



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG
HELD AT DURBAN**

CASE NO: 6488/2012

18 April 2018

In the matter between:

ASSMANG LIMITED

APPLICANT

and

LINDA HOLDEN

RESPONDENT

JUDGMENT IN THE APPLICATION FOR LEAVE TO APPEAL

HENRIQUES J:

[1] This is an application for leave to appeal by the applicant to the Supreme Court of Appeal, alternatively the Full Bench of the KwaZulu-Natal High Court Pietermaritzburg against the whole of the judgment and orders delivered on 8 February 2018. I will refer to the parties as they appear in the application for leave to appeal.

[2] The grounds on which the applicant seeks leave to appeal are set out in full at paragraphs 1 to 5 of the application for leave to appeal. The application for leave to appeal is opposed by the respondent. The applicant submits that based on the submissions contained in paragraphs 1 to 5 aforementioned, there is a reasonable prospect that another court would come to a different decision and it is on this basis that leave to appeal out to be granted.

[3] In essence the applicant submits that the court erred in dismissing the special pleas of jurisdiction and prescription as envisaged in s 17(1)(a)(i) and (ii) of the Superior Courts Act.

Legal Position

[4] Applications for leave to appeal are governed by ss 16 and 17 of the Superior Courts Act. Section 17 reads as follows:

‘Section 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) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and
- (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.’

[5] The applicant in essence submits that because there is no South African authority on this point apart from the provision in *Mhlango* which it submits is distinguishable, this matter ought to enjoy the attention of the Supreme Court of Appeal. However at the hearing of the matter I raised this with Mr Bothma whether the full court of this division could deal with the matter and he indicated that it could. What is meant by reasonable prospects of success within s 17(a)(i) of the Superior Court Act has always been defined to mean that there is a reasonable possibility of another court coming to a different decision.

[6] However with the enactment of the section, the test has obtained statutory force, and a far more stringent test is envisaged. In *Mout Chevaux Trust (IT 2012/28) v Tina Goosen LCC 14R/2014* dated 3 November 2014 the Land Claims Court held albeit, obiter, that the wording of the subsection raised the bar of the test that now has to be applied to the application for leave to appeal. In *Notshokuvu v S* at para [2] it was held that an appellant has a high and stringent threshold in terms of the test.

[7] Mr Rall referred to the decision of the full court in *Acting National Director of Public Prosecutions and others v Democratic Alliance NR: Democratic Alliances Acting National Direction of Public Prosecutions and others (19577/09) [2016] OGPPHC489* (24 June 2016). Ledwaba DJP writing for the full court considered the test as envisaged in s 17 of the Superior Court Act. At para 25 of the judgment he dealt with the test set out in the *Mout Chevaux Trust* where Bertelsmann J held the following:

'It is clear that the threshold for granting leave to appeal against the 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 & other* 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.'

[8] Having considered the submissions of the applicant and the respondent, I am of the view that in relation to the order dismissing the special plea of jurisdiction no other court would come to a different conclusion. In relation to the second order dismissing the special plea of prescription, I am of the view that there is a reasonable possibility that another court could come to a different conclusion. It is for this reason that I propose granting leave to appeal against that order only and directing that the appeal serve before the full court of this division and that the costs of the application for leave to appeal in this regard be costs in the appeal.

[9] In the result the orders I issue are the following:

1. The application for leave to appeal paragraph 1 of the order dated 8 February 2018 is dismissed with costs.
2. The application for leave to appeal the second order dated 8 February 2018 being the special plea of prescription is granted to the Full Bench of this division.
3. Costs of the application for leave to appeal this order (para 2) will be costs in the appeal.