

REPUBLIC OF SOUTH AFRICA



EASTERN CAPE LOCAL DIVISION
MTHATHA

CASE NO. 5100/18

- (1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

DATE

SIGNATURE

In the matter between:

BLANCHE NOMATHEMBA MDI

Applicant

and

MONICA LUMKA MDLEDLE
THE DEPUTY SHERIFF, CALA

First Respondent
Second Respondent

JUDGMENT

NOTSHE AJ:

[1] This is an application for leave to appeal the judgment and order that I made against the applicant.

[2] The issue of the application for leave to appeal is regulated by the provisions of section 17(1) of the Superior Courts Act, 10 of 2013 ("**the Act**").

The said provision reads as follows:

"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"*

[3] The first question that has arisen is whether the provisions of s17(1)(a) of the Act have changed the test for granting of leave to appeal. The common test applicable for the grant of leave to appeal is whether there is a reasonable prospect that another court may come to a different conclusion.

[4] In *Mont Chevaux Trust (IT 2012/2008) v Tina Goosen and Others*,¹ the Land Claims Court held that the wording of this subsection raised the bar of the test that now has to be applied to the merits of the proposed appeal before leave should be granted. Bertelsmann J is reported to have said the following:

"It is clear that the threshold for granting leave to appeal against a judgment of the 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 and Others 1985 (2) SA 342 (T) at 342H. 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."

[5] This judgment is referred to with approval in the matter of *Acting National Director of Public Prosecutions and Others v DA In re: DA v Acting National Director of Public Prosecutions and Others*².

¹ An unreported decision of the Land Claims Court under LCC 14R/2014, dated 3 November 2014.

² (19577/09) [2016] ZAGPPHC 489 (24 June 2016).

[6] Erasmus: Superior Court Practice³ in an apparent support of these judgments refers to an unreported case of the Supreme Court of Appeal,⁴ wherein they say that the Supreme Court of Appeal held that an appellant faces a high and stringent threshold in terms of the Act compared to the provisions of the repealed Supreme Court Act, 59 of 1959.

[7] Subsequent to the Land Claims Court and the Full Court judgments the Supreme Court of Appeal,⁵ dealt with the issue of the application for leave to appeal. It stated that an applicant for leave to appeal must convince the Court on proper grounds that there is a reasonable prospect of a realistic chance of success on appeal. It further said that a mere possibility of success, an arguable case or one that is not hopeless is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal. The Court referred to its earlier judgment in *S v Smith*.⁶

[8] The Supreme Court of Appeal did not say that the bar has been raised by the provision s17(1)(a) of the Act. Both the Land Claims Court and the Full Court did not consider the issue in depth.

[9] Section 34 of the Constitution of the Republic of South Africa provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court. In my view this includes a right of appeal to the highest court of the land.

³ RS6-2018, A2-55.

⁴ Notshokovu v S (157/15) [2016] ZASCA 112 (7 September 2016).

⁵ MEC for Health, Eastern Cape v Mkhitha and Another (1221/2015) [2016] ZASCA 176 (25 November 2016).

⁶ 2012 (1) SACR 567 (S CA) para [7].

[10] Any law that seeks to limit that right must meet the stringent requirements of section 36 of the Constitution.⁷ Furthermore one of the presumptions of interpretation of statutes is that “...*the legislature does not alter the common law or statute law more than is necessary. It cannot be inferred that an enactment intends to alter the law; alteration must be explicitly stated or no other conclusion can be arrived at except that the legislature did have that intention.*”⁸ It is further presumed that when construing a statute, the existing law should not be altered unless the statute is clearly intended to alter the law.⁹

[11] Section 17(1)(a) of the Act should be construed in that fashion as well.

[12] The judgment of the Supreme Court of Appeal in the *Notshokovu*¹⁰ was dealing with the provisions of s17(2)(f) of the Act and not s17(1)(a). It is no authority that the provisions of s17(1)(a) raised the bar in respect of the test for an application for leave to appeal.

[13] In the circumstances, I am of the view that the law remains as it was prior to the promulgation of the Superior Courts Act, namely that an applicant

⁷ It reads as follows:

“The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”

⁸ Kellaway: Principles of Legal Interpretation (Butterworths) p.335.

⁹ Ibid 337.

¹⁰ Ibid.

for leave to appeal must convince the Court, on proper grounds, that there is a reasonable prospect or realistic chance of success on appeal.

[14] The application for leave to appeal has a peculiar feature that “permission” to appeal is sought from the very same judge who was satisfied that the order that he/she made is a sound and correct one. Although the presiding officer was satisfied that the order he/she made is a sound one, he/she is required to stand back and look at the order and reasons therefor and ask himself/herself whether there is a reasonable prospect that another court may come to a different conclusion. This requires that, even if one is satisfied that the order is valid in view of the reasons he/she gave for it, he/she must seriously consider whether there is a reasonable prospect that another court may come to a different conclusion.

[15] In that event a court should steer that fine course between a Scylla of granting leave to appeal and the Charybdis of granting leave to appeal in cases where there are no reasonable prospects of success on appeal and unduly burdening the appeal courts.¹¹

[16] In this case the grounds for leave to appeal and even argument before me do not satisfy me that there is a reasonable prospect of success on appeal. It must be made clear that the order that I made for restoration of possession to the first respondent does not affect the dispute between the parties as to the beneficiaries of the main estate. It is merely an order regarding possession.

[17] In the circumstances, I am satisfied that there no is reasonable prospect of success on appeal and the application for leave to appeal is dismissed, with costs.

V S NOTSHE
Acting Judge of the High Court

Heard: 15 November 2018
Judgment delivered: 22 November 2018

¹¹ Phakathi kwenyama nozipho.