



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

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

Case number: 1264/2012

In the matter between:

D KUHN FERRIERS

1st Applicant

G E GELDENHUYS

2nd Applicant

and

WESRUP BELEGGINGS CC

Respondent

In re:

WESRUP BELEGGINGS CC

Plaintiff

and

D KUHN FERRIERS

1st Defendant

G E GELDENHUYS

2nd Defendant

CORAM: DAFFUE, J

JUDGMENT BY: DAFFUE, J

DELIVERED ON: 30 MAY 2019

- [1] The applicants in this application for leave to appeal are the unsuccessful defendants in a delictual claim based on negligence arising from a motor vehicle collision that occurred as long ago as 10 May 2010. The application is opposed by the successful plaintiff who is cited as the respondent herein.
- [2] On 3 August 2017 I delivered judgment after having separated merits and *quantum* on the basis as set out in paragraph [12] of the judgment. I held the two applicants liable, jointly and severally, for 100% of the respondent's damages to be proven or agreed upon as is apparent from the orders contained in paragraph [37] of the judgment.
- [3] On 3 August 2018 the parties settled the *quantum* of respondent's claim in the amount of R590 866.05 and agreed that payment be held over pending an appeal of the judgment of 3 August 2017.
- [4] The application for leave to appeal was filed on 19 September 2018. Nothing was said in the application of the fact that the parties settled the *quantum* on 3 August 2018 only and as a result I insisted on a condonation application which was received on 28 February 2019. Having read the application which is not opposed, I am satisfied that condonation should be granted and this is so ordered.
- [5] By agreement with the parties, heads of argument were to be filed before the end of the first term, but applicants' counsel failed to do so as he had lost all his notes and wanted the record to be transcribed. Problems were apparently experienced in that regard. It has never been a requirement that an applicant for leave to appeal must file the record of proceedings. In any event, applicants filed a detailed application for leave to appeal, dealing with all aspects that could possibly be dealt with. Consequently I

insisted that applicants' heads be filed on or before 15 May 2019 which was duly done. Respondent's heads have been filed on 25 March 2019. The parties agreed that I may consider the application in chambers on receipt of the heads of argument.

[6] Section 17(1) of the *Superior Court Act*, 10 of 2013 deals with applications for leave to appeal. The section reads as follows:

“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;

- (b) ...
- (c) ...” (emphasis added)

[7] The bar for granting leave to appeal has now been raised. Previously the test was whether there was a 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. See: *Acting National Director of Public Prosecutions and Others v Democratic Alliance (19577/09)* [2016] ZAGPPHC 489 (24 June 2016). See also *Matoto v Free State Gambling and Liquor Authority and Another*, case no 4629/2015, an unreported judgment of this Division delivered on 8 June 2017 at paragraph [5], *Erasmus, Superior Court Practice*, vol 1 at A2-55 and *Mont Chevaux Trust v Tina Goosen LCC 14R/2014* (an unreported judgment of the Land Claims Court).

- [8] I do not intend to deal with any of the grounds of appeal in any detail as I believe the judgment speaks for itself. I shall briefly refer to pertinent issues.
- [9] It is contended that respondent did not prove *locus standi* to sue for damages. I referred in paragraph [9] of the judgment to what was common cause on the pleadings. This must be read with the issues in dispute considered in paragraph [10] as well as what was recorded in paragraph [11] together with the evaluation of the evidence and findings in paragraphs [20] and [21]. See also *Smit v Saipem* 1974 (4) SA 121 (A) confirmed in *Refrigerated Transport (Edms) Bpk v Mainline Carriers* 1983 (3) SA 121 (A) at 125B – H.
- [10] I dealt with the versions of the two drivers and the expert witness, Mr Grobbelaar, in paragraphs [22] – [32]. I accepted that it would be difficult to remember much detail bearing in mind that the collision occurred seven years earlier. However, respondent's driver not only marked the area where the collision occurred with a plastic bottle attached to the adjacent fence, but was able to point the area out to Mr Grobbelaar two and a half years later. Contrary to the version of respondent's driver, second applicant was quite clueless as to where the collision occurred and in his evidence he contradicted the respondent's version as pleaded which was admitted in the plea.
- [11] In paragraph [26] I pointed out that 2nd appellant made a poor impression on me and I explained in that as well as the next paragraph why I came to that conclusion. Contrary thereto I held respondent's driver to be a credible witness. See my conclusions from paragraph [33] onwards. It is also reiterated that the probabilities were analysed in paragraph [25] of the judgment and I found these to favour respondent's version.

[12] Appellants' criticism of Mr Grobbelaar's opinion is without merit. He made a good impression on the court and although he was not in a position to inspect the damaged vehicles, he observed photograph of the damaged vehicles and attended the scene where marks were observed that tied in with the version of respondent's driver.

[13] I am not satisfied that the appeal would have a reasonable prospect of success. Consequently, I have not been persuaded that the application for leave to appeal is meritorious, falling within the parameters set out in s 17 of the Superior Court Act.

[14] Therefore the following order is made:

The application for leave to appeal is dismissed with costs.

J P DAFFUE, J

On behalf of Applicants	:	Adv P Haasbroek
Instructed by	:	Botha & Sutherland c/o Jacobs Fourie Attorneys Bloemfontein

On behalf of Respondent	:	Adv M Naudé
Instructed by	:	Horn & Van Rensburg Bloemfontein