



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

Reportable / Not reportable

Case no: 24/2015

In the matter between:

MEMBER OF THE EXECUTIVE COUNCIL:

DEPARTMENT OF HEALTH, FREE STATE

Applicant¹

and

DOLLY NTOMBIZODWA MARUMO

Respondent²

Neutral Citation: *MEC for Health, Free State v Marumo* (24/2025)

[2025] ZAFSHC 163

Coram: Opperman J

Heard: 5 December 2024

¹ Defendant *a quo*.

² Plaintiff *a quo*.

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date and time for hand down is deemed to be 4 June 2025 at 15h00.

Summary: Application for leave to appeal – reasonable prospect of success established – appeal granted.

ORDER

1. The application for leave to appeal on the judgment as a whole is granted and to a full court of this Division.
 2. Costs shall be in the appeal.
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JUDGMENT

Opperman J

[1] The application for leave to appeal that lies before this Court relates to a matter that served on trial before Lekhoaba AJ.³ It was ordered *a quo* that the

³ The presiding officer's term as acting judge lapsed and the matter is entertained in terms of s 17(2)(a) of the Superior Courts Act 10 of 2013 read with rule 49(1)(e) of the Uniform Rules of Court in that leave to appeal may be granted by the judge or judges against whose decision an appeal is to be made or, if not readily available, by any other judge or judges of the same Court or Division.

defendant shall compensate the plaintiff for 100% of her proven damages and the defendant to pay the costs.

[2] The claim that forms the crux of the application for leave to appeal is, succinctly, that on 19 June 2013 the plaintiff went into labour and her baby died during the process; alternatively, she gave birth to a stillborn child. During the delivery, the plaintiff was under the care of the personnel of the defendant and the claim is that the personnel were negligent and acted contrary to the legal duty owed to the plaintiff. As a result of the negligence of the personnel in the employ of the defendant, it is claimed that the plaintiff's baby died during the process of birth, alternatively, was still born. The plaintiff experiences emotional shock and pain and claimed one million five thousand rand in general damages.

[3] Slotting in with the above, as gleaned from the heads of argument of the applicant, the grounds for leave to appeal are:

‘34. The learned Acting Judge erred on the facts when she states in paragraph 1 of the judgement that the Plaintiff was in the ambulance when she went into labour and gave birth to a still born child.

35. The learned Acting Judge erred when they found that it was not disputed that Mr Marumo called for assistance at around 09:00.

36. The learned Acting Judge erred on a finding of fact that the Plaintiff pleaded that she gave birth in the ambulance as a result of the negligence of the personnel at Marantha Clinic and the paramedics.

37. The learned Acting Judge erred in making findings considerations of negligence.

38. The learned Acting Judge erred in ordering that the Defendant shall compensate the Plaintiff for 100% of her proven or agreed damages, when the court was only called upon to adjudicate the issue of whether or not there was a refusal to dispatch the ambulance, or whether or not it was dispatched timeously.

39. The learned Acting Judge erred in ordering the Defendant to pay the costs of Dr Kemp, when the doctor himself conceded that he was an ill-suited expert for this matter.’

[4] The respondent opposes the application and on the following basis as per their heads of argument:

‘20.1 In the premises it is submitted that the notice of application for leave to appeal does not succeed in showing proper grounds for a reasonable prospect or realistic chance of success on appeal. The application for leave to appeal therefore stands to be dismissed with costs.

20.2 The Court a quo's order as set forth in paragraph [46.1] amounts to a patent error when cognisance is had to the totality of the Judgment and in particular the conclusion reached by the Court in paragraphs [44.1] to [44.3]. It is submitted that the Court may vary and correct its order in terms of Rule 42(1)(b).’

[5] Meritless appeals may not be allowed. The test in an application for leave to appeal is simply whether there are any reasonable prospects of success in an appeal, not whether a litigant has an arguable case or a mere possibility of success. The Supreme Court of Appeal (SCA) has in the past criticized the regularity with which leave to appeal is granted in matters not deserving its attention. Marais AJ stated that:

‘The inappropriate granting of leave to appeal to this court increases the litigants’ costs and results in cases involving greater difficulty and which are truly deserving of the attention of this court having to compete for a place on the court’s roll with a case which is not.’⁴

[6] The right to appeal is, among others, managed by the application for leave to appeal. It may not be abused but the hurdle of an application for leave to appeal may never become an obstacle to justice in the post-constitutional era. Section 17

⁴ *Shoprite Checkers (Pty) Ltd v Bumpers Schwarmas CC and Others* (231/2002) [2003] ZASCA 57; [2003] 3 All SA 123 (SCA); 2003 (5) SA 354 (SCA) (30 May 2003) para 6.

of the Superior Courts Act 10 of 2013⁵ is the law. The test demands a greater measure of certainty of a different outcome on appeal. The stipulation should not be interpreted as setting the bar so high as to deny an applicant any chance of being granted leave to appeal. This is not what the legislature intended. The case law that evolved after the promulgation of the legislation was enacted was clarified in *H.B (Nee D.J) v R.J.B (Leave to Appeal)*.⁶

[7] With regard to the meaning of reasonable prospects of success, it was held in *S v Smith*⁷ that:

‘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.’

[8] The issues in *casu* are peculiar in that it is the case for the applicant that the presiding judge caused, in addition, compelling circumstances by pronouncing on issues that were not before the Court. The case of *Minister of Justice and*

⁵ ‘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.’

⁶ *H.B (Nee D.J) v R.J.B (Leave to Appeal)* (21480/2014) [2024] ZAGPPHC 401 (2 April 2024).

⁷ *S v Smith* [2011] ZASCA 15; 2012 (1) SACR 567 (SCA) para 7.

*Constitutional Development and Others v Southern African Litigation Centre and Others*⁸ comes to the fore where it was ruled that:

‘[23] After expressing its conclusion on prospects of success the High Court also said that it had no discretion once it reached that conclusion to grant leave to appeal. But it failed to consider the provisions of s 17(1)(a)(ii) of the Superior Courts Act which provide that leave to appeal may be granted, notwithstanding the Court’s view of the prospects of success, where there are nonetheless compelling reasons why an appeal should be heard. ...

[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. Furthermore, where the purpose of the appeal is to raise fresh arguments that have not been canvassed before the High Court, consideration must be given to whether the interests of justice favour the grant of leave to appeal. It has frequently been said by the Constitutional Court that it is undesirable for it as the highest court of appeal in South Africa to be asked to decide legal issues as a court of both first and last instance. That is equally true of this Court. But there is another consideration. It is that if a point of law emerges from the undisputed facts before the court it is undesirable that the case be determined without considering that point of law. The reason is that it may lead to the case being decided on the basis of a legal error on the part of one of the parties in failing to identify and raise the point at an appropriate earlier stage. But the court must be satisfied that the point truly emerges on the papers, that the facts relevant to the legal point have been fully canvassed and that no prejudice will be occasioned to the other parties by permitting the point to be raised and argued.’

[9] Careful reading of the papers before court shows that a reasonable prospect of success was established by the applicant. Some issues were conflated by the court *a quo* and some orders are erroneous. The whole of the judgment must go on appeal and to a full bench of this Division. Costs shall be in the appeal.

⁸ *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* (867/15) [2016] ZASCA 17; 2016 (4) BCLR 487 (SCA); [2016] 2 All SA 365 (SCA); 2016 (3) SA 317 (SCA) (15 March 2016).

Order

In the result, the following order is made:

1. The application for leave to appeal on the judgment as a whole is granted and to a full court of this Division.
2. Costs shall be in the appeal.



Opperman J

Appearances

For applicant: K Nhlapo-Merabe
Instructed by: Office of the State Attorneys
Bloemfontein

For respondent: D De Kock
Instructed by: Webbers Attorneys
Bloemfontein