



IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Case No: 3668/2021

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

In the matter between:

CORNELIUS JAHANNES DE BRUYN N.O

1st Applicant

CORNELIUS JOHANNES DE BRUYN N.O

2nd Applicant

and

KOOT OOSTHUIZEN ATTORNEYS

1st Respondent

MASTER OF THE HIGH COURT

BLOEMFONTEIN

2nd Respondent

CORAM: CHESIWE J

DATE OF APPEAL: The matter was adjudicated on the Heads of Argument as directed and authorised by the Court.

DELIVERED ON: 19 MAY 2022

APPLICATION FOR LEAVE TO APPEAL JUDGMENT

- [1] The Applicants' application for leave to appeal is to the full court of this Division against the court order of my judgment handed down on 25 November 2021, which order was that each party shall be liable to pay their own costs.
- [2] The Applicants raised five grounds of appeal based on the premises that the court did not exercise its discretion judicially in granting the cost order and misdirected itself, thus another court will interfere with such order.
- [3] The issues raised on these grounds of appeal, entail a revisit to the contended issues that were dealt with in the main application. However, the issue is whether another court would come to a different decision.
- [4] In order to succeed, the Applicants must convince this court on proper grounds that there are prospects of success on appeal and these prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must in other words be a sound and rational basis for the conclusion that there are prospects of success on appeal.
- [5] Section 17(1)(a) of the Superior Court's Act 10 of 2013 determines *enter alia* that leave to appeal may only be given where the judge or judges concerned are of the opinion that the appeal would have reasonable prospects of success or there are compelling reasons why leave should be heard.

[6] The Applicants contend that the Respondent had conceded to the relief sought in the notice of motion, namely prayers 1, 2, 3 and 4 which that alone the court ought to have awarded costs to the successful party.

[7] The test to be applied in applications of this nature is explained by Daffue J in **Mototo v Free State Gambling and Liquour Authority**¹ as follows:

“There can be no doubt that the bar for granting leave to appeal has been raised. Previously, the test was whether there was reasonable prospect that another court might come to a different conclusion. Now, the use of the word ‘would’ indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against. The use of the word ‘only’ emphasised *supra* is a further indication of a more stringent test.”

[8] With applications for leave to appeal, the court is called upon to consider whether another court would in considering all the facts of the applicable case come to a different conclusion. This procedure calls upon a presiding officer to consider its own judgment and adjudicate such judgment from the perspective of the court of appeal. The invidious position of the judge called upon to consider to grant or not to grant leave to appeal.²

[9] In **R v Muller**³, Thompson AJ said the following:

“From the very nature of things, it is always somewhat invidious for a Judge to have to determine whether a judgment which he has himself given may be considered by a high Court to be wrong, but that is a duty imposed by the Legislature upon the Judges in both civil and criminal matters.”

¹ 4629/2017 ZAFSHC 8 June 2017

² R v Balloi 1949 (1) SA 53 AD at 524-525.

³ 1957 (4) SA 642 (A) at 645

[10] Having considered the written heads of argument of both parties, in my view another court may come to a different conclusion in respect of the cost order.

[11] Accordingly, I order as follows:

1. Leave to appeal is granted to the Full Court of this Division.
2. Costs to be costs in the appeal.

A handwritten signature in black ink, consisting of a series of loops and a large, sweeping flourish that extends upwards and to the right. The signature is written over a horizontal line.

CHESIWE, J

On behalf of the Plaintiff: Adv. R van der Merwe
Instructed by: Badenhorst Inc.
BLOEMFONTEIN

On behalf of Respondents: Adv. JC Coetzer
Instructed by: Lovius Block Attorneys
BLOEMFONTEIN