

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 11188/15

1. REPORTABLE: NO
 2. OF INTEREST TO OTHER JUDGES: NO
 3. REVISED: NO
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In the matter between:

MOODLIYAR & BEDHESI ATTORNEYS

PLAINTIFF

and

YASINE MADATT

FIRST DEFENDANT

BERNADETTE AUBREY MADATT

SECOND DEFENDANT

APPLICATION FOR LEAVE TO APPEAL

JUDGMENT

Olivier, AJ:

1. For convenience, I shall refer to the parties as they were denoted in the main judgment. The plaintiff, a firm of attorneys, applies for leave to appeal to the Supreme Court of Appeal, alternatively, the Full Bench of this Court, against part of the judgment and order handed down by me on 2 August 2022. The defendants, former clients of the plaintiff, oppose the application for leave to appeal. The parties are embroiled in a long-standing contractual dispute about the payment of legal fees.
2. The judgment appealed against emanates from two special pleas of prescription raised by the defendants. I dismissed the first special plea – the effect was that the plaintiff’s claim against the defendants in their personal capacity would proceed. I upheld the second special plea, resulting in the dismissal of the plaintiff’s claim against the defendants in their representative capacity as the guardians of their minor daughter, A.
3. The plaintiff submits that the Court erred in upholding the second special plea and dismissing the claim against the defendants in their representative capacity. They appeal against that part of the judgment and order.

The test for a successful leave to appeal application

4. The test was formerly whether there was a reasonable prospect that another court ‘might’ come to a different conclusion to that of the court of first instance.

Section 17(1) (a) of the Superior Courts Act 10 of 2013 now 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' (s 17(1)(a)(i)), or that there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration (s 17(1)(a)(ii)).

5. In what has become an oft-referenced judgment in applications for leave to appeal, the Land Claims Court in *Mont Chevaux Trust* held *obiter* that the wording of this subsection raised the bar of the test that now has to be applied to the merits of the proposed appeal before leave should be granted.¹ The Supreme Court of Appeal in *Notshokovu* confirmed this view:²

It is clear that the threshold for granting leave to appeal against the 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. 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. (Footnotes omitted.)

6. The Supreme Court of Appeal has explained that the prospects of success must not be remote, but there must exist a reasonable chance of succeeding. An applicant who applies for leave to appeal must show that there is a sound and rational basis for the conclusion that there are prospects of success.³ An applicant must convince the 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 than a mere possibility of success, or that the case is arguable on appeal, or that the case cannot be categorised as hopeless.⁴ (my emphasis)

¹*The Mont Chevaux Trust v Tina Goosen* 2014 JDR 2325 (LCC).

²*Notshokovu v S* [2016] ZASCA 112 (7 September 2016).

³*Ramakatsa and Others v African National Congress and Another* (724/2019) [2021] ZASCA 31 (31 March 2021).

⁴*S v Smith* 2012 (1) SACR 567 (SCA).

7. In *Kruger v S* the Supreme Court of Appeal emphasised the need for a lower court to act as a filter in ensuring that the appeal court's time is spent only on hearing appeals that are truly deserving of its attention and that the test for the grant of leave to appeal should thus be scrupulously followed.

Submissions

8. Essentially, the plaintiff seeks leave on the grounds that this Court erred in finding that the claim against the defendants in their representative capacity as parents and guardians of their minor child had prescribed. The Court should have found instead that the true debtors were the defendants, whether sued in their personal or representative capacities, for purposes of interrupting prescription in terms of s 15(1) of the Prescription Act 68 of 1969. Furthermore, the Court ought to have found that the running of prescription had been interrupted when the original combined summons was served on the respondents, which fell within the prescriptive period of 3 years from the date on which the cause of action arose.
9. In her heads of argument, plaintiff's counsel Ms Lapan introduced a further ground which was not listed in the notice of leave to appeal. Miss Docrat, counsel for the defendants, strenuously objected on the basis that it was improper to raise a new ground in argument. She submitted that the plaintiff should stand or fall by what is contained in the notice.
10. On the day that the application was due to be heard, defendants' counsel argued that effectively she had been taken by surprise and could not address argument on this supplementary point raised by the plaintiff. I stood the matter down until the following day to allow defendants' counsel to file supplementary heads of argument, which she did. I do not consider there to have been any

prejudice to the defendants, as their counsel was afforded sufficient time to respond to this new ground and argument.

11. Defendants' counsel objected to several other aspects of the notice, but I do not consider them to be of sufficient merit to decline to hear the leave application, or to dismiss it out of hand.

12. Some background is required. The plaintiff had instituted action against the defendants for payment of legal fees and disbursements. The plaintiff was mandated by the defendants to prosecute a medical negligence claim against the Gauteng Provincial Government. Their daughter had suffered life-altering injuries during her birth at a state hospital. The mandate was terminated by the defendants, but no payment was forthcoming from them. Action proceedings were launched by the plaintiff. The original particulars of claim did not specify that the claim was against the parents in their personal and representative capacities, resulting in an application for amendment of the particulars of claim, which was granted by Cele AJ.⁵ The effect of the amendment was to insert a new paragraph that refers to the defendants in their personal and representative capacities; previously it made no reference to the defendants in their representative capacity.

13. The particulars of claim were amended more than 3 years after service of the original summons on the defendants. In my judgment I found that the amendment had introduced a new defendant, namely the defendants' minor daughter, and that the claim against the defendants in their representative capacity had prescribed.

14. The plaintiff argued that the amendment was irrelevant in determining whether the claim had prescribed, as the cause of action remained the same as set out in the original summons, which was served on the defendants within the

⁵ *Moodliyar & Badhesi Attorneys v Madatt and another* Unreported, Case no 11188/2015 (7 June 2018).

prescriptive period of 3 years. Therefore, I ought to have found that the amended particulars of claim merely corrected the description of the defendants. Plaintiff's counsel relied on *Blaauwberg* in support of this argument,⁶ in which the Supreme Court of Appeal considered s 15(1) of the Prescription Act, in particular whether prescription is interrupted by service of a summons in which the debtor is wrongly described but which is rectified after the prescriptive period. In my judgment I found that *Blaauwberg* was distinguishable from the present case, as that case dealt with a debtor who had been incorrectly named. In the present case, a new debtor was introduced when the amendment to the Particulars of Claim was made. The defendants, in their representative capacity, were added only when the amendment was effected.

15. I was also referred to *Imperial Bank Ltd*, where the Court was called upon to consider whether or not prescription was interrupted by service of the original summons in light of a late amendment.⁷ The Court stated that the substance rather than the form of the previous process must be considered in determining whether or not it interrupted prescription.⁸ However, the case is not on point as it deals with whether the creditor was properly described as the liquidators of a company.

16. Cele AJ found pertinently in paragraph 19 of his judgment, as did I, that the amendment sought to introduce a new party to the proceedings. A claim against a minor, in whatever way she is represented, is clearly distinct from a claim against her guardians in their personal capacity. The fact that summons in a claim against the minor would be served on her guardians does not merge her claim into that of her guardians.

⁶ *Blaauwberg Meat Wholesalers CC v Anglo Dutch Meats (Exports) Ltd* 2004 (3) SA 160 (SCA).

⁷ *Imperial Bank Ltd v Barnard and Others NNO* 2013 (5) SA 612 (SCA).

⁸ At para 9.

17. Even though the original particulars of claim described each of the first and second defendants without indicating the capacities in which they were being referred to, the plaintiff submitted that the defendants are the true debtors, as they had received notice of the action by way of service of the original summons. They were properly notified of the action and could recognize the claim that was being brought against them.
18. The plaintiff submitted that the effect of my judgment was that the defendants would have needed to be served again following the amendment, which the plaintiff argued was unnecessary as the defendants knew who the plaintiff was and that the claim related to their liability to the plaintiff in terms of the mandate concluded by them. The plaintiff now argues that the summons was not amended, only the particulars of claim, which means that it would be unnecessary to serve it on the defendants again.
19. The plaintiff submitted that Cele AJ held that the same debt was claimed in the original summons and particulars of claim as the one introduced by the proposed amendment, and that the claim had not prescribed. The plaintiff argued that I came to the opposite conclusion without finding that Cele AJ's finding was clearly wrong. I effectively overruled the finding of Cele AJ, which was wrong in law because I was bound by it in terms of the doctrine of judicial precedent.
20. Cele AJ found that there was one cause of action from which a debt or debts could arise. The plaintiff submits that I should have found the same.
21. The defendants' argument was that I was not required to make a positive finding of who the 'true' debtor was; they supported the findings that the amendment introduced a new party, and that the claim had prescribed. Miss Docrat argued that the amendment introduced a new claim against the minor, which is different from the claim against the defendants in their personal

capacity. It was also submitted that I was not bound by the findings of Cele AJ.

22. The plaintiff submits that there are reasonable prospects of success. During argument it emerged that the plaintiff relies also on s 17(1)(a)(ii), submitting that there are conflicting decisions which require consideration by a higher court. The latter relates to the judicial precedent argument, it would appear.

23. I have considered the submissions and arguments of the plaintiff's counsel and am of the view that they are not sufficiently persuasive to merit my granting leave to appeal. Much of the argument presented in this application is the same as those made by the plaintiff's counsel at the hearing of the special pleas. The only significant new argument is that of judicial precedent and I do not consider it sufficiently meritorious to justify granting leave on that ground. In my view Cele AJ was not required to pronounce on prescription and he certainly did not have the benefit of comprehensive argument on the point. He was concerned with whether or not he should grant an amendment to the particulars of claim.

24. The plaintiff's case is no different from that of many other cases that are not hopeless and might be arguable on appeal. However, this is not the test. 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. I do not consider such certainty to be present in this case. Furthermore, there are no other compelling reasons, including conflicting judgments, to grant leave to appeal.

25. There is no justification for costs to be awarded on a punitive scale as argued by the defendants.

In the circumstances, the following order is made:

The application for leave to appeal is dismissed with costs. .

M Olivier

Acting Judge of the High Court, Gauteng Division, Johannesburg

Date of hearing: 26 January 2023

Date of judgment: 6 February 2023

Appearances:

On behalf of the Plaintiff: Ms A.J. Lapan

Instructed by: Moodliyar & Bedhesi Attorneys

On behalf of the Defendants: Miss F.F. Docrat

Instructed by: Ivan Maitin Attorneys