IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GQEBERHA)

Case No. 2596/2020

In the matter between: -

THE MINISTER OF PUBLIC WORKS AND First Applicant

INFRASTRUCTURE

THE MINISTER OF JUSTICE AND CORRECTIONAL Second Applicant

SERVICES

and

LINEEN SWARTS Respondent

Coram: Bands AJ
Date heard: 7 September 2022
Delivered: 9 September 2022

JUDGMENT

BANDS AJ:

[1] The applicants, the defendants in the main action, seek leave to appeal against the whole of my judgment and order granted in favour of the respondent, as plaintiff, delivered on 12 August 2022.

[2] The test to be applied in applications of this nature finds legislative expression in section 17 of the Superior Courts Act, 10 of 2013 ("*the Act*"), which provides that leave to appeal may only be granted where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success, or that there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.

[3] The Supreme Court of Appeal has on more than one occasion had the opportunity to consider what constitutes a reasonable prospect of success, which is stated to be as follows:[1]

> "*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.*"

[1] *S v Smith* 2012 (1) SACR 567 (SCA) para 7.
Maphana and Another v S (174/2017) [2018] ZASCA 8 (1 March 2018).

[4] The applicants bring their application in terms of sections 17(1)(a)(i) and (ii) of the Act.

[5] It is incumbent upon an applicant, in an application for leave to appeal, to set out the grounds of appeal upon which it relies, clearly and succinctly, in clear and unambiguous terms, so as to enable the court and the respondent to be fully appraised of the case which the applicant seeks to make out and which the respondent is to meet in opposition of the application.[2] The applicants' notice of application for leave to appeal is not a model of clarity, and in most instances contends that the court erred, firstly in its findings; and secondly, in its application of the legal principles to the facts at hand. Startlingly absent from the notice of application for leave to appeal, particularly in respect of the applicants' fourth ground of appeal, being "*application of the law to the facts*", is any indication as to the manner in which the court erred in applying the, now settled, legal principles to the facts at hand.

[6] Insofar as the applicants contend that there are reasonable prospects of success as envisaged by section 17(1)(a)(i) of the Act, five grounds of appeal are relied upon, each of which I deal with *a seriatim*, insofar as is necessary to do so.

<u>The applicants' first and second ground of appeal</u>

[7] The first ground of appeal as set out in paragraph 1, including paragraphs 1.1 to 1.4 of the notice of application for leave to appeal, in essence attacks my finding that there was no merit in the applicants' special plea of non-

[2] Songono v Minister of Law and Order 1996 (4) SA 384 (E).

joinder insofar as *Sky Ground* is concerned. The second ground of appeal, appearing in paragraphs 2 to 9 of the notice of appeal, is predicated on my dismissal of the applicants' second special plea of mis-joinder of the second applicant to the proceedings.

[8] To the extent that the legal principles pertaining to joinder were not addressed in my judgment, given the ultimate finding to which I came, I shall deal with same in greater detail here under.

[9] It is settled law that the joinder of a party to proceedings is only required as a matter of necessity, and not of convenience. The substantial test is whether the party that is alleged to be a necessary party has a direct and substantial interest in the matter, more commonly stated as a legal interest in the subject matter of the litigation, which may be affected prejudicially by the judgment of the court in the proceedings concerned.[3]

[10] Insofar as the alleged non-joinder of *Sky Ground* is concerned, the applicants, at trial, as well as during the application for leave to appeal, failed to indicate how the judgment sought against the applicants, by the respondent, which judgment was subsequently granted by me, would or could prejudicially affect the legal interests of *Sky Ground*. This too is not apparent from the applicants' plea filed of record; their notice of application

[3] *Aquatur (Pty) Ltd v Sacks* 1989 (1) SA 56 (A) at 62A-F; *Bowring N.O. v Vrededorp Properties CC* 2007 (5) SA 391 (SCA) at paragraph 21; *Transvaal Agricultural Union v Minister of Agriculture and Land Affairs* 2005 (4) SA 212 (SCA) paras 64-66).

for leave to appeal; or in their written submissions in support of the application for leave to appeal handed up at the hearing of the matter.

[11] Whilst the aforesaid is dispositive of the applicants' special plea of non-joinder, it is apposite to highlight that the argument on behalf of the applicants at trial went as follows:[4]

> "*… I would like to briefly just deal with the legal principles of misjoinder and nonjoinder. The first principle is that must arise on the pleadings. It has arisen the points of misjoinder and nonjoinder had arisen from the pleadings. Then the second point, is that if we can find nonjoinder, this will be found in Rule 10 of the Superior Court Practice, Volume 2 and the principles as set out on nonjoinder and misjoinder are set out there and it also goes further to say that if one can just briefly define non joinder. It is the failure of the plaintiff to join a particular defendant. That is what it essentially is. Misjoinder is the joining of either several plaintiffs or defendants in one circumstance which the law does not sanction i.e., the objection is that the wrong plaintiff are assuming or the wrong defendant or defendants are being sued. That is the point that was made with the points raised there.*"

[12] The high-water mark of the applicants' argument, as it developed at trial in respect of non-joinder, was that the respondent sought to hold the applicants liable for the conduct of *Sky Ground* on the basis of vicarious liability and for this reason, *Sky Ground* ought to be brought before court.[5] This too was the argument that was advanced, although in not so many words, at the hearing of the application for leave to appeal. This contention was rejected by me in the main action and I have dealt fully with my reasons for such finding in my judgment. Insofar as the applicants, in the application for leave to appeal, have raised new legal contentions in respect of the manner in which the

[4] Record of proceedings p 105 at line 25 and p 106 at lines 1 to 16.

[5] Record of proceedings p 107 at lines 1 to 11; read with p 116

respondent's case was pleaded, I deal with same hereunder at the appropriate juncture.

[13] Turning to the issue of misjoinder, raised on the pleadings in respect of the second applicant. It cannot be gainsaid that the second applicant against whom judgment was sought (and thereafter granted), had (and has) a legal interest in the subject matter of the litigation, which may be (and subsequently is) affected prejudicially by the judgment of the court in the proceedings concerned.

[14] Uniform Rule 10(3) reads as follows:

> "*Several defendants may be sued in one action either jointly, jointly and severally, separately or in the alternative, whenever the question arising between them or any of them and the plaintiff or any of the plaintiffs depends upon the determination of substantially the same question of law or fact which, if such defendants were sued separately, would arise in each separate action."*

[15] Correctly so, at no stage in the proceedings was it contended by the applicants that the respondent's particulars of claim lacked averments which are necessary to sustain a cause of action against the second applicant. It is trite that an action is based on both facts and law, such facts, if proven, would sustain in law the cause of action relied upon.[6] The respondent's claim against the first and second applicants is founded on delict. The pleaded cause of action against both of the applicants is founded on the same incident, taking place at the same time and place.

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[6] *Alberts and Others v The Minister of Justice and Correctional Services* (Case no 404/2021) [2022] ZASCA 25 (9 March 2022) at paragraph [13].

[16] Regard being had to what I have stated above, it is startling that the second applicant contends that: (i) it does not have a direct and substantial interest in the litigation; (ii) a judgment of the court will not affect the interests of the second applicant prejudicially; and (iii) there is no live controversy between the respondent and the second applicant on the particulars of claim.

[17] The plea on behalf of the second applicant, if properly construed, is no more than one of a denial of liability, which does not fall within the ambit of mis-joinder and accordingly the special plea raised in this regard is ill conceived.

[18] For the above reasons, I am of the view that there are no reasonable prospects that another court will come to a different conclusion on the issues of non-joinder and mis-joinder.

The applicants' third ground of appeal

[19] The applicants' third ground of appeal, as set out in paragraph 10, including sub-paragraphs 10.1 to 10.8 of the notice of application for leave to appeal, pertains to the formulation of paragraph 6 of the respondent's particulars of claim.

[20] Due to an oversight, I note that my judgment contained a typographical error in that certain words were omitted in my recordal of the content of paragraph 6 of the respondent's particulars of claim. Whist nothing turns on this error,

regard having been had to the pleadings at the time of writing my judgment, I repeat the relevant portion of the said paragraph herein, with the previously omitted words being underlined for ease of reference. The said paragraph reads as follows:

> "*6. The Plaintiff's slip and fall was caused by, and ascribable to, the negligence of the First Defendant, alternatively the Second Defendant, alternatively both Defendants, and/or one or more of their employees and/or cleaning contractors, who acted within the course and scope of their employment, and who were negligent in one or more or all of the following respects:"*

[21] In short, the applicants take issue with the manner in which the respondent utilised the expression "*and/or*" in paragraph 6 of his particulars of claim, and concomitantly, the manner in which I dealt therewith.

[22] The applicants' contention is that the said expression has been the subject of "*judicial disapproval"* and *"endangers*" the "*accuracy in the pleadings*". In essence, the main complaint on behalf of the applicants is that the use of such expression resulted in the applicants being prejudiced or embarrassed and subjected to a trial by ambush. I pause to mention that this was not raised by the applicants at trial and accordingly, was not dealt with by me in my judgment.

[23] Not only is the aforesaid an incorrect assessment of the present state of our law, but such allegations are misleading.

[24] Insofar as the applicants belatedly now contend that they were prejudiced; embarrassed; or subject to a trial by ambush in that they at all stages understood the respondent's pleaded case to be founded solely on vicarious liability for the alleged wrongs committed by *Sky Ground*, such contentions can be dismissed out of hand.

[25] The applicants, in their request for trial particulars, dated 4 June 2021, requested the following trial particulars from the respondent:

> "*1.2 The plaintiff is requested to explain with when references made that the plaintiff's 'slip and fall was caused by the ascribable to the negligence of the first defendant' which grounds of negligence are ascribable to the first defendant only. Full details and particularity are requested.*
>
> *1.3 The plaintiff is requested to explain what negligence is ascribable to the second defendant. Full details and particularity are requested.*
>
> *1.4 The plaintiff is further requested to explain whether there are similar grounds of negligence that is (sic) ascribable to both first and second defendants. Full details and particularity are requested.*"

[26] Accordingly, the applicants, were already at that stage under no misapprehension as to the fact that the respondent's particulars of claim, ascribed negligence to the first applicant; alternatively, the second applicant; further alternatively, to both applicants, and not merely to *Sky Ground*. It does not lie in the mouth of the applicants to now contend otherwise. The aforesaid was not disputed on behalf of the applicants, following the aforesaid having been raised by the respondent's counsel in argument during the application for leave to appeal.

[27] Whilst the applicants placed reliance on the judgment in *Berman v Teiman*[7] to advance their third ground of appeal, such judgment, whilst citing the difficulties that the courts have had in the past with the expression "*and/or*", utilised predominantly in a contractual context and not in the context of pleadings, is not an authority for the conclusion/s which the applicants seek to draw. The court in *Berman* was of the view that meaning ought to be given to the said words and that they must be read both disjunctively, as well as conjunctively.

[28] The aforesaid approach was endorsed by Ponnan JA, writing the unanimous judgment of the Supreme Court of Appeal in *Brink v Premier of the Free State*,[8] who succinctly stated at paragraphs [11] and [12] as follows:

"*[11] The matter is essentially one of interpretation. According to the 'golden rule' of interpretation the language in a document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity, or some repugnancy or inconsistency with the rest of the instrument.*

[12] The first difficulty in the interpretation of the relevant words in clause 2 is created by the use of the expression 'and/or'. Those words must in the context of the clause be read disjunctively as well as conjunctively. If that is done, then it is clear that what the clause envisages is a second option to renew on either:

(a) the same conditions; or
(b) new conditions; or
(c) a combination of (a) and (b).

[7] 1975 (1) SA 756 (W).

[8] 2009 (4) SA 420 (SCA).

It is not in dispute that the qualifier, 'as will be mutually agreed', which is couched in the future tense, is applicable to a renewal in terms of either (b) or (c). The sole issue for determination therefore is whether it applies as well to a renewal under (a). Upon a natural construction of the words of clause 2 they do not signify, I think, that the qualifier is rendered inapplicable to (a). <u>There appears to be no reason for the limitation of the ordinary grammatical meaning of the phrase. It has not been shown why such a limitation of the ordinary meaning of the phrase is either necessary or desirable or what absurdity or repugnancy would arise should the phrase be given its ordinary grammatical meaning</u>."

[29] The aforesaid comments are apposite herein. Accordingly, if the language utilised in paragraph 6 of the respondent's particulars of claim are given their ordinary grammatical meaning, negligence on behalf of the first applicant's cleaning contractor, *Sky Ground*, is not the only negligence upon which the respondent relies in his pleadings, this being consistent with what I have stated in paragraph 10 of my judgment.

[30] Further and in any event, had the applicants been of the view that the manner in which the respondent had formulated his pleadings was vague and embarrassing, it was open to the applicants to make use of their remedies in accordance with Uniform Rule 23. The fact that they did not opt to do so, speaks for itself.

[31] For the said reasons, any argument on behalf of the applicants that (i) I erred in the interpretation of the respondent's pleaded case; or (ii) that the applicants were prejudiced; embarrassed; or subject to a trial by ambush, cannot be sustained. I am accordingly of the view that there are no reasonable prospects that another court will come to a different conclusion in respect of the applicants' third ground of appeal.

The applicants' fourth ground of appeal

[32] The applicants' fourth ground of appeal, particularised in paragraphs 11 to 20 of the notice of application for leave to appeal, broadly takes issue with the manner in which I applied the prevailing legal principles to the facts of the matter.

[33] Having said that, the applicants do not state in what respects they contend that I erred in applying the, now settled, legal principles to the facts at hand.

[34] In paragraphs [39] to [62] of my judgment, I dealt extensively with the legal principles insofar as they are applicable to the facts of the present matter and same need not be repeated herein.

[35] The applicants accept that insofar as the enquiry under (a) and (b) of the test as set out in *Langley Fox Building Partnership (Pty) Ltd v De Valence*[9] is concerned, same had been established. This was in any event apparent from the evidence at trial. There can accordingly be no doubt that the reasonable possibility of a person slipping and falling in the passages of the court building, as a consequence of a wet floor, was foreseeable. The applicants do not take issue with my finding in paragraph [52] of my judgment, in that the legal duty as pleaded, was established by the respondent in respect of both applicants.

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[9] 1991 (1) SA 1 (A).

[36] Whilst it is not clear from the wording of the applicants' notice of application for leave to appeal, nor in the applicants written submissions, it was argued that I failed to properly apply the legal principles set out in *Chartaprops 16 (Pty) Ltd and Another v Silberman*[10] to the facts of the matter. The argument advanced was that *Chartaprops 16 (Pty) Ltd* is authority for the proposition that the legal duty, as established, was discharged by the mere appointment of *Sky Ground*, which the applicants, in their plea, contend to be a "*competent and professional independent contractor*". In other words, it was argued on behalf of the applicants that in addition to the aforesaid, they need not do more to discharge the legal duty on them. I disagree.

[37] Leaving aside my finding that the applicants had failed to establish on the evidence that *Sky Ground* was a competent and professional independent contractor, the court, in *Chartaprops 16 (Pty) Ltd*, in declining to hold *Chartaprops 16 (Pty) Ltd* liable, pertinently found that the latter did not merely content itself with contracting the cleaning contractor to perform the cleaning services in the shopping mall, but that it did more, as per paragraph [46] of the judgment of Ponnan JA. It goes without saying that this court is bound by the findings of the Supreme Court of Appeal.

[38] In paragraphs [56] to [61] of my judgment, I dealt with the question as to whether or not the steps taken by the applicants in the circumstances of this matter were reasonable. For the reasons stated therein, and in the exercise of my value judgment, the answer to such question was in the negative. The

[10] 2009 (1) SA 265 (SCA).

applicants have cited no grounds upon which my value judgment was exercised improperly.

[39] Accordingly, I do not think that there are reasonable prospects that another court will come to a different conclusion.

The applicants' fifth ground of appeal

[40] In light of what I have stated above, it follows that the applicants' fifth ground of appeal in respect of the costs of the matter, must fail.

[41] The broader argument advanced on behalf of the applicants in terms of section 17(1)(a)(ii) of the Act, in that there is some other compelling reason why the appeal should be heard, is that (i) the matter is of public importance; (ii) is of importance to the applicants; and (iii) there are now conflicting judgments on the matter under consideration, is without merit.

[42] This matter is no different to, and of no greater importance than, any other "spillage" case or any other case involving the legal principles pertaining to the liability (or lack thereof) of an employee for an independent contractor. The findings in such cases are inextricably linked to the peculiar facts of each matter.

[43] It is not so that there are conflicting judgments on the matter under consideration, this court having followed the findings of the Supreme Court

of Appeal, and the applicants having failed to establish any basis for challenging such findings. In this regard, I note that the proposed appeal is to the Full Bench of the Provincial Division, which in any event is bound by the Supreme Court of Appeal.

[44] Accordingly, I am of the view that there exists no reasonable prospect of success in the contemplated appeal. I am further of the view that there exists no compelling reason why such appeal should be heard.

[45] In the result, the following order shall issue:

1. The applicants' application for leave to appeal is dismissed with costs.

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I BANDS

ACTING JUDGE OF THE HIGH COURT

Appearances:

For the Applicants	Adv Dala
Instructed by:	State Attorney, 29 Western Road, Central
For the Respondent	Adv Niekerk
Instructed by:	Boqwana Burns Inc. 84 – 6th Avenue, Newton Park