Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, MTHATHA

CASE NO: 605/2020

In the matter between:

ANDISWA SIVENENE obo M M Plaintiff

and

THE MEMBER OF THE EXECUTIVE COUNCIL FOR THE DEPARTMENT OF HEALTH, EASTERN CAPE PROVINCE Defendant

---

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

Rugunanan J

[1] In this matter I heard argument by the parties in an application for leave to appeal. For convenience they will be referred to by their trial

designations. At issue are the heads of damages for architectural services, loss of income, and caregiver and domestic services for which post-contingency amounts of R1 371 398, R4 154 160 and R7 427 158 were respectively awarded to the plaintiff in my judgment of 2 March 2023.

[2] My judgment sets out the background to the matter, the evidence adduced by the parties and the reasons for the awards arrived at.

[3] The defendant argues that I erred and misdirected myself in various respects. Its summation of the grounds of appeal is detailed in its application for leave to appeal.

[4] The legislation dealing with the circumstances upon which leave to appeal may be granted is set out in section 17(1) of the Superior Courts Act 10 of 2013 (the Act).

[5] The section reads as follows:

Leave to appeal

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.

[6] The test previously applied in applications of this nature was whether there were reasonable prospects that another court may come to a different conclusion.[1] What emerges from section 17(1) is that the

[1] *Commissioner of Inland Revenue v Tuck* 1989 (4) SA 888 (T) at 890B.

threshold for granting leave to appeal has been raised. It is now only granted in specified circumstances. This is deduced from the word 'only'.

[7] In *The Mont Chevaux Trust v Tina Goosen and 18 Others*[2], Bertelsmann J held as follows:

'It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in 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.'

[8] Smith J, in *Valley of the Kings Thaba Motswere (Pty) Ltd and another v A L Mayya International.*[3] aptly summed up the position in this manner:

'There can be little doubt that the use of the word "would" in section 17(1)(a)(i) of the Superior Courts Act implies that the test for leave to appeal is now more onerous. The intention clearly being to avoid our courts of appeal being flooded with frivolous appeals that are doomed to fail. I am, however, of the respectful view that the "measure of certainty" standard propounded by the learned judge in *Mont Chevaux Trust* may be placing the bar too high. It would, in my respectful view, be unreasonably onerous to require an applicant for leave to appeal to convince a judge – who invariably would have provided extensive reasons for his or her findings and conclusions – that there is a "measure of certainty" that another court will upset those findings. It seems to me that a contextual construction of the phrase "reasonable prospect of success" still requires of the judge, whose judgment is sought to be appealed against, to consider, objectively and dispassionately, whether there are reasonable prospects that another court may well find merit in arguments advanced by the losing party. . .'

[2] 2014 JDR 2325 (LCC) para 6.
[3] *Valley of the Kings Thaba Motswere (Pty) Ltd and another v A L Mayya International* [2016] ZAECGHC 137 para 4.

[9] The grounds for leave to appeal assert to a large extent that my conclusions regarding the acceptability of the expert evidence was erroneous. Put otherwise, the argument is that I erred in not accepting the evidence of the defendant's experts; that in doing so my reasoning was erroneous and that I failed to consider or give sufficient weight to other factors. The experts who testified for the defendant, were industrial psychologist Mr Sabelo Gumede, educational psychologist Mr Xolani Fakude, and Mr Sikhumbuzo Mtembu, an architect.

[10] It is not intended to extrapolate the minute detail of the exhaustive grounds of appeal again, or to repeat that which is set out in my judgment, in as much as that which I thought was relevant was dealt with in the judgment. I am mindful of the fact that an appeal is solely aimed at an order of a court and not its reasoning.

[11] As regards the impugned awards the defendant argued that another court would conclude differently.

[12] What constitutes reasonable prospects of success, has been laid down in *S v Smith*[4] as follows:

> '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.'

[4] *S v Smith* 2012 (1) SACR 567 (SCA) para 7, quoted with approval in *S v Kruger* 2014 (1) SACR 647 (SCA) para 2.

[13] The applicable legal principles and case authorities for the evaluation of expert opinion are set out in my judgment and footnotes at paragraphs [12] and [13]. These are not repeated save to state, in summary, that in order to be defensible, a conclusion arrived at by an expert must be informed by logical reasoning underpinned by admissible facts (see generally *Michael v Linksfield Park Clinic* 2001 (3) SA 1188 (SCA) 1200I-1201B).

Loss of Income

[14] To begin with, it was the plaintiff's evidence that her family aspired that their children would attend university to acquire a tertiary qualification such as a degree and that had M been born a normal child she would have wanted him to progress like any other child to obtain a university education.

[15] This evidence was uncontested.

[16] Testifying for the plaintiff the educational psychologist, Ms Zethu Gumede, explained that the above factor was underweighted in her initial assessment. Having given sufficient consideration thereto she expressed the following opinion relevant to M's academic aptitude for the purpose of determining his premorbid income earning potential:

> 'The child's premorbid estimate of at least average ability is consistent with the ability to acquire requisite knowledge, skills and values age appropriately; it is also consistent with functioning at a level where he could have progressed through the mainstream school system, matriculated and proceeded to obtain a tertiary qualification, at least a 3 year university degree. However, it is probable that he could have done better and surpass the level of his father achieving a university degree or better than his father.

[17] In his report for the defendant, Mr Fakude makes the following observation regarding M's pre-accident functioning:

> 'Most of M's paternal family members have degree levels of education. Most of his maternal family members have post-matric levels of education. Given that M's family's educational backgrounds as reported, it is likely that he would have received good support and role modelling that he too would be expected to study through matric and tertiary education.
>
> When considering all relevant information in postulating M's pre-accident potential, a case of normality must be accepted and, therefore, [an] assumption of low average to average range of intellectual ability is made. Educationally, it is likely that M would have progressed through primary and senior mainstream education [and] given the educational profile of his family, it is probable that he would have passed Grade 12 with at least a Diploma endorsement. Further studying would have been probably at a tertiary institution where he would have attained a diploma level of education.'

[18] The uncontested evidence of M's family background (both maternally and paternally), to which the plaintiff testified, advocates that the case for 'normality' is that the expectation for M would have been that he attends university. The weight accorded to this evidence by Ms Gumede falls at the level of recognising M to be 'of at least average ability' for which she expressed the opinion that he would have progressed to obtain a university degree.

[19] Mr Fakude on the other hand accepts 'a case for normality' albeit on the assumption of a low average to average range of intellectual ability.

[20] To my mind both experts had regard to essentially the same facts (or evidence) but arrived at different conclusions. Mr Fakude's opinion, however, evidences a patent disconnect or inconsistency. He proceeds from an acceptance of normality and springs to a conclusion pillared on

an assumption. In the absence of facts informing the assumption his opinion cannot be held to be underpinned by logical reasoning. The effect is that the illogicality taints the evidence of the defendant's remaining experts who sought reliance on his prediction/s.

[21] I should mention that the disconnect in Mr Fakude's evidence is rendered all the more disquieting in the light of numerous concessions by the defendant's earnings expert Mr Sabelo Gumede – most notably that children from poor backgrounds and with uneducated parents may also obtain degree qualifications, and that in general it can be expected that children will out-perform their parents. It is not anything farfetched to deduce that societal attitudes, individual standards and rising expectations may draw upon these concessions. Moreover, M has several positives for predicting his income earning capacity such as a stable and well-educated family with a strong educational ethos.

[22] Left unassailed, the evidence of the plaintiff as a factual witness informed the concluding opinions of her expert/s. Accordingly, there is no latitude for contending that the applicable legal principles were misapplied.

[23] The track of the evidence by Ms Gumede informed the opinion of Dr Lieselotte Badenhorst and ultimately the basis on which actuaries IAC calculated the loss under this head of damages. I need not repeat Dr Badenhorst's evidence. It has been dealt with extensively in the main judgment. Sequential to the evidence of the plaintiff as a factual witness it suffices to say that the ultimate contingency factor of 20% determined discretionarily, was not contested in argument.

Caregiver and domestic services

[24] The joint minutes between Ms Anneke Greef and her counterpart for the defendant Ms Cheryl Rooy reflect agreement that the services of a caregiver and a domestic worker are required for managing M. Where they differ, is on the cost of these services. It is somewhat mystifying for the defendant to have submitted that the reasonableness of the costs are placed in issue without contending that the 20% contingency applied thereto was the result of an improper exercise of judicial discretion. Where the costing was in issue it was incumbent on the defendant to have led evidence from Ms Rooy to substantiate the challenge to the evidence put up by Ms. Greeff. I have dealt with the defendant's flawed approach to the conduct of the trial in paragraph [40] of my judgment.

Architectural services

[25] The point of departure between the architects respectively for the plaintiff and the defendant, Mr Lizo Macingwane and Mr Sikhumbuzo Mtembu, is that the former recommends renovation and construction while the latter recommends a low-cost proposal on the basis that 'alterations' are possible to the existing house in which M lives. The plaintiff gave detailed evidence as to the condition of the house. She testified that the house is not adequate for tending the needs of M and proffered detail as to its inaccessibility in his handicapped state. The detail of her evidence is set out in paragraph [20] of my judgment. Her evidence was not meaningfully challenged nor materially contradicted.

[26] The recommendations by Mr Macingwane are in line with SABS standards (and are compliant with the proposals by Ms Greeff). There is no evidence to suggest that the recommendations by Mr Mtembu are

compliant with SABS standards. What has been put forward in argument is that the R250 000 cost estimate by Mr Mtembu ought to have assumed preference over the pre-contingency amount of R1 714 247 quantified by the actuaries in line with the recommendations by Mr Macingwane. I have dealt comprehensively with the recommendations by the architects in paragraphs [44] to [48] of the main judgment and having demonstrated the fallacy in the reasoning employed by Mr Mtembu, I gave motivated reasons for my finding as to whose evidence was accorded preference.

[27] From whichever perspective one views the present application, whether objectively and/or dispassionately, I am not persuaded that there is merit in the arguments advanced for the defendant.

Conclusion

[28] The ostensible basis on which the defendant sought leave to appeal was under section 17(1)*(a)*(i) of the Act, and I wish to make it clear that I have applied that test hereto, which is whether there is a reasonable prospect that another court would come to a different conclusion than did I.

[29] Although differing contentions on the merits of the application were made, I am not minded to grant leave to appeal as I am similarly unpersuaded that there are some other compelling reasons why the appeal should be heard.

[30] In the result, the following order issues:

The application for leave to appeal is dismissed with costs, such costs to include those consequent to the employment of two counsel, where applicable.

____

M. S. RUGUNANAN
JUDGE OF THE HIGH COURT

APPEARANCES:

For the Plaintiff:	A. D. Schoeman SC with L. L. Sambudla Instructed by M. Dayimani Inc. Plaintiff's Attorneys Mthatha (Ref: MD/vs/00308) Tel: 047-532 3178 or 047-531 1983
For the Defendant:	H. van der Linde SC with N. James Instructed by The Office of The State Attorney Mthatha (Ref: X Hanise 331/20-AH) Tel: 047-502 9900
Dates heard:	06 April 2023.
Date delivered:	13 June 2023.