



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

Case No: 83856/15

1. Reportable: No

2. Of interest to other judges: No

3. Revised: Yes

(Signature)

(Date)

In the matter between:

VAN ZYL, JACOBUS PETRUS

Applicant

and

STEYN, MARIANNE DESIREE

Respondent

Summary: *Application for leave to appeal against a costs order.*

JUDGMENT

DE VILLIERS, AJ:

Introduction

[1] The respondent sued the applicant for division of a property jointly owned. Division was not in issue. The remaining issue became the amount due upon division. The respondent claimed payment of R550 000.00, and in the end the applicant admitted to an indebtedness, and agreed to pay R310 000.00 during settlement negotiations. I had to determine costs only and ordered that the costs of the action be awarded against the applicant. I have dealt with the reasons for my order in a written judgment. I do not intend to traverse the reasons for my findings, as I have done so in some detail in my original judgment. In short, I made an order that costs should follow the result, I then looked at the fairness of such an order, and concluded that it was fair too. The applicant seeks leave to appeal against my costs order to the full court.

[2] No issue has been taken with my approach to look first at who the successful party was. In the end, the exercise of my discretion on costs, was an exercise to determine what is fair, an enquiry in which substantial success carries significant weight. Substantial success is often described as the general, although not an inflexible rule. It is not easily departed from, as in general, the purpose of a costs award is to indemnify the successful party. On general principles see **Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others** 1996 (2) SA 621 (CC) Para 3 (footnotes omitted):

“The Supreme Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer, and the second that the successful party should, as a general rule, have his or her costs. Even this second principle is subject to the first. The second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs. Without attempting either comprehensiveness or complete analytical accuracy, depriving successful parties of their costs can depend on circumstances such as, for example, the conduct of parties, the conduct of their legal representatives, whether a party achieves technical success only, the nature of the litigants and the nature of the proceedings. I mention these examples to indicate that the principles which have been developed in relation to the award of costs are by their nature sufficiently flexible and adaptable to meet new needs which may arise in regard to constitutional litigation.”

Principles (leave to appeal)

[3] In essence the two parties were in agreement on the test that I had to apply to decide if I had to grant leave to appeal (underlining added here and in the remainder of this judgment):

[3.1] The applicant submitted in its heads of argument-

“12. With the promulgation of the Superior Courts Act, the legislator has introduced a statutory jurisdictional requirement for applications for leave to appeal.

13. Leave to appeal may accordingly only be given, when the appeal would have reasonable prospects of success.¹”

[3.2] The respondent submitted in its heads of argument-

“2.1 The test which was applied previously in applications of this nature was whether there were reasonable prospects that another court may come to a different conclusion.²

2.2 What emerges from section 17(1) is that the threshold to grant a party leave to appeal has been raised. It is now only granted in the circumstances set out and is deduced from the words “only” used in the said section.”

[4] Despite these submissions, I had to address the test to be applied in considering leave to appeal in this judgment, as the respondent’s counsel brought a judgment to my notice. That judgment is by the Supreme Court of Appeal (“*the SCA*”) and it may suggest a change in the current approach. That judgment is **Ramakatsa and Others v African National Congress and Another** [2021] ZASCA 31 (31 March 2021). I revert to it later.

[5] I commence by saying what test is not applicable on the facts of this case. This is not a case where there is some “*other compelling reason*” why an appeal should be heard as contemplated in section 17(1)(a)(ii) of the Superior Courts Act, 10 of 2013 (“*the Act*”). The notice of application for leave to appeal and argument did not suggest otherwise. It is thus a case where the usual test applies, as set out in section 17(1)(a)(i) of the Act:

¹ “3. *E-TV v Minister of Communications* 2015 JDR 2418 JDP, at [11]; *Minister of Justice & Constitutional Development v Southern Africa Litigation Centre* 2015 JDR 2102 (GP).”

² “1. *Commissioner of Inland Revenue v Tuck* 1989 (4) SA 888 (T) at 890”

“17(1) Leave to appeal may only be given where the judge or judges concerned are 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) ...”

- [6] First, as a matter of logic, on the outer ends of the spectrum of prospects of success on appeal, one would have at the one end cases that with certainty must fail on appeal. On the other end of the spectrum, one would have cases that with certainty must succeed on appeal. Closer to the middle-ground between those two extremes, on the one side would be cases that probably would fail on appeal, and on the other side, cases that probably would succeed on appeal. Still closer to the middle-ground, on the one side one would be cases that are arguable (but not to any degree convincingly so), and on the other side cases that are arguable with some prospect of success. Prospects of success would range from poor prospects to good prospects, with realistic prospects somewhere in-between. The wording used in section 17(1)(a)(i) is that leave to appeal may only be given where the judge is of the opinion that the appeal would have a reasonable prospect of success.
- [7] Historically and over time, different acts applied that governed appeals, but the test to grant leave to appeal has been uncontroversial for some time. It was usually formulated as whether there was a reasonable prospect that a higher court may come to a different conclusion. It was by no means a low threshold.
- [8] In **Rex v Baloi** 1949 (1) SA 523 (A) at 524 the SCA held that leave to appeal should not be granted unless the applicant has a reasonable prospect of success on appeal, and that this reasonable prospect of success is not merely a fairly arguable case, or even an arguable case. There must be substance in the argument, it must carry weight, as was held in **Afrikaanse Pers Beperk v Olivier** 1949 (2) SA 890 (O) at 892. Put differently at 894 of the **Afrikaanse Pers Beperk** judgment, reasonable prospects of success

constitute more than a mere possibility of success. A few decades later in **Van Heerden v Cronwright and Others** 1985 (2) SA 342 (T) at 343C-D, the court rejected an approach that leave to appeal should be granted in all but hopeless cases. The court held that reasonable prospects of success had to be shown, as had been the case over many years. This approach was accepted as correct in the SCA in **Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd** 1986 (2) SA 555 (A) at 561E. Even later, in **Smith v S** 2012 (1) SACR 567 (SCA) the court dealt with the test to be applied and the **Ramakatsa** judgment relies on the **Smith** judgment in interpreting section 17(1)(a)(i), subsequently introduced. The **Smith** judgment rejected the argument that leave to appeal should only be refused “*where there is absolutely no chance of success or where the court is certain beyond reasonable doubt that such an appeal will fail*”. It rejected the argument that leave to appeal should be granted “*if there was a possibility of success on appeal*”. It also rejected the argument that on the other hand, leave to appeal should only be granted if there was a balance of probabilities of success on appeal. See Para 4-6 before this summary of the law in Para 7:

“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.³ 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”.

- [9] Against this background, the Act was introduced, and with it, section 17(1)(a)(i). As reflected in the full text quoted earlier, section 17(1)(a)(i) states that “*leave to appeal may only be given where the judge or judges concerned are of the opinion that the appeal would have a reasonable prospect of success*”. Did section 17(1)(a)(i) raise the threshold?

³ “11. **S v Mabena & another** 2007 (1) SACR 482 (SCA) para 22.”

[10] In this division, the legislated test set out in section 17(1)(a)(i), has been held to be a higher test than the test previously applied. See the full court judgment, **Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others** [2016] ZAGPPHC 489 (24 June 2016) Para 25, 29 and 31. See especially Para 25:

*“The Superior Courts Act has raised the bar for granting leave to appeal. In **The Mont Chevaux Trust (IT2012/28) v Tina Goosen & 18 Others**, Bertelsmann J held as follow:*

*“It is clear that the threshold for granting leave to appeal against a 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, see **Van Heerden v Cronwright & Others** 1985 (2) SA 342 (T) at 343H. 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.”*

[11] Our courts did not read “a measure of certainty that another court will differ” as a probability of success. In at least one decision the SCA also held that the bar has been raised. See **Notshokovu v S** [2016] ZASCA 112 (7 September 2016) Para 2-

*“... An appellant, on the other hand, faces a higher and stringent threshold, in terms of the Act compared to the provisions of the repealed Supreme Court Act 59 of 1959. (See **Van Wyk v S, Galela v S** [2014] ZASCA 152; 2015 (1) SACR 584 (SCA) para [14])”;*⁴

[12] Without seeking to produce a comprehensive list of judgments, the SCA in dealing with section 17(1)(a)(i) of the Act, usually steers clear from comparing the test before and after the introduction of section 17(1)(a)(i), and simply addresses the test:

[12.1] **MEC for Health, Eastern Cape v Mkhitha and Another** [2016] ZASCA 176 (25 November 2016) Para 16-18 (footnotes omitted):⁵

“[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 Courts 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

⁴ The **Ramakatsa** judgment does not refer to this case.

⁵ The **Ramakatsa** judgment refers with approval to this judgment.

reasonable prospect of success; or there is some other compelling reason why it should be heard.

[17] 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 a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.

[18] In this case the requirements of 17(1)(a) of the Superior Courts Act were simply not met. The uncontradicted evidence is that the medical staff at BOH were negligent and caused the plaintiff to suffer harm. The special plea was plainly unmeritorious. Leave to appeal should have been refused. In the result, scarce public resources were expended: a hopeless appeal was prosecuted at the expense of the Eastern Cape Department of Health and ultimately, taxpayers; and valuable court time and resources were taken up in the hearing of the appeal. Moreover, the issue for decision did not warrant the costs of two counsel”;

[12.2] Four Wheel Drive Accessory Distributors CC v Rattan NO 2019 (3) SA 451 (SCA) Para 34:

“There is a further principle that the court a quo seems to have overlooked – leave to appeal should be granted only when there is ‘a sound, rational basis for the conclusion that there are prospects of success on appeal’.⁶ In the light of its findings that the plaintiff failed to prove locus standi or the conclusion of the agreement, I do not think that there was a reasonable prospect of an appeal to this court succeeding, or that there was a compelling reason to hear an appeal.⁷ In the result, the parties were put through the inconvenience and expense of an appeal without any merit.”

[12.3] Zuma v Office of the Public Protector and Others [2020] ZASCA 138 (30 October 2020) Para 19-

“Since there is no appeal against the order dismissing the review, the only question is whether the appeal against the costs order has a reasonable prospect of success.⁸ In this regard Mr Zuma faces a formidable hurdle: in granting a costs order, a lower court exercises a true discretion. An appellate court will not interfere with the exercise of that discretion, unless there was a material misdirection by the lower court”;

⁶ “23 **S v Smith** [2011] ZASCA 15; 2012 (1) SACR 567 (SCA) para 7.”

⁷ “24 Section 17 of the Superior Courts Act 10 of 2013 provides in relevant part: ...”

⁸ “[5] In terms of s 17(1) of the Superior Courts Act 10 of 2013, leave to appeal may be granted only where the court is of the opinion that the appeal has a reasonable prospect of success.”

- [12.4] **Fusion Properties 233 CC v Stellenbosch Municipality** [2021] ZASCA 10 (29 January 2021) Para 18-

“Since the coming into operation of the Superior Courts Act, there have been a number of decisions of our courts which dealt with the requirements that an applicant for leave to appeal in terms of ss 17(1)(a)(i) and 17(1)(a)(ii) must satisfy in order for leave to be granted. The applicable principles have over time crystallised and are now well established. Section 17(1) provides, in material part, that leave to appeal may only be granted ‘where the judge or judges concerned are of the opinion that-

‘(a) (i) the appeal would have a reasonable prospect of success; or

(ii) ...’

It is manifest from the text of s 17(1)(a) that an applicant seeking leave to appeal must demonstrate that the envisaged appeal would either have a reasonable prospect of success, or, alternatively, that ‘there is some compelling reason why an appeal should be heard’. Accordingly, if neither of these discrete requirements is met, there would be no basis to grant leave ...”;

- [12.5] **Nwafor v The Minister of Home Affairs and Others** [2021] ZASCA 58 (12 May 2021) Para 25:

“Section 17(1) of the Act sets out the statutory matrix as well as the test governing applications for leave to appeal. The section states in relevant parts, and in peremptory language, that leave to appeal may only be given where the judge or judges concerned are of the opinion that:

‘ (the text of the section is then set out) ...”;

- [12.6] **Chithi and Others; In re: Luhlwini Mchunu Community v Hancock and Others** [2021] ZASCA 123 (23 September 2021) Para 10:

“The threshold for an application for leave to appeal is set out in s 17(1) of the Superior Courts Act, which provides that leave to appeal may only be given if the judge or judges are of the opinion that the appeal would have a reasonable prospect of success. ...”

- [12.7] **Khathide v S** [2022] ZASCA 17 (14 February 2022) Para 4,

“Section 17(1) of the Superior Courts Act 10 of 2013 (the Act) provides that:

‘Leave to appeal may only be given where the judge or judges concerned are of the opinion that–

*(a)(i) the appeal **would** have a reasonable prospect of success; or*

(ii) ...

In considering an application for leave to appeal, a court must be alive to the provisions of s 17(1) of the Act as quoted above.

[13] The **Ramakatsa** judgment Para 10 implicitly held that the bar has not been raised by the introduction of section 17(1)(a)(i). The question is if the **Ramakatsa** judgment lowered the threshold that a court must determine if an appeal would have a reasonable prospect of success:

“[10] Turning the focus to the relevant provisions of the Superior Courts Act⁹ (the SC Act), leave to appeal may only be granted where the judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there are compelling reasons which exist why the appeal should be heard such as the interests of justice.¹⁰... I am mindful of the decisions at high court level debating whether the use of the word ‘would’ as opposed to ‘could’ possibly means that the threshold for granting the appeal has been raised. If a reasonable prospect of success is established, leave to appeal should be granted. ... 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. In other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist.¹¹”

[14] In restating the requirements of the section in the second part of the paragraph, the court:

[14.1] Restated the test of “*would have a reasonable prospect of success*” as meaning “*a court of appeal could reasonably arrive at a conclusion different to that of the trial court*”. I do not read this as different in meaning;

[14.2] Omits twice the word “*reasonable*” in formulating the test as to “*have prospects of success on appeal*” and as “*there are prospects of success*”. However, the word “*reasonable*” appears in other parts of the paragraph, formed part of the traditional test, formed part of

⁹ “5. Section 17(2)(d) Act 10 of 2013.”

¹⁰ “6. **Nova Property Holdings Limited v Cobbett & Others** [2016] ZASCA 63; 2016 (4) SA 317 (SCA) para 8.”

¹¹ “9. See **Smith v S** [2011] ZASCA 15; 2012 (1) SACR 567 (SCA); **MEC Health, Eastern Cape v Mkhitha** [2016] ZASCA 176 para 17.”

the reasoning in both judgments relied upon (**Smith** and **Mkhitha**), and has been emphasised in several SCA judgments. Read in context, I do not read these formulations as intending to remove the assessment of reasonableness from the assessment of the prospects of success;

- [14.3] Restates the test of “*would have a reasonable prospect of success*” as meaning “*a reasonable chance of succeeding*”. In so doing the court did not use the wording in the **Mkhitha** judgment (“*a reasonable prospect or realistic chance of success on appeal*”). The court also did not use the wording in the **Smith** judgment (“*those prospects are not remote but have a realistic chance of succeeding*”). The main difference is the omission of the word “*realistic*” and replacing it with “*reasonable*” in using the word “*chance*”. The word “*prospect*” in itself often seeks to convey an expectation or anticipation of future success. Accordingly, to be “*prospectless*”, is to have no expectation or anticipation of future success. The Act made the meaning of “*prospect*” clear by the use of the words “*reasonable prospect of success*”. A “*chance*” on one interpretation may be more speculative than a “*prospect*”, being an unexpected happening. However, when the word “*realistic*” is added thereto, it seems to me too to convey “*reasonable prospect*”. Did the court intend to lower the threshold by using “*reasonable chance*”? Read in context, I think not. The fact that success on appeal must be more than a chance of success forms part of the legislated test, formed part of the traditional test, formed part of the reasoning in both quoted judgments (**Smith** and **Mkhitha**, both of which held that the chance of success must be realistic), has been emphasised in several SCA judgments. Accordingly in the absence of a finding that other judgments clearly have been wrongly decided, I do not read the formulation of “*reasonable chance*” as intending to remove the assessment of how realistic the chance of success would be. As held in the **Mkhitha** judgment there must truly be a reasonable prospect of success.

- [15] Accordingly, in my view the **Ramakatsa** judgment did not lower the threshold as generally applied. All courts must still determine if an appeal would have a reasonable prospect of success. In applying the legislated test, this judgment need not deal with the conflict between the **Ramakatsa** judgment and the **Notshokovu** judgment about the question if section 17(1)(a)(i) postulates a higher test than before or not.

Principles (the remainder)

- [16] Having had to address the test to apply in granting leave to appeal in some detail, the far greater matter of importance in this matter is that a costs judgment reflects the exercising of a judicial discretion on costs. This is so as I exercised a true discretion, in deciding from a number of equally permissible options, to award costs against the applicant.
- [17] A court of appeal would first have to consider if there are grounds to interfere with the exercise of my discretion. Once that hurdle is crossed, it could alter my judgment if it believes the outcome to be wrong, but only then. The grounds for interfering with the exercise of my discretion are usually only where my discretion was not exercised judicially, or where my decision was influenced by wrong principles, or where my decision was affected by a misdirection on the facts, or where my decision could not reasonably have been reached by a court properly directing itself to the relevant facts and principles. The law in this regard is settled and needs no detailed discussion. See amongst others **National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others** 2000 (2) SA 1 (CC) Para 11, **Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another** 2015 (5) SA 245 (CC) Para 83-89, **Public Protector v South African Reserve Bank** 2019 (6) SA 253 (CC) Para 144-145, the **Zuma v Office of the Public Protector and Others** Paragraph 20-22.
- [18] The approach of restraint, namely of a court of appeal being slow to interfere with a judgment on costs, is trite too. See **Hotz and Others v University of**

Cape Town 2018 (1) SA 369 (CC) Para 25 and 28. The impact is that leave to appeal based against costs orders only, is rare. See **Tebeila Institute of Leadership, Education, Governance and Training v Limpopo College of Nursing and Another** [2015] ZACC 4; 2015 (4) BCLR 396 (CC) Para 13.

[19] The threshold that the applicant faces does not end here. As set out the above judgments, section 16(2)(a) of the Act requires that exceptional circumstances must be established for the applicant to succeed in an application for leave to appeal on costs. “*Very substantial*” costs could be a ground for finding exceptional circumstances. See **John Walker Pools v Consolidated Aone Trade & Invest 6 (Pty) Ltd (in Liquidation) and Another** 2018 (4) SA 433 (SCA) Para 8, referring to **Oudebaaskraal (Edms) Bpk en Andere v Jansen van Vuuren en Andere** 2001 (2) SA 806 (SCA) 812D-E, a case where the trial and for several days, experts testified and senior lawyers were used. (The judgment dealt with a similar provision that existed under the previous legislation, section 21A of the Supreme Court Act, 59 of 1959.) In **Naylor and Another v Jansen** 2007 (1) SA 16 (SCA) Para 10 the SCA also dealt with section 21A and held that “*a failure to exercise a judicial discretion would (at least usually) constitute an exceptional circumstance*”.

[20] It seems to me that the real enquiry remains prospects of success to determine exceptional circumstances. The stronger those prospects of showing that I failed to exercise my discretion on costs judiciously, the closer one gets to finding exceptional circumstances too. It seems to me that such a weighted approach would tie into a finding that a decision is appealable in the interests of justice as being the primary test. See **Van Huyssteen and Others v Pepkor Speciality (Pty) Ltd and Another** [2020] ZASCA 78 (30 June 2020) Para 19, **United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others** [2021] 2 All SA 90 (SCA) Para 8-9, and the **Ramakatsa** judgment Para 10.

The merits

[21] The applicant relied on **Merber v Merber** 1948 (1) SA 446 (A) at 453-454:

“It seems therefore that, when a successful party has been deprived of his costs in the trial court, an appeal court will enquire whether there were any grounds for this departure from the general rule and if there are no such grounds, then ordinarily it will interfere. But when, as in the present case, the general rule has been followed, then the appellant must first show that there were grounds for departing from the rule and, if there are such grounds, that the trial Judge, in refusing to depart from the rule, has either failed to take such grounds into consideration or has acted arbitrarily in not giving effect to them by depriving the successful party of his costs. In either of these events the appeal court would be free to exercise its own discretion. The mere fact that the appeal court would have given more weight to the grounds does not mean that the judge has acted arbitrarily, i.e. not with a judicial discretion. In the present case the learned Judge has taken into consideration the facts which the appellant contended entitled her to an order depriving the respondent of his costs and I see no justification whatever for holding that he did not exercise a judicial discretion in holding that they did not warrant the relief claimed by the appellant.”

[22] The reasoning in my judgment is detailed. As stated at the outset, I refrain below as far as possible from repeating my reasoning. However, I make some remarks on the particular issues raised.

[23] The applicant’s primary argument was that it was the successful party and that I deprived him of his costs as I misdirected myself when I found that that the respondent was substantially successful. The applicant argued that he was the successful party as he had achieved success before Louw J in obtaining an order that would guide the further conduct of the matter. With respect, I disagree for the reasons set out in my main judgment.

[24] The application for leave to appeal goes beyond the summary of the applicant’s case set out in the previous paragraph and it discloses additional difficulties. The first formulation in the notice of application for leave to appeal of the argument on success is:

“The Defendant pleaded exactly how the parties should calculate what is owed between the parties, which plea was verbatim made an order of Court by the Honourable Justice Louw J on 16 March 2021, which was complete success by the Defendant and not partial”.

[25] It is in part correct that the court order did follow many of the suggestions in the plea/counterclaim as to the method to be followed in calculating (what would in the end be the applicant’s) indebtedness and that it did not follow

the respondent's pleaded method. That is not the whole truth, however. The order added matters that were not pleaded by the applicant. It added timelines, it provided for compulsory use of referees, it provided for compulsory mediation, and it added (seemingly without exception) for vouchers and proof of payments to be produced to prove payment of expenses. The crucial matter, as set out in my judgment, is that the applicant was ordered to account for his occupation of the property. (This finding not only upholds a pleaded contention by the respondent, but is in conflict with the terms of an agreement as pleaded by the applicant that omitted this obligation.) It is not contended that I erred in my assessment that the finding on liability turned out to be crucial in the matter. Assuming that I was wrong (and not making such a finding) and that the applicant was indeed completely successful before Louw J, it is but one battle in the war. The matter appears to have been seen as such by Louw J, as he reserved costs, and did not order that the costs follow the alleged success before him. His order has not been challenged.

[26] The incorrect version of complete success before Louw J soaks through the notice of application for leave to appeal. An added difficulty for the applicant is that it is not clear what occurred before Louw J. The counsel who appeared before me, were not present at that hearing. Seemingly without hearing evidence and without giving a judgment, an order was issued. I assumed in my judgment that the order was by consent, as all the objective facts point thereto. The applicant disagrees and advances a version in its application for leave to appeal that a combined draft order became necessary, that there was no agreement on the draft to be made an order or court, and that the applicant's draft prevailed. This is not common cause, but it seems not to matter. Even assuming that the applicant achieved some success (or the greater success) on the process to be followed, it was but one step in the proceedings, as I held in my judgment.

[27] The further difficulty that the applicant faces, is that there was no trial before me during which I could observe the impact of the order by Louw J on the proceedings. The matter was settled. I was not present during that process,

and have no knowledge what concessions the parties made, or what the reasons for making such concessions were.

[28] As set out in my main judgment, I did consider what substantial success meant in the matter. I had to decide and found that the applicant did not achieve success as meant in the application of the general rule, the respondent did. I gave reasons for my findings. Bar really a dispute as to what happened before Louw J, my factual grounds for my order are not challenged. In order to overturn my finding on appeal, the applicant had to make out a case that I misdirected myself on the facts before me as to who was substantially successful.

[29] I also set out in my judgment the reasons why I believe that the outcome that costs should follow the result, is fair too. The applicant raises a number of errors I allegedly made in this process as support of contentions why I should have awarded costs to him. In general application of the guidelines that courts follow, once I find that the respondent was substantially successful, the question was if fairness dictated that the respondent should be deprived of costs. Again, most of the factual findings I made are not challenged, but some are.

[30] The first group of contentions are that I erred in not considering that the process agreed upon before the institution of the action, was not completed. I dealt with this aspect in my judgment. I came to the view on the facts of the matter that the institution of legal proceedings became necessary when the process failed to deliver results. It seems to me beyond doubt that the process to resolve the matter failed therein and so did several court hearings. It is clear from my judgment that I considered and disagree with the submission that the respondent “*simply complied with that agreement and not have issued summons, then the matter could and should have been finalised years ago*”, as argued before me. Again, in order to overturn my finding on appeal, the applicant had to make out a case that I misdirected myself on the facts before me.

- [31] The second group of contentions are about the liability of the applicant to account for his occupation of the property. It is alleged that I erred when I found that he must always have known that he was indebted to the respondent. I erred, it is alleged, as the applicant did not have to account for the use of the property until the order by Louw J. It is a submission that has its inherent problems. (a) The respondent raised this failure to account in her plea. Assuming that liability was initially rejected by the applicant, on his version he came round to this view before the order by Louw J as he contends that Louw J issued the order he proposed. (b) I believe an argument that the applicant believed that he could appropriate sole use of the joint property with no consequences, would face some difficulty. (c) But assuming (and not making such a finding) that I am wrong, and the applicant had believed that he did not have to account for his occupation of the property before March 2017, after that date he had no excuse for taking it into account. But does it matter? Would it have been a ground to find it unfair to order costs against the applicant? The answer, with respect, is clearly not.
- [32] Linked to the second group of contentions is that I erred in allegedly blaming the applicant for not settling the matter earlier. As set out in my judgment I came to the view that the applicant had sufficient information to make a tender (this is not challenged), or to resolve the matter, and that it was fair that he carries the cost of the proceedings. The grounds upon which I made those findings are not disputed. Various excuses were raised in the application for leave to appeal as to why the applicant did not offer to settle the matter: He was entitled in law to follow the accounting process to its end (I agree that this was the case after the order by Louw J, leaving aside what the position might have been before the order on the facts of this case), he was entitled in law not to make an offer of settlement (I agree), the respondent made no offers to settle (addressed in the footnote below),¹² and

¹² It is correct that the respondent made no formal offers to settle. But the respondent did initially seek to settle the matter, and did try to arrange a settlement meeting. My judgment contains an averment by the respondent's then counsel about her opponents having taken the approach that she had to prove her case in court as attitudes hardened. This is challenged in the notice of application for leave to appeal as an error to accept the statement by counsel. However, the objective evidence in pre-trial minutes and in the facts of prior, postponed hearings where it is not even suggested that settlement negotiations took place, support what she averred. The pre-trial minute of 23 October 2019 recorded that the parties agreed that the matter could not be settled.

the respondent changed the amounts claimed from time to time (it seems to be correct, although the pre-trial minutes raise no prejudice it seems). I again raise the question if any of it matters and would it have been grounds upon which one could find it unfair to order costs against the applicant? The answer again, with respect is clearly not. Again, in order to overturn my finding on appeal, the applicant had to make out a case that I misdirected myself on the facts before me.

[33] In summary where leave to appeal is sought under section 17(1)(a)(i) of the Act, being where it is not a case where there is some “*other compelling reason*” why an appeal should be heard as contemplated in section 17(1)(a)(ii):

[33.1] I may only (and must) give leave to appeal if I am of the opinion that the appeal would have a reasonable prospect of success;

[33.2] I must find that there is a sound, rational basis for such a finding of reasonable prospects of success of a court on appeal interfering with my judgment;

[33.3] Reasonable prospect of success in an appeal against a costs order is that the applicant must show that (a) I failed to exercise my discretion judiciously on some ground (in this case that my judgment reflects a material misdirection), and (b) that my decision was wrong. In many cases, the first inquiry will determine the second as well;

[33.4] The applicant further has to show that that exceptional circumstances exist to grant leave to appeal, as contemplated in section 16(2)(a) of the Act.

[34] In an appeal against the exercise of a discretion on costs, the hurdle is formidable, as was held in **Zuma v Office of the Public Protector**. Such a hurdle cannot be insurmountable, but I find that there is not a sound, rational basis for a finding of reasonable prospects of success on appeal on grounds that I misdirected myself or that I failed to exercise my discretion judiciously

for some other reason. In my assessment there are no prospects of success on appeal and the application must fail.

[35] With regard to exceptional circumstances to grant leave to appeal, the matter before me was relatively simple, would not have required extensive preparation, and, in the end, amounted to an accounting exercise after the order by Louw J. The issues were not wide-ranging, and the facts not complicated. Ultimately the case was settled on the first day of trial and I heard argument on costs the next day. Costs were increased as the matter was crowded out on several occasions. As such there would have been additional costs of the appearances on the first days, some duplicated pre-trial meetings and the like, and some duplicated refreshing of the preparation. In my assessment the costs were not very substantial, or substantial, in as far as High Court litigation is concerned. I thus further find that there are no exceptional circumstances to grant leave to appeal, whether due to an error of justice, or the costs involved, or any other reason, and the application must fail.

[36] Also, there is no factual basis why the interest of justice requires that this matter must continue. The easy decision is to grant leave to appeal. It is a comfort that someone else may fix an error made in adjudicating a matter. We all err. Taking the easy decision comes at a cost when it is the wrong decision. Granting leave to appeal in an unmeritorious matter, chokes the roll and thus prevents access to justice, and comes at a cost to the respondent (both financial and in delaying the completion of a matter). The application must be dismissed.

Rule 42

[37] This is not the end of the matter. The parties had agreed to a draft order being made an order of court. It seems that I did not make it an order of court. It is unclear where and how the error arose. The applicant's counsel stated that there was an earlier version to which he had agreed that had left the costs portion blank. It seems that it was intended to have formed part of his heads of argument at the time, and he recalls that the respondent's counsel uploaded it to CaseLines system for the order to be made. Various

technical difficulties exist to trace the history fully. The current draft order was uploaded onto the CaseLines system only after I delivered judgment. Before me it was common cause that it was a patent omission from my main judgment, no matter how the error occurred. There was agreement at the hearing of this application that I could make the draft order that appears on CaseLines an order of court acting in terms of Rule 42(1)(b). I do so below.

Accordingly, I make the following order:

1. The application for leave to appeal is dismissed with costs;
2. The order annexed hereto marked "A", dated and initialled by me, is made an order of court.

DP de Villiers AJ

Heard on: 11 April 2022

Delivered on: 28 April 2022 by uploading on CaseLines

On behalf of the applicant:	Adv R Ellis
Instructed by	Tiaan Smuts Attorneys
On behalf of the respondent:	Adv M Snyman SC
Instructed by	ML Schoeman Attorneys

