



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates:	YES / NO
Circulate to Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape Division, Kimberley)**

Case number: **911/2016**
Dates heard: **17/09/2024**
Date available: **25/04/2025**

In the matter of:

ANNA MARIA BRITS

Plaintiff

and

SHOPRITE CHECKERS (PTY) LTD

First Defendant

GERHARD POTGIETER MAINTENANCE

SERVICES CC t/a MR CLEAN

Second Defendant

Coram: Van Tonder, AJ

JUDGMENT

VAN TONDER, AJ

1. This is an application for leave to appeal in respect of the dismissal of an action for damages by the Plaintiff against the First and Second Defendants, in a delictual claim instituted by the Plaintiff in respect of injuries

suffered as a result of her fall at/near the entrance to the Checkers Hartswater, in Hartswater on the 5th of May 2014.

2. The question of the merits and the *quantum* was separated in terms of Rule 33 and the matter continued only in respect of the merits of the action.
3. In respect of the merits of the matter, I had made the following order on the 5th of May 2025:

Wherefore I make the following order:

- 1 The Plaintiff's claim is dismissed with costs.**
 - 2 Each party is ordered to pay its own costs in respect of the application for absolution.**
4. The aforesaid order was made *inter alia* based on the conclusions reached in paragraphs [46] and [47] of my judgment dated 5 May 2023, which paragraphs concluded as follows:

"CONCLUSION

[46] *The probabilities do not favour the Plaintiff's case any more than they do the Defendant's case, and I am unpersuaded that the Plaintiff's evidence is true and that of the Defendants are false.*

[47] *When the evidence as a whole is considered, the Plaintiff has failed to discharge the onus of proving that the floor was wet and/or cleaned with a wet or damp mop, wherefore she had failed to discharge the onus of proving negligence on the part of the Defendants."*

5. It is against the order made, and the findings and conclusions reached by the Court *a quo* that the Plaintiff seeks leave to appeal to the full bench of this Division.
6. The Defendants oppose the application for leave to appeal.

FACTUAL BACKGROUND

7. The facts of the matter appear from my judgment dated 5 May 2023, as dealt with in detail therein,

wherefore I do not deem it necessary to repeat it herein.

GROUND OF APPEAL

8. In the Plaintiff's application for leave to appeal, the grounds of appeal relied upon by the Plaintiff are set out to be *inter alia* the following:

8.1. The learned Judge failed to have proper regard to the evidence of Mr Brian Makwati, an independent witness, who testified that whilst the plaintiff was inside the supermarket, a cleaner was cleaning the outside three rows of the tiles with a wet mop and that she was waving a yellow warning sign to dry the floor.

8.2. The learned Judge failed to have proper regard to the plaintiff's evidence that both her feet suddenly slipped out from under her and that the fall was not caused by the gradient of the passage or as a result of her pre-existing (condition?) and that this was not rebutted. Such evidence was consistent with the probability that the floor was wet.

- 8.3. The learned Judge erred by failing to consider the latent if not the patent bias of Ms Mothibi in weighing up the probabilities.
- 8.4. The learned judge failed to have proper regard to the fact that it emerged during the trial that there was a contemporaneous investigation of the incident. The defendants did not present the report nor call the in responsible investigator. Allied to that, Ms Mothibi was not the only cleaner working that night, she worked alongside Ms Taitai. Ms Taitai was also not called as a witness. The learned Judge ought to have made an adverse finding against the defendants.
- 8.5. The learned Judge found that there were "*a number of contradictions*" between the evidence of the plaintiff and that of Mr Makwati but made no evaluation as to the effect. In any matter in which contradictions and inconsistencies arise, the aim is not to establish which of the versions is correct but rather to satisfy oneself that the witness could err, either because of a defective recollection or because of dishonesty. Not every error by a witness and not every contradiction or deviation affects the credibility of the witness. Contradictory

versions must be considered and evaluated on a holistic basis. The circumstances under which the versions were made, the proven reasons for the contradictions, the actual effect of the contradictions with regards to the reliability and credibility of the witnesses, the question whether the witness was given sufficient opportunity to explain the contradictions and the connection between the contradictions and the rest of the witness's evidence amongst other factors, must be taken into consideration and weighed up. The learned Judge did not undertake such evaluation.

8.6. The learned judge ought to have found that based on the established facts and evidence, against the underlying probabilities and the estimate of the credibility of the witness, the plaintiff had discharged the burden of proving that she slipped and fell because the floor of the passage and/or the supermarket was wet or damp.

9. As summarised in Mr van Aswegen's heads of argument (filed on behalf of the Plaintiff):

"2. The grounds of appeal are, by and large self-explanatory. The substantive order appealed against is premised on the conclusion reached by the Court that the probabilities do not

favour the Plaintiff's case more than they do the Defendant's case.

3. *In demonstrating that the appeal would have reasonable prospects of success and that another court may reach a different conclusion on the facts and legal principles when applied to the facts in relation to the order appealed against, I address the fundamental suppositions underlying them."*

10. The application for leave to appeal is therefore clearly premised on the finding by the Court *a quo*, regarding where the preponderance of probabilities lies after having heard all the evidence of the parties, whether the probabilities favours the Plaintiff or the Defendants, and whether the Plaintiff had succeeded in discharging the onus of proof.

THE APPLICATION FOR ABSOLUTION

11. As stated in my judgment dated 5 May 2023, the Defendants had applied for absolution after the evidence on behalf of the plaintiff had been led, which application was dismissed by me on the 24th of February 2022, as set out in my judgment dated 5 May 2023:

"[31] *After having heard the evidence for the Plaintiff, the First and Second Defendants applied for absolution of the instance, on the basis that the Plaintiff's evidence did not meet the threshold to establish the required elements of negligence and causation.*

[32] *On the 24th of February 2022, I gave a written ruling, in which I denied the application for absolution, and reserved the costs of the said application.*

[33] *In my ruling I held inter alia that:*

"[37] At absolution stage, the Plaintiff's evidence must be such that he has a reasonable chance of success, and if the Court is uncertain whether the Plaintiff's evidence measures up to this standard, absolution ought to be refused:

*"In case of doubt at what a reasonable court 'might' do, a judicial officer should always...lean on the side of allowing the case to proceed."*¹

CONCLUSION

[38] I am satisfied that based on the evidence on behalf of the Plaintiff, and the legal position as set out above, one of the reasonable inferences that can be drawn in the present matter favours the Plaintiff.

[39] I find that the Plaintiff had placed sufficient evidence before court, *"upon which a reasonable court might reasonably find for the plaintiff."*

¹ Supreme Service Station (1969) (Pvt) Ltd v Fox and Goodridge (Pvt) Ltd 1971 (4) SA 90 (RA)

12. Reference to the aforesaid application was made in my judgment dated 5 May 2023 (as well as herein) to illustrate that the Defendants had already after the close of the Plaintiff's case, contended that the plaintiff had failed to present sufficient evidence to establish the required elements of negligence and causation in order to succeed with her claim.
13. It is trite that in deciding whether absolution should be granted at the close of a Plaintiff's case, it must be assumed that, in the absence of very special considerations, such as the inherent unacceptability of the evidence adduced, the evidence is true.²
14. During the application for absolution, Mr. van Aswegen also argued that the court was not required to weigh up different possible inferences, but merely to determine whether one of the reasonable inferences is in favour of the Plaintiff, and if that is the case, absolution ought to be refused.³

² Atlantic Continental Assurance Co of SA v Vermaak 1973 (2) SA 525 € at 527C-D

³ Marine & Trade Insurance Co Ltd v Van der Schyff 1972 (1) SA 26 (A) at 38H

15. Based *inter alia* on the aforesaid (as well as set out in my ruling in more detail) I had refused the application for absolution.
16. It is however trite, that the test between whether absolution ought to be granted at the end of a Plaintiff's case, and the test whether a plaintiff had succeeded to prove a case to such an extent that he had discharged the onus, insofar as it rested upon him, is vastly different.

THE PARTIES ARGUMENTS

17. The Plaintiff contends that the pivotal question is, what had caused the Plaintiff to slip? And that if it can be established that the floor was cleaned with a wet mop, the fact that the floor was wet becomes a compelling likelihood.
18. In this regard Mr van Aswegen on behalf of the Plaintiff referred to the matter of **Chauke v Road Accident Fund**⁴, which stated the following:

⁴ Chauke vs RAF (A59/2022) (2023) ZAFSHC 214 (31 May 2023) at par [13]

"[13] *The preponderance of probabilities standard requires that the court be satisfied that an incident or event had happened if the court considers that, on all the evidence before it, the occurrence of the event is more likely than not. Thus for the appellant to succeed the court must be satisfied that it is more likely than not that the incident happened as recounted by him.*"

19. Mr van Aswegen in his heads of argument also referred to the test as formulated in **Stellenbosch Farmers Winery Group Ltd and Another v Martell and Cie and Others**⁵, and set out in par [5] thereof.
20. Mr van Aswegen argued that the Court *a quo* had failed to apply the aforesaid test in respect of the present matter, and had failed to in its judgment deal with the analysis of each and every step as set out in the test.
21. However, as set out in par [6] of the said judgment, the importance of the overall probabilities cannot be ignored, and the outcome of a case often ultimately hinges on the evaluation of the general probabilities.

⁵ Stellenbosch Farmers Winery Group Ltd and Another v Martell and Cie SA and Others 2003 (1) SA 11 (SCA)

22. As also enunciated by the Plaintiff's application for leave to appeal: *"Contradictory versions must be considered and evaluated on a holistic basis."*
23. Despite the Plaintiff's direct evidence that she had observed Ms Mothibi, the member of the Second Defendant's cleaning staff on duty the night of the incident, Mr van Aswegen argued that a negative inference ought to have been drawn by the Second Defendant's failure to have called the other cleaner on duty that night, Ms Taitai as a witness.
24. It was never seriously disputed that Ms Taitai was nowhere near the entrance of the store when the events forming the subject matter of the action had taken place.
25. Similarly Mr van Aswegen also argued that in respect of the failure by the Second Defendant to have called the investigator and to present the report of his findings, in respect of the investigation that was launched by the Second Defendant, once again a negative inference ought to have been drawn by the Second Defendant's failure to do so.

26. In this regard it has been held that the failure of a party to call a witness is reasonable in certain circumstances, such as when the opposition failed to make out a *prima facie* case.⁶

27. In the headnote to **Munster Estates (Pty) Ltd Killarney Hills (Pty) Ltd**⁷ it was confirmed that in each instance it depends on the facts of the specific case:

"...Where a party fails to call as his witness one who is available and able to elucidated the facts, whether the inference, that the party failed to call such a person as a witness because he feared that such evidence would expose facts unfavourable to him, should be drawn could depend on the facts peculiar to the case where the question arises. ..."

28. In the circumstances of the matter at hand, I am not of the view that any negative inference ought to have been drawn against the Defendants for not calling the aforesaid witnesses.

⁶ Tshishonga v Minister of Justice and Constitutional Development and Another 2007 (4) SA 135 (LC) also reported as [2007] 4 BLLR 327 (LC)

⁷ Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd 1979 (1) SA 621 (AD)

THE PLAINTIFF'S CASE

29. Mr van Aswegen argued that in light of the evidence of the Plaintiff, as well as Mr Makwati, in respect of the allegations that Ms Mothibi had cleaned the floor area in question, with a wet mop, in the absence of any explanation as to why she would have done so, if not to dry a wet floor, leads to the inevitable conclusion that the Plaintiff had slipped and fallen, as a result of a wet floor, and that there was no alternative postulate as to what else could have caused the Plaintiff to have fallen.
30. In view of the aforesaid, Mr van Aswegen argued that the appeal has reasonable prospects of success that another Court would come to a different conclusion on the facts and application of the law, than the Court *a quo*.
31. The evidence presented by the respective parties, had already been dealt with in my judgment dated 5 May 2023, although I do find it prudent to again refer to the evidence in respect of the Plaintiff' case.
32. The evidence presented by and on behalf of, the Plaintiff, was *inter alia* to the effect that:

- 32.1. when the Plaintiff approached the entrance to the Checkers, at about 19h30, she observed a cleaning lady mopping the floor just inside the Checkers, towards the left-hand side of the entrance, as you approach it from the outside.
- 32.2. the Plaintiff testified that the cleaning lady had used a wet mop with some or other fluid, with which she had washed the floor.
- 32.3. the Plaintiff testified that the cleaning lady had a trolley-bucket in which she put the mop, whereafter she would pull out the mop from the trolley-bucket and wash the floor.
- 32.4. the Plaintiff testified that when the Plaintiff exited the Checkers approximately 15 minutes later, she exited towards the left-hand side of the entrance, where the cleaning lady had been mopping the floor when she had entered.
- 32.5. she testified that when she exited, she did not see the cleaning lady, and as she had exited the Checkers, she had walked two or three steps,

when both her feet slipped out from under her, and she fell on her back.

32.6. the Plaintiff also testified that her feet had slipped out from under her approximately on the third row of tiles outside the Checkers.

32.7. the Plaintiff had during cross examination conceded that she did not see or know if the floor was wet or not at the time that she had fallen.

32.8. Mr Makwati the independent witness testified that he was approximately 16 metres from the entrance to the Checkers, and that he had seen the Plaintiff arrive and enter the Checkers.

32.9. as the Plaintiff entered the store, he saw a cleaning lady mopping the floor just inside the entrance.

32.10. he saw the Plaintiff enter towards the left-hand side of the entrance, and the cleaning lady was cleaning towards the right-hand side of the entrance.

32.11. the cleaning lady was cleaning the floor with a mop, wiping it with the mop and using the yellow warning sign to dry the floor, by waiving it about in her hand.

32.12. he had observed that the mop was wet, although he did not see whether the floor was wet or not.

32.13. after the Plaintiff had entered, the cleaning lady had finished cleaning the inside of the Checkers, and was also cleaning the floor just outside the Checkers, approximately on the first three rows of tiles on the sloped area.

32.14. while doing this, the cleaning lady had left the trolley bucket inside the store, as it would run down the slope outside the Checkers.

32.15. before the Plaintiff exited the store, the cleaning lady was done cleaning the floors.

32.16. Mr Makwati did not see the Plaintiff exit the Checkers, and he also did not see her fall.

- 32.17. he had however heard the Plaintiff scream, whereafter he saw her lying on her back on the floor just outside the Checkers.
- 32.18. when he saw that the Plaintiff had fallen, he saw that the cleaning lady was standing next to the security guard inside Checkers.
33. Neither the Plaintiff, nor Mr. Makwati had expressly testified that:
- 33.1. they had seen that the floor was wet as a result of the mopping,
- 33.2. the cleaning lady was present at the entrance at the time when the Plaintiff exited,
- 33.3. the cleaning lady was still busy mopping the entrance at the time when the Plaintiff had exited the store.
34. The Plaintiff's application for leave to appeal, effectively centres on the question whether I had erred in finding that the probabilities favour the Defendants, and in

finding that the Plaintiff had failed to discharge the onus of proving that the floor was wet and/or cleaned with a wet or damp mop, with the resultant conclusion that the Plaintiff had failed to discharge the onus of proving negligence on the part of the Defendants.

35. Mr van Aswegen contends that a consideration of the entire basket of evidence points to the fact that:

35.1. it is more likely than not that the Plaintiff slipped because the floor was wet,

35.2. and that there is a reasonable prospect that a Court of appeal, would find that it is more likely than not, that the Plaintiff had slipped because of a wet floor surface caused by the cleaning of the floor.

THE ONUS OF PROOF

36. The principles regarding the onus of proof were formulated by Stegman J as follows:

"...The onus is on the plaintiff to prove that his injuries and damages were caused by negligence on the part of the defendant ie by a failure on the part of the defendant to

show towards the plaintiff the degree of care in his conduct which is to be expected of the reasonable man in order to avoid causing foreseeable harm to another...

...

...The plaintiff's evidence would therefore have to go further in order to establish a *prima facie* case of negligence on the part of the defendants. Of course, once such a *prima facie* case had been established, there would be an "evidentiary" onus on the defendants to lead evidence to rebut the *prima facie* case, or to face judgment against themselves. But the "overall" burden of proof always remains the plaintiff's.

...

... In this situation the defendant does not have to go so far as to establish on the balance of probabilities that the accident occurred without any negligence on his part: it is enough that the defendant should produce evidence which leads to the inference that the accident which caused harm to the plaintiff was just as consistent with the absence of any negligent act or omission on the part of the defendant as with negligence on his part"⁸

37. The interplay between credibility and the probabilities, has been formulated as follows by the Supreme Court of Appeal:

*"...It is equally true that findings of credibility cannot be judged in isolation, but require to be considered in the light of the proven facts and the probabilities of the matter under consideration."*⁹

As well as:

"...However, the proper test is not whether a witness is truthful or indeed reliable in all that he says, but whether on a balance of

⁸ Probst v Pick 'n Pay Retailers (Pty) Ltd [1998] 2 All SA 186 (W) at page 195 and 198B-C

⁹ Snyman Bpk v Biddulph 2004 (5) SA 586 (SCA) at 589G

probabilities the essential features of the story which he tells are true..."¹⁰

38. The application of the balance of probability test includes *inter alia* that:

"...where the *onus* rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false."¹¹

39. As stated in the unreported matter of **Chauke vs RAF**:

*"[13] The preponderance of probabilities standard requires that the court be satisfied that an incident or event had happened if the court considers that, on all the evidence before it, the occurrence of the event is more likely than not. Thus for the appellant to succeed the court must be satisfied that it is more likely than not that the incident happened as recounted by him."*¹²

¹⁰ *Snyman Bpk v Biddulph* 2004 (5) SA 586 (SCA) at 592B

¹¹ *National Employers' General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E) also reported as [1984] 4 All SA 622 (E)

¹² *Chauke v RAF* (A59) [2023] ZAFSHC 214 (31 May 2023) at par [13]

40. In considering the evidence holistically and applying the aforesaid principles to the facts, in my judgment dated 5 May 2023, I concluded that:

"[47] When the evidence as a whole is considered, the Plaintiff has failed to discharge the onus of proving that the floor was wet and/or cleaned with a wet or damp mop, wherefore she had failed to discharge the onus of proving negligence on the part of the Defendants."

41. It is this conclusion reached after the application of the aforesaid principles to the facts of the present matter, that the Plaintiff takes issue with, and the question whether there is a reasonable prospect that another Court could come to a different conclusion in this regard, forms the crux of the matter.

THE REQUIREMENTS FOR LEAVE TO APPEAL TO BE GRANTED

42. Section 17 of the Superior Courts Act 10 of 2013, deals with leave to appeal and provides as follows:

"17. Leave to appeal.—(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.”*

43. The test is now whether the appeal would have a reasonable prospect of success, which would suggest that the bar has been raised in respect of the merits of the appeal.¹³

44. As stated by Bertelsmann J in the **Mont Chevaux Trust** matter:

“It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised by 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.”¹⁴

¹³ *The Mont Chevaux Trust (IT 2012/28) v Tina Goosen* Unreported, LCC case no LCC 14R/2014 dated 3 November 2014; *Notshokovu v S* Unreported, SCA case no 157/15 dated 7 September 2016

¹⁴ *The Mont Chevaux Trust (IT 2012/28) v Tina Goosen* Unreported, LCC case no LCC 14R/2014 dated 3 November 2014 at par [6]

45. The aforesaid criteria were also approved by the Limpopo Division of the High Court in the matter of **Pretoria Society of Advocates v Nthai**, where it was formulated as follows:

"[5] It was submitted by Adv Shakwane SC, counsel for **Nthai**, that s 17(1) sets out an inflexible threshold to grant leave to appeal. Therefore both the JSA and LPC must of necessity meet this stringent threshold set out in s 17 of the Superior Courts Act in order to succeed with their respective applications for leave to appeal. That the threshold under s 17(1) of the Superior Courts Act is now stringent, now even more stringent than when the now repealed Supreme Court Act 59 of 1959, was still applicable, is aptly demonstrated by **S v Notshokovu and Another [2016] ZA SCA 112 paragraph 2 [7 September 2016]**, where Shongwe JA, writing for the Court, had the following to say:

"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 59 of 1959."

Section 17(1) uses the word "only". It provides that:

"(17.1) Leave to appeal may "only" be given"

and then proceeds to set out the circumstances under which leave to appeal may be given. See **South African Breweries (Pty) Ltd v The Commissioner of the South African Revenue Services (SARS) [2017] 2 AGPPHC 340 (28 March 2017) par 5**, in which the Court cited with approval the following passage from the **Mont Chevaux Trust v Tim Goosen and 18 Others 2014 JDR 2325 (LCC) par 6**:

*"It is clear that the threshold for granting leave to appeal against a judgment of the High Court has been raised in the new Act. The former test whether leave to appeal should be granted was reasonable prospect that another court might come to a different conclusion. See Van Heerden v Cornwright and Others **1985 (2) SA 342 (T)** at 343 H. The use of the word "would" in the new statutes indicates a measure of certainty that another Court will differ from the court whose judgment is sought to be appealed against."*

Finally, on the rigidity of the threshold, Plaskett AJA, as he then was, wrote the following in the judgment in which Cloete JA and Maya JA, as she then was, concurred in **S v Smith 2012 (1) SACR 567, 570 par (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."*¹⁵

46. If a Court is not persuaded of the prospects of success, it must still enquire whether there is a compelling (i.e. cogent; strong; convincing) reason for the appeal to be heard.

47. In respect of compelling reasons to grant leave to appeal, the merits of the appeal, however remain vitally important, and are often decisive, as stated by the Supreme Court of Appeal:

"[24] That is not to say that merely because the High Court determines an issue of public importance it must grant leave to appeal. The merits of the appeal remain vitally important and will often be decisive."¹⁶

¹⁵ Pretoria Society of Advocates v Nthai 2020 (1) SA 267 (LP) at par [5]

¹⁶ Minister of Justice & Constitutional Development v Southern Africa Litigation Centre 2016 (3) SA 317 (SCA) at 330C

48. In the matter of **CLOETE MURRAY N.O. AND OTHERS V NTOMBELA AND OTHERS**, [2022] 3 All SA 689 (FB) the principles for adjudicating an application for leave to appeal, has also been enunciated as follows:

[53] The atmosphere of this case reminds of the words of the Constitutional Court in *Shinga v S and another (Society of Advocates (Pietermaritzburg Bar) intervening as amicus curiae)*; *S v O'Connell and others* 2007 (2) SACR 28 (CC) [also reported at 2007 (5) BCLR 474 (CC) – Ed] that defined the judicial character of the task conferred upon a presiding officer in determining whether to grant leave to appeal. Although having heard the evidence and having made a ruling; the judge is called upon to consider whether another court may reach a different conclusion. This requires a careful analysis of both the facts and the law that have supported the judgement *a quo* and a consideration of the possibility that another court may differ either in relation to the facts or the law or both. This is a task that has been carried out by High Court Judges for many years and it is a judicial task of some delicacy and expertise. It should be approached on the footing of intellectual humility and integrity, neither overzealously endorsing the ineluctable correctness of the decision that has been reached, nor overanxiously referring decisions that are indubitably correct to an appellate court.

49. Leave to appeal may only be given if I am of the opinion that either the appeal would have a reasonable prospect of success, or if there is some other compelling reason for the appeal to be heard.

50. Recently it has also been formulated in the Supreme Court of Appeal in the matter of **RAMAKATSA AND OTHERS V AFRICAN NATIONAL CONGRESS AND ANOTHER** [2021] JOL 49993 (SCA) in March 2021:

[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 section 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 oppose 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.

51. The final argument raised by the Plaintiff (as quoted from the heads of argument filed on her behalf) is that

it would be in the interests of justice that leave to appeal be granted.

CONCLUSION

52. Leave to appeal ought only to be given if I am of the opinion that the appeal would have a reasonable prospect of success or if there is some other compelling reason why the appeal should be heard.

53. As formulated by Musi JP in the matter of **Chauke v RAF**:

*"[15] A court of appeal is generally reluctant to disturb factual findings which depend on credibility. It will, however, do so if the factual findings are plainly wrong or where the reasons given for them is seriously flawed. It must be underscored that credibility findings should not be judged in isolation, but must be considered in the light of the proven facts and probabilities of the matter."*¹⁷

54. I am not persuaded that the factual findings in the judgment dated 5 May 2023, are plainly wrong, or that the reasons given for them are seriously flawed, to such a degree that there is a reasonable possibility of another Court coming to a different finding.

¹⁷ Chauke v RAF (A59) [2023] ZAFSHC 214 (31 May 2023) at par [15]

55. On the contrary, I am of the view that no other court could possibly come to another conclusion but that the Plaintiff had failed to discharge her onus of proof, and had failed to prove her case, wherefore I am satisfied that there are no prospects of success in respect of the Plaintiff's application for leave to appeal.
56. The next question to be answered is whether there is any other compelling reason why the appeal should be heard. Despite mentioning it in her heads of argument, the Plaintiff has not advanced any such ground.
57. I am satisfied that the appeal would neither have a reasonable prospect of success, nor that there is some other compelling reason why the appeal should be heard. The application for leave to appeal therefore stands to be dismissed.
58. The final issue for consideration is that of the costs of this application for leave to appeal. I believe that costs should follow the result, and that the appropriate order is that the application for leave to appeal be dismissed with costs.

ORDER

I therefore make the following order:

- 1 THE PLAINTIFF'S APPLICATION FOR LEAVE TO APPEAL IS
DISMISSED WITH COSTS.**



**AG VAN TONDER
ACTING JUDGE**

On behalf of the Plaintiff: Adv W.A. van Aswegen (oio Duncan & Rothman Attorneys.)

On behalf of First Defendant: Mrs Snyders (oio Engelsman Magabane Inc.)

On behalf of Second Defendant: Adv A.D. Olivier (oio Roux Welgemoed & du Plooy Attorneys.)