

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1)	NOT REPORTABLE
(2)	NOT OF INTEREST TO OTHER JUDGES

CASE NO: 2023/021837

DATE: 29TH FEBRUARY 2024

In the matter between:

MANAKA, KOKETSO MONOBE

Applicant

and

THE UNIVERSITY OF THE WITWATERSRAND

Respondent

Neutral Citation: *Manaka v The University of the Witwatersrand*
(2023/021837) [2024] ZAGPJHC --- (29 February 2024)

Coram: Adams J

Heard: 29 February 2024 – ‘virtually’ as a videoconference on *Microsoft Teams*

Delivered: 29 February 2024 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 12:00 on 29 February 2024.

Summary: Application for leave to appeal – s 17(1)(a)(i) of the Superior Courts Act 10 of 2013 – an applicant now faces a higher and a more stringent threshold – leave to appeal granted.

ORDER

- (1) The applicant's application for leave to appeal succeeds.
 - (2) The applicant is granted leave to appeal to the Full Court of this Division.
 - (3) The cost of this application for leave to appeal shall be costs in the appeal.
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JUDGMENT [APPLICATION FOR LEAVE TO APPEAL]

Adams J:

[1]. I shall refer to the parties as referred to in the original urgent application by the applicant for interim interdictory relief against the respondent in relation to his exclusion from the MBBCh III course of study during the 2023 academic year. The applicant is the applicant in this application for leave to appeal and the respondent herein was also the respondent in the urgent application. The applicant applies for leave to appeal against the costs order of the judgment and the order, which I granted on 22 March 2023, in terms of which I had struck the applicant's application from the roll for lack of urgency, with costs.

[2]. The application for leave to appeal is against the costs order I granted against the applicant, and it is based on the contention that I had misdirected myself in that I ordered the applicant to pay the costs of the application when such costs were not asked for by the respondent or when the prayer for costs or any order of costs had been expressly abandoned by the respondent. The court *a quo* also misdirected itself in that it ought to have applied the *Biowatch* principle as the applicant was vindicating his constitutional rights in sections 29(1) and 33(1) of the Constitution.

[3]. It was also argued on behalf of the applicant that in awarding costs against him, I did not exercise my discretion judiciously.

[4]. The traditional test in deciding whether leave to appeal should be granted was whether there is a reasonable prospect that another court may come to a different conclusion to that reached by me in my judgment. This approach has now been codified in s 17(1)(a)(i) of the Superior Courts Act 10 of 2013, which came into operation on the 23rd of August 2013, and which provides that leave to appeal may only be given where the judges concerned are of the opinion that 'the appeal would have a reasonable prospect of success'.

[5]. In *Ramakatsa and Others v African National Congress and Another*¹, the SCA held that the test of reasonable prospects of success postulates 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. These 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.

[6]. The ratio in *Ramakatsa* simply followed *S v Smith* 2012 (1) SACR 567 (SCA), [2011] ZASCA 15, in which Plasket AJA (Cloete JA and Maya JA concurring), held as follows at para 7:

'What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that the 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 *Ramakatsa and Others v African National Congress and Another* (724/2019) [2021] ZASCA 31 (31 March 2021);

[7]. In *Mont Chevaux Trust v Tina Goosen*², the Land Claims Court held (in an *obiter dictum*) 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. I agree with that view, which has also now been endorsed by the SCA in an unreported judgment in *Notshokovu v S*³. In that matter the SCA remarked that an appellant now faces a higher and a more stringent threshold, in terms of the Superior Court Act 10 of 2013 compared to that under the provisions of the repealed Supreme Court Act 59 of 1959. The applicable legal principle as enunciated in *Mont Chevaux* has also now been endorsed by the Full Court of the Gauteng Division of the High Court in Pretoria in *Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others*⁴.

[8]. I am persuaded that the issues raised by the applicant in his application for leave to appeal are issues in respect of which another court is likely to reach conclusions different to those reached by me. If regard is had to the documentary evidence in the matter, there appears to be merit in the applicant's claim that the respondent was not asking for costs against the applicant. For this reason alone, I am of the view that there are reasonable prospects of another court making factual findings and coming to legal conclusions at variance with my factual findings and legal conclusions in relation to costs. The appeal, therefore, in my view, does have a reasonable prospect of success.

[9]. Leave to appeal should therefore be granted.

Order

[10]. In the circumstances, the following order is made:

- (1) The applicant's application for leave to appeal succeeds.
- (2) The applicant is granted leave to appeal to the Full Court of this Division.

² *Mont Chevaux Trust v Tina Goosen*, LCC 14R/2014 (unreported).

³ *Notshokovu v S*, case no: 157/2015 [2016] ZASCA 112 (7 September 2016).

⁴ *Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others* (19577/09) [2016] ZAGPPHC 489 (24 June 2016).

- (3) The cost of this application for leave to appeal shall be costs in the appeal.

L R ADAMS

*Judge of the High Court
Gauteng Division, Johannesburg*

HEARD ON: 29th February 2024

JUDGMENT DATE: 29th February 2024 – judgment handed down electronically

FOR THE APPLICANT: Adv William Mokhare SC

INSTRUCTED BY: T M Mahapa Incorporated, Randburg

FOR THE RESPONDENT: Advocate Barry Edwards _

INSTRUCTED BY: MVMT Attorneys,
Rosebank, Johannesburg