



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

Case No: 380/2012
Date Heard: 15/04/2021
Date Delivered: 07/05/2021

In the matter between:

**THE DEPARTMENT OF TRANSPORT ROADS &
PUBLIC WORKS OF THE NORTHERN CAPE** 1st Applicant/Defendant

THE PREMIER OF THE NORTHERN CAPE 2nd Applicant/Defendant

**THE MEMBER OF THE EXECUTIVE COUNCIL
OF THE NORTHERN CAPE FOR TRANSPORT,
ROADS & PUBLIC WORKS** 3rd Applicant/Defendant

and

FRANCIS OBAKENG LONDON 1st Respondent/Plaintiff
MOTSAME PETRUS RANTHO 2nd Respondent/Plaintiff
MALEBOGO LOUIS MOKWENA 3rd Respondent/Plaintiff
NTHABISENG CONSTANCE KEMANE 4th Respondent/Plaintiff

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

Mamosebo J

[1] This is an application for leave to appeal to the Supreme Court of Appeal, alternatively, to the Full Bench of this Division, against my

judgment handed down on 05 February 2021 in which the application was dismissed with costs. The application is opposed.

- [2] It is trite that since the coming into operation of the Superior Courts Act,¹ the test for applications for leave to appeal is governed by section 17, which stipulates:

"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 a matter under consideration;

(b) The decision sought on appeal does not fall within the ambit of section 16(2)(a); and

(c)"

- [3] The practical effect of section 17(1)(a) is that the threshold for determining whether to grant leave to appeal on the basis that the appeal would have a reasonable prospect of success is higher and more stringent. See *Notshokovu v S*². Our courts have already interpreted the phrase "*would*", found in section 17(1)(a)(i) of the Act, as indicative of some form of certainty or realistic chance of success. See *The Mont Chevaux Trust v Tina Goosen & 18 Others*³ and *MEC for Health, Eastern Cape v Mkhitha and Another*⁴, to name a few.

- [4] Mr Rautenbach SC, for the applicant, argued that there is no certainty in the said test because there is nothing that imputes that the bar is set higher by the substitution of the word "*could*" with "*would*". No supporting authority for this contention is proffered by

¹ Act 10 of 2013

² [2016] ZASCA 112 (7 September 2016) at para 2

³ 2014 JDR 2325 (LCC) at para 6

⁴ [2016] ZASCA 176 (25 November 2016) at paras 16-17

counsel. Shongwe JA, writing for the unanimous court in *Notshokovu*⁵ at para 2 said:

"An appellant, on the other hand, faces a higher and stringent threshold, in terms of the Act compared to the provisions of the repealed Supreme Court Act 59 of 1959. See Van Wyk v S, Galela v S [2014] ZASCA 152; 2015 (1) SACR 584 (SCA) para 14."

- [5] It is incomprehensible therefore that counsel would still persist that the threshold remains unaltered in the face of such overwhelming authority by the Supreme Court of Appeal that binds this Court. The distinction is founded on the basis that it is not a mere possibility but there must be supporting facts that another court will differ with the outcome of the trial court. The submission in this regard is without merit and stands to fail.

- [6] The crisp issue in this application relates to whether a successful party granted leave to amend its pleadings by the Court must give the other party notice in terms of Rule 28(1) of the Uniform Rules of Court or not.

- [7] The submission by Mr Rautenbach is that notice must be given to the other party in order to afford them the right to be heard (*audi alteram partem*) to determine if the amendment is objectionable or excipiable. In countering this submission, Mr Segal, for the respondents, contended that Rule 28(1) does not stand in isolation. According to Mr Segal the trial court interpreted Rule 28(6) correctly where it made the following enunciation:

"Unless the court otherwise directs, an amendment authorised by an order of the court may not be effected later than 10 days after such authorisation."

⁵ Footnote 2 above

In this instance, Vuma AJ had afforded the parties 20 days to effect the amendment, and following an appeal to the Supreme Court of Appeal, the period was extended with effect from the date of the SCA order.

- [8] Should the applicants deem that they have been adversely affected by the amendment they still have recourse, as provided by Rule 28(8), within 15 days after the amendment has been effected, to file any consequential adjustment to the documents or pursue steps contemplated under Rules 18, 23 and 30. Rule 28(7) entitles the respondents, as the parties entitled to amend, to serve the amended pages on the applicants because the amendment has already been authorised by Vuma AJ and the SCA.
- [9] There is therefore no substance in the contention that the applicants' right to the *audi alteram partem* rule has been taken away. This application is also not novel nor are there any compelling reasons why the appeal should be heard in terms of s 17(1)(a)(ii) by the SCA or the Full Bench. Further, there are no conflicting judgments in the matter under consideration.
- [10] In the premises, I am satisfied that there are no reasonable prospects of a successful appeal. The application for leave to appeal stands to fail.
- [11] On the question of costs. There is no reason why costs should not follow the result.
- [12] The following order is made:

The application for leave to appeal is dismissed with costs.



M.C. MAMOSEBO

JUDGE OF THE HIGH COURT

Counsel for the Applicants:
Instructed by:

Adv. J.G. Rautenbach SC
Mjila and Partners Incorporated

Counsel for the Respondents:
Instructed by:

Adv. N. Segal
Cranko Karp & Associates
c/o Adrian B Horwitz & Associates