

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 66667/2018

DATE: 29-07-2024

In the matter between

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

DATE 30.07.2024

SIGNATURE

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MEC FOR HEALTH IN GAUTENG

Applicant

and

FRANCINAH PULENG CHAUKE

Respondent

J U D G M E N T

LEAVE TO APPEAL

MABUSE, J:

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[1] This matter came before me on the 24th of May 2024 as an application by the MEC for Health Gauteng Province (the applicant) for leave to appeal to the full Court of this division, alternatively, to the Supreme Court of Appeal against the whole of the judgment handed down by this Court on 13 November 2023. It is opposed by the respondent, Francinah Puleng Chauke.

[2] In the said judgment, the Court had granted the following order in favour of the respondent, that the plaintiff

“On the merits judgment is hereby granted in favour of the plaintiff against the defendant.”

The applicant was obviously disgruntled with the said judgment and it is therefore the said judgment that is the target of this application for leave to appeal.

10 There was no application for leave to appeal against the order.

[3] The grounds upon which the applicant intends challenging the said judgment have been carefully and fully set out in the application for leave to appeal. In the light of the fact that such application for leave to appeal constitutes part of the appeal papers, I do not plan to repeat such grounds in this judgment.

[4] This application for leave to appeal is brought in terms of section 17(1)(a)(i)(ii) of the Superior Courts Act number 10 of 2013 (the Act). This action provides that,

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“17.1 Leave to appeal may only be given where the judgment, 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.”

Although there are other grounds under section 17(b) and(c) on the basis of which an application for leave to appeal may be brought, the applicant does not rely on such grounds. The applicant’s application for leave to appeal is therefore confined only to such grounds as are mentioned in section 17(1)(a)(i) and (ii) of the Act.

[5] When confronted with such an application, the Court must hold a two staged enquiry. First, it must decide whether it has been persuaded that the appeal would have reasonable prospects of success if the application for leave to appeal is granted. If the Court is persuaded, then it must grant the application. If the Court is not persuaded, it must then move to the next step of the enquiry which is to determine as to whether there is some compelling reason why the appeal should be heard. Such grounds include the fact that, on the subject under consideration, there are conflicting judgments.

May I hurriedly say that it is not one of the applicant’s

grounds of the appeal that there are any conflicting judgments in this matter. Accordingly, this Court will in its consideration, in its judgment consider only the first ground.

[6] In order to succeed with his application for leave to appeal, the applicant must satisfy this Court that another Court seized with the same set of facts would arrive at a different finding, favourable to him. He must persuade the Court that if granted leave to appeal, he has reasonable prospects of success.

[7] Section 17(1) of the Act sets out an inflexible touchstone to grant leave to appeal. Therefore, the applicant must of necessity meet this stringent touchstone as set out in section 17 of the Act in order to succeed with his application. To observe that under section 17(1) of the Act, the threshold is now even more stringent than when the now repealed Act 59 of 1959 was applicable. That the threshold is now stringent is aptly demonstrated by *S v Notshokovu and Another* [2016] ZA SCA 112 paragraph 2 [7 September 2016] where Shongwe JA, who was writing for the Court, had the following to say,

“An applicant on the other hand faces a higher and stringent threshold in terms of the Act compared to the provisions of the [indistinct]

Supreme Court Act 59 of 1959.”

Section 17(1) uses the word “only”, it provides that “leave to appeal may only be given” and proceeds to set out the circumstances under which leave to appeal may be granted.

[8] Finally, Plaskett AJA, in dealing with the validity of the threshold wrote in a judgment in which Cloete JA and Maya JA agreed in *S v Smith* 2012 (1) SACR 567 at 570 paragraph [7] that, I quote,

10 “What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that the Court of appeal could reasonably arrive at a conclusion different to that one of the trial Court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of

20 succeeding. More is required to be established than that there is a mere possibility of success; that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rationale basis for the

conclusion that there are prospects of success
on appeal.”

[9] Both counsel, Advocate S Pashwane for the applicant and Advocate DM Kekana duly assisted by Advocate KC Makopa for the respondent, filed heads of argument in this application. I wish to thank them for their assistance.

10 In his heads of argument and relying on some authorities, counsel for the applicant submitted that the applicant has made out a good case for the relief she sought and that on that basis leave to appeal should be granted.

[10] On the other hand, counsel for the respondent, whose argument was sandbagged by some authorities, submitted that there is no reasonable prospects of success if leave to appeal is granted. Based on his argument, he submitted that the application for leave to appeal must be dismissed with costs.

20 [11] I have not been persuaded that if granted leave to appeal, the applicant would have any reasonable prospects of success. Accordingly, the following order is made.

The application for leave to appeal is hereby refused with costs, which Court shall include the cost of two counsel.



MABUSE, J

JUDGE OF THE HIGH COURT

DATE: 5.6 August 2024