

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case Nr: LA50/04
(ex 1857/2001)

In the matter between:

ROAD ACCIDENT FUND

Applicant

and

ANDREW HUGH ARTHUR DALY

Respondent

CORAM: RAMPAL, J

HEARD ON: 20 AUGUST 2004

DELIVERED ON: 30 SEPTEMBER 2004

[1] These proceedings were concerned with an application for leave to appeal. The applicant who was the defendant in the main action applies for leave to appeal against my judgment which was delivered on Thursday 4 March 2004. The applicant wishes to appeal against numerous adverse

findings I made against the Road Accident Fund.

[2] There are 20 grounds on which the application for leave to appeal is based. Mr. Camp, counsel for the applicant contended among others, that I erred in holding that:

- That no causal nexus existed between the gouge marks and the collision;
- That the black mark was an oil residue which originated from one of the vehicles involved in the collision;
- That the several exhibits allegedly relating to the blood sample extracted from the driver of the Renault sedan were handed in with the consent of counsel for the defendant;
- That the driver of the Renault had, on account of the alcohol he had consumed, driven the sedan in a

negligent manner;

- That the Court could deduce from mr. Bernieri's evidence that the Renault was driven in a negligent manner shortly prior to the accident;
- That the objective facts militated against the scenario where the Renault was struck by the Golf while it was travelling in its correct lane;
- That the evidence of mr. Badenhorst was preferred over and above that of ms. Grobbelaar;
- That the apportionment of 70 % to 30 % in favour of the plaintiff against the respondent was appropriate in the circumstances.

[3] On the strength of the foregoing grounds Mr. Camp submits that in the circumstances there is a reasonable prospect of success and that another Court may differently conclude that

the plaintiff's claim ought to have been dismissed with costs alternatively that an equal apportionment of the blame or negligence ought to have been considered appropriate.

[4] The application is opposed. Mr. Ploos van Amstel, counsel for the respondent contends that none of the foregoing grounds of appeal have any substance. He contends that there was no reasonable likelihood that another Court will differ from me on the conclusions I reached on all the issues raised. His main submission is that the defendant does not have a reasonable prospect of success on appeal. He urges me to refuse leave to appeal and to direct the defendant to pay the cost of this application.

[5] When I was presiding in the original proceedings I did so from the comfort zone of a middle man. I saw myself in that middle position as a neutral mediator in the eyes of the parties, the public and the law. I was expected and required to be an objective assessor of the dispute. On Thursday 4 March 2004 I blew what I thought was to be the final whistle.

Like a referee in a soccer match I thought I had signalled the end of the match but it was not to be. I received that message through the applicant's application for leave to appeal. This sort of judicial relief comes like a storm which dethrones an umpire from the elevated tower of comfort on the touchline and draws the umpire right into the tennis court. The previously neutral umpire has now lost his via media and is now in the camp of the successful party. The leave to appeal sought by the unsuccessful party is a form of protest by the unsuccessful party that the decision of the referee is wrong. It calls upon a Judge to acknowledge that he or she did not correctly reason out the judgment. Since it is only human to err more often than not I am inclined to grant leave to appeal against my decision. Such an inclination is not always fair to the party in whose favour my judgment was.

- [6] The invidious position of a Judge called upon to consider whether to grant or not to grant leave to appeal was eloquently articulated by Centlivres JA in **REX v BALOI** 1949 (1) SA 523 AD on p. 524 – 525:

“We are aware that this Court is able to apply the proper test with greater ease than the trial Judge. For the trial Judge must, in the nature of things, find it somewhat difficult to look at the matter from a purely objective standpoint; he has a natural reluctance to say that his own judgment is so indubitably correct that the Judges of appeal will concur therein.”

Brink J appreciated the difficulty. He expressed himself as follows in the case of **AFRIKAANSE PERS BEPERK v OLIVIER** 1949 (2) SA 890 (OPD) on p. 894:

“Dit is geen benydenwaardige taak vir ‘n Regter om oor die juistheid van ‘n uitspraak waarmee hy saamgestem het te oordeel nie – hy sal soos Appèlregter Centlivres in **BALOI** se saak opmerk, ‘n natuurlike huiwering hê om te sê dat sy uitspraak so ontwyfelbaar juis is dat die Appèlhof nie van hom sal verskil nie.”

[7] Ogilvie Thompson AJA echoed similar sentiments about half a century ago. He said:

“From the very nature of things it is always somewhat invidious for a Judge to have to determine whether a judgment which he has himself given be considered by a higher Court to be wrong; but that is a duty imposed by the Legislature upon Judges in both civil and criminal matters”

(*vide* **REX v MULLER** 1957 (4) SA 642 (AD) on p. 645.)

This passage was quoted with approval by Diemont JA in **S v SIKHOSANA** 1980 (4) SA 559 AD.

I am in complete agreement with the foregoing sentiments by the four distinguished Judges. Today, more than fifty years later, we are still grappling with precisely the same difficulty. I may add that this difficulty is here to stay. Seemingly it will never go away. It is inherently human in nature.

- [8] Over many years the requisite for leave to appeal has been held to be a reasonable prospect of success. For instance see **REX v NXUMALO** 1939 AD 580 on p. 581; **REX v**

NGUBANE AND OTHERS 1945 AD 185 on p. 187; **REX v BALOI 1949 (1) SA 523 AD**; **HAINE v PODLASHUC & NICOLSON** 1933 AD 104; **S v SIKHOSANA** 1980 (4) SA 559 AD. This then is the basic test. The basic rule laid down by the Appellate Division is that leave to appeal should not be granted unless the applicant satisfied the trial court concerned that he has a reasonable prospect of success on appeal.

- [9] It must be readily appreciated that the basic rule is formulated in the negative and not positive mode. This was done deliberately. It was done on purpose in order to convey the message that decisions of our courts of law, especially those of the high courts, must generally be regarded as correct unless the contrary can be shown; that it is incumbent upon the applicant to discharge the formidable duty of satisfying the trial court that its decision is probably wrong, that the trial court should not readily succumb to the temptation of believing on flimsy grounds that its judgment is wrong and that it is neither in the interest of the victorious

litigant nor those of the general public to have the wheels of justice slowed down by appeals which are devoid of substantive merits.

- [10] Quite often when one is relatively a novice on the bench the temptation becomes irresistible to simply let a matter go on appeal so that one can see what the full bench or for that matter a higher tribunal with appellate competency will decide. That however is not the proper test to be applied. Such a temptation, however seductive, must be avoided. The test laid down in **REX v NGUBANE** *supra* remains the only proper criterion that should always be applied in determining whether or not to grant leave to appeal.

“In all the cases, no matter what form of words was used, the same thing was, in my opinion, intended to be conveyed, namely, that it is for the applicant for special leave to satisfy the Court that, if that leave be granted, he has a reasonable prospect of success on appeal. That was the test applied, for instance, in **BEZUIDENHOUT v DIPENAAR** (1943, A.D. at p. 195), and it is, in my view, the correct one.”

(per Davies AJA in **R v NGUBANE** 1945 AD 185 on p. 187.

The dominant issue of the enquiry is whether, if leave to appeal is granted, the applicant will have a reasonable prospect of success on appeal. If the answer is affirmative, leave to appeal must be granted. If the answer is negative, leave to appeal must be refused.

[11] In the case of **S v SHABALALA** 1966 (2) SA 297 AD on p. 299 Rumpff JA gave an instructive exposition of the basic normative rule:

“Alleen dan wanneer die Verhoorregter tot ‘n weloorwoë konkulsie kom dat daar gronde is waarop die Hof van Appèl tot ‘n ander afleiding van die feite kan kom as wat hy gekom het, en daar dus ‘n redelike moontlikheid van sukses vir die applikant bestaan, behoort verlof toegestaan te word. Bestaan daardie moontlikheid, behoort verlof ook toegestaan te word sonder huiwering of teësin.”

[12] Our caselaw shows that in grappling with the uneasy task of deciding whether or not leave to appeal should be granted certain considerations have weighed significantly with the Supreme Court of Appeal or Appellate Division, as you wish. I might mention some of them.

- That leave to appeal is not to be had for the mere asking. The legislator has not granted a carte blanche licence to appeal as of right to every vanquished litigant *vide* **REX v BALOI**, *supra* on p. 523 – 524.

“Die vergunning van verlof om in hoër beroep te gaan is egter geen blote formaliteit nie.”

(Per Brink J in **AFRIKAANSE PERS BEPERK v OLIVIER** 1949 (2) SA 894.)

- That a successful litigant should not be subjected to all the procedural disadvantages of the appeal.

“Die hof moet sig tevrede stel dat daar ‘n redelike vooruitsig is

dat die appèl sal slaag. Dit is onbillik teenoor 'n party in wie se guns 'n uitspraak gegee is deur 'n hoer hof om hom te onderwerp aan al die nadele van 'n appèl, indien sy teenparty geen redelike kans op sukses het nie”

(Per Brink J in **AFRIKAANSE PERS BEPERK v OLIVIER** *supra* on p. 894.)

- That it should not be overlooked that even if leave to appeal is refused, another grievance avenue is still open to the applicant to petition the SCA President for leave to appeal. (*Vide* **R v MULLER** 1957 (4) SA 262 AD per Ogilvie Thompson JA.)
- That the amount of the claim in issue in comparison with the tremendous costs already incurred in connection with such a claim should not be relatively small. (*vide* **VOLLENHOVEN v HOENSON & MILLS** 1970 (2) SA 368 (CPD) at 372H – 373B per Van Wyk J.)

- That it is in the public interest and in the interest of the successful litigant to have litigation finalized as speedily as possible. (*vide* **VOLLENHOVEN v HOENSON & MILLS**, *supra* at 373 B – C.)
- That the gravity of the adverse consequences of the judgment to the applicant should not influence the trial judge to relax the rule of a reasonable prospect.

These then are some additional considerations which underpin the basic rule which demands that leave to appeal should be refused unless a reasonable prospect of success exists if the matter is let to go on appeal.

[13] It will now be readily appreciated that the ground of leave of appeal is, so to speak, an exception to the basic rule hence the description “special leave”. Where such leave to appeal is granted the reasons have to be given for the benefit of the higher tribunal whose duty it will be to hear the appeal. (*vide* **S v SIKHOSANA** 1980 (4) SA 559 AD at 562 A per Diemont

JA.)

If there are several grounds of appeal as in the instant case it is expected of the trial court to indicate those specific grounds in respect of which leave to appeal has been granted. In an appropriate case leave to appeal may be limited to some particular grounds by discarding other grounds in respect of which a reasonable prospect of success on appeal does not exist. (*vide* **R v JANTJIES** 1958 (2) SA 273 AD at 275 per Schreiner JA and **S v SIKHOSANA** *supra* at 363 B.)

- [14] The first five grounds of appeal as listed in the applicant's Notice of Application for Leave to Appeal deal with the issue of the gouge marks on the northern lane. I deem it necessary to quote only two passages from the judgment challenged relating to the gouge marks:

“Now I turn to the gouge marks. Grobbelaar's evidence was that he did a site inspection on Thursday 20 November 2003. On the northern lane he found two scrape marks. Those two scrape marks were identical to the two marks which were depicted on photograph “A1”.

He came to the conclusion that it was probable the gouge marks he found on the tarmac on the scene indicated the area of impact between the two sedans. He advocated the proposition that the gouge marks were probably caused by the damaged metal components of either or both vehicles such as suspension, chassis, engine or gearbox which would have been forced downwards at the moment of impact to leave such gouge marks on the surface of the road. The forced downward displacement was due to the tremendous forces generated between the vehicles at impact.

(*vide* par. 59 on p.46)

I have some difficulty with this evidence. The first problem was that the alleged gouge marks themselves were so tiny that they were almost invisible. The witness himself acknowledged in his chief evidence that it was very difficult to see those marks. The second problem was that virtually nobody, I mean no other witness including the three police officers, Nortjie, Van Gorkom and Du Plessis, noticed such marks. The third critic is that there is no evidence that any of the aforesaid vehicle components were so damaged, forced downwards and scraped the tarmac as the witness assumed. My finding, therefore, is that I can find no casual nexus whatsoever between those minute scratches and the accident I am here dealing with. That being the case, it

follows without saying that such marks have to be disregarded in this complex search for the probable site, area or point of impact. The witness' proposition is juridically invalid and untenable."

(*vide* par. 50 on p. 42)

[15] The next four grounds of appeal as listed in the same notice deal with the issue of the black mark on the northern lane. Here I have selected only three passages from the judgment challenged in connection with the black marks:

"Badenhorst described the black mark on the southern lane as a definite oil spillage. During cross-examination, however, she conceded that it could have been a fluid of some kind, for example brake fluid spillage. But she denied the suggestion that the black mark could have been bitumen seepage from the tar. She expressed the view that bitumen does not evaporate or disappear. It can hold on for as long as six years. Her conclusion concerning the black mark on the southern lane was that it was an oil spillage and that it probably originated from this collision.

(*vide* par. 63 on p. 50)

Grobbelaar disagreed with Badenhorst about the nature of the black mark on the southern lane. In his opinion it was improbable that the black mark was an oil spillage which could

be associated with impact between the vehicles involved in this accident. In the first place if the oil came from the damaged gearbox of either of the vehicles the shape of the black mark would have been an aerial splatter of oil and not a circular patch of oil. In the second place such visible splash deposit would have a small trail of oil droplets leading to the final rest position of the vehicle with a damaged gearbox and not just a nicely defined single patch of oil. In the third place the oil patch deposited at impact would have exhibited some directional properties and not have an almost circular shape. He therefore disagreed with Badenhorst that the black mark could be related to this accident. In his opinion the black mark also be the bleeding of the tar, the so-called bitumen.

(*vide* par. 64 on p. 50)

In an attempt to find the probable source of the black mark, it must be remembered that no real forensic test was carried out in a science laboratory to ascertain whether the black mark was caused by an oil spillage from a car or bitumen bleeding from the tarmac itself; that a trail of a few smaller black dots imprinted on the surface of the road in a westerly direction from the original black mark can be seen; that those smaller black dots are approximately of equal distance apart; that the black dots gradually fade away the further one moves away from their

original source; that they are in a straight line almost parallel to the white barrier line; that they were apparently brought about by the wheel of a vehicle which had uplifted the liquid substance from the original spot of the black mark and repeatedly imprinted it on the surface of the road at regular intervals as it was rotating; that the defendant's two witnesses conceded that the indications were that the black mark could be an oil mark; that there was no concession on the plaintiff's side that the black mark could be tar bleeding. The concessions on the defendant's side fortified Badenhorst's conclusion that the black mark was probably not bitumen but one kind of fluid or another. The black mark in question, is a crucial item of real evidence or physical evidence which provided a factual foundation of Badenhorst's view. On the strength of the available evidence, I find Badenhorst's view preferable to Grobbelaar's view on the preponderance of probabilities."

(*vide* par. 65 on p. 51)

[16] In the foregoing five paragraphs I have made some rather strong findings on credibility. I brought my reasoning to bear upon the issues. I want to believe that the end product of my objective reasoning or analytical evaluation of those cardinal issues was correct. The strong language I chose evidences my own faith in the judgment I handed down. Difficult though

it was, I did subsequently try to disabuse my mind of the reality that I had previously found in favour of the respondent in other words the plaintiff. In addition to both questions of law or issues of fact raised in these proceedings I have directed myself specifically to the critical enquiry of whether there is a reasonable prospect of success on appeal if I were to allow the matter to proceed to a higher tribunal of law for the reconsideration of the judgment currently under attack – *vide* **REX v KUZWAYO** 1949 (3) SA 761 A at 765. I was at pains to re-evaluate my judgment. Having endeavoured to adopt an objective stance, and having regard to all the circumstances of the case, all the grounds of the appeal and all the valued submissions by the two counsels, I can only come to the modest conclusion that the applicant has failed to satisfy me that if leave to appeal be granted it has a reasonable prospects of success on appeal.

[17] Accordingly I make the following order:

[17.1] The application for leave to appeal is refused.

[17.2] The applicant is directed to pay the costs hereof.

M.H. RAMPAL, J

On behalf of Applicant:

Adv. A. Camp
Instructed by
Webbers
BLOEMFONTEIN

On behalf of Respondent:

Adv. C. Ploos van Amstel SC
Instructed by
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