



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED: YES
- (4) Signature: [REDACTED] Date: 27 August 2024

CASE NO : - 30326/2018

In the matter between:

SEAL A DEAL CC t/a MAKHAFOLA KHAFLINS TRANSPORT

1st Applicant

TAU DANIEL MAKHAFOLA

2nd Applicant

AND

ATTORNEY FIDELITY FUND BOARD

1st Respondent

LEGAL PRACTICE COUNCIL

2nd Respondent

This judgment is handed down electronically by circulation to the parties' representatives by email, publication on the CaseLines System and release to SAFLII. The date for hand down is 27 August 2024.

JUDGMENT

ERASMUS AJ

INTRODUCTION

1. This is an application for leave to appeal against my judgment of 10 June 2024.
2. The Applicants approach this court for leave to appeal on the ground that the appeal has a reasonable prospect of success as well as the existence of a compelling reason why the appeal should be heard.

TEST

3. An application for leave to appeal is now governed by section 17(1) of the Superior Courts Act 10 of 2013 ("the Superior Courts Act"). The section provides that:

"(1) 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;*
 - (b) *the decision sought on appeal does not fall within the ambit of section 16 (2) (a); and*
 - (c) *Where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.”*
- 4. Prior to the Superior Courts Act coming into force, the test in an application for leave to appeal was whether there were reasonable prospects that another court may come to a different conclusion. Much debate has ensued as to whether s 17(1) imposes a more stringent and onerous test before leave to appeal can be granted.
- 5. The Supreme Court of Appeal set out the application for a test to grant leave to appeal in **Cook v Morrisson and Another**ⁱ as follows:

“[8] *The existence of reasonable prospects of success is a necessary but insufficient precondition for the granting of special leave. Something more, by way of special circumstances, is needed. These may include that the appeal raises a substantial point of law; or that the prospects of success are so strong that a refusal of leave would result in a manifest denial of justice; or that the matter is of very great importance to the parties or to the public. This is not a closed list (Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd 1986 (2) SA 555 (A) at 564H – 565E; Director of Public Prosecutions, Gauteng Division, Pretoria v Moabi 2017 (2) SACR 384 (SCA) ([2017] ZASCA 85) para 21).*”

6. In **MEC for Health, Eastern Cape v Mkhita**ⁱⁱ the Supreme Court of Appeal emphasised the application for the test for leave to appeal and found as follows in paragraphs [16] to [18]:

*"[16] Once again it is necessary to say that **leave to appeal**, especially to this court, **must not be granted unless there truly is a reasonable prospect of success**. Section 17(1)(a) of the Superior Courts Act 10 of 2013 makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the **appeal would have a reasonable prospect of success**; or there is some other compelling reason why it should be heard.*

*[17] An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. **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.***

*[18] In this case the requirements of 17(1)(a) of the Superior Courts Act **were** simply not met. The uncontradicted evidence is that the medical staff at BOH were negligent and caused the plaintiff to suffer harm. The special plea was plainly unmeritorious. **Leave to appeal should have been refused. In the result, scarce public resources were expended: a hopeless appeal was prosecuted at the expense of the Eastern Cape Department of Health and ultimately, taxpayers; and valuable court time and resources were taken up in the hearing of the appeal.** Moreover, the issue for decision did not warrant the costs of two counsel."*

(own emphasis)

7. The above legal principles emphasise that the requirement for a successful leave to appeal is more than a mere possibility that another judge might come to a different conclusion. The test is whether there is a reasonable prospect of success that another judge would come to a different conclusion.
8. I am of the view that it is now authoritatively established that the position remains that if there is a reasonable prospect of success, leave to appeal should be granted. The different views and findings in this regard, in my view, essentially are now moot in light of the finding in ***Ramakatsa and Others v African National Congress and Another***.ⁱⁱⁱ
9. In ***Ramakatsa***, in interpreting the section, the SCA held that:

'If a reasonable prospect of success is established, leave to appeal should be granted. Similarly, if there are some other compelling reasons why the appeal should be heard, leave to appeal should be granted. The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal.'
10. I, accordingly, consider this application for leave to appeal on the basis that leave should be granted if a reasonable prospect of success is established, or if there are some other compelling reasons why the appeal should be heard.
11. In the heads of argument filed by the Applicants, reference was made to the question of the appealability of the order. I did not understand the argument of

either the first or second Respondents that the order is not appealable. This is not a contentious issue, and I therefore do not have to deal with that in this judgment.

GROUND OF APPEAL

12. The Applicants' various grounds of appeal set out in the application for leave to appeal and, in summary form, are that the court erred in respect of practically all its findings. The Applicants do so in approximately 30 grounds of appeal.
13. I find myself compelled to state that the Notice of Application for Leave to Appeal is unduly prolix, lacks clarity and does not succinctly set out the grounds of appeal.
14. When the matter was argued, the Applicant confined itself to much narrower grounds than the grounds in the application for leave to appeal.
15. This can only be described as a shot-gun approach. In the Application for Leave to Appeal the Applicants casted its net as wide as it possibly could. As stated, during the argument of the matter, the argument was restricted to narrower issues.
16. This borders on the abuse of the process. This is supported by the following:

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- 16.1 Many of the grounds of Appeal raised by the Applicant in the application for leave to appeal are repetitive in nature or overlap;
 - 16.2 Nor is it clear why the grounds raised amount to errors and/or misdirections that a reasonable prospect of success is thereby established. The mere prefacing of each sentence with the words 'erred and misdirected' does not suffice to render what is next averred to indeed constitute an appropriate ground or basis upon which to substantiate the averments;
 - 16.3 The grounds raised also goes beyond the judgment and focusses on exchanges between the Court and the respective counsel during the initial hearing of the matter.
17. As stated above, the Applicant's Application for Leave to Appeal consists of 30 grounds for leave to appeal. During the argument of the leave to appeal, Mr Kwindia who appeared on behalf of the applicants, confined his argument to the provisions of section 26 of the Attorneys Act, No 53 of 1979 ("the Attorneys Act"), arguing that the Court erred in making a finding that the provisions of chapter III of the Attorneys Act does not define the entrusted money to attorneys to be a debt.
 18. It was further argued by Mr Kwindia that he stands with the Grounds for Leave to Appeal and the Short Heads of Argument filed on behalf of the Applicant.

19. Mr Kwinda was invited to submit further Heads of Argument should he so wish. This invitation was not made use of.
20. Such an approach where a net is casted as wide as possible only to use one or two arguments at the end of the day waists valuable public resources in the form of Court time and Court availability. Such practice should not be encouraged and it should be condemned.
21. The application for leave to appeal is made on a large number of grounds, and because of the prolixity I do not propose to set out the grounds relied upon in support thereof so as not to unduly overburden this judgment.
22. In any event most of the grounds stipulated in the Application for Leave to Appeal were dealt with in detail in the main judgment and do not bear repetition here.
23. Be that as it may, short of its verbosity and repetition, the main issue the Applicant focused on during the argument of the Application for Leave to Appeal, was the correctness of the application of the question if the moneys that were allegedly entrusted to the attorneys should be regarded as a debt or not.

CONSIDERATION OF THE GROUNDS OF APPEAL

24. I turn now to the gravamen of the ground raised by the Applicant in the Application for Leave to Appeal.
25. It is a pointless and fruitless exercise to regurgitate the long list of the grounds of appeal and the multiple identifications of all the purported misdirections and errors and then deal with them seriatim. The focus of the argument by the Applicant was on one narrow issue. Mr Kwindu, save for stating that the Applicants are standing with the grounds raised in the Application for Leave to Appeal and the short heads of argument filed, did not formulate any additional arguments on the grounds of appeal raised in the Application for Leave to Appeal.
26. The consistent or common thread running through the 30 paragraphs in the Application for Leave to Appeal is the allegation that moneys was entrusted to the attorney Snijman and Smullen during approximately 2018 and the findings that this Court made on the alleged amounts entrusted to the attorney Snijman and Smullen.
27. In the main judgment I have aligned myself with the judgment by the Honourable Judge Mashile in the matter of ***Du Toit and Others v Du Toit-Smuts & Partners and Another***^{iv} where he was faced with a similar set of facts and in a well-reasoned judgment found that a deposit is a debt as is defined.

28. During argument all the representatives was invited to make submissions why I should deviate from this judgment, and on what basis I should find that the judgment I relied on is wrong. No such arguments were made.
29. I can find no reason why I should deviate from this judgment. In amplification of this I wish to stress the following:
- 29.1 The term “debt” is not defined in the Prescription Act, 68 of 1969. In the absence of such a definition our courts have held that it must be given a wide and general interpretation. ^v
- 29.2 In ***The Law of South Africa, Volume 21, page 55, paragraph 142***, it is stated as follows:-
- “In the absence of a definition of the term “debt”, the Courts have held that it must be given a wide and general meaning. So, for the purposes of Section 12(1) of the Prescription Act of 1969, the word “debt” includes any liability arising from and being due (debitum) or owing under a contract, but obviously includes delictual debts.”*
- 29.3 Consequently, in its broader sense, the idea of a “debt” in relation to the Act refers to an obligation to do something, whether by payment or by the delivery of goods and services, or not to do something. The concept of a debt therefore has a proprietary character. ^{vi}

30. The very generic argument in the Heads of Argument by the Applicant in paragraph 7 thereof does not assist the Court at all in coming to any different conclusion regarding the nature of money paid on trust.
31. In addition, and even though it was not argued during the hearing of the leave to appeal, there are also a number of evidentiary shortcomings in the case by the Applicants. I have dealt with this at length in the main judgment. There is no reason why I should repeat same in this judgment.
32. In the circumstances, I am not convinced that a case is made that an appeal has a reasonable prospect of success.

APPEAL AGAINST THE COSTS ORDER

33. I exercised my discretion and ordered the Applicants to pay the costs of the application on a punitive scale.
34. In the Application for Leave to Appeal, the Applicants relies on the argument that the Bio Watch – principle had to be applied in the hearing of this application. I do not agree with the Applicants.

CONCLUSION

35. After careful consideration, I am of the view that the numerous grounds of appeal lack merit.
36. I was not convinced during argument that I erred in any way, nor was I convinced that in the exercise of its discretion another Court would interfere with the costs order. I am of the view that there is no reasonable prospect of another Court coming to a different conclusion.
37. As there are no compelling reasons why leave to appeal should be granted, and none were raised, leave to appeal cannot be granted on this basis.
38. As regards costs, I refer to my comments and findings in the main judgment and I cannot, in the circumstances, and in the exercise of my discretion conclude otherwise than that the Applicant should again be liable for the costs on the same scale and for the same reasons.
39. This is also supported in the fashion in which the Application for Leave to Appeal was brought to court. I have dealt with the approach by the Applicants herein above.
40. In the event, the following order is made:
- 40.1 The application for leave to appeal is refused;
- 40.2 The applicant is to pay the costs of the Application for Leave to Appeal of both the first and second Respondents, which costs are to be paid in scale B.

N ERASMUS

Acting Judge of the High Court



BY ORDER

Appearance on behalf of the 1st and 2nd Applicants : Adv T C Kwindu

Appearance on behalf of the 1st Respondent : Heads of Argument
prepared by Adv G Hulley SC

Appearance on behalf of 2nd Respondent : Heads of Argument
prepared by Mr Liam Groome

ⁱ 2019 (5) SA 51 (SCA)

ⁱⁱ 2016 JDR 2214 (SCA)

ⁱⁱⁱ (724/2019) [2021] ZASCA 31 (31 March 2021)

^{iv} Unreported Judgment (4748/2021) [2023] ZAMPMBHC 22 (12 April 2023)

^v Loubser – Extinctive Prescription, pages 26 - 31

^{vi} CGU Insurance Limited v Rumdel Construction (Pty) Limited 2004 (2) SA 622 (SCA) pages 627-8, paragraph [6]