

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

Case No: 5056/2021

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

RODOS IOANNIDES N.O.

First Applicant

CHRISTOS IOANNIDES N.O.

Second Applicant

WAYNE GARETH BEELDERS N.O.

Third Applicant

*(in their respective official capacities as duly appointed
Trustees of the Caramello's Trust (IT 730/04))*

and

WESTERN NATIONAL INSURANCE COMPANY LIMITED First Respondent

STEPP BLOEMFONTEIN

Second Respondent

JUDGMENT BY: C REINDERS, J

RESERVED ON: 7 OCTOBER 2022

DELIVERED ON: 22 NOVEMBER 2022

This judgment was handed down in open court where after it was distributed electronically to the parties' legal representatives via email.

APPLICATION FOR LEAVE TO APPEAL

[1] This is an application for leave to appeal against the whole of the order and judgment granted by myself on 23 May 2022 in terms whereof I dismissed the application (hereafter "the main application") with costs.

[2] On 13 June 2022 the applicants (as cited both in the main application and in this application for leave to appeal) issued a notice for leave to appeal ("the notice").

[3] As no feedback was received to requests for dates for the hearing of the application for leave to appeal, the parties were informed that I intended to decide the application in chambers in terms of Free State Rule 16.5. No written objection thereto was received and parties were instructed to file heads of arguments on 3, 5 and 7 October 2022 respectively. I am indebted to counsel for their able and comprehensive heads of argument.

[4] The nature of the relief claimed by the applicants in the main application was a declaratory order to the effect and extent that the first respondent be declared liable to indemnify the applicants for any loss suffered as a result of a fire at the applicants' Preller Plein Caramello's premises in terms of an agreement of insurance contract ("the contract") concluded between the Caramello's Trust and the first respondent as insurer, and costs of the application.

[5] The legislative framework for considering an application for leave to appeal is set out in section 17(1) of the Superior Courts Act, 10 of 2013 ("the Act"). It reads:

"17(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;
..." (own emphasis).

I do not read the notice or the heads of argument filed by the applicants to indicate that reliance is placed also on section 17(1)(a)(ii) of the Act in that there is some other compelling reason why the appeal should be heard.

[6] In considering an application for leave to appeal the test to be applied by a court was set out in ***The Mont Chevaux Trust (IT2012/28) v Tina Goosen & 18 Others*** 2014 JDR 2325 (LCC). Bertelsmann J held as follows in para [6]:

"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, see ***Van Heerden v Cronwright & Others*** 1985 (2) SA 342 (T) at 343H. 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." (own emphasis)

[7] It is trite that previously in applications of this nature the test to be applied was whether there were reasonable prospects that another court may come to a different conclusion. The principles laid down by Plasket AJA in ***S v Smith*** 2012 (1) SACR 567 (SCA) at para [7] thereof in considering what constitute reasonable prospects of success, remains undisturbed:

"What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those 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, rational basis for the conclusion that there are prospects of success on appeal." (own emphasis)

See also: ***MEC Health, Eastern Cape v Mkhita and Another*** (1221/2015) [2016] ZASCA 176 (25 November 2016) at paras [16] and [17];

[8] In the notice the applicants set out its grounds of appeal under paragraphs [1] and [2], inclusive of the sub-paragraphs thereto. I do not intend repeating the said grounds herein, save to state that the applicant avers that the court erred and misdirected itself in several ways in regards to the essence the dispute between the parties, namely the obligation on an insured to make a full disclosure to an insurer of all material facts that may influence an insurer's opinion in relation to the risk to be incurred by it. From the applicants' heads of argument, it also seems that issue is taken with the interpretation of the contract, although not so mentioned as a ground of appeal in the notice. The applicants ultimately submitted that the appeal would have a reasonable prospect of success. In opposing the application for leave to appeal, the first respondent in its heads of argument dealt with all of the aforementioned submissions made by the applicants and contended that the applicants did not succeed in meeting the threshold as set out in the case law mentioned herein before.

[9] I have carefully considered the papers filed in respect of the application that served before me, and my judgment. I have also scrutinised the submissions made by counsel for both parties in their heads of argument, including the guiding case law and legislation dealing with the main application as well as applications of this nature. Having done so, I am of the view that the applicants did not succeed in convincing me that there is a reasonable prospect that another court would come to a different finding.

[10] It is trite that costs should follow the successful litigant and I do not have any reason to find otherwise.

[11] In the result the following order is made:

The application for leave to appeal is dismissed with costs.

C. REINDERS, J

On behalf of the Applicants:

Instructed by:

Adv C Snyman

Phatsoane Henney Attorneys

BLOEMFONTEIN

On behalf of the first respondent:

Instructed by:

Adv DJ Coetsee

BDP Attorneys

c/o Kramer Weihmann Attorneys

BLOEMFONTEIN