



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NUMBER: 37676/2021

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

DATE

SIGNATURE

In the matter between:

JETHRO DIPHARE

APPLICANT

And

**PAWN
RESPONDENT**

MY

CAR

JUDGMENT-APPLICATION FOR LEAVE TO APPEAL

OOSTHUIZEN-SENEKAL AJ:

- [1] Mr Jethro Diphare (“the applicant”) seeks leave to appeal to the Supreme Court of Appeal alternatively, to the Full Court of this Division against the whole judgment and order delivered by me on 3 March 2023, on the grounds that I erred in fact and in law in dismissing the application.
- [2] The applicant contends that the appeal would have a reasonable prospect of success as contemplated by section 17(1)(a)(i) of the Superior Courts Act 10 of 2013 (“the Superior Courts Act”). The applicant further contends that there are other compelling reasons why the appeal should be heard as contemplated by section 17(1)(a)(ii) of the Act.
- [3] It is trite that an application for leave to appeal a decision from a single Judge of the High Court is regulated by Rule 49 of the Uniform Rules of Court. The substantive law pertaining to application for leave to appeal is dealt with in section 17 of the Superior Courts Act.
- [4] The respondent did not oppose the application for leave to appeal and filed a notice to abide by me decision.
- [5] The applicant’s grounds of appeal are found in his Notice of Application for Leave to Appeal.
- [6] The applicant’s Notice to Appeal is a replication of his heads of arguments filed during the hearing. Within this jumble of grounds for leave to appeal, a terse allegation was made that I was not impartial during the hearing and furthermore that I allowed social and private acquaintances to influence my judicial decision.
- [7] The principles governing the question whether leave to appeal should be granted are well established in our law. Such principles have their origin in the common law and they entail a determination as to whether reasonable prospects of success exist that another court, considering the same facts and the law, may arrive to a different conclusion to that of the court whose judgment is being impugned.

- [8] The common law test has now been codified in the Superior Court Act. In terms of Section 17(1)(a)(i) and (ii) of this Act, leave to appeal may only be granted where the judge is of the opinion that the appeal *would* have a reasonable prospect of success, or when there are compelling reasons that the appeal should be heard, including conflicting judgments on the matter under consideration. The use of the word *would* raise the bar of the test that now has to be applied to the merits of the appeal, before leave can be granted.¹
- [9] An applicant faces a higher and more stringent threshold in terms of Section 17 (1) than what used to be the test in terms of the previous Supreme Court Act 59 of 1959, which is repealed. The test of reasonable prospects of success postulates a dispassionate decision, based on the facts and the law that a court of appeal ‘*would*’ reasonably arrive at a conclusion different to that of the trial court. The prospects of success must not be remote, but there must exist a reasonable chance of succeeding on appeal. An applicant who applies for leave to appeal, must show that there is a sound rational basis for the conclusion that there are reasonable prospects of success on appeal.
- [10] I have in my written judgment, dealt comprehensively with the *rationale* underlining the decision arrived at. The issues raised in the grounds of appeal, (in the application for leave to appeal), were extensively dealt with in my judgment and same need not be rehashed herein, save to state that the *ratio decidendi* can be regarded as being incorporated herein, to reach the conclusion.
- [11] The applicant’s approach to this application for leave to appeal was similar to his approach adopted in the original application argued before me. In the application for leave to appeal, it is stated that I was biased and that my “social acquaintances” influenced my decision in the matter. These are serious allegations and if true have the potential to be disastrous consequences to impartiality of the judiciary. During the hearing of the application for leave to appeal I requested the applicant to address me on this ground of appeal.

¹ *Ramakatsa and Others v African National Congress* (unreported SCA Case No. 724/2019) dated 31 March 2021 at par [10].

[12] It was evident that no bases for the averments in this regard were forthcoming from the applicant. I find it irresponsible for a party to make such a statement where there is no factual foundation for doing so.

[13] I need to mention that prior to the hearing, both the applicant and counsel appearing for the respondent, Mr Krause, were present when introductions were made. I in the presence of the applicant and the registrar enquired as to whether Mr Krause was acquainted with a prosecutor, Ms Riki Krause stationed at Klerksdorp Magistrate Court, where I originated from. Mr Krause responded that he does not know her or he had no relation to Ms Krause. Nothing untoward transpired during the introductions. Interaction with parties in this regard prior to the hearing of a matter is not improper. However, it is sad that during this interaction the applicant made the wrong assumptions. I am not acquainted with Mr Krause and I had no reason to find in favour of the respondent, despite what the applicant may believe.

[14] Courts has time and time again warned against litigants making unfounded allegations of bias on part of presiding officers tasked to decided disputes without cogent proof to substantiate the allegation.² The allegation of bias, especially on part of a Judge, must be substantiated by proper factual basis, and must not be based on mere speculation and conjecture.³

[15] Overall considered, the criticism by the applicant of this Court, as well as the allegations of bias, are without any shred of foundation, and falls far short of establishing bias and my disqualification in hearing the matter. I simply decided the matter on the merits thereof, as gathered from the pleadings as it stood before me.

[16] This Court has carefully considered each of the grounds of appeal and concluded that on both requirements as enunciated in Section 17 (1) (a) (i) and (ii), the application for leave to appeal should fail. There are no reasonable prospects of success on appeal that

² *Sappi Kraft (Pty) Ltd t/a Tugela Mill v Majake NO and Others* (1998) 19 ILJ 1240 (LC) at para [48]; *SMCWU v Party Design CC* [2001] 6 BLLR 667 (LC) at para [12].

³ *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* (2000) 21 ILJ 1583 (CC) at para [12]; *S v Basson* 2007 (3) SA 582 (CC) at para [31].

another court would come to a different conclusion than what this Court had arrived at. Therefore, the applicant has failed to meet the required standard for leave to appeal to be granted to either the Full Court of this Division or the Supreme Court of Appeal.

[17] The applicant's attention is drawn to Section 17(2)(b) of the Superior Courts Act, which provides the following;

“(b) If leave to appeal in terms of paragraph (a) is refused, it may be granted by the supreme Court of Appeal on application filed with the registrar of that court within a month after such refusal, of such longer period as may on good cause be allowed, and the Supreme Court of Appeal may vary any order as to costs made by the judge or judges concerned in refusing leave.”

[18] Accordingly, I make the following order:

1. Leave to appeal to either the Supreme Court of Appeal (SCA) or to the Full Bench of this Division is refused.
2. No order as to cost.

**CSP OOSTHUIZEN-SENEKAL
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG**

This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *Case Lines* and by release to SAFLII. The date and time for hand-down is deemed to be 16h00 on 26 May 2023.

DATE OF HEARING: 12 May 2023

DATE JUDGMENT DELIVERED: 2 June 2023

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