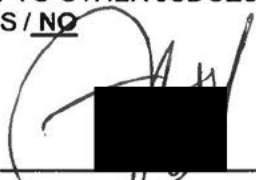


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1)	REPORTABLE: YES / <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: YES / <u>NO</u>
(3)	REVISED: YES / <u>NO</u>
12 MAY 2025	
DATE	SIGNATURE

Case Number: 2023/116432

In the matter between:

SIKOSANA NTANDOYENKOSI

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT IN APPLICATION FOR LEAVE APPEAL

MAKGATE AJ:

INTRODUCTION

1. This is an application for leave to appeal by the plaintiff against the judgment and order dated 09 July 2024 (the judgment). Leave is sought to a full bench of this division. The application is unopposed and the respondent, the Road

Accident fund, was not represented at the hearing of this application for leave to appeal.

2. At the risk of stating the obvious, my judgment contains my full reasons for the orders granted. As such, I do not intend to deal herein with each of the grounds on which leave to appeal is sought. Nor do I intend to repeat what is contained in the judgment. Nevertheless, I have evaluated and considered, for purposes of this application and this judgment, each ground on which leave to appeal is sought, and the applicant's leave to appeal arguments.

THE TEST FOR LEAVE TO APPEAL

3. Section 17 of the Superior Courts Act, No 10 of 2013 now legislates the circumstances in which leave to appeal is to be sought and granted. Section 17(1) reads as follows: -

"17(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.”

4. That said, a court may only grant leave to appeal if it is convinced that (a) the appeal would have a reasonable prospect of success, or (b) there is some other compelling reason to hear the appeal. This means that the applicant must clear a fairly high bar. The use of the word “would” rather than “could” signals a stricter standard than the old common-law test.
5. Previously, a litigant simply needed to show a reasonable possibility that another court might reach a different conclusion, but now a reasonable prospect of success must be shown. In other words, it is no longer enough to raise mere arguable grounds; there must be a real chance of success on appeal for leave to be granted.
6. In the circumstances, for leave to be granted, the court is obliged to consider the prospects of success and other compelling reasons. Further, even if the prospects appear weak, leave may still be granted if there are compelling reasons to have the appeal heard in the interests of justice. Conversely, if the case shows no realistic prospect of success and no other compelling reason, the application for leave to appeal will be refused.
7. In summary, an applicant for leave to appeal must convince the court hearing the application that, on a sound rational basis, his / her prospects of success on appeal are not remote but have a reasonable and realistic chance of succeeding. Equally, a mere possibility of success on appeal is not enough.

MERITS OF THIS APPLICATION FOR LEAVE TO APPEAL

8. For the sake of convenience, I shall refer to the parties as they are cited in the judgment.
9. Mr Tshungu who appeared for the plaintiff, contends that, in dealing with the liability aspect, the court only focused on the plaintiff's negligence and failed to have regard to the insured driver's negligence who drove on a yellow lane, skipped the red robot and ultimately hitting the plaintiff. He further submitted that the plaintiff was a credible witness.
10. Further submissions made by Mr Tshungu on behalf of the plaintiff were that the court erred in not dealing with the extent of the negligence of the insured driver. Instead, according to the submissions made, the court only contained itself to the negligence of the plaintiff who was not the cause of the accident, but the insured driver. According to Mr Tshungu, the Road Accident Fund (Raf) should have been found 100% liable.
11. In argument, Mr Tshungu relied on the case of **Fox v RAF (A548/16) [2018] ZAGPPHC 285 (26 April 2018)**. In his submissions, he contended that for the plaintiff to be found to have contributed to the negligence, the defendant ought to have pleaded contributory negligence, further bearing the onus of proving it on a balance of probabilities. In the circumstances, according to Mr Tshungu, if no evidence is led to discredit the plaintiff's version, and the plaintiff is found to be a credible witness, then the court cannot simply apportion fault without a factual foundation.

12. I need to point out that in terms of the pleadings as they stand, the Raf was *ipso facto* barred.
13. With reference to Fox, *supra*, even though it is established that a defendant bears the onus of proving contributory negligence when pleaded, the court can still find such negligence on the plaintiff's own version without the Raf having led any evidence, if her evidence clearly supports such a finding.
14. What distinguishes this matter from the authority relied upon by the plaintiff, is that in Fox, *supra*, the plaintiff's evidence was not inherently negligent; the court found he had acted reasonably, and the Raf failed to rebut it. Whereas in this case, the plaintiff admits to the conduct that falls below the standard of a reasonable person. In the circumstances, the court can find her contributorily negligent without the Raf leading evidence.
15. Further, in this matter, the plaintiff knowingly crossed a busy road during peak traffic, avoiding a safer, lawful crossing point, simply because she was in a hurry to join the taxi queue since it was already long. In fact, the point of impact was not on the yellow lane as alleged, but in the middle of the Germiston Road. This demonstrates a conscious disregard for her own safety. It suggests a deliberate deviation from the conduct of a reasonable person.
16. In the result, the case, of Fox, *supra* does not shield the plaintiff in that, contributory negligence is evident from her own testimony. Furthermore, Raf's failure to lead evidence does not excuse or override what she has already admitted, that she intentionally acted unsafely in a busy traffic road.

17. In Kruger v Coetzee 1966 (2) SA 428 (A), Holmes JA set out the classic test for negligence: - foreseeability of harm, reasonableness of taking precautions, and a failure to take such steps.

18. A further ground for the leave to appeal is that the court erred in disregarding the plaintiff's past loss of patrimonial damages *in toto*. The plaintiff's evidence is that she did not return to work on her volition following the accident. There is no evidence that the plaintiff tried to resume her duties after the accident however failed to cope due to the accident-related injuries. She simply decided not to return to her employment on her own. Based on her version, she can't be deemed to have suffered any past loss. She simply stayed home with no reason. Therefore, the Raf cannot be liable for this claim.

19. Based on the aforesaid, a careful consideration of this application for leave to appeal, reveals that there is no satisfactory basis made out for the leave to appeal to be granted.

20. I am not persuaded that another court would come to a different conclusion than that arrived at by this court. There are also no other compelling reasons why the appeal must be heard.

Order:

21. For the reasons set out above, the following order is made:

The application for leave to appeal is dismissed.


T J MAKGATE

**ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG**

For the Plaintiff: Adv S Tshungu instructed by Titus & Associates

Date of Hearing: 10 April 2025

Date of Judgment: 12 May 2025