

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NO: 3948/2021

- (1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE JUDGES: YES/NO
(3) REVISED.

25/11/2024
DATE..... SIGNATURE.....

In the matter between:

GIDIZA FARIS MTHOMBENI

PLAINTIFF

And

TWO MOUNTAINS BURIAL SERVICES (PTY) LTD

DEFENDANT

JUDGMENT

Application for Leave to Appeal

Deane AJ

Introduction

1. This is an opposed application for leave to appeal against my judgment and Order handed down herein on 3 May 2024.

2. The said Order provided as follows:

It is accordingly ordered that:

1. *The exception application is upheld.*
2. *The Plaintiff's particulars of claim are struck out.*
3. *The Plaintiff is ordered to pay the Defendant (excipient's) costs.*

3. The reasons for the Order as granted are detailed in the judgment and will not be repeated herein.

4. In anticipation of the hearing of the application for leave to appeal, the parties were requested to file short heads of argument. They both acceded to this request so directed by the Court.

5. The application for leave to appeal is premised on the twelve (12) grounds as listed in the Heads of Argument received on 11 November 2024.

Legal Principles

6. The application is governed by section 17(1) of the *Superior Courts Act 10 of 2013* which provides:

"17 Leave to appeal

a. *Leave to appeal may only be given where the judge or judges concerned are of the opinion that -*

i. (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,

ii. *the decision sought on appeal does not fall within the ambit of section 16 (2) (a), and*

iii. *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."*

7. *In casu* the applicant relies on both grounds of appeal mentioned in section 17(1)(a) of the *Superior Courts Act*, namely, that the appeal would have reasonable prospects of success and that there are compelling reasons justifying the appeal.

8. Furthermore, section 16(2) of the *Superior Courts Act* reads as follows:

"(2) (a) (i) When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.

(ii) Save under exceptional circumstances, the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs."

9. In *MEG Health, Eastern Cape v Mkhitha*¹ the Supreme Court of Appeal said the following (reference to other authorities omitted):

¹ *MEG Health, Eastern Cape v Mkhitha* (1221/15) [2016] ZASCA 176 (25 November 2016).

"[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."

10. Furthermore, Bertelsmann J in *The Mont Chevaux Trust v Tina Goosen & 18 Others* 2014 JDR 2325 (LCC) at para 6 stated the following:

"It is clear that the threshold for granting leave to appeal against a judgment of a 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, see Van Heerden v Cronwright & Others 1985 (2) SA 342 (T) at 343H. The use of the word "would" in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against."

11. 'In order to succeed', therefore, the Applicant 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.²

12. In *Fair-Trade Independent Tobacco Association v President of the Republic of South Africa and Another*³ the Full Court observed that:

“As such, in considering the application for leave to appeal it is crucial for this Court to remain cognizant of the higher threshold that needs to be met before leave to appeal may be granted. There must exist more than just a mere possibility that another court, the SCA in this instance, will, not might, find differently on both facts and law. It is against this background that we consider the most pivotal grounds of appeal.”

Analysis and Conclusion

13. In support of the application for leave to appeal, this court was referred to a number of authorities relating to why this court should grant leave to appeal.

14. What is important to note is that the merits of an appeal remain vitally important. Having read the papers and having carefully heard counsel I conclude that the numerous grounds of appeal lack merit and that there is no reasonable prospect that another court would come to a different conclusion on the order of the court in terms of section 17(1)(a) of the *Superior Courts Act*.

15. Indeed, the fact of the matter is that none of the applicants purported grounds in its leave to appeal provide any sound or rational basis to conclude that there is a reasonable prospect of success on appeal and that another Court would come to a different conclusion.

² *S v Smith* 2012 (1) SACR 567 (SCA) at para 7.

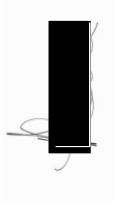
³ Case no: 21688/2020 [2020] ZAGPPHC 311 (24 July 2020) at [6].

16. In all the above and taking into account the test on appeal as laid down, this court concludes that the Applicant has failed to meet the required threshold.

Order

Accordingly, the following order is made:

1. The Appeal is dismissed with costs on an attorney and client scale.



T Deane

**ACTING JUDGE OF THE HIGH COURT,
POLOKWANE; LIMPOPO DIVISION**

APPEARANCES

FOR THE PLAINTIFF : MH Letsela
 INSTRUCTED BY : Letsela Nkondo Inc
 FOR THE DEFENDANT : Adv L Van Gass
 INSTRUCTED BY : Nelis Britz Incorporated
 DATE OF HEARING : 19 November 2024
 DATE OF JUDGEMENT :