

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

Case Number: 2022-041561

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE: 30 October 2025

SIGNATURE

In the matter between:

SIKELELA PAUL BOOI

Applicant/Plaintiff

And

ROAD ACCIDENT FUND

Respondent/Defendant

JUDGMENT: LEAVE TO APPEAL

WEIDEMAN AJ

- [1] This matter was called on 18 February 2025. There was no representation for the defendant. Counsel for the plaintiff presented the plaintiff's case and the

matter was fully ventilated. At the conclusion of counsel's submissions this court handed down its judgment *ex tempore*.

- [2] On 25 February 2025 the plaintiff's attorneys of record requested reasons for the judgment.
- [3] The reasons for the judgment was handed down on the 13th March 2025.
- [4] Application for leave to appeal was filed on the 4th April 2025.
- [5] The application for leave to appeal was eventually heard on Wednesday 29 October 2025.
- [6] The grounds for leave to appeal may be summarised as follows:

[6.1] The Court erred and/or misdirected itself in rejecting the Educational Psychologist's opinion on the basis that it failed to meet the criteria as set out in *Bee v Road Accident Fund 2018 (4) SA 366 (SCA)*.

[6.2] The Court erred and/or misdirected itself in finding that the Educational Psychologist and Industrial Psychologist relied heavily on the educational qualifications and employment history of the family of the Applicant in coming to their conclusions.

[6.3] The Court erred and/or misdirected itself in finding that the Applicant failed grade 2 before the accident.

[6.4] The Court erred and/or misdirected itself in finding that the Educational Psychologist's failed to compare the Applicant's marks to the grade average.

[6.5] The Court erred and/or misdirected itself in finding that the Educational Psychologist's report did not assist the Court.

- [7] The test for leave to appeal is well established. Section 17(1)(a) of the Superior

Courts Act 10 of 2013 provides that leave to appeal may only be granted on two grounds:

“(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”.

[8] Accordingly, to obtain leave to appeal, the Applicant must show that he would have a reasonable chance of succeeding on appeal or that there is a compelling reason to entertain the appeal.

[9] There has been some debate about whether the requirement that a judge be of the opinion that the phrase *“the appeal would have a reasonable prospect of success”* contained in section 17(1)(a) of the Superior Courts Act has imposed a higher standard than under the previous statute. The SCA settled that issue in *Ramakatsa v African National Congress (724/2019) [2021] ZASCA 31 (31 March 2021)* when it expressed itself as follows:

“I am mindful of the decisions at high court level debating whether the use of the word ‘would’ as opposed 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...

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."

- [10] I highlight two principles which the SCA set down in the above passage. First, the fact that a matter is of public importance is not in itself a reason to grant leave to appeal. The matter must also be one of public importance that "*will have an effect on future disputes*". Even if the matter reaches this threshold, this court may only grant leave to appeal if there is some prospect of success, as "*the merits remain decisive*".
- [11] Secondly, applicants for leave to appeal must demonstrate that their prospects of success are not remote and that a court of appeal would reasonably arrive at a conclusion different to that of the court below.
- [12] In evaluating the probability of success on appeal the starting point must be the actual injury sustained in the accident and which *in casu* was a closed fracture of the left tibia and fibula.
- [13] The foundational expert that evaluated the injury was the orthopaedic surgeon, Dr Kumbirai. His findings were that the Applicant had a full range of movement of the left knee and ankle joints with no pain. The leg was neurovascularly intact, and X-rays confirmed that the fracture had united with tibiofibular synostosis. Dr Kumbirai recorded the Applicant's whole person impairment at a mere 4%.
- [14] The finding of Dr Kumbirai that the Applicant has full range of movement of the knee and ankle joint with no pain is important in light of the finding of tibiofibular synostosis and which could be defined as "*a rare complication that has a potential effect on limb length and alignment, both at the ankle and the knee in the skeletal immature patient*".
- [15] The fact that the X-rays taken on the 3 February 2025 show a "*healed tibia and fibula fracture with no orthopaedic hardware in situ*" read with Dr Kumbirai's findings that the Appellant has full range of movement of the knee and ankle joint with no pain places the seriousness of the long-term pain, discomfort and disability in perspective.

- [16] According to the occupational therapist, Ms D Mathebula, as reported in the applicant's Heads of Argument, paragraph 36 on CL 39-13 *"the physical findings from the evaluation, his standing and walking ability are mildly affected"*. This correlates with the findings of Dr Kumbirai.
- [17] Final comment in respect of the occupational therapist: I am of the opinion that the occupational therapist ventured outside what one would strictly require from an occupational therapy evaluation. This opinion must be seen in light of the content of paragraph 39 of the Heads of Argument [CL 39-14] and which states that there *"was nothing contentious and contradictory in the report of the occupational therapist"*.
- [18] The above is factually incorrect. I drew counsel's attention to CaseLines 07-78, which is part of the occupational therapist's report and where the following is recorded: *"She should undergo about 20 sessions of psychotherapy, at a cost of R1100 per session, for the long-term sequelae associated with pelvic injuries"*. (my underlining)
- [19] The Applicant is male; there is no foundational expert to make a finding that would necessitate psychotherapy and the Applicant did not sustain pelvic injuries. I provided counsel an opportunity to comment on this, but she indicated that she could not.
- [20] The main thrust of the application for leave to appeal is the averment that I erred in my findings relating to the educational psychologists' approach to the matter and her findings.
- [21] The educational psychologist, Ms N Rajuili, prepared an original report dated 3 September 2022. This report is on CaseLines at 7-27. The content of this report was confirmed under oath by the expert in her affidavit dated the 11th March 2024 [CL14-4]
- [22] The difficulty arises with Ms N Rajuili's two subsequent reports, and which are found on CaseLines at 07-139 and 32-4 respectively. Both these reports were served under Rule 36(9), the first on the 10th February 2025 and the second on the 14th February 2025. According to the Rule 36(9) notice both these reports

are dated 3 February 2025. The respective reports do however not reflect the date on which they were finalised or an original signature of their author. Both state that the date of assessment was the 3rd February 2025.

- [23] There is no Rule 38(2) affidavit in respect of either of the above reports. I posed the question to counsel as to what the legal status of the reports are, given that there are no affidavits in terms of which the expert confirmed their contents.
- [24] Counsel indicated that one should look at the application in terms of Rule 38(2) and in which the names of the respective experts do appear. This is indeed correct. However, it was pointed out to counsel that the application is dated 17th January 2025 and predates the probable date of the drafting of the two reports. Counsel could not proffer a legal motivation why an application which predates the expert reports, which *ex facie* the Rule 36(9) notices had not yet been drawn, would also apply to those reports.
- [25] The preceding paragraphs relating to the educational psychologist's reports are relevant as their content differ significantly from one another.
- [26] Prior to considering some of the differences between the reports, two questions were posed to counsel. In the clinical records, which form part of the documentation placed before the trial court, on CaseLines 10-29, as part of the anaesthetist evaluation, it is recorded that the Applicant used "*e-smoking / ETOH / illicit drugs*". ETOH is the abbreviation for alcohol. This despite the applicant only having been 14 years old at that time. Counsel confirmed that the potential effect of these harmful substances on the Applicant's educability was not dealt with in any of the three reports that had been generated by the educational psychologist.
- [27] Part of the grounds for leave to appeal is that in my judgment too much emphasis was placed on the academic environment in which the Applicant functioned and in particular my reference to the academic performance of his immediate family and his mother's extended family. Despite the Applicant's father's cellphone number being recorded in each of the medico legal reports and reporting that the Applicant grew up with both parents in the household, not

a single fact in respect of the father's academic or work record is recorded in any of the medico legal reports.

- [28] There is no indication that any effort was made to secure his details, which should have been relatively easy, given the access to his phone number and the statement that they all lived together. Counsel was called upon to comment on whether it would be fair for the Court to make an adverse finding in the absence of an explanation for not including same - as the only logical conclusion would be that it does not suit the narrative that the educational psychologist wished to present. Counsel off course did not agree but was equally not able to proffer a reason for this glaring omission in the educational psychologist's reports.
- [29] Another of the grounds for leave to appeal is that I erred in finding that the applicant failed Gr 2 before the accident and that it is factually not true. Paragraph 8.3.2, in the educational psychologist's report on CL 07-162, states "*he reportedly failed and repeated Grade 02 pre-accident*". The same paragraph in the educational psychologist's report appearing on CaseLines 32-28 states that "*he was required to repeat Grade 02 due to the absence of Grade 03 classes.*"
- [30] Similarly, on CaseLines 07-147 it shows "*2014 Grade 2 Fail*" and on CaseLines 32-12 "*2014 Grade 2 Pass*". Both these reports were generated on the same date based on an assessment which took place on the same date, i.e. the assessment of 3 February 2025. Both cannot be correct.
- [31] A further ground of appeal is that I erred in finding that the educational psychologist did not take into the consideration the grade averages in reaching her conclusions. None of the reports however record what the grade average for any subject in any academic year might have been or compared the Applicant's actual marks against the actual marks for the grade average. Without it being discussed in the report I cannot simply make the assumption that it had been done and what the potential relevance, or lack of relevance, it might have.

- [32] There are some clear legal questions that flow from this matter, *inter alia*, what is the legal effect is of an amendment to the expert evidence and amount claimed without a corresponding amendment to the application for default judgment. If the parties are bound to the content of their pleadings, does the same apply to the application for default judgment?
- [33] Is it possible to place an expert report before court in terms of a Rule 38(2) application, if the application is moved before the report is written, simply by including the expert's name in the application?
- [34] Is it possible for an affidavit sworn to in 2024, in which an expert confirms the content of a 2022 report, to cover "*supplementary or addendum reports*", which differ from the original report, and which is generated a year later in 2025?
- [35] The questions posed in paragraphs 32 to 34 above would clearly benefit from the guidance that a Full Bench could provide and would fall under:
- "The matter must also be one of public importance that "will have an effect on future disputes". Even if the matter reaches this threshold, this court may only grant leave to appeal if there is some prospect of success, as "the merits remain decisive".*
- [36] The requirement remains that there must be merit in the application for leave to appeal, *per se*, and there must be a probability that another court would come to a different decision on the merits of the application.
- [37] No evidence was placed before me to assist me in determining which of the two reports, both dated 3 February 2025, were to be preferred and why. Both cannot be correct and the expert is in conflict with herself with no explanation available to the court as to why two different reports were generated on the same day, by the same expert.
- [38] There are issues that the educational psychologist should have dealt with and which are absent in all the reports, including the 2022 report. This would include the issues referred to above, *inter alia*, the comments recorded by the anaesthetist in the clinical records, the details relating to the applicant's father's

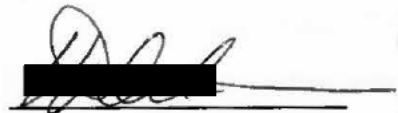
education and lack of proper comparison between grades achieved by the applicant and the grade averages of the schools he attended.

- [39] There is, in my opinion, a complete lack of evidence linking the Applicant's academic performance, or lack thereof, to the orthopaedic injury as described and dealt with by Dr Kumbirai in his report.
- [40] The educational psychologist makes the bold statement that in her opinion the Applicant would have, but for the accident, been able to obtain a NQF 6 level of education. She does however do so without providing the facts on which she has based her findings.
- [41] The reports of Dr Kumbirai and the occupational therapist indicate that the Applicant has recovered from the physical injury, and they provide for future treatment. I have however not been provided with any report which addresses why residual pain, if any, of the tibia and fibula fracture would debilitate the Applicant to the extent as to compromise his intellectual capacity, reducing his projected post-accident achievement to an NQF level 2 or 3 (depending on which report is used).
- [42] Ms N Rajuili (the educational psychologist) is not a pain expert and she is not qualified to make conclusions based on the so – called “*sleeper effect*” which is ordinarily only referred to in the context of a brain injury, and which injury is absent here. If the Applicant wanted to rely on a “*sleeper effect*” due to orthopaedic injuries and pain, as the cause of the diminution of his academic potential, an appropriately qualified expert ought to have been called to present same, and which was not done.
- [43] Having considered the documents filed of record, the application for leave to appeal, counsel's Heads of Argument and counsel's submissions during the hearing of the application I find nothing on which a different court would come to a different conclusion, in respect of the evidence and, in particular, that of the educational psychologist.
- [44] My judgment to reject the educational psychologist's evidence as it fails to meet the criteria as set out in *Bee v Road Accident Fund 2018 (4) SA 366 (SCA)* was

correct and I am not persuaded that another court will come to a different conclusion.

[45] Order:

The application for leave to appeal is dismissed.

A handwritten signature in black ink, appearing to be 'Weideman', is written over a solid black rectangular redaction box. A horizontal line extends from the right side of the signature.

WEIDEMAN AJ

Acting Judge of the
High Court of South
Africa, Johannesburg

Representatives

For the Applicant: Adv. N Q Mabena

Attorneys of records: Ndebele- Chitongo Attorneys

Hearing date: 29 October 2025

Judgment date: 30 October 2025