

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

(1) Reportable: No
(2) Of interest to other Judges: No
(3) Revised: No

Date :29/03/2024

A Maier-Frawley



CASE NO: 2009/36826

In the matter between:

KOTZÉ, JOHANNES STEPHANUS

Plaintiff/Respondent in leave
to appeal

and

THE MINISTER OF SAFETY AND SECURITY

Defendant/Applicant for leave
to appeal

J U D G M E N T

(Application for Leave to Appeal)

MAIER-FRAWLEY J:

1. For ease of reference, the parties will be referred to as they were in the proceedings *a quo*. The defendant applies for leave to appeal against my judgment, delivered on 10 November 2023, on the basis that I erred in

finding that the evidence presented at trial¹ supported a finding of factual causation in respect of the plaintiff's claim for damages arising from the development loss. No leave to appeal is sought in relation to the damages awarded in respect of the cost of an assistant.

2. It may be recalled that the defendant chose not to lead any evidence at trial to rebut the evidence of the plaintiff's witnesses. The extensive list of issues and facts that were common cause or not disputed between the parties at trial were summarized in *inter alia*, paragraphs 6, 74, 89 of the judgment. Ultimately, the factual evidence of all the plaintiff's witnesses remained unrefuted.
3. The complaints listed in the notice of application for leave to appeal, are to the effect that the trial court ought to have found (and erred in finding to the contrary) that:
 - 3.1. Despite the plaintiff's physical condition, he continued to conduct business;
 - 3.2. The Plaintiff's decision to accept the proposal to sign over the development to the land owner (Transacht) broke the chain of causation between the shooting incident and the loss of the development. This is because the plaintiff understood the implications thereof for his business; allegedly had other choices available to him, rather than to let the development go; was in control of his businesses at the time the development was lost and continued to manage his businesses after the incident;

¹ Evidence presented at trial, which included oral evidence, documentary evidence and affidavit evidence remained either common cause, undisputed or unrefuted.

- 3.3. At the time that the bank took the decision to withdraw approval for the provision of finance for the project, the plaintiff's "company"² was not a rudderless ship, nor was the plaintiff's life in jeopardy. The plaintiff was in control of his business at the time;
- 3.4. The bank's decision to withdraw the facility constituted an intervening act that broke the chain of causation between the incident and the plaintiff's loss.
4. The factual findings in paragraph 94 of the judgment were not, however, challenged by the defendant in the application for leave to appeal. These include that, prior to the shooting incident, (i) the plaintiff was the sole person who managed, conducted and controlled the affairs of Tsiris CC; (ii) Tsiris CC's profitability was wholly dependent on the plaintiff's personal skill and performance; (iii) as regards the development, the plaintiff was the person who took all pivotal decisions, dealt with builders and negotiated with creditors. This should be read with that which is recorded in paragraphs 29 and 40 of the judgment.
5. In terms of section 17 of the Superior Courts Act, 10 of 2013:
- “(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;
- (b) ...”

² This is presumably a reference to *Tsiris Properties CC* (the vehicle used by the plaintiff to purchase the land - erf 903 - on which the development was constructed). It will be recalled that *Kotze Lebotse (Pty) Ltd* was the vehicle used by the plaintiff to manage the project development.

6. The ground listed in s 17(1)(a)(ii) was not pursued at the hearing.
7. In *S v Smith*,³ it was stated that in deciding whether there is a reasonable prospect of success on appeal, there must be '*a sound, rational basis for the conclusion that there are prospects of success on appeal.*' As the court explained, a mere possibility of success, an arguable case or one that is not hopeless, is not enough. In *Dexgroup*,⁴ the SCA cautioned that the '*need to obtain leave to appeal is a valuable tool in ensuring that scarce judicial resources are not spent on appeals that lack merit.*' In *Kruger v S*,⁵ the Supreme Court of Appeal reiterated the need for a lower court to act as a filter in ensuring that the appeal court's time is spent only on hearing appeals that are truly deserving of its attention and that the test for the grant of leave to appeal should thus be scrupulously followed. In order to meet the test for the grant of leave to appeal, '*more is required than the mere 'possibility' that another court might arrive at a different conclusion.*' Quoting from *Smith*, the court went on to state that it is not enough that the case is arguable on appeal or not hopeless, instead the appeal must have '*a realistic chance of succeeding.*' More recently, in *Ramakatsa*,⁶ the Supreme Court of Appeal, again affirming what was stated in *Smith*, stated that '*The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive*

³ *S v Smith* 2012 (1) SACR 567 (SCA) para 7.

⁴ *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and Others* 2012 (6) SA 520 (SCA) at par 24.

⁵ *Kruger v S* 2014 (1) SACR 647 (SCA) at paras 2 and 3.

⁶ *Ramakatsa and Others v African National Congress and Another* (724/2019) [2121]ZASCA 31 (31 March 2021) at par 10.

MEC Health, Eastern Cape v Mkhitha (1221/2015) [2016] ZASCA 176 (25 November 2016) at par 17, quoting from *S v Smith*, par 7, where the following was said: '*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.*' (footnote omitted) (emphasis added).

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 a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist.'

8. The same arguments proffered by the defendant at trial for why it contended that factual causation had not been proven by the plaintiff (as recorded in paragraphs 96; 99 and 109 of the judgment) were pursued by it at the hearing of the application for leave to appeal. These grounds were rejected, for reasons given in, inter alia, paragraphs 100 to 116 of the judgment. I stand by the judgment and reasons provided.⁷

9. Ultimately, the question whether a causal nexus exists in a particular case is a question of fact which must be answered in light of the available evidence and relevant probabilities. A causal nexus is simply something which (factually) exists or does not exist, and it appears that no amount of theorising can take the matter any further.⁸ The learned authors Neethling, Potgieter and Visser record that the *conditio sine quo non* theory, also known as the “*but for*” test, is explained in the following example by Van der Merwe & Olivier:⁹

"According to this, an act is the cause of a result if the act cannot be thought away without the result disappearing simultaneously. The act must in other words be conditio sine quo non of the result."

⁷ In par 112 of the judgment, I specifically record that the defendant resorted to speculation rather than evidence in support of its contentions.

⁸ Law of Delict, 5th Edition, Neethling, Potgieter and Visser at p 159.

⁹ Law of Delict, 5th Edition, Neethling, Potgieter and Visser at p 161 read with fn 14 thereto

10. According to the above theory one should, in order to determine whether X was a cause of Y (the result), eliminate X mentally and consider whether Y (the result) still exists or not. If Y falls away when X is eliminated, X is a cause of Y. If Y still exists even when X is eliminated, Y has not been caused by X.¹⁰ In the present context, 'X' is the shooting incident in which the plaintiff was severely injured with concomitant sequelae. 'Y' is the bank's decision to withdraw finance and the plaintiff's decision thereafter to settle the action instituted by Transacht against Tsiris CC by signing over the development.
11. The authors propose that it is usually sufficient for the purposes of factual causation, if a defendant's conduct has in any way contributed to the damage sustained by the plaintiff; for causation, it is unnecessary that the defendant's conduct should be the only cause, or the main cause, or a direct cause.¹¹
12. Applying the above test *in casu*, two questions arise: First, would the bank have withdrawn the finance if the plaintiff was not shot and seriously injured? The answer is a resounding 'no', as the evidence¹² and probabilities established. More pertinently, other than the fact that the plaintiff was shot (and thereby severely injured), not a single other reason for the withdrawal of finance was provided in the evidence tendered at trial. Second, would the plaintiff have signed over the development if he was not shot and seriously injured in the incident in question? Again, the answer is a resounding 'no', as

¹⁰ Law of Delict, 5th Edition, Neethling, Potgieter and Visser at p 162.

¹¹ Law of Delict, 5th Edition, Neethling, Potgieter and Visser at p 171.

¹² The uncontested evidence of **Ms Le Roux** at pp 006-51 to 006-52 of the record was as follows:

"MR MARITZ: *Let us assume for a moment... that the shooting incident did not occur and he [plaintiff] was not severely injured, would Absa have proceeded to finance the development?*

MS LE ROUX: *Absolutely.*"

the evidence¹³ and probabilities established. More pertinently, it was never suggested by the defendant, nor was it put to the plaintiff at any stage that

¹³ **Ms Vld Walt's evidence** in-chief is at p006-147, line 7-12 of the record. When asked what state Mr Kotze was in [during February 2009/early March 2009] she testified that *"well he was still very very sick and he was not in a position to deal with major crises or issues and to that extent he was also still not back at the office; he was still getting medical attention at the stepdown on a daily basis and so he was, I am not even sure if he comprehended what I said to him at that time"*

She further testified that when she went to see the plaintiff at the stepdown facility, he could not deal with the issues of his businesses at all (record p006-148 L10); he was at that stage just trying to stay alive and trying to go through all the medical procedures. He did not want to talk about anything. His stomach had to be opened and closed every second day.(record p006-149 L4-13)

The uncontested evidence of the **plaintiff** in-chief, was as follows:

As at February 2009, the plaintiff testified that he was still fighting for his life. Most of the time he was just laying on his back and not able to concentrate on anything that was not happening in the business (record p006-230, line 17). When asked about signing over the development, he indicated that *"Ja, I got the message, not knowing what I was signing, later it got through to me."* (record 006-231, line 13)

The uncontroverted evidence of **Ms Le Roux** in-chief, was as follows:

The plaintiff was the sole member of the CC and the only person that the bank had ever dealt with. He was the jockey and the driving force behind everything. He was also the only one in management of the CC. He also signed personal surety for all of the loans. The plaintiff being shot had a significant impact on the risk of the bank (record, p 006-50, line 20 and further). The bank decided not to proceed with the finance because of the plaintiff's medical condition. The bank could not speak to the plaintiff, he was the jockey but was incapacitated (record p Page 006-51) Not much progress was made in terms of his recovery. The company had no jockey and there was no succession plan in place (record p006-96, line 17 and further). The Bank had only ever dealt with Mr Kotze and they were not aware of anyone else. (record p006-97, line 22 and further; p 006-98, line 13 and further) .

It would be like lending money to a company that is headless. The plaintiff was the only one who could take decisions. A bank cannot put money into a company where no decisions can be taken. The bank pulled the plug as the company was without leadership and nothing that had been planned could have been executed. The plaintiff was not in a medical condition to speak to anyone. In response the defendant put it to Ms Le Roux that the plaintiff was fighting for his life when the plug was pulled.

If the plaintiff had died, Absa would have pulled the plug on erf 902 and would have taken steps to recover all the other outstanding loans. If the plaintiff is incapacitated, it means that there isn't somebody who can manage the business that the bank is lending money to. If the bank lends the money and the plaintiff is incapacitated, who will repay the loan? The plaintiff went from a perfectly healthy person to someone who could not attend the day-to-day business of a company or CC of which he was the sole member – that changed the risk significantly. He was not in a position to see the bank. The bank tried to get a hold of the plaintiff for 3 (three) months, but he was not able to speak to the bank.

(record pp 006-99, line 14 and further; Page 006-101, line 1 and further; Page 006-101, line 21 and further; Page 006-103, line 8 and further; Page 006-104, line 7 & 17 and further; Page 006-104, line 17 and further; Page 006-185, line 10 and further; Page 006-185, line

he would have signed over the development, even if he had *not* been shot and seriously injured.

13. Hence the conclusions reached in paragraphs 115 the judgment, namely, that, had it not been for the shooting, the plaintiff would not have been seriously injured. And, had he not been injured, the bank would not have withdrawn the finance, given that it had already been approved at the time of the shooting, with the result that the purchase price for the sale of erf 902 would have been paid and the plaintiff would have continued with the development, which would in all probability have been a resounding success.
14. As pointed out in par 116 of the judgment, the unrefuted evidence was that Absa withdrew the finance purely as a result of the Plaintiff's ongoing dire medical condition as a result of injuries sustained by him, all of which occurred as a direct result of the shooting incident. At the relevant time (i.e., February/early March 2009) creditors (such as the land owner and builder) had already instituted action for outstanding payment. Without loan finance, the land on which the development was being built could not be paid, and the project, seen from the plaintiff's investment perspective, was doomed to fail and did in fact fail.
15. Had it not been for the shooting incident and the serious injuries sustained therein, the plaintiff would have procured the funds needed and would not have lost the development.¹⁴ As a result of his condition (precipitated by the shooting) the plaintiff effectively had no choice but to let the development go at great personal cost to him.

23 and further; Page 006-187, line 8 and further; Page 006-188, line 12 and further; Page 006-190, line 5 and further; Page 006-186, line 2 and further)

¹⁴ See fn 12 above. I am mindful that the loan funds had been approved in principle by the time of the shooting incident, although they had not yet been released. Formal documents such as loan agreement would not doubt have had to have been concluded between the bank and the plaintiff (representing *Tsirir Properties CC*).

16. Mr Simelane who appeared for the defendant, referred to extracts from the record of the evidence,¹⁵ in an attempt to bolster the defendant's hypotheses that the plaintiff (i) remained mentally fit to make decisions; (ii) did in fact make '*crucial*' business decisions at crucial times; and (iii) carried on his businesses from his bed in hospital or at the step-down facility, which extracts, so it was contended, I failed to mention in the judgment. What must be borne in mind, however, is that merely because something was not mentioned in the judgment does not mean that it was not considered. But lest there be any doubt, I did indeed consider the evidence holistically (by which I mean the full conspectus of facts emerging from the evidence) in reaching my conclusions.
17. The record evidences that when asked whether or not he was shocked to learn from Ms V/d Walt of the bank's decision to withdraw the facility, the Plaintiff replied '*My interest was not into any development at that point in time. I was fighting for my life, most probably I just heard the words but it did not go through to my actions.*'¹⁶ This evidence was consistent with the evidence given by Ms V/d Walt and Ms Le Roux at trial, as detailed above. Later during cross-examination, the plaintiff was questioned about his decision to sign over the development. The plaintiff testified that he understood the nature of the problem as conveyed by his attorney to him. His instruction was that whatever he needed to sign to let go of the project, he was prepared to sign. It was then put by the defendant's counsel to the plaintiff that: 'what you felt you had to deal with at the time, this was the best way of dealing with the circumstances that you found yourself in?' to which the Plaintiff replied '*correct*'.¹⁷ The questioning proceeded as follows:¹⁸

¹⁵ The extracts referred to evidence given under cross-examination by the plaintiff

¹⁶ Record, p006-313

¹⁷ Record, p006-315

¹⁸ Record 003-315 to 006-316.

"MR SIMELANE: And that you would let go of the project with the consequences that you would lose what you put into it and rather fight this other fight?"¹⁹

MR KOTZE: Correct.

MR SIMELANE: That is what you had in mind which is understandable.

MR KOTZE: Yes." (emphasis added)

18. The defendant's submission, namely, that the plaintiff made the decision to forego the development consciously, understanding the implications thereof, in circumstances where his physical injuries did not prevent him from making decisions, which broke the chain of causation, was dealt with in paragraphs 70; 96; 109-110; and 120-122 of the judgment.
19. Mr Simelane who represented the defendant, referred to references in the record regarding evidence given by Ms le Roux and Mr Sinden under cross-examination, which he contends, supports a conclusion that at critical times, when required, the plaintiff continued to make decisions pertaining to the running of his business, having the mental capacity to do so,²⁰ so that the

¹⁹ The 'other fight' being the plaintiff's fight for his life.

²⁰ Record p006-85 L 19; 006-86 L11-20 & 24; 006-87 L17; 006-88 L17;006-89 L6. These references relate to evidence given by Ms Le Roux under cross-examination in regard the change of mandate form which was signed by the plaintiff whilst in ICU; the bank's protocols; open communication that continued between Ms Le Roux and the financial manager regarding production at one of Mr Kotze's other companies - Sprotsade; and reports Ms Le Roux received from the financial manager as to the progress of the development after the incident.

As regards the change of mandate, she testified that "*I did see Mr Kotze. I do not know if it was a week or two after the incident, and the reason for that is we had to amend the mandates for signing power, otherwise his businesses could not do any banking, because he was ...the major signatory on most and then the financial manager had certain powers but she is not allowed to sign by herself.*" (record, p 006-83 L20-25)

As regards the bank's protocols, Ms Le Roux testified that "*we do not have protocols for what happened to Mr Kotze. So we do have protocols for making sure that we look after, like part of the changes of signatories was one of the first things I had to do, because otherwise the businesses*

cannot continue and that is a risk for us as well. But there is [sic] no protocols. We did continue, we did not pull our lines immediately because if Mr Kotze two weeks later was out of hospital, nothing would have changed. (record p006-84 L18-25) (emphasis added).

Extracts from the record of Mr Sinden's cross-examination related to: par 2.7 of his affidavit, in which he stated that *'When the Glen Erasmia project commenced, we oversaw construction as well as the architectural drawing'*. This the defendant interpreted to mean that although Mr Sinden was not a decision maker, he knew of the status of the project and would have been involved in discussions about construction. The defendant's submission was that Mr Sinden was managing a team prior to the incident and that after the incident the business was not rudderless because the financial manager could report to Ms Le Roux of Absa that the project was still on track whilst Mr Sinden could report to Mr Kotze what was happening on the ground. This is quite a leap from the undisputed evidence that he had merely performed maintenance jobs at the development site whilst also overseeing or managing 8-9 workers in the maintenance team.

Sight should not be lost of the fact that Mr Sinden was employed by Kotse Lebotse (Pty) Ltd, and not Tsiris Properties CC at the time of the incident.

Further extracts related to Mr Sinden's evidence under cross-examination to the effect that he would have general discussions with the plaintiff during his recuperation at the step-down facility in 2009 *'on what is expected to happen on that day or that week.'* He was asked, (at p006-360 to 006-361) *inter alia*:

MR SIMELANE: Yes and then you would be the one who would give progress feedback on what is going on in the business...when you were seeing some of the things that were happening there [**which business was being referred to, was not clarified**] ...was there anyone else like you that was reporting to Mr Kotze?

MR SINDEN: no...

MR SIMELANE: So in 2009...you were able to supervise whatever projects were taking place in the development that Mr Kotze had already made decisions on, you were just making sure that those things were carried out, correct?

Mr Sinden: Correct

MR SIMELANE: And you would report to him and come back to him and what new instructions would necessary (sic), that is correct right?

MR SINDEN: That is correct

MR SIMELANE::The decisions he took when you were briefing him, which you went out and executed, you were able to execute those decisions and the company was able to take them and use them properly?

MR SINDEN: That is correct.

plaintiff's company was not a 'rudderless ship'. 'Basic work' had continued for 6 months, so the contention went, and it was only then, after 6 months, that the bank 'pulled the plug'. The defendant's arguments were considered in paragraphs 99 to 106 of the judgment. The arguments were rejected in paragraph 110 of the judgment for not being borne out by the evidence. The same argument was again pursued in these proceedings, to which end, isolated extracts of the record²¹ were referred to in an attempt to demonstrate some evidential basis for the defendant's submission that the development loss was occasioned by a cause solely related to the voluntary behaviour of the plaintiff.

20. I am not persuaded that the passages relied on by the defendant can be considered in isolation. The selected extracts referred to by defendant's counsel in argument must be viewed contextually and holistically together with all the other (uncontested) evidence in the matter, as referred to in the judgment. At the risk of sounding repetitive, the fact that the bank put a document in front of the Plaintiff whilst he was in a terrible condition in ICU does *not* mean that he was transacting business or running his businesses from his bed whilst in hospital. The fact that the plaintiff took the decision to

All this evidence must be view in context. At p 006-362 of the record, Mr Sinden's answers above were put into perspective:

MR SIMELANE: So if we accept that the project was never at risk because of Mr Kotze (sic) absence, it was because you were able to work with him and take,(sic) and allow him to take decisions at home or at the farm [**recuperation at home/at the farm occurred after the only relevant timeline, being Feb, March 2009 while the plaintiff was at the step-down facility**] while he was recuperating because you would have briefed him to make sure that all of that works. Is that not correct?

MR SINDEN: **I think I need to understand how to work projects.**

MR SIMELANE: ...I am ta[l]king of only of the development at erf 902 now

MR SINDEN: I was only in charge of maintenance in a managerial position. I was not ...the development manager or site supervisor for 902. I was only on maintenance...I was not in charge of stand 902 at that time, so I could not make decisions on behalf of Mr Kotze. [emphasis added]

²¹ Referred to in fn 20 above.

let the development go after being institutionalized for 6 months, whilst in the step-down facility, also does not mean that normal business had continued, unabated, irrespective of the plaintiff's injuries and condition, whilst the plaintiff was bedridden in the hospital or at the step-down facility over that period. Even if plaintiff was able to mentally appreciate the consequences of signing over the development, this does not derogate from the fact that as at February/march 2009, on the *undisputed* evidence, his focus remained entirely on saving his life, and not on making money or defending court actions instituted by creditors or on running his businesses. And why was this so? Because of the shooting and the injuries that resulted in him still being in a debilitated condition 6 months later. The former cannot be divorced from the latter.

21. Ultimately, the defendant's contention that the plaintiff's own decision to forego the project and the bank's decision to withdraw financing the project, irrespective of the plaintiff's injuries and condition, is what caused the plaintiff's loss, remained simply that – a speculative contention, which, on the probabilities and the unrefuted direct evidence of the witnesses (considered holistically and in context) cannot and does not support a finding that the chain of causation was broken.
22. The defendant's contention in any event fails to take account of two significant factors in the case: First, the bank declined to provide finance to the plaintiff because of the dire condition he was still in. Absent bank finance, there was no countervailing evidence tendered regarding any alternate revenue streams at the disposal of the plaintiff with which to preserve his investment in the development at that point in time. The unchallenged evidence was that absent finance being provided by Absa bank, the project apropos the plaintiff was doomed to fail. The unrefuted evidence of Ms Le Roux was that the bank was not willing to take the risk of providing

finance to Tsiris properties CC being without a functional head. A person who was busy fighting for his life, whose stomach remained open and exposed, and who lacked the psychic energy to go into any corporate struggle whilst in a state of trauma,²² could hardly be categorized as a functioning head. Ultimately, Ms Le Roux testified that the plaintiff was considered to be the centre behind the entire Kotze group. If something fatal were to have happened to him, the bank would have called up all existing loans for which the plaintiff had stood personal surety. The fact that the bank waited for 6 months, during which time the progress of the plaintiff's recovery was assessed, before deciding not to release finances to Tsiris CC, does not assist the defendant. ²³Why the bank ought *not* to have waited for 6 months before 'pulling the plug', was simply not answered.

23. Second, the probabilities militate against a finding that the plaintiff signed over a development that was projected to be a financial success for any reason other than by force of his health condition having remained affected by the impairment of normal physical or mental/emotional/psychological function, as discussed in paragraph 106 of the judgment, read together with paragraphs 108, 116, 118 and 121-122 thereof. Why would the plaintiff willingly sign over a development and thereby lose all the fruits of his labour? Precisely because he was in no position to deal with any business or finances or pending court cases at the time *because of* his injuries and the ongoing sequelae suffered by him as a result of the shooting.
24. Even if the plaintiff understood what he was doing when he signed over the development, this also does not assist the defendant. The plaintiff's case was never that he lacked total mental capacity, as pointed out in par 110 of the judgment. The plaintiff's case was that he was significantly injured as a result

²² See in this regard, what was stated in par 105 of the judgment.

²³ See above, fn 20 for Ms le Roux's evidence (undelined for ease of reference).

of the incident and thereby disabled across different spectrums – emotionally, cognitively, physically and psychologically, which was not in dispute at trial.

25. As regards the extracts of Mr Sinden's evidence given under cross-examination to which I was referred at the hearing of the application for leave to appeal,²⁴ the precise nature, content and complexity of the general discussions Mr Sinden held with the plaintiff during his recuperation at the step-down facility in 2009 were not addressed in the evidence. This was considered in paragraphs 100-105, read with par 59 of the judgment.
26. Having regard to the foregoing, and having dispassionately considered my judgment, I remain unconvinced that the defendant has met the required threshold for being granted leave to appeal.
27. The plaintiff seeks a dismissal of this application with punitive costs based on what was contended to be reprehensible conduct on the part of the defendant in making submissions and formulating arguments which were at variance with the undisputed evidence, the common cause facts, the probabilities and, on occasion, that which was put to the plaintiff and his witnesses on behalf of the defendant under cross-examination. Although the defendant largely repeated the same arguments it raised at trial in the application for leave to appeal, I am not persuaded that the defendant deliberately misstated the evidence – rather, it may be criticized for interpreting snippets of evidence it extracted from the record and relying thereon, absent proper context, for purposes of advancing an argument that suited its own narrative. However, I am not able to conclude that the defendant was malicious in so doing or did so with a view to mislead the court.

²⁴ These are set out in fn 20 above.

28. The application for leave to appeal was postponed on 19 February 2024 as a result of the defendant's counsel having travelled to the physical seat of the court without appreciating that the matter had been set down for hearing virtually, as conveyed by my registrar in correspondence addressed to the legal representatives of the parties prior to the hearing. Travel time occupied by Mr Simelane in travelling to the physical seat of the court and returning to chambers in order to access the virtual hearing meant that the time allocated for the hearing had been exceeded, given that the hearing was scheduled to commence at 9 am on the day, that is, before I was to continue hearing matters rostered for hearing that week as from 10am.
- 1.1 The plaintiff seeks his costs occasioned by the postponed hearing. The plaintiff's written argument is that: "On 31 January 2024, the registrar sent an e-mail to all the attorneys in which e-mail it was made clear that the hearing would take place virtually. Due to the fact that the defendant did not read the e-mail or did not communicate same to the defendant's counsel, the hearing had to be postponed. There is no reason why the plaintiff should be out pocket for any costs in this regard."
29. I accept that a mistake was made by the defendant's counsel which resulted in the postponement of the hearing of the application for leave to appeal. However, it has proven to be a costly mistake as the plaintiff's counsel was reserved to argue the matter on 19 February 2024 and to that end, costs were incurred due to no fault whatsoever on the part of the plaintiff. I agree that the plaintiff should not be out of pocket for the costs occasioned by the postponement.

30. Accordingly, the following order is granted:

ORDER:

1. The application for leave to appeal is dismissed.
2. The Defendant is ordered to pay the Plaintiff's costs on the party and party scale which includes, but is not limited to, the costs occasioned by the postponement of the Application for Leave to Appeal on the 19th of February 2024.



**AVRILLE MAIER-FRAWLEY
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, JOHANNESBURG**

Date of hearing: 14 March 2024
Judgment delivered 29 March 2024

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on Caselines and release to SAFLII. The date and time for hand-down is deemed to be have been at 10h00 on 29 March 2024.

APPEARANCES:

Counsel for plaintiff (respondent in leave to appeal)		Adv SG Maritz SC
Instructed by:		N V/d Walt Inc Attorneys
Counsel for defendant (applicant in leave to appeal)	:	Adv M. Simelane SC
Instructed by:		State Attorney, Johannesburg