

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

Case No. 66127/2018

**REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED: YES
DATE:08/03/2024**

In the matter between:

**M[...] K[...] obo
M[...] T[...] L[...]**

Applicant

and

THE ROAD ACCIDENT FUND

Respondent

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

YENDE AJ

Introduction

[1] In the applicant's default trial *a quo*, I dismissed with costs the applicant's action on merits. The applicant seeks leave to appeal against the judgment and order I delivered on 13 November 2023. The matter was purely determined on papers the "merit Police Docket" and a sworn affidavit by Udoaluwa Nethengwe

deposed to on 26 October 2023 (three days before the default trial) uploaded on Caselines platform without the hearing of *viva voce* evidence.

[2] The grounds of appeal are encapsulated in the Notice of Application for leave to appeal and I deem it unnecessary to restate same. The application for leave to appeal is sought in terms of section 17(1)(a)(i) of the Superior Courts Act (“the Superior Courts Act”)¹ to the Full Court of this Division contending that there is reasonable prospect of success that another Court would come to a different conclusion, alternatively to the Supreme Court of Appeal. Now I turn to consider the legal principles applicable in this application.

[3] Section 17(1)(a) of the Superior Courts Act 10 of 2013 (“the Superior Courts Act”) provides that leave to appeal may be granted where the judge concerned is of the opinion that:

[3.1] the appeal would have a reasonable prospect of success (section 17(1)(a)(i);
or

[3.2] there is some other compelling reason why the appeal should be heard (section 17(1)(a)(ii).

[4] The Supreme Court of Appeal has held that the test for granting leave to appeal is as follows;

[4.1] In the matter of *MEC for Health, Eastern Cape v Mkhitha and Another* [2016] ZASCA 176 (25 November 2016), it was held (*footnotes omitted*)-

“[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.

¹ Act No.10 of 2013.

[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”.

[4.2] The Full Court of this Division, Pretoria when dealing with section 17(1)(a)(i) of the Superior Courts Act, in the matter of Acting National Director of Public Prosecutions and Others v Democratic Alliance [2016] ZAGPPHC 489 (24 June 2016) held that-

*“[25] The Superior Courts Act has raised the bar for granting leave to appeal. In **The Mont Chevaux Trust (IT2012/28) v Tina Goosen & 18 Others**, Bertelsmann J held as follows:*

‘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’ ”.

[4.3] Four years later, the Full Court of this Division, Pretoria in Fairtrade Tobacco Association v President of the Republic of South Africa [2020] ZAGPPHC likewise held-

“As such, in considering the application for leave to appeal, it is crucial for this Court to remain cognisant of the higher threshold that needs to be met before leave to appeal may be granted. There must exist more than just a mere possibility that another court, the SCA in this instance, will, not might, find differently on facts on law”

[4.4] In *Fusion Properties 233 CC v Stellenbosch Municipality* [2021] ZASCA 10 (29 January 2021), it was held that –

“[18] Since the coming into operation of the Superior Courts Act, there have been a number of decisions of our courts which dealt with the requirements that an application for leave to appeal in terms of ss 17(1)(a)(i) and 17 (1)(a)(ii) must satisfy in order for leave to be granted. The applicable principles have over time crystallised and are now well established. Section 17(1) provides, in material part, that leave to appeal may only be granted ‘Where the judge or judges concerned are of the opinion that-

(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.’

It is manifest from the text of s 17(1)(a) that an applicant seeking leave to appeal must demonstrate that the envisaged appeal would either have a reasonable prospect of success, or, alternatively, that ‘there is some compelling reason why an appeal should be heard’. Accordingly, if neither of these discrete requirements is met, there would be no basis to grant leave”.

[4.5] Later, eight (8) months after the decision in *Fusion Properties 233 CC v Stellenbosch Municipality*, the very same court in *Chithi and Others; In re: Luhlwini Mchunu Community v Hancock and Others* [2021] ZASCA 123 (23 September 2021), held that –

“[10] The threshold for an application for leave to appeal is set out in s 17(1) of the Superior Courts Act, which provides that leave to appeal may only be given if the judge or judges are of the opinion that the appeal would have a reasonable prospect of success....”.

[5] It is worthy to observe that all the decisions mentioned *supra* are in accordance

with the judgment of the Supreme Court of Appeal In the matter of *Notshokovu v S* [2016] ZASCA 112 in which it was held that – *an applicant in an application for leave to appeal “faces a higher and stringent threshold, in terms of the Act compared to the provisions of the repealed Supreme Court Act 59 of 1959”.*

[6] Having considered the grounds of appeal raised by the applicant, the submissions and/or argument raised by the applicant's counsel in support of the application including the heads of argument, I am not of the view that on the grounds of appeal raised by the applicant, the appeal would have a reasonable prospect of success.

[7] Comprehensive reasons were adumbrated and provided for the order that I granted in my carefully considered and sound written judgment delivered and I do not propose to rehash those.

[8] Apropos of the high threshold that has been raised in the new Act and same confirmed by the legal precedence mentioned *supra* I am obliged to determine whether another Court would (*not might*) come to a different conclusion. Notwithstanding the able argument of Ms Themane, I am not convinced that another Court would come to a different conclusion other than that which I have made.

[9] I am also of a firm view that the applicant has not made out a case for the application to succeed in terms of the provisions of section 17(1)(a) of the Superior Courts Act No 10 of 2013.

Order

[10] Consequently, the application for leave to appeal is dismissed with costs.

J YENDE
ACTING JUDGE OF THE HIGH COURT

Yende AJ prepared this judgment. It is handed down electronically by circulation to the parties or their legal representatives by e-mail, by uploading the electronic file on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date of hand-down is deemed **08 March 2024**.

APPEARANCES:

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Instructed by:

no appearance

Heard: 21 February 2024

Judgment: 08 March 2024