



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

**Reportable /
Not reportable**

Case no: 4143/2018

In the matter between:

**MEMBER OF THE EXECUTIVE COUNCIL:
POLICE, ROADS & TRANSPORT, FREE STATE
PROVINCE**

Applicant

And

SAMUEL MPHUTHI

Respondent

In re:

SAMUEL MPHUTHI

Plaintiff

and

MALUTI-A-PHOFUNG LOCAL MUNICIPALITY

First Defendant

**THABO MAFUTSANYANE DISTRICT
MUNICIPALITY**

Second Defendant

**MEMBER OF THE EXECUTIVE COUNCIL:
POLICE, ROADS & TRANSPORT, FREE STATE
PROVINCE**

Third Defendant

Coram: Cronje AJ

Heard: 6 June 2024

Delivered: 23 August 2024

Summary: Application for leave to appeal. Motor vehicle accident. Negligence apportioned – whether the Supreme Court of Appeal restated the test on applications for leave to Appeal in *Ramakatsa and Others v African National Congress and Another* [2021] ZASCA 31.

ORDER

1. The application for leave to appeal is dismissed.
2. The Applicant pays the costs of the application.

JUDGMENT

Cronje AJ

Introduction

[1] The Plaintiff instituted action against the Third Defendant pursuant to a vehicle accident that took place on 29 August 2005. I heard the evidence in respect of the merits (quantum to be adjudicated later) and found that:

- 1.1 Both the Plaintiff and the Third Defendant were negligent in causing the accident.
- 1.2 Negligence of 20% is attributed to the Plaintiff and 80% to the Third Defendant.
- 1.3 Mr Boshanki Ernest Lelilo is declared a necessary witness.
- 1.4 Third Defendant is liable for payment of the Plaintiff's costs in respect of the merits. Costs are not apportioned.'

[2] Dissatisfied with the Judgment, the Third Defendant applied for leave to appeal against the whole of my order.

The test for leave to appeal

[3] The test on whether another Court would come to a different conclusion is trite. Ms Wright, who appeared for the Applicant, however, referred to *Ramakatsa and Others v African National Congress and Another*¹ (*Ramakatsa*), where the Supreme Court of Appeal (SCA) held:

'[10] Turning the focus to the relevant provisions of the Superior Courts Act (the SC Act), leave to appeal may only be granted where the judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there are compelling reasons which exist why the appeal should be heard such as the interests of justice. This Court in *Caratco*, concerning the provisions of s 17(1)(a)(ii) of the SC Act pointed out that if the court is unpersuaded that there are prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal. Compelling reason would of course include an important question of law or a discreet issue of public importance that will have an effect on future disputes. However, this Court correctly added that "but here too the merits remain vitally important and are often decisive". I am mindful of the decisions at high court level debating whether the use of the word "would" as opposed to "could" possibly means that the threshold for granting the appeal has been raised. 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. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist.' (Footnotes omitted and my emphasis added.)

[4] Although a reading of the relevant part in the judgment leaves the impression that the SCA intended to amend the test for leave to appeal as found in section 17(1)(a)(i) and (ii) of the Superior Courts Act,² I do not believe that the test as to whether another Court would reach a different conclusion is intended. In an attempt to prevent a flood of applications, the Legislature probably deemed it wise to lift the bar. The SCA stated that the appellants needed to convince the SCA on proper grounds

¹ *Ramakatsa and Others v African National Congress and Another* [2021] ZASCA 31; The Constitutional Court did not reconsider this test in *Ramakatsa and Others v Magashule and Others* [2012] ZACC 31; 2013 (2) BCLR 202 (CC); See also: *S v Khumalo and Another (Application for Leave to Appeal)* [2023] ZAGPJHC 1409.

² Superior Courts Act 10 of 2013.

that they had prospects of success on appeal. Those prospects of success must not be remote, but a reasonable chance of succeeding must exist. Reference was made to *Ramakatsa* in *Manaka v The University of the Witwatersrand*³ where the Court held: 'The ratio in *Ramakatsa* simply followed *S v Smith* 2012 (1) SACR 567 (SCA), [2011] ZASCA 15, in which Plasket AJA (Cloete JA and Maya JA concurring), held as follows at para 7: "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 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 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, rational basis for the conclusion that there are prospects of success on appeal." In *Mont Chevaux Trust v Tina Goosen*, the Land Claims Court held (in an *obiter dictum*) that the wording of this subsection raised the bar of the test that now has to be applied to the merits of the proposed appeal before leave should be granted. I agree with that view, which has also now been endorsed by the SCA in an unreported judgment in *Notshokovu v S*. In that matter the SCA remarked that an appellant now faces a higher and a more stringent threshold, in terms of the Superior Court Act 10 of 2013 compared to that under the provisions of the repealed Supreme Court Act 59 of 1959. The applicable legal principle as enunciated in *Mont Chevaux* has also now been endorsed by the Full Court of the Gauteng Division of the High Court in Pretoria in *Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others*.⁴ (Footnotes omitted)

[5] The summary of the grounds of appeal later herein should not be interpreted as a failure to consider the import of all the grounds. It is not the purpose of this judgment to expand on the findings but to establish whether the test for granting leave is satisfied.

The grounds of appeal

[6] It is stated that the test for negligence was incorrectly applied; more specifically, that reasonableness forms part of determining negligence. The prevailing circumstances were not on account of any alleged breach of any statutory duties. A burden of proof was cast on the Applicant.

³ *Manaka v The University of the Witwatersrand* [2024] ZAGPJHC 252.

⁴ *Ibid* paras 6-7.

[7] I disagree. The person doing the grading and the foreman did not testify. The worksheets showed that grading was done, but not specifically with respect to the portion where the potholes were located. In this regard, I refer to *AK v Minister of Police*,⁵ where it was held:

'The standard of a reasonable organ of state is sourced from the Constitution. The Constitution is replete with the phrase that the state must take reasonable measures to advance the realisation of rights in the Bill of Rights. In the context of socio economic rights the availability of resources plays a major part in an enquiry whether reasonable steps have been taken. I can think of no reason in principle or logic why that standard is inappropriate for present purposes. Here, as in the case of socio economic rights, the choice of steps taken depends mainly on the available resources. That is why an organ of state must present information to the court to enable it to assess the reasonableness of the steps taken.'⁶

The Constitutional Court continued and held:

'It is trite that even if an omission is negligent it is not per se wrongful. Rather, whether a negligent omission is wrongful turns on the legal convictions of the community, as informed by our constitutional values. Essentially, this demands an enquiry as to whether it is reasonable to impose liability in the circumstances.'⁷

[8] It is stated that an overly cautious approach was adopted in favour of the Plaintiff, and no consideration was given to the negative aspects/features of his evidence. However, I considered those, but I also found that the accident took place more than 8 years before the testimony of the Plaintiff. In *S v Khumalo and Another (Application for Leave to Appeal)*,⁸ the Court referred to *S v Sauls*,⁹ where it was stated that there is no rule-of-thumb test or formula to apply when considering single witnesses. The trial court should weigh the evidence and its merits (or lack thereof) and decide whether it is satisfied that the truth has been told despite shortcomings or defects in the evidence.

[9] It is stated that, merely because the road may not have been in perfect condition, it cannot be inferred that it was not reasonably safe for road users. I

⁵ *AK v Minister of Police* [2022] ZACC 14; 2022 (11) BCLR 1307 (CC). See also: *Mashongwa v Passenger Rail Association of South Africa* 2016 (3) SA 528 (CC) at para [41].

⁶ *Ibid* para 70.

⁷ *Ibid* para 117.

⁸ *S v Khumalo and Another (Application for Leave to Appeal)* [2023] ZAGPJHC 1409.

⁹ *S v Sauls* 1981 (3) SA 172 (A) 180.

accepted that the road was in fair condition, but that would only be up to the point where the potholes were present.

[10] It is stated that the percentage that I apportioned to negligence did not consider the speed at which the Plaintiff travelled, and this speed was unreasonably fast. Mr Moloi conceded that the road speed was 80 km/h. The Plaintiff stated that he may have travelled between 80-90 km/h. I could not find that the speed in itself constituted negligence when the Plaintiff assessed the road as in a fair condition.

[11] It is stated that it was not considered whether the Plaintiff kept a proper look-out and failed to apply his brakes. However, the Plaintiff already explained that the road was in a fair condition and he did not expect potholes. Transposing one to what he could and would have seen under the circumstances, and him being the only person present, would place me in the position of an arm-chair critic.

[12] It is stated that no reliable evidence was presented that the mere presence, size and location of the potholes caused the accident, only the Plaintiff's actions and reactions. This also relates to the discrepancy between the evidence of the Plaintiff and Mr Makhubu, specifically regarding a third pothole. The fact that there were contradictions between the Plaintiff and the two witnesses, concessions made by the Plaintiff as well as contradictions and improbabilities in the evidence of the Plaintiff, impacted the reliability of the evidence. The finding that the Plaintiff presented the best evidence did not consider that no corroborative evidence was presented; alternatively, it did not prove the grounds of negligence.

[13] The direct evidence regarding the potholes' number, size, and location came from the Plaintiff. Mr Makhubu was requested to take photos of the scene much later. Regarding credibility and reliability, I only had the Plaintiff's version of what he encountered on that day. I could not find that contradictions – there were some – materially impacted on the credible and reliable evidence of the Plaintiff. There was, however, corroboration in respect of potholes on the road by Mr Lelilo.

[14] It is stated that applying the principles of sudden emergency was incorrect as it was not pleaded. In this regard, I did not refer to *Sekhokho v S*¹⁰ to find sudden emergency, but to what a reasonable man would have done, and whether the error is justifiable. I applied the principles.

[15] It is stated that I erred in accepting that the existence of the donga and the fear of falling into the donga was reasonable. However, the photos and video material indicated the location of the donga and the Plaintiff was therefore truthful in what he considered. It formed part of his appreciation of danger. I avoided being an arm-chair critic.

[16] It is stated that in placing a burden on the Third Defendant to prove to what extent it maintained the road, I made findings that were not based on evidence presented by the Plaintiff. But, the road resorted under the jurisdiction of the Third Defendant. The Plaintiff presented what he encountered and the Third Defendant elected to present evidence in rebuttal of a *prima facie* case. This is not a 'full' onus, and I did not treat it that way.

[17] It is stated that because grading of the road was done, I inferred that the Third Defendant was aware of the condition of the road and that it negligently failed to comply with its legal duties. In this regard, the Third Defendant presented worksheets to show that grading was actively executed. This was presented as a rebuttal of the Plaintiff's assertion that there were potholes and no direct evidence of the grader or foreman was presented to rebut the Plaintiff's version.

[18] It is stated that I accepted the Plaintiff's evidence as undisputed because the grader and foreman did not testify. My expectation that they would testify was unreasonable.

[19] The Third Defendant elected to disclose worksheets of grading being done, however, not at the point where the accident occurred.

¹⁰ *Sekhokho v S* [2010] ZAGPPHC 103.

[20] It is stated that I failed to consider the distance of road to be maintained and thereby placed an unrealistically high and unreasonable burden on the Third Defendant.

[21] The Third Defendant presented evidence that grading was done on that specific road, and it can be accepted that it was aware of the road's condition. I balanced the Third Defendant's duties with the Plaintiff's in attributing contributory negligence.

Arguments

[22] Ms Wright relies on *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd*¹¹ (*Caratco*) for the second ground on which parties may rely for leave to appeal, namely whether

there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration. In *Caratco*, the SCA held that a compelling reason includes an important question of law or a discreet issue of public importance that will have an effect on future disputes.¹²

[23] The merits remain vitally important and are often decisive. I do not find such questions of law or discreet issues of public importance. I balanced the duties of the State with that expected from the road user. All accidents have their own peculiar facts that exist in a specific context, and my findings will not impact on attributing liability to actions by the State, whether they be actions, omissions or negligence. In this regard, I again refer to *AK v Minister of Police*.

[24] Ms Wright argues that it was not proven that there was non-compliance with a duty to maintain the road. The Plaintiff had to prove non-compliance by the Third Defendant. She argues that it is in the public interest that leave be granted, as I, for example, made generalisations regarding what motorists can expect from the State. In this regard, I refer to *Henson v MEC for Transport and Public Works, Western Cape Government*¹³ and the cases referred to therein where the State's duties with respect

¹¹ *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* [2020] ZASCA 17; 2020 (5) SA 35 (SCA).

¹² *Ibid* para 2.

¹³ *Henson v MEC for Transport and Public Works, Western Cape Government* [2023] ZAWCHC 90.

to the maintenance of roads were referred to. In that matter, incidentally, the witness for the State was virtually in the same position as Mr Moloi regarding the knowledge he had of the condition of the road at the date of the accident.

[25] Furthermore, she argues that another Court would reasonably attribute negligence more favourably towards the Third Defendant. The Third Defendant did plead contributory negligence. However, I considered the conduct of the Plaintiff in my Judgment.

[26] Mr Zietsman SC argues that no public issue should be considered for appeal. He argues that the pleadings clarify that the Third Defendant did not act reasonably. It was pleaded that there was a duty on the Third Defendant to monitor, routinely inspect and maintain the road to ensure the safety of road users. As such, regarding contributory negligence, he stated that Mr Moloi did not apply his brakes and thought he would be able to safely negotiate the potholes. Only when he was confronted with the donga did he realise that he had to take evasive action. He argues that there is no prospect of success that another Court would interfere with the apportionment of negligence.

Conclusion

[27] I carefully considered the dictum in *Ramakatsa*. I do not believe that the decision should be understood to restate the requirements. The test remains whether there is a reasonable prospect of success or compelling reasons. The bar remains on whether another court *would* come to a different conclusion. Even if the test has been reformulated, I still do not find sufficient grounds to meet the test.

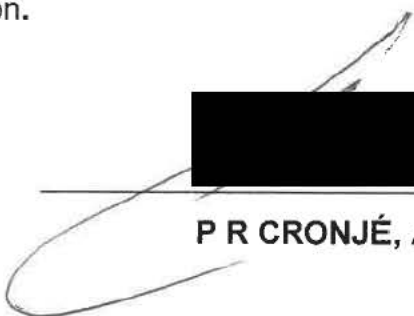
Costs

[28] There is no reason why costs should not follow the result.

ORDER:

[29] Wherefore the following order is made:

1. The application for leave to appeal is dismissed.
2. The Applicant pays the costs of the application.



P R CRONJÉ, AJ

Appearance

Counsel for Applicant: Adv GJM Wright

Attorneys for Applicant: State Attorney
Bloemfontein

Counsel for Respondent: Adv PJJ Zietsman SC

Attorneys for Respondent: Honey Attorneys
Bloemfontein