

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 20693/2018

DATE: 26-07-2024

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

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

(3) REVISED.

DATE 2024-08-20

SIGNATURE [REDACTED]

10 In the matter between

STEYN DA

Applicant

and

MEC ROAD AND TRANSPORT, GAUTENG

Respondent

J U D G M E N T

LEAVE TO APPEAL

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MABUSE, J:

[1] Following the order that this Court made on 05 June 2023, after hearing evidence, the applicant applied for leave to appeal; either to the Full Court of this Division or in the alternative to the Supreme Court of Appeal against the whole of the said judgment and order delivered on the said date. This matter is therefore an application for leave to appeal

and is opposed by the respondent.

[2] The applicant's application is sandbagged by full and carefully Grafted grounds, which have been set out in the application for leave to appeal. Seeing that the relevant application for leave to appeal is a constituent part of the appeal papers before the Court, I deem it unnecessary in this judgment and for the purposes of this judgment to repeat the applicant's grounds of appeal.

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[3] Although the application for leave to appeal contains numerous grounds, at the heart of the grounds were two grounds which Adv Rossouw laid heavy emphasis on. Those grounds are firstly, that the Court erred in not finding that there was contributory negligence on the part of the plaintiff at the material time the respondent's cause of action arose. Secondly, that there are conflicting judgments on the matter under consideration.

20 [4] Although the applicant abandoned all the other grounds enumerated in the application for leave to appeal, the signals I got from Mr Rossouw were that in his judgment on the application for leave to appeal, this Court should restrict itself to the aforementioned two grounds and not go beyond them.

[5] Before analysing those two grounds, I find it prudent and necessary to deal with the provisions of section 17(1)(a)(i)(ii) of the Superior Courts Act, 10 of 2023. (For purposes of brevity this shall be called the Act). For it is that section that contains the test that the applicant must satisfy in order to be successful with this application.

[6] Any party, who is disgruntled with the judgment and
10 order of the High Court must apply for leave in terms of the said section, if he wants to challenge such judgment and order.

The said section provides as follows:

Section 17(a)(i)(ii) "Leave to appeal may only be given where the Judge, or Judges, concerned are of the opinion that:

(i) The appeal would have a reasonable prospect of success; or

(ii) There is some other compelling
20 reasons why the appeal should be heard; including conflicting judgments on the matter under consideration."

[7] When a Court is confronted with an application for leave to appeal, under the said section, it must hold a

two-stage enquiry. Firstly, it must decide whether it has been persuaded that the appeal would have a reasonable prospect of success, if the application for leave to appeal is granted. If the Court has been persuaded, then it must grant leave to appeal.

[8] If the Court is not persuaded it must move to the next stage of the enquiry which is to determine as to whether there is any compelling reason why the appeal should be heard.
10 Such grounds include the fact that on the subject matter, under consideration, there are conflicting judgments.

[9] In order to succeed with its application for leave to appeal, the applicant must satisfy the Court that another Court seized with the same set of facts would arrive at a different conclusion favourable to it. The applicant must satisfy this Court that, if granted leave to appeal, it would have reasonable prospects of success.

20 [10] Section 17(1) sets out the inflexible touchstone to grant leave to appeal. The applicant must, therefore, and of necessity, meet these stringent touchstones. This is clear from the judgment of *S v Notshokovu* (157/15) [2016] ZASCA 112 [7 September] in which Shongwe J, as he then was, and who was writing for the majority, stated that:

“An appellant on the other hand faces a higher and stringent threshold in terms of the Act compared to the provisions of the repealed Supreme Court Act, 59 of 1959.”

It will be recalled that in terms of the old Act, 59 of 1959, leave to appeal could only be granted when there was reasonable prospect of success. (See for instance *Rex v Baloyi* 1949(1) SA 523 (AD) which adopted the first laid down in *Rex v Nxumalo* 1939 (AD) 580 at 581.

10 [11] Section 17(1) uses the word: “only”. It provides that:

“Leave to appeal may “only” be granted”

Then it proceeds to set out the circumstances under which leave to appeal may be granted. The use of the word: ‘only’ implies that there is imposed on the applicant a heavier duty than was the case under Act 59 of 1959, imposed on the applicant to persuade a Court that, if granted leave to appeal, it would have a reasonable prospect of success.

See also *South African Breweries (Pty) Limited v The*
20 *Commissioner of South African Revenue Services* [2017] ZAGPPHC 340 [28 March 2017] paragraph 5, in which the Court cited with approval the followig passage from *Mont Chevaux Trust v Tim Goosen and 18 others* 2014 JDR 2325 (LCC) paragraph 6:

“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.

The use of the word: 'would' in the new statutes indicates a measure of certainty that another Court will differ from the Court whose judgment is sought to be appealed against."

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See also *S v Smith* 2012 (1) SACR 567 at paragraph 7 in which the Court dealt with the test of reasonable prospects of success.

[12] The purpose of section 17 of the Act is to sift the appeals that go through for consideration; to make sure that only appeals that have merits... or to put it in the language of the subsection: "to make sure that only appeals that would have reasonable prospect of success" go through.

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[13] I have now been told that the judgments that I have referred to above have been set aside and are therefore not applicable. There is an argument though that judgment of *Notshokovu*, above, conflicts with the judgment of *Ramakatsa*

and Others v African National Congress and Another
(724/219) [2021] ZASCA 31 [31 March 2021].

[14] I will deal with this argument later. This judgment, in particular paragraph 226 do not support the argument that there are conflicting judgments. On the contrary this paragraph supports the view that the applicant must show reasonable grounds of success in order to succeed with the application for leave to appeal.

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[15] The judgment, which is sought to be appealed, I have dealt with the legal principles which are applicable in the subject matter of the suit. Those principles were backed by some judgments. I have heard no argument that I erred in relying on those authorities. That I have misunderstood the principles that I was dealing with; or that I misapplied the relevant principles.

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[16] I have also dealt with the issue of contributory negligence. This Court could not make a finding that there was contributory negligence on the part of the plaintiff in the situation where no evidence was placed before Court to support a plea of contributory negligence; or in a situation where the plaintiff, or the applicant himself, did not admit that there was contributory negligence on his part.

[17] I find it difficult to accept the argument by Mr Rossouw that there was, or the Court should have found that there was contributory negligence on the part of the plaintiff, now the respondent. In the absence of the relevant evidence there is no leg upon which even the argument by Mr Rossouw can stand. There is, in my view, no reasonable prospect that the appeal would succeed if leave to appeal be granted on this point.

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[18] As I pointed out earlier the second, or next, stage of the enquiry is to establish whether there are some conflicting decisions. The applicant applies for leave to appeal on a further ground that there are compelling reasons why the appeal should be heard.

According to the applicant, this is so because there are conflicting judgments on the question of the test to be applied in this matter, or on the subject under consideration.

20 [19] According to the applicant's application for leave to appeal, a compelling reason would include an important question of law, or a discreet issue of importance that will have an effect on future disputes as well as conflicting judgments on the matter under consideration.

According to Mr Rossouw, the question is whether section 17

has raised the threshold. After referring to some authorities, he argued that the judgment of *Ramakatse* held implicitly that the bar has not been raised by the introduction of section 71.

In this regard he found support in the judgment of *Fair Trade Independent Tobacco Association v President of the Republic of South Africa and another* (21688/2020) [2020] ZAPPHC (4 July 2020) paragraph 226 and the authorities cited therein.

10 [20] He submitted that the legal position is not clear and needs to be authorotatively addressed. Based on that, he contends that there appears to be conflicting judgments between the Provincial Divisions and the SCA regarding the issue whether the threshold for granting leave to appeal against a judgment of the High Court has been raised.

I have in this paragraph underlined the following. That the contends that there appears to be conflicting judgments between Provincial Divisions and the SCA regarding the issue whethe the threshold for granting leave to appeal against a
20 judgment of a High Court has been raised.

[21] In his reply Mr Guldenpfennig, counsel for the respondent submitted that there are no compelling reasons. He submitted furthermore that the authorities quoted by counsel for the applicant do not take the matter any further.

I agree with counsel for the respondent that there is nothing conflicting in the judgments of *Notshokovu* and *Ramakatsa*. The two judgments speak about the same thing. Neither of the judgments conflicts the other.

In the premises the application for leave to appeal cannot succeed. It is therefore refused with costs. Costs shall be costs of two counsel.

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MABUSE, J
JUDGE OF THE HIGH COURT
DATE: 20.08.2024