THE HIGH COURT OF SOUTH AFRICA
FREE STATE PROVINCIAL DIVISION

Reportable: yes/no
Circulate to other Judges: yes/no
Circulate to Magistrates: yes/no

Case Number 1137/2019

MANGAUNG METROPOLITAN MUNICIPALITY Applicant

and

JOHANNES BENJAMIN BUYS Respondent

In Re

MANGAUNG METROPOLITAN MUNICIPALITY Applicant

and

JOHANNES BENJAMIN BUYS Respondent

CORAM: BERRY, AJ

HEARD ON: 09 MAY 2023

DELIVERED ON: 16 OCTOBER 2023

JUDGEMENT BY: BERRY, AJ

JUDGMENT – APPLICATION FOR LEAVE TO APPEAL

INTRODUCTION

[1] This is an Application for leave to appeal against a judgment handed down on 03 March 2023.

[2] Quantum and merits were separated at trial.

[3] The Respondent bumped into a partially constructed speed hump on 12 July 2016 at about 06:05.

[4] I found the Applicant liable for seventy percent of the damages to be proven and ordered that the Applicant pay the costs to the date of trial.

GROUNDS FOR LEAVE TO APPEAL

[5] The Applicant applies for leave to appeal against the whole of the judgment, including the finding on apportionment and the cost order.

[6] The Applicant elected to follow the literal gunshot approach and is effectively seeking a retrial in that the Applicant rehashes every single piece of evidence in its Application for leave to appeal.

[7] The grounds for the Application for leave to appeal are listed below. I repeat all the grounds as I cannot summarise them in a manner that will give justice to all the grounds.

[8] The Court erred in one or more of the following respects:

"8.1 By finding that the Applicant is liable for 70% of the Respondent's damages and that the Applicant is to pay the Respondent's costs of trial to date.

8.2 By not taking into account that Mr Venter who testified on behalf of the Applicant, did not testify as an expert witness.

8.3 By not properly considering the Respondent's case as pleaded in paragraph 5 of the Particulars of Claim.

8.4 By not limiting the Court's questions to Mr Venter to clearing up aspects that emanated from evidence in chief and cross-examination but having effectively cross-examined Mr Venter.

8.5 By having elicited an opinion from Mr Venter whether he considered milling of the road surface (“milling”) as part of the construction process of a speed hump.

8.6 By having elicited an opinion from Mr Venter whether he considered milling as being dangerous to road users.

8.7 By having elicited an opinion from Mr Venter about the height of the gravel and bricks as depicted on photo 25.

8.8 By having made a negative credibility finding against Mr Venter because he provided his opinions to Court as requested to the effect:

(a) That he did not consider milling as part of the construction process of a speed hump.
(b) That he did not consider a milled portion of the road surface as creating any danger.
(c) That he considered the height of the sand and bricks as depicted on photo 25 as allegedly 100 mm.

8.9 By not taking into account that no other opinion/s existed except that of Mr Venter.

8.10 The Court assumed the role of an expert, alternatively expressed expert opinion by disagreeing with Mr Venter in respect of his opinions expressed, upon request of the Court.

8.11 By having found that Mr Venter was evasive and not willing to make a concession.

8.12 By having found that Mr Venter was not a credible witness because he was allegedly unwilling to make a concession that milling is part of a construction in an effort to get away from his testimony.

8.13 By having found that there were serious questions about Mr Venter's impartiality whilst the Court, after having questioned Mr Venter about his relationship with the Applicant, indicated that the aspect need not be canvassed further as the Court would not keep it against the Applicant.

8.14 By having found that the Respondent and his wife, Mrs Buys, were allegedly credible witnesses notwithstanding that:

8.14.1 The Respondent's pleaded case, as set out in the Particulars of Claim and supplemented by his application for condonation, was extremely vague, ultimately only resulting in the Respondent alleging that he had drove into “something” on 12 July 2016.

8.14.2 During evidence in chief the Respondent’s version suddenly changed that he allegedly drove into bricks on top of a sand layer, i.e. a partially completed speed hump.

8.14.3 They insisted that there were no road signs, i.e. permanent road signs or temporary road signs at the scene of the alleged incident the morning of 12 July 2016 whilst the photographs which served as undisputed and accepted evidence before Court (Exhibit A) confirmed the presence of permanent road signs as well as temporary road signs at the scene on 12 July 2016.

8.14.4 The Respondent insisted that he drove in the right lane of Louw Wepener Street over speed bump number 3 which was completed and painted white.

8.14.5 Mrs Buys testified that she drove in the left lane of Louw Wepener Street over speed bump number 3 which was completed.

8.14.6 Photograph nr 25 (12 July 2016 at 10:27) clearly depict that speed bump number 3 (right lane) was not painted and the speed bump number 3 (left lane) had not been erected at the time.

8.14.7 The Court’s concern that the Respondent and his wife's testimony in this regard did not accord with the evidence contained in photograph nr 25.

8.15 By, notwithstanding having found that the Respondent and his wife could not have made the observations at speed bump number 3, justified the Respondent and Mrs Buys' evidence by attributing it to the lapse of approximately seven years and that they allegedly made bona fide mistakes notwithstanding their insistence during cross-examination that they are well experienced in construction sites and speed bumps and that they know what they encountered when they drove over speed bump number 3.

8.16 By not having found that the Respondent as supported by his wife, Mrs Buys were extremely evasive and obstructive witnesses by at least:

8.16.1 Not having conceded the presence of warning and other road signs at the alleged scene in Louw Wepener Street, Bloemfontein.

8.16.2 The Respondent's evidence that one can see about 300 - 400 meters with his vehicle's lights on the “bright setting” and then when confronted about his field of view on the way to the alleged scene of accident, testified he could only see 30 meters.

8.17 By having placed reliance on the evidence relating to Mr Luus whilst he was not called as a witness and justifying same that Mr Luus was allegedly residing in New Zealand. No evidence was tendered why an affidavit of Mr Luus could not be obtained in terms of the provisions of Rule 38 or why his evidence could not be adduced by way of electronic means.

8.18 By not having rejected the evidence of the Respondent and his wife.

8.19 By not having found that Mrs Buys' evidence as to how the Respondent entered the hospital, i.e., being carried by Mr Akron, was in contrast of the hospital records which indicated that the Respondent walked into hospital.

8.20 By not making a negative finding against the Respondent for not having adduced the evidence of Mr Akron.

8.21 By not having found that since Mr Venter visited the scene on 12 July 2016, took photographs at 10:26, 10:27 and 10:28 and then drove back to work using Louw Wepener Street eastbound, encountering no construction opposite house nr. 38 in Louw Wepener Street, eastbound, that no incident could have taken place at 06:05 on 12 July 2016 as alleged by the Respondent.

8.22 By not having found that the evidence before the Court amounted to two mutually destructive versions, that the Court could not reject the evidence adduced on behalf of the Applicant as false, that the Respondent bore the onus, that the Respondent did not discharge the onus and that the claim should therefore have been dismissed with costs.

APPORTIONMENT

9.1 Even if it should be found by another Court that the Applicant is liable towards the Respondent for payment of damages, the Court seriously erred by making an apportionment of 70% in favour of the Respondent.

9.2 In this regard the Court, with respect, erred by not taking into account or properly taking into account that according to the evidence:

9.2.1 The area was well lit.

9.2.2 The Respondent's vision was not impaired.

9.2.3 The Respondent drove with his lights on bright setting.

9.2.4 There were no other vehicles or people present at the scene.

9.2.5 Warning sign boards were present at the scene as confirmed by the undisputed and accepted photographs.

9.2.6 Chevron plates (danger plates) were present at the time of the incident.

9.2.7 The Respondent drove over speed bump number 3 at a speed of between 50 - 60 km/h.

9.2.8 The Respondent testified that he was surprised by the presence of speed bump number 3.

9.2.9 The Respondent reduced his speed to 30 - 40 km/h after having traversed speed bump number 3.

9.2.10 The Respondent retained his light settings on high beam after having traversed speed bump number 3.

9.2.11 That on high setting the Respondent was able to see approximately 300 - 400 m in front of him.

9.2.12 The Respondent was able to stop in a distance of 5 meters.

9.2.13 Speed bump number 3 and 4 are only 142 meters apart.

9.2.14 The alleged paving bricks that he drove over was grey in colour and was raised from the road surface making it easy to observe.

9.2.15 The grey paving bricks would have been visible in his vehicle's bright lights.

9.3 The Court should have found that the Respondent grossly failed to keep a proper lookout and is solely to blame for the occurrence of the incident.

9.4 Taking the above into account, another Court will probably find that at best an apportionment in favour of the Respondent should not be more than 20%.

COSTS

10.1 In the first instance it is submitted that the Honourable Court erred in granting the Respondent's claim with costs.

10.2 In the event of it being found that the Applicant is indeed liable, and that an apportionment in the vicinity of 20% should rather have been awarded to the Respondent, then the Respondent cannot be considered as having been substantially successful and costs should then not be awarded in favour of the Respondent."

ANALYSIS

[11] The main thrust of the Application for leave to appeal seems to be that the Court *a quo* erred in accepting the evidence of the Respondent and his wife, regardless of the shortcomings of their testimony, and finding that the sole witness for the Applicant (Mr Venter), was not a credible witness.

[12] The testimony of Mr Venter was not presented as expert evidence and the Court did not treat his testimony as such.

[13] Mr Venter testified that he conducts an independent civil engineering consultancy business.

[14] He is a qualified consulting engineer, and his firm was appointed to manage the project on behalf of the Applicant.

[15] He provided the service as project manager for this project.

[16] Mr Venter testified that he was responsible for the overall management of the project and was responsible for all aspects on site, including safety.

[17] Mr Venter represented the Applicant on site and took the photos for the purpose of making progress reports to the Applicant.

[18] A Court is not bound by the evidence of an expert and must apply its own mind to the evidence presented. More so when a person is called as a witness who was involved in the matter serving before Court.

[19] Mr Venter was not called as an expert witness, but as a witness to the photos he took, and in his capacity as project manager, that oversaw the construction of the four speed humps.

[20] Mr Venter testified that he only took photos of the work that was being done on a specific day. The conclusion must then be that he did not take photos of the place where speed hump four was being constructed on 12 July 2016.

[21] Photo twenty-seven show that construction of speed hump number three in the right lane is complete and that construction in the left lane is almost complete at 10:27 on 12 July 2016.

[22] Photo twenty-nine show that construction of speed hump number four in the right lane is complete and the construction in the left lane is almost complete at 12:09 on 13 July 2016.

[23] Photo thirty-seven show construction of speedhump number four is completed at 12:13 on 13 July 2016.

[24] Mr Venter testified that he only took photos of the work being done on the day, thus he would have taken photos if any work was being done on speedhump number four on 12 July 2016.

[25] Mr Venter’s persistence that milling of the tar road surface forms part of the construction process, begs questioning.

[26] So does his persistence that removing the tar surface creates a safety risk.

[27] One does not need an expert opinion to realise that removing the tar surface on a tar road, constitutes a road hazard.

[28] Mr Venter testified that one speed hump would be completed before work on the next speed hump would start to manage traffic control and traffic flow.

[29] Photo twenty-one shows that the milling for speed hump three (eastern direction) is almost complete on both sides of the speed hump at 10:48 on 11 July 2016.

[30] Photo twenty-one, with photo nineteen, shows that construction on speed hump two (western direction) was still ongoing, when milling of the tarmac of speed hump three started on 11 July 2016.

[31] This is in contrast with Mr Venter's testimony that a speed hump would be completed before work on the next one started.

[32] When Mr. Venter was asked about the contradiction in his testimony, he responded that he did not consider milling as part of the construction process.

[33] Mr. Venter also testified that a speed hump would normally be completed in a day.

[34] Photos twenty-one and twenty-three contradict Mr Venter's testimony, in that it shows that construction of speed hump number three started on 11 July 2016 and was only completed on 12 July 2016.

[35] Mr. Venter testified that the paving bricks used at this site was 80mm high.

[36] He further testified that the height of the speed hump is 100mm.

[37] Mr. Venter was asked about the obvious contradiction in his testimony that the speed hump is 100mm high and asked about the two bricks of 80mm high each, lying on top of each other in front of the uncompleted speed hump, which was higher than the two bricks on photo twenty-five.

[38] Mr Venter persisted with his testimony that the height of the gravel was 100mm.

[39] Mr Venter was not called as an expert witness, but as the project manager, who happens to be a civil engineer, whose civil engineering consultancy rendered independent project management services to the Applicant.

[40] There is no reason why the Court *a quo* should not have accepted his testimony that the paving bricks are 80mm high.

[41] Photo twenty-five show two bricks laying on top of each other and the two bricks are lower than the compacted gravel, thus the speed hump cannot be 100mm high.

[42] Mr Venter also testified that the speed hump is normally as high as the pavement next to the road, which is certainly not 100mm high.

[43] Expert evidence as to the height of two 80mm bricks on top of one another, is not needed.

[44] These are the reasons the Court *a quo* did not accept Mr Venter's testimony as credible.

[45] I did not accept Mr Venter's testimony that construction on speed hump number four only started on 13 July 2016 and further that there was no hazard created by a partially constructed speed hump on the morning of 12 July 2016.

[46] The finding that Mr Venter could not be regarded as an independent witness is in line with the fact that his evidence was not presented as that of an expert, but as an independent contractor that rendered services to the Applicant.

[47] I questioned Mr Venter's impartiality due to the credibility finding I made.

[48] The Respondent and his wife, with special reference to the completion of speed hump three and the construction warning signs, were not satisfactory either.

[49] Their insistence that speed hump three was completed at 06:00 on the morning of 12 July 2016 raised serious concerns.

[50] So did their persistent denial of having seen any warning signs, whilst both witnesses testified to their knowledge of road construction, as they both work in the industry.

[51] Mrs Buys testified that she was a trained health and safety officer and has skilled knowledge about the safety requirements on a road construction site.

[52] As quoted in **Milfi v Klingenberg** Case Number 2/97 Unreported [1998] ZALCC 7 par 79-81 from the 1984 Olive Schreiner Memorial Lecture delivered by Judge HC Nicholas[1].

> "A witness is proved to be in error where his statements are contradicted by the proven facts or where he is guilty of self-contradiction. Where he has made contradictory statements, since both cannot be correct, in one at least he must have spoken erroneously. Yet error does not in itself establish a lie. It merely shows that in common with the rest of mankind the witness is liable to make mistakes. A lie requires proof of conscious falsehood, proof that the witness has deliberately misstated something contrary to his own knowledge or belief."

[1] "Credibility of Witnesses" Olive Schreiner Memorial Lecture, 24 August 1984, 33 published in 102 SA Law Journal (1985) 32.

[53] I repeated the evidence of the Plaintiff and the two witnesses, as the main thrust of the Application for leave to appeal is the Court's finding that Mr Venter was not a credible witness, and the Court's own observation about the height of the speed hump, the height of two bricks lying on top of one another, and the danger a milled road pose.

[54] Mr Venter's persistence to deny the obvious, raised serious doubt about the trustworthiness of his testimony that construction on speed hump four did not start before the morning of 12 July 2016.

[55] The mutually destructive testimony between the two parties were whether speed hump number four was partially constructed on 12 November 2016 or not.

[56] Whilst the testimony of the Plaintiff and his wife was not satisfactory in all aspects, the denial of the obvious by Mr Venter, outweighed the unsatisfactory aspects of the Plaintiff and his wife's testimony.

[57] Thus, the Court *a quo* had to decide whose version is more probable.

[58] Sec 17(1) of the Superior Court's Act 10 of 2013 provides that leave to appeal may only be granted if the judge concerned is 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 the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.

[59] In **Matoto v Free State Gambling and Liquor Authority and Others**[2] the Court held:

[2] (4629/2015) [2017] ZAFSHC 80 (8 June 2017).

> "There can be no doubt that the bar for granting leave to appeal has been raised. Previously, the test was whether there was a reasonable prospect that another court might come to a different conclusion. Now, the use of the word 'would' indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against."

[60] In **S v Smith**[3] the Court dealt with the question of what constitutes reasonable prospects of success 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. 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."

[61] In **MEC for Health, Eastern Cape v Mkhitha and Another**[4] the Court held:

> "[16] Once again it is necessary to say that leave to appeal, especially to this court, must not be granted unless there truly is a reasonable prospect of success. Section 17(1)(a) of the Superior Court Act 10 of 2013 makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success; or there is some other compelling reason why it should be heard.
>
> An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be sound, rational basis to conclude that there is a reasonable prospect of success on appeal."

[62] The grounds for the Application for leave to appeal, entail a revisit to the contended issues in the main action.

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[3] 2012 (1) SACR 567 (SCA) par [7].

[4] (1221/2015) [2015] ZASCA 176 (25 November 2016).

[63] An Applicant may revisit the issues at trial in an Application for leave to appeal, provided that the Court is satisfied that there is a reasonable prospect that the factual matrix would receive a different interpretation by another Court.

[64] The bar has been raised for granting leave to appeal.

[65] In my opinion another Court would not interpret the factual matrix and the credibility findings in a different manner.

[66] **ORDER**

The following order is made:

1. The Application for leave to appeal is dismissed with costs.

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AP BERRY, AJ

APPEARANCES:

For the Applicant:	**Adv. H Cilliers**
Instructed by:	Phatshoane Henney Inc (Ref: J van den Bergh/SJ/THE110/0226 BLOEMFONTEIN
For the Respondent	**Adv. L Pohl SC**
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