

**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION, MTHATHA]**

Case No:4538/2019

Date heard: 23/5/2024.

Date delivered:27 /5/2024.

In the matter of:

N[...] M[...]

1ST APPLICANT

N[...] M[...] O.B.O

A[...] M[...]

2ND APPLICANT

And

MAZIYA GENERAL CONSTRUCTION

RESPONDENT

This judgment was handed down electronically by circulation to the parties' legal representatives via e-mail. The date and time for hand-down is deemed to be 09H30 on 27 May 2024.

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

MJALI J:

- [1] This is an opposed application for leave to appeal in terms of section 17(1)(a) of the Superior Act Number 10 of 2013 to the full bench of this division against the whole of my judgment delivered on 27 March 2024 in which I dismissed the plaintiffs' claim for damages arising from the drowning of her six-year-old minor son whilst swimming in a hole some distance from his home.

- [2] Apart from the criticism levelled at the court's remark that the particulars of claim were not a model of clarity, what can be gleaned from the applicants' notice of appeal as well as its heads of argument¹ as the basis of the challenge against the judgment and order is broadly that the court erred on facts and law. On the facts the criticism is that the court erred in rejecting the plaintiff's evidence which was corroborated by the head woman that the hole in which the minor child died was dug by the defendant. Mr Mkongozeli who appeared for the applicants argued that the evidence led in support of the plaintiffs' claim ought to have been accepted especially in the light of the fact that the defendant flew all the way from Johannesburg to visit the scene, apologised to the applicant and contributed to the funeral expenses. He asked rhetorically as to why it acted in that manner if it had not done anything wrong. Such behaviour, according to Mr Mkhongozeli amounted to an unequivocal admission of liability on the part of the defendant. As such the applicant contends that the court erred in finding that there was no proof that the hole in which the applicant's son drowned was dug by the respondent.
- [3] On the question of law, what can be gleaned from the heads of argument is that the court erred in not finding a causal connection between the drowning of the plaintiff's minor child and the failure of the defendant to safeguard the area when in the applicant's view, the evidence proved that it is the respondent that dug that hole. The confusion as regards the alleged omission is whether it is based on common law or failure to comply with the provisions of the Occupational Health and Safety Act 85 of 1993 as the particulars of claim vacillates between the two and not in the alternative. In Mr Mkhongozeli's view, the court erred in its pronouncement that the particulars of claim are not a model of clarity as the defendant had not filed any exception to the particulars of claim.
- [4] The application for leave to appeal is opposed by the respondent on the basis that there are no prospects of success for the proposed appeal.

¹ Which documents themselves are not a model of clarity.

- [5] The law when it comes to a consideration of whether or not leave to appeal ought to be granted is well settled. Section 17(1) of the Superior Courts Act governs applications for leave to appeal and provides that leave to appeal may only be granted where the judge or judges concerned are of opinion that the appeal would have reasonable prospects of success or there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration. In regard to the question of reasonable prospect of success, the SCA remarked as follows:

“Leave to appeal should be granted only where there is a sound rational basis for the conclusion that there are prospects of success on appeal”.²

- [6] The sole question to be considered in such an application is whether there is a sound rational basis that another court would come to a different conclusion on the same facts. The prospects of success must not be remote but there must exist a reasonable chance of succeeding.

- [7] In a consideration of an application of this nature, I am placed in position that although I was satisfied that the order I granted and reasons thereof were sound, I must now reflect dispassionately upon my judgment and decide whether there are any prospects of success on appeal. At this stage I am not called upon to adjudicate upon the appeal itself. Commenting on the difficulties inherent in the nature of this application Ogilvie Thompson AJA³ 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 may 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. As regards the latter, difficult though it may be for a trial Judge to disabuse his mind of the fact that he has himself found the Crown case to be proved beyond reasonable doubt, he must, both in relation to questions of fact and of law,

² Four Wheel Drive Accessory Distributors CC v Rattan NO 2019 (3) SASA 451 (SCA) at par [34] with reference to S v Smith 2012 (1) SACR 567 (SCA) par [7].

³ R v Muller 1957 (4) SA 642 AD at page 646 paragraph E-G.

direct himself specifically to the enquiry of 'whether there is a reasonable prospect that the Judges of Appeal will take a different view'.

- [8] I have in my judgment extensively dealt with the evidence led in support of the plaintiffs' claim and the issue of who dug the hole in which the drowning took place. Apart from the mere allegations that the respondent construction company excavated in that area, the witnesses could not deny that there was another construction company that harvested soil in that area prior to the defendant taking the over construction of the school. They also could not deny that the respondent dug in a different site that was fenced and access controlled. Both witnesses were in no position to deny that that hole was already in existence when the respondent took over the construction of the school. They both sought to assign blame on the respondent on the fact that it contributed to the funeral expenses, an issue that was in my view sufficiently explained by the respondent. Without establishing that it is the respondent who dug the hole, the question of negligence on its part did not arise.
- [9] Having carefully listened to and given the submissions made by both counsel some careful consideration I have not been persuaded to think that another court would find differently in this matter. I also cannot any compelling reason warranting the hearing of this matter by the appeal court.
- [10] On the issue of costs. The general rule is that costs must follow the event. There is no reason to deviate therefrom. In the result

10.1 The application for leave to appeal is dismissed with costs.

10.2 10.2 The applicant shall pay the costs of this application including those that are consequent upon the employment of two counsel where so employed.

**GNZ MJALI
JUDGE OF THE HIGH COURT**

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