

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

SIGNATURE

DATE: 31 January 2025

CASE NO: 12291/2020

DATE: 31 January 2025

In the matter between:-

ADVOCATE HERMAN KRIEL N.O.

obo Minor Child

Applicant

and

ROAD ACCIDENT FUND

Respondent

Neutral Citation: *Advocate Herman Kriel N.O. obo Minor Child v Road Accident Fund*
(12291/2020) [2025] ZAGPJHC.... (2025/01/31)

Coram: Allen AJ

Heard: 31 January 2025

Delivered: 31 January 2025 – this judgment was handed down electronically by circulation to the parties' representatives by email and by being uploaded to CaseLines and by release to SAFLII. The date and time for hand-down is due to be 14:00 on 31 January 2025.

Summary: Application for Leave to Appeal – s 17(1)(a)(i) of the Superior Courts Act 10 of 2013 – an applicant now faces a higher and a more stringent threshold – leave to appeal dismissed

ORDER

[1] The applicant's application for leave to appeal is dismissed with costs.

JUDGMENT [APPLICATION FOR LEAVE TO APPEAL]

Allen AJ :

Introduction

- [1] This is an application for leave to appeal to the Full Court of this Division, alternatively to the Supreme Court of Appeal against part of my judgment in an action for damages against the defendant. The plaintiff is the applicant in this application for leave to appeal and the defendant is the respondent in this application. On 27 August 2024 I gave judgment.
- [2] The applicant applies for leave to appeal against the following findings in my judgment:
 - [2.1] the award of R900 492.10 in respect of the applicant's claim for future loss of earnings, having concluded that the minor child has not been rendered practically unemployable on the open labour market, the applicant having submitted that an award of R7 203 936.50 would be reasonable;
 - [2.2] that it was not established that the respondent made an offer to the applicant in respect of the claim for general damages and that it should therefore be deferred for consideration by the Health Professions Council of South Africa ("HPCSA"), therefore not making an award to the applicant in this regard.

Basis of the appeal and discussion

- [3] In the notice of application for leave to appeal, the applicant alleges numerous grounds for the said application. Important, applicant contends that the court *a quo* erred in finding that the minor child has not been rendered practically unemployable in the open labour market as a result of the sequelae of the brain injuries she sustained. The court also erred in deferring the applicant's claim for general damages to the HPCSA (and in particular not to award an amount of R2 000 000.00 to the minor child).

- [4] There are a number of further grounds on the basis of which, according to the applicant, leave to appeal should be granted. In some, the applicant contends, that most, if not all, of my factual findings I erred. The applicant avers that I erred in my conclusions contrary to the expert opinions. So, for example, Dr Kruger, Neurosurgeon, opined that the minor child's Glasgow Coma Scale score ("GCS") was 11/15 upon admission. The Emergency Medical Service Patient Report Form had only one handwritten reading of 14/15. I also enlarged this reading to ensure the correctness thereof. The Sebokeng Hospital Observation Charts for 3 and 4 March 2018 (date of the accident and the following day) did not have any readings for the GCS and the columns were vacant. A progress note on 3 March 2018 at 13h13 had a GCS reading of 13/15 (077-49). On 7 March 2018 the GCS was recorded as 15/15 "which remained constant throughout her ordeal". Dr Kruger also did not file a RAF 4 Serious Injury Assessment Report.
- [5] The minor, after the accident, returned to school and continues to attend a mainstream school. Dr Jooste, Industrial Psychologist, with Dr Linde, Industrial Psychologist, also present during an interview with the minor child reported that she enjoys her school and does not find it particularly difficult. They also reported that her favourite subjects are mathematics and english and that she appeared to be an intelligent girl.
- [6] I have considered all the opinions with the minor's pre- and post-accident school reports. In paragraph 110 of my judgment her average and the grade average were set out and it is evident that the minor's average remains 10% plus above the grade average from Grade 1 to Grade 9-Term 2 (latest report available at the trial). The minor child's average, pre- and post-accident, therefore remains consistent above the grade average. No deterioration could be established since the accident to render her unemployable.
- [7] Applicant did not submit any proof to substantiate respondent's offer in respect of applicant's claim for general damages. Respondent argued that the court *quo* did not have jurisdiction on general damages and same should be postponed *sine die*. Respondent also argued that general damages be referred

to the HPCSA. Respondent further argued that a “without prejudice” offer was made during settlement negotiations which was rejected by applicant whilst applicant responded that it was not rejected but just not accepted. Applicant did not disagree that the offer was made “without prejudice”. The contents of the without prejudice offer, notwithstanding my enquiry, was not disclosed and I therefore could not take cognizance thereof.

- [8] Nothing new has been raised by the applicant in this application for leave to appeal. In my original written judgment, I have dealt with most, if not all of the issues raised by the applicant in this application and it is not necessary for me to repeat those in full. Suffice to restate what I say in the judgment, namely that, on the basis of my findings the applicant is not rendered unemployable and the general damages claim postponed *sine die* and deferred to the HPCSA for a determination.

The test

- [9] The traditional test in deciding whether leave to appeal should be granted was whether there is a reasonable prospect that another court may come to a different conclusion to that reached by me in my judgment. This approach has now been codified in the Superior Courts Act.

- [10] In terms of Section 17 of the Superior Courts Act, 10 of 2013:

“(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 success; or
- (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
- (b) “

- [11] The word “would” in Section 17(1)(a)(i) of the Superior Courts Act, 10 of 2013, was discussed in the matter of **Mont Chevaux Trust v Tina Goosen & 18 Others**¹ as per Bertelsman J, held as follows:

*“It is clear that the threshold for granting leave to appeal against the judgement of a high court has been raised in the new Act. ...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.”*²

- [12] The learned judge in the **Mont Chevaux Trust** matter, supra, indicated that the word “would” should include and been interpreted as a “measure of certainty” that another court could come to another conclusion. “Measure of certainty” should not be interpreted that another court will come to a *different conclusion* as a probability of success.³

- [13] The courts as far back as 2013 in the **Mgezeni Gasbat Nxumalo v The National Bargaining Council for the Chemical Industry (NBCCI) and Others**⁴ summarized the approach one should follow in determining whether to allow an application for leave to appeal having due regard to the wording of Section 17(1)(a)(i) of the Superior Courts Act:

“[12]...[3] The traditional formulation of the test that is applicable in an application such as the present requires the court to determine whether there is a reasonable prospect that another court may come to a different conclusion to that reached in the judgement that is sought to be taken on appeal. As the respondents observe, the use of the word “would” in section 17(1)(a)(i) are indicative of a raising of the threshold since previously, all that was required for

¹ Case No LCC14R/2014, dated 3 November 2014 at para [6]

² Daantjie Community and Others v Crocodile Valley Citrus Company (Pty) Ltd and Another (75/2008) 2015 JDR 1534 (LCC) at par 3. Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others (19577/09) [2016] ZAGPPHC 489 (24 June 2016) Para [25]

³ Van Zyl v Steyn (83856/15) [2022] ZAGPPHC 302 (3 May 2022) at Para [11]

⁴ JR1170/2013 [2016] ZALCJHB 212 (15 June 2016)

the applicant to demonstrate was that there was a reasonable prospect that another court might come to a different conclusion.”

- [14] “Reasonable prospect of success” was discussed in the matter of **MEC for Health, Eastern Cape v Mkhitha and Another** (1221/2015) [2016] ZASCA 176 (25 November 2016) at Para [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.”

- [15] The statutory prerequisite derived from section 17(1)(a)(i) of the Superior Courts Act, is the prompt resolution of disputes where there is a reasonable prospect that the factual matrix could receive a different treatment or where there is some legitimate dispute of law which would allow another court to come to a different conclusion.

- [16] In **Ramakatsa and Others v African National Congress and Another** (724/2019) [2021] ZASCA 31 (31 March 2021) at para [10] the court expressed itself as follows on “reasonable prospects of success” as provided for in Section 17(1)(a) of the Superior Courts Act:

“.... 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” and

- [17] In the case of **S v Smith** 2012 (1) SACR 567 (15 March 2011) 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 a 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”.

- [18] I, therefore, agree that there must be sound, rational, and compelling reasons that there are prospects of success on appeal before leave to appeal can be granted.
- [19] In an unreported judgment in **Notshokovu v S**⁵ at para [2] the SCA remarked that an appellant now faces a higher and a more stringent threshold, in terms of the Superior Courts Act 10 of 2013 compared to that under the provisions of the repealed Supreme Court Act 59 of 1959.

Conclusion

- [20] I am not persuaded that the issues raised by the applicant in the application for leave to appeal are issues in respect of which another court is likely to reach conclusions different to those reached by me. I am therefore of the view that there are not reasonable prospects of another court making factual findings and coming to legal conclusions at variance with my factual findings and legal conclusions. The appeal, therefore, in my view, does not have a reasonable prospect of success and leave should not be granted.

⁵ Notshokovu v S (157/2015) [2016] ZASCA 112 (7 September 2016).

ORDER:

[21] In the result the following order is made:

[21.1] The applicant's application for leave to appeal is dismissed with costs.



JP ALLEN

ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

HEARD ON: 31 January 2025

JUDGMENT DATE: 31 January 2025

For the Applicant: Adv GJ Strydom SC

Instructed by: A F Van Wyk Mabitsela Williams Inc

For the Respondent: Mr M Madasele

Instructed by: State Attorney