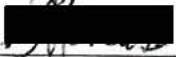




**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

|                                           |                                                                                     |
|-------------------------------------------|-------------------------------------------------------------------------------------|
| (1) REPORTABLE: YES / NO                  |                                                                                     |
| (2) OF INTEREST TO OTHER JUDGES: YES / NO |                                                                                     |
| (3) REVISED                               |                                                                                     |
| <u>2025.04.07</u>                         |  |
| DATE                                      | SIGNATURE                                                                           |

CASE NUMBER: 40579/2021

DATE 7 April 2025

**MPHO ELVIS MHLONGO**

**APPLICANT**

**V**

**MEC FOR EDUCATION GAUTENG PROVINCE**

**RESPONDENT**

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## JUDGMENT

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MABUSE J

[1] This is an application by the Applicant, Mpho Elvis Mhlongo, for leave to appeal to the Full Court of the North Gauteng High Court otherwise known as the Gauteng Division or the Supreme Court of Appeal against the order and the whole of the judgment of this court handed down on 23rd October 2023.

[2] On said date, this Court, in a written and fully motivated judgment, made the following order:

*"On the merits, the Plaintiff's claim is hereby dismissed"*

The Applicant is obviously disgruntled with the said order and wants to appeal against it on the grounds which he has fully set out in his written application for leave to appeal (application) and which grounds have been further explained by Advocate Williams S C, counsel for Applicant, in his oral submissions and heads of argument.

[3] In view of the fact that the application for leave to appeal constitutes part of the record of appeal, I do not deem it necessary to quote in this judgment the grounds upon which the Applicant contemplates challenging the said judgment and order. It is, in my view, sufficient to point out that the Applicant's application for leave to appeal is the one dated 5 November 2024. The application for leave to appeal is opposed by

the Respondents on whose behalf Advocate V Mnisi was acting. Adv Mnisi appeared for the Respondent even during the trial of the matter that resulted in the impugned order.

[4] In order to succeed with his application for leave to appeal, the Applicant must satisfy the test set out in section 17(1)(a)(i) of the Superior Courts Act 10 of 2023 (the Act). The said section sets out the test that must be satisfied by the Applicant in an application for leave to appeal.

[5] S 17(1)(a)(i) of the Act provides that:

*“17(1)(a)(i) Leave to appeal may only be granted to where the Judge or Judges consent are of the opinion that-*

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

Of course, there are other grounds in terms of the said 17 upon which an application for leave to appeal may be launched. But for purposes of this application, this application is concerned only with the ground set out in section 17(1)(a)(i) the Act.

[6] I have in the past and in many similar applications stated that section 17(1) sets out a rigid threshold to grant leave to appeal. In such an application, an applicant must meet the stringent touchstone set out in the said section to be successful with his application. The applicant must persuade the Judge or Judges hearing the application, that another Judge hearing his case may decide it differently. In other words, that, based on the same set of facts placed before the Judge who heard this matter, those facts placed before another Judge, would produce a different outcome.

[7] Under the Act, this threshold is even more stringent than it used to be under the now repealed Supreme Court Act 59 of 1959. To demonstrate its rigidity, one merely

must refer to the judgment of Shongwe J, who, writing for the Court in **S v Notshokove and Another [2016] 2 SCA 112 par 2 [7 September 2016]**, stated as follows:

*“An applicant 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 of 1959”.*

[8] Section 17(1)(a)(i) of the Act uses the words “*may only be given*” and thereafter sets out the circumstances under which a Judge or Judges seized with an application for leave to appeal may grant such an application.

[9] Hughes J, then of the Gauteng Division, also had an opportunity to revisit the applicable test in this kind of an application. In her judgment in **South African Breweries (Pty) Ltd v The Commissioner of South African Revenue Services (SARS) 2017 2 GPPHC 342 [28 March 2017] paragraph 5**, the learned Judge had the following to say:

*“The test which was applied previously in applications of this nature was whether there were reasonable prospects that another court may come to a different conclusion... What emerges from section 17(1) is that the threshold to grant a party leave to appeal has been raised. It is now granted in circumstances set out and is deduced from the word ‘only’ used in said section.”*

The Judge then cited with approval and in support of the applicable test, a paragraph in **Van Heerden v Cromwright and Others 1985 (2) SA 343 (T)** H by Bertelsman J.

[10] Of particular importance in the said paragraph is the last sentence that states that:

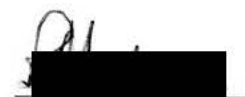
*“The use of the word ‘would’ indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against”.* See also **S v Smith 2012(1) SCA 567, 570 par 7**.

[11] The centerpiece of the Applicant's counsel's argument is that the Respondent's employers failed to put sufficient measures in place to ensure that the learners are adequately supervised while playing on the school grounds. There is no definition of "sufficient means" nor is there any for "*adequately protected*". Counsel for the Applicant did not give any of those terms any definition. On a question by the court as to what is meant in his argument by "*sufficient means*", he had great difficulty in explaining it in the context of this case.

[12] In paragraph [34] of the judgment appealed against, I relied on the authority of **Kruger v Coetzee 1966(2) SA 428(A) at p 430**. That judgment put it quite clearly that: "*The defendant should take reasonable steps to guard against such occurrence*". It is clear that what is required of the Defendant is to take reasonable steps and not "sufficient steps". The said judgment dealt fully with that issue in paragraph [34]. I need not repeat it here. The court was not criticized for relying on the said authority.

[13] On the whole I have not been persuaded that, if granted leave to appeal, the applicant has any reasonable prospect of success. In the circumstances, the following order is hereby made.

**The application for leave to appeal is hereby refused**



PM MABUSE

JUDGE OF THE HIGH COURT, PRETORIA

Attorneys

Appearances:

|                             |                      |
|-----------------------------|----------------------|
| Counsel for the Applicant:  | Adv Williams         |
| Instructed by:              | K S Dinaka Attorneys |
| <br>                        |                      |
| Counsel for the Respondent: | Adv V Mnisi          |
| Instructed by:              | The State Attorney   |
| Date of Hearing:            | 26 March 2025        |
| Date of the judgment:       | 7 April 2025         |