: 3742/2016

In the matter between:

LORENZO BEVAN NELSON

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

CORAM: NAIDOO J

HEARD ON: 13 NOVEMBER 2023

DELIVERED ON: 4 DECEMBER 2023

**JUDGMENT – APPLICATION FOR LEAVE
TO APPEAL**

- [1] This is an application by the applicant, Lorenzo Bevan Nelson, who was the plaintiff in the main action, for Leave to Appeal against part of the judgment and order in this matter, which was delivered on 5 May 2023. The respondent in the action was the Road Accident Fund (RAF). Adv (Ms) K Petersen represented the plaintiff and Ms K Mkhwanazi represented RAF.
- [2] The judgment was assailed on a number of grounds, which in essence, are that the court erred in:
- 2.1 not determining the aspect and/or applicability of the contingency deduction, as agreed by the parties;
 - 2.2 making a finding in respect of the applicant's past and future loss of earnings and/or income, when these aspects were not before the court;
 - 2.3 finding that the respondent did not accept all the applicant's experts reports, including that of the actuary, Mr Wim Loots, whereas the respondent accepted the contents of all the applicant's expert reports and only disagreed with the percentages of the contingency deductions applied by the actuary;
 - 2.4 placing reliance on the respondent's expert reports whereas the latter accepted the applicant's expert reports;
 - 2.5 raising concerns with the age of the applicant's various expert reports, as the factual findings contained in those reports were accepted by the respondent, the current condition of the applicant and the impact of his injuries on his employability;
 - 2.6 making a finding of absolution from the instance, and
 - 2.7 making a costs order that each party should pay its own costs, as the applicant was substantially successful in three of the four heads of damages claimed.

- [3] it is by now trite that section 17 of the Superior Courts Act 10 of 2013 regulates the test to be applied in an application for leave to appeal. The relevant provisions of section 17(1) provide as follows:

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

(my emphasis and underlining)

- [4] An applicant was, previously, merely required to show that there is a reasonable possibility that another court, differently constituted, would find differently to the court against whose judgment leave to appeal is sought. It is clear from section 17(1), set out above, that the situation is now somewhat different, and an applicant for leave to appeal is required to convince the court that there is a reasonable prospect of success and not merely a possibility of success. In the matter of *The Mont Chevaux Trust v Tina Goosen + 18 2014 JDR LCC*, Bertelsmann J held that:

“It is clear that the threshold for granting leave to appeal against 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....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.”

- [5] The Mont Chevaux decision was cited with approval in a number of cases, one such matter being *Matoto v Free State Gambling and Liquor Authority* (4629/2015) [2017] ZAFSHC 80 (8 June 2017), a decision emanating from this Division, where my brother Daffue J echoed the remarks of Bertelsmann J at paragraph 5 and remarked that “There can be no doubt that the bar for granting leave to appeal has been raised...The use by the legislature of the word “only” emphasized supra, is a further indication of a more stringent test.”

The Full Court in *Acting National Director of Public Prosecutions and Others v Democratic Alliance* (19577/2009) [2016] ZAGPPHC 489 (24 June 2016) also cited Mont Cheveaux with approval.

- [6] In this matter, the court was informed that most of the heads of damages had been settled and only the loss of earnings and the contingency deductions were in dispute. While the respondent had accepted the applicant’s expert reports, it appeared that the purpose was to prevent the calling of those experts to testify. The only expert report filed by the respondent, which the court was asked to disregard was that of the respondent’s actuary. This was dealt with in the judgment, a careful reading of which will indicate that the mentioning of the respondent’s expert reports was largely to outline the physical condition of the applicant after the accident.
- [7] The court’s assessment of the applicant’s condition and alleged disabilities was based on the applicant’s expert reports. The concerns raised by the court arose from the applicant’s expert reports. In order to assess past and future loss of earnings and decide on a reasonable contingency deduction (both of which were in dispute), the court must have recourse to what was disclosed in the expert reports. It is therefore misguided to assert that the court

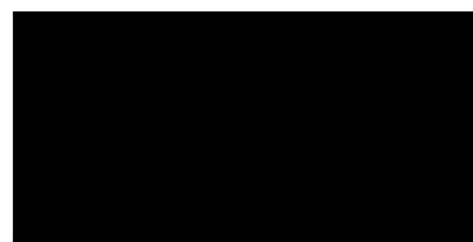
was not entitled to raise concerns if the respondent accepted the applicant's expert reports. It is trite that the court is not bound to slavishly follow the opinions of experts if other circumstances raise queries requiring clarification by those experts. Hence the court's concerns regarding the age of the reports as well as other concerns detailed in the judgment.

- [8] Similarly the court has a discretion in deciding the issue of contingency deductions. This has been settled in a number of cases in our law, that a judge is not tied down by actuarial calculations and has the discretion to decide what is right [See *Legal Assurance Company Ltd v Botes* 1963(1) SA 608 (A)]. That discretion entails considering a number of factors, for example the extent to which the plaintiff's injuries have affected his employability.
- [9] As is evident from the judgment, various factors which prevented this court from properly exercising that discretion were detailed and raised as concerns by the court. As pointed out in the judgment, the court was of the view that the applicant had not proven that his injuries resulted in the pecuniary loss he claimed, which entitled the court to dismiss his claim. However, the court was loathe to shut the door of the court to the applicant, and granted absolution from the instance. This was to afford the applicant an opportunity to approach the court again with better and (in this case, updated) information from the experts in order that the court could properly exercise its discretion in assessing the contingency deductions.

[10] The award of costs is in the discretion of the court, which may make an award that deviates from the norm that costs follow the result. Although the applicant claims he was substantially successful, the court was of the view that he proceeded to present evidence that was of little assistance to the court, and the costs order reflected the court's attitude in this regard

[11] This court is of the view that the applicant has not met the threshold of showing that he has good prospects of success on appeal, as another would come to a different conclusion.

[12] In the circumstances, I make the following order:
The application for leave to appeal is dismissed with costs

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S NAIDOO, J

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