



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

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

21 NOVEMBER 2023

DATE

A handwritten signature in black ink, appearing to be "M. M. M.", is written over a horizontal line.

SIGNATURE

Case Number 73663/2016

In the matter between:

HOSEA MADIME NKOGATSE

APPLICANT

And

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on CaseLines by the Judge or her Secretary. The date of this judgment is deemed to be 21 November 2023.

JUDGMENT

COLLIS J:

1. This is an application for leave to cross-appeal against the judgment and order made on 2 June 2023.

2. The application is premised on the grounds as listed in the cross-appeal dated 5 July 2023 and it is this application which this ruling relates to.

3. In anticipation of the hearing of the application for leave to appeal, the parties were requested to file short heads of argument. Only the applicant acceded to this request so directed by the Court. On the date of the hearing the respondent was also not present. The Court expresses its gratitude to the applicant for the main heads and supplementary heads so filed.

LEGAL PRINCIPLES

4. Section 17 of the Superior Court's Act provides as follows:¹

"(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) the decision sought to 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 issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties."

¹ Act 10 of 2013

5. In *casu* the applicant relies on the grounds of appeal mentioned in section 17(1)(a)(i) of the Superior Courts Act 10 of 2013, namely, that the appeal would have reasonable prospects of success.

6. As to the test to be applied by a court in considering an application for leave to appeal, Bertelsmann J in *The Mont Chevaux Trust v Tina Goosen & 18 Others* 2014 JDR 2325 (LCC) at para 6 stated the following:

‘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.’

7. ‘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 categorized

as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.²

8. In *Fair-Trade Independent Tobacco Association v President of the Republic of South Africa and Another*³ the Full Court of this Division observed that:

“As such, in considering the application for leave to appeal it is crucial for this Court to remain cognizant of the higher threshold that needs to be met before leave to appeal may be granted. There must exist more than just a mere possibility that another court, the SCA in this instance, will, not might, find differently on both facts and law. It is against this background that we consider the most pivotal grounds of appeal.”

9. The crisp issues for determination before this Court was whether there was in fact one or two prosecutions which ensued and whether such prosecutions were malicious in respect of which the applicant instituted a claim for damages.

² *S v Smith* 2012 (1) SACR 567 (SCA) at para 7.

³ Case no: 21688/2020 [2020] ZAGPPHC 311 (24 July 2020) at [6].

10. This Court had found against the applicant that one prosecution ensued, this after the initial conviction and sentence of the applicant was set aside on review and remitted back to the trial court to start the trial *de novu*.

11. Having read the papers and having carefully heard counsel, I come to the conclusion that there is a reasonable prospect that another Court would come to a different conclusion on the order of the Court in terms of section 17(1)(a)(i) of the Superior Courts Act 10 of 2013.

ORDER:

12. Consequently, the following order is made:

12.1. Leave to appeal is granted to the Full Court of this Division, with costs in the appeal.



COLLIS J

JUDGE OF THE HIGH COURT, PRETORIA

APPEARANCES:

Counsel for the Applicant: Adv. S. Mbhalati

Instructing Attorney: Mokoena Attorneys

Counsel for the Respondent: No appearance

Instructing Attorney: Office of the State Attorney Pretoria

Date of Hearing: 17 November 2023

Date of Judgment: 21 November 2023