REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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

01/03/24
DATE

SIGNATURE

In the matter between:

Case No: 64786/17

TSAKANI MALULEKE APPLICANT

and

PASSANGER RAIL AGENCY OF SOUTH AFRICA RESPONDENT

JUDGEMENT IN THE APPLICATION FOR LEAVE TO APPEAL

JOYINI AJ:

INTRODUCTION

[1] This is an application for leave to appeal against my Judgment ("Judgment *a quo*") that was handed down *extempore* on 15 November 2023 and followed by written reasons[1] that were handed down on 28 November 2023.

[2] The parties shall be referred to throughout this Judgment as follows:

(a) Ms Tsakani Maluleke, an adult female person, shall be referred to as 'the Applicant'.
(b) The Passenger Rail Agency of South Africa shall be referred to as 'the Respondent'.

BACKGROUND FACTS

[3] By way of summary, the Applicant in the Court *a quo* was claiming compensation from the Passenger Rail Agency of South Africa ("PRASA") for damages arising out of an incident in which she was injured at or around Irene Train Station in a train which was from Olifantsfontein Station to Pretoria on 13 March 2017. The Applicant's case as pleaded was that, as a result of falling from a moving train after having been pulled out of a carriage by a man who was trying to snatch her handbag, she sustained serious injuries in the form of an ankle fracture, among others. In her particulars of claim the Applicant based her cause of action on the Respondent's alleged negligence, breach of its 'legal duty, and a duty of care to ensure the safety of the passengers who are making use of such services as passengers, in particular the Applicant.

[4] In the Court *a quo*, there were no issues that should be decided separately in terms of rule 33(4). In other words, the issues of liability and quantum were not separated. As such, the Court *a quo* proceeded with an understanding that both merits and quantum were before Court for determination.

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[1] Caselines 0010-1 to 0010-9

[5] At the close of the Applicant's case in the Court *a quo*, Counsel for the Respondent applied for absolution from the instance on the basis that the Applicant did not make out a *prima facie* case. The Respondent's Counsel was given an opportunity to address the Court *a quo* on the application for absolution. The Applicant's Counsel was also given an opportunity to address the Court in reply. The latter argued against the application emphasising that the Respondent was definitely not a candidate for absolution from the instance.

[6] The application for absolution from the instance was premised on the Respondent's argument that the evidence of the Applicant was contradictory, conflicting, mutually destructive, unreliable and not credible[2]. The Respondent's Counsel, in addressing the court, argued that the causal negligence on the part of the defendant was not established due to lack of evidence. The Counsel for the Respondent concluded his argument by pointing to the Court *a quo* that the Applicant had failed the test by which to determine delictual liability[3].

APPLICANT'S GROUNDS FOR LEAVE TO APPEAL

[7] The Applicant's grounds of appeal, upon which leave is sought, comprises 4 pages of the notice for leave to appeal[4] which is divided into 14 grounds listed below. Counsel for the Applicant read the grounds of appeal to the Court as they are listed in the notice for leave to appeal and this did not assist the Court at all. They are listed as follows:

*"**Grounds Of Appeal***

We submit that the learned judge erred in coming to the conclusion that he did on the application for absolution base (sic) on the following reasons:

1. With regard to the cause of action as contained in the particulars of claim, the action against the defendant (PRASA) was based on the fact the latter had "a legal duty to passengers travelling between the above-mentioned stations, in particular to the plaintiff

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[2] Caselines 0010-3, see elaboration on this in paragraphs 8 and 9.
[3] *South African Rail Commuter Corporation Ltd v Thwala* (661/2010) **[2011] ZASCA 170** (29 September 2011) in paragraph 14 below.
[4] Caselines 00011-1 to 00011-4.

to ensure that: ...4.5 Adequate security was provided to protect passengers from any harm that might be caused by any other person". In her evidence-in-chief, the plaintiff indicated that the (sic) throughout her trip, including at Irene Station where the robbery occurred, there was no security guard present in the carriage nor anywhere near it.

2. The supposition by the learned judge in paragraph [8] to the effect that "two security guards carried her back to the train station where the ambulance was called for her" is materially incorrect, as it suggests that the security personnel played a meaningful part. Contrary to the suggestion by the Court, the plaintiff testified that two strangers who had tried to come to her rescue carried her to the security office after she couldn't walk any longer from pain. It was at the security office that she had come into contact with the security personnel for the first time on that day.

3. The foregoing indicates clearly that the defendant, through its officials, failed to comply with its legal duty to provide security to protect passengers including the plaintiff.

4. The plaintiff testified that she fell from the train as it was moving out of the platform. She was insistent during cross-examination that she did not fall onto the platform but on the ground as the train had already moved out of the platform when she stood up to try to fight for possession of her handbag from the robber. None of them (the robber and herself) let go of the bag up to the stage when the robber jumped off the moving train and she, because of the pulling by the more powerful robber, lost balance and fell from the train as a result while holding on to the string of the bag.

5. According to the plaintiff's testimony, the carriage doors were open when the train was stationary and when it was moving.

6. The heavy reliance placed by the Court on the so-called inconsistencies, conflicting, contradictory, unreliable and mutually destructive evidence is mistaken as the other versions that were taken from the ambulance book and medico-legal experts about the circumstances of the incident were all hearsay and not properly before Court. (please see, ***Rautini v Passenger Rail Agency of South Africa (Case no. 853/2020) [2021] ZASCA 158 (8 November 2021).*** *The defendant did not have a counter version.*

7. In the light of the above instructive caselaw and given the comparability of the facts between the Supreme Court of Appeal case (supra) and the one before the Court, it is evidently clear that the Court erred in considering inadmissible evidence in order to found contradictions and inconsistencies. The plaintiff was, in any case, the only witness to give evidence at the trial.

8. The facts in ***South African Rail Commuter Corporation Ltd v Thwala (661/2010) [2011] ZASCA 170 (29 September 2011)*** *are distinguishable from the ones in the case at hand. Moreover, the respondent had led evidence by at least three of its own witnesses against the appellant.*

9. The learned judge was misdirected in assuming that that reports by the plaintiff's experts were meant to used (sic) for determination of merits of the case, particularly the circumstances of the incident.

10. The conclusion that failure by the plaintiff to call the experts was fatal is misdirected.

11. At the beginning of the trial, it was indicated that plaintiff had filed expert reports as well as confirmatory affidavits by the same experts which were to be used in respect of the quantum aspect of the case in terms of rule 38(2).

12. The determination goes against His Lordship's own observations and comments in terms of paragraph [11] of His judgement to the effect that "...In the pre-trial held in October 2023, the plaintiff sought an admission of these expert reports and the defendant had apparently not been forthcoming with a denial with reasons. The defendant's counsel ended up admitting the reports in court with a caveat that the contents of the reports are in dispute...."

13. Absolution from the instance should not be granted lightly by courts and should only be granted in circumstances where the plaintiff's case is so weak that no reasonable court could find for the plaintiff. This is not the case in the matter before Court. We submit that the Honourable Judge should take cue from the following dicta from the case of ***G.E.P obo M.L.F v MEC for The Department of Health Gauteng Provincial Government (33632/2014) [2023] ZAGPJHC 535 (22 May 2023)*** *at paragraph [20]: ...endorsing the*

proposition made by the defendant in this case would deny the plaintiff a fair hearing and would amount to a denial of access to justice in that the plaintiff would be deprived of the opportunity to ventilate all the issues she has raised in the in the (sic) particulars of claim.

14. Based on the above highlighted errors, it is our submission that there are prospects of success regarding the appeal and that such would lead to a solution of the disputes between the parties."

RESPONDENT'S OPPOSITION TO THE APPLICATION FOR LEAVE TO APPEAL

[8] This application for leave to appeal is vehemently and vigorously opposed by the Respondent. Counsel for the Respondent argued that the Applicant, in the notice for leave to appeal, did not set out the grounds for leave to appeal as required in terms of Section 17 of the Superior Courts Act.[5] He submitted that leave to appeal must not be granted unless there truly is a reasonable prospect of success. He argued that 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 reasonable prospect of success or there is a compelling reason why it should be granted. He further argued that the 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. He also argued that the Applicant's grounds of appeal are not succinctly set out in clear and unambiguous terms so as to enable the Court and the Respondent to be fully informed of the case the Applicant seeks to make out and which the Respondent is to meet in opposing the application for leave to appeal. The Respondent submitted that the Applicant's notice for leave to appeal does not specify the finding or fact and/or ruling of law appealed against and the grounds upon which the appeal is found. The Respondent submitted that the Applicant's application for leave to appeal comprising 14 vague grounds of appeal[6] does not adhere to the requirements of Section 17(1)(a) of the Superior Courts Act 10 of 2013. He asked the Court to dismiss the Applicant's application for leave to appeal on this ground alone.

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[5] Act 10 of 2013.

[6] Caselines 00011-1 to 00011-4.

APPLICABLE PRINCIPLES/TESTS TO THE ADJUDICATION OF AN APPLICATION FOR LEAVE TO APPEAL AND ANALYSIS OF THE APPLICANT'S NOTICE FOR LEAVE TO APPEAL

[9] Rule 49 of the Uniform Rules of Court dictates the form and process of an application for leave to appeal and the substantive law pertaining thereto is to be found in Section 17 of the Superior Courts Act.[7] The latter Act raised the threshold for the granting of leave to appeal, so that leave may now only be granted if there is a reasonable prospect that the appeal will succeed. The possibility of another court holding a different view no longer forms part of the test. There must be a sound, rational basis for the conclusion that there are prospects of success on appeal. The interpretation of the Rules and the Law has evolved in case law since 2013. In numerous cases, the view is held that the threshold for the granting of leave to appeal was raised with the inauguration of the 2013 legislation (Superior Courts Act 10 of 2013). The former assessment that authorization for appeal should be granted if *"there is a reasonable prospect that another court might come to a different conclusion"* is no longer applicable.

[10] The words in section 17(1) that: *"Leave to appeal may only be given..."* and section 17(1)(a)(i) that: *"The appeal would have a reasonable prospect of success"* are peremptory. *"If there is a reasonable prospect of success"* is now that: *"May only be given if there would be a reasonable prospect of success."* A possibility and discretion were therefore, in the words of the legislation and consciously so, amended to a mandatory obligatory requirement that leave may not be granted if there is no reasonable prospect that the appeal will succeed. It must be a reasonable prospect of success; not that another Court may hold another view.

[11] The Court *a quo* may not allow for one party to be unnecessarily put through the trauma and costs and delay of an appeal. In *Four Wheel Drive v Rattan N.O.* **2019 (3) SA 451** (SCA), the following was ruled by Schippers JA (Lewis JA, Zondi JA, Molemela JA and Mokgohloa AJA concurring): *"[34] There is a further principle that the court a*

[7] Act 10 of 2013.

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'. 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 that there was a compelling reason to hear an appeal. In the result, the parties were put through the inconvenience and expense of an appeal without any merit."

[12] In *MEC Health, Eastern Cape v Mkhitha,*[8] the Supreme Court of Appeal held: *"[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 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."*

[13] In *Phiri v Phiri and Others,*[9] the Court warned against an Applicant from marshalling grounds of appeal over the bar and reiterated the considerable and substantial presence of a cause for appeal: *"[9] An application for leave to appeal is in terms of Rule 49 of the Uniform Court. Rule 49(l)(b) of the Uniform Court Rules provides as follows: "When leave to appeal is required... application for such leave shall be made and the grounds thereof shall be furnished..." The use of the word "shall" denote that this sub rule is peremptory. The Applicant must set out the grounds upon which he seeks to appeal. In the matter of Songono v Minister of Law Order,*[10] *the Court held at 3851—386A that: "... the grounds of appeal required under Rule 49(l)(b) must ...be clearly and succinctly set out in clear*

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[8] (1221/15) [2016] ZASCA 176 (25 November 2016); S v Smith 2012 (1) SACR 567 (SCA) para 7.

[9] (39223/2011) [2016] ZAGPPHC 341 (14 March 2016).
[10] *Songono v Minister of Law-and-Order* **1996 (4) SA 384** (E) at 3851-386A.

and unambiguous terms so as to enable the Court and the Respondent to be fully and properly informed of the case which the Applicant seeks to make out and which the Respondent is to meet in opposing the application for leave to appeal. .. Rule 49(l)(b) must also be regarded as being peremptory. [10] In casu, the grounds tabulated in paragraph [2] supra, can hardly qualify to be grounds. In this regard the notice for leave to appeal is fatally defective and, on this ground, alone the application for leave to appeal should be dismissed. It does not help the Applicant to marshal grounds of appeal over the bar which have not been set out clearly and succinctly in the notice for leave to appeal, no matter how meritorious these might be, which is not the case in my view, otherwise, there is no need for the Rules; vide Xayimpi v Chairman Judge White Commission (formerly known as Browde Commission ***[2006] 2 ALL SA 442*** *E at 446i-j."*

[14] This finding was endorsed by a full bench in *Xayimpi v Chairman Judge White Commission*. In that matter the applicant had, instead of a notice setting out the grounds of appeal, filed a lengthy affidavit. The court considered that it was entitled to dismiss the application on that basis. It nevertheless considered the merits of the application and refused leave. The approach to the requirements of Rule 49 (1) (*b*) has subsequently been followed in several judgments in this Division and other Divisions, in both civil and criminal cases.[11]

[15] In *Hing and Others v Road Accident Fund*[12] which relied upon *Songono* case *supra* Binns-Ward J observed: *"The application for leave to appeal had listed 65 grounds on which the judge a quo was alleged to have 'erred and misdirected himself'. As the respondent's counsel justifiably observed, a number of those grounds were so vaguely formulated as to be of little or no assistance in meaningfully defining the bases of the intended appeals. In any event it should have been apparent to the appellants that the learned acting judge could not possibly have intended his words to be taken literally. The effect of the notice of application for leave to appeal was to suggest that he had misdirected himself at every turn in making any findings adverse to their claims. In the*

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[11] *S v Van Heerden* **2010 (1) SACR 599** (ECP) at para 4; *S v McLaggan* **2013 (1) SACR 267** (E) at para 6-7; *S v McKenzie* **2003 (2) SACR 620** (C) at 621e.
[12] 2014 (3) SA 350 (WCC).

context of his detailed and fully reasoned judgment, it could not reasonably have been assumed by the appellants or their legal representatives that by granting leave to appeal in the terms he did, the judge meant to be understood to be acknowledging that such wide-ranging error and misdirection on his part might reasonably be established on appeal. On the contrary, the manifestly indiscriminate formulation of the grounds on which the application for leave to appeal was brought brings to mind the observation of a US Appeals Court judge that when he sees 'an appellant's brief containing seven to ten points or more, a presumption arises that there is no merit to any of them'.[13]"

[16] Let me comment on an amendment to Rule 49 which came into effect after the judgments in *Songono* and *Xayimpi* referred to above were handed down. Rule 49 (3) was substituted by GN R472 of 12 July 2013. The sub-rule in its present form came into effect on 16 August 2013. Prior to its amendment and at the time when *Songono* and *Xayimpi* were decided the sub-rule read as follows: *"(3) The notice of appeal shall state whether the whole or part only of the judgment or order is appealed against and if only part of such judgment or order is appealed against, it shall state which part and shall further specify the finding or fact and/or ruling of law appealed against and the grounds upon which the appeal is found."* It is this sub-rule which was held to be peremptory and, by parity of reasoning, that Rule 49 (1) (*b*) is peremptory. Sub-rule (4), prior to the amendment, provided that: *"A notice of cross-appeal shall be delivered within ten days after delivery of the notice of appeal or within such longer period as may upon good cause shown be permitted and the provisions of these Rules will regard to appeals shall mutatis mutandis apply to cross-appeals."* Sub-rule (3) in its present substituted form is identical in every respect to the erstwhile sub-rule (4). The present sub-rule (4) reads: *"Every notice of appeal and cross-appeal shall state:(a) what part of the order is appealed against; and (b) the particular respect in which the variation of the judgment or order is sought."*

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[13] MEC for Health, Eastern Cape and Another v Melane (2017/2015) [2022] ZAECMHC 16 (14 June 2022) para 50.

[17] The effect of the amendment therefore was to deal with the subject matter of the erstwhile sub-rule (3) in the new sub-rule (4). The judgments in *Songono* and *Xayimpi* must accordingly be read in this light. The basis upon which *Songono* held that the erstwhile sub-rule (3) was peremptory is to be found in the following passage of the judgment: *"Accordingly, insofar as Rule 49 (3) is concerned, it has been held that grounds of appeal are bad if they are so widely expressed that it leaves the appellant free to canvass every finding of fact and every ruling of the law made by the court a quo, or if they specify the findings of fact or rulings of law appealed against so vaguely as to be of no value either to the Court or to the respondent, or if they, in general, fail to specify clearly and in unambiguous terms exactly what case the respondent must be prepared to meet - see, for example, Harvey v Brown* ***1964 (3) SA 381*** *(E) at 383; Kilian v Geregsbode, Uitenhage* ***1980 (1) SA 808*** *(A) at 815 and Erasmus Superior Court Practice B1-356-357 and the various authorities there cited."*

[18] This rationale applies, with equal force, to the proper interpretation of sub-rule (4). Accordingly, the subsequent amendment of Rule 49 has not altered the law regarding compliance with its provisions. The effect is that where a party fails to comply with the peremptory requirements of Rule 49 (1) (*b*) inasmuch as they do not set out the grounds of appeal in clear, unambiguous and succinct terms, the court hearing the application may, on that basis, dismiss the application.

ANALYSIS OF THE APPLICANT'S GROUNDS FOR LEAVE TO APPEAL

[19] It is common cause that the grounds of appeal set out in the Applicant's notice for leave to appeal are widely expressed and vague. That is, however, not the only respect in which they do not meet the requirements. These grounds are so vaguely formulated as to be of little or no assistance in meaningfully defining the bases of the intended appeal. No attempt is made to identify the factual findings which the Applicant seeks to challenge on appeal nor the findings of law. To say the least, the grounds are incomprehensible.

[20] There are various issues raised by the Applicant in the notice for leave to appeal that do not qualify as grounds for appeal. For example, ground number 1 reads: "*1. With regard to the cause of action as contained in the particulars of claim, the action against the defendant (PRASA) was based on the fact the latter had "a legal duty to passengers*

travelling between the above-mentioned stations, in particular to the plaintiff to ensure that: ...4.5 Adequate security was provided to protect passengers from any harm that might be caused by any other person". In her evidence-in-chief, the plaintiff indicated that the (sic) throughout her trip, including at Irene Station where the robbery occurred, there was no security guard present in the carriage nor anywhere near it." It is not clear what the error is on my part as Judge in this ground. The way it is formulated does not show the error made by me and what the correct finding would have been in this regard.

[21] Ground number 2 reads: *"2. The supposition by the learned judge in paragraph [8] to the effect that "two security guards carried her back to the train station where the ambulance was called for her" is materially incorrect, as it suggests that the security personnel played a meaningful part. Contrary to the suggestion by the Court, the plaintiff testified that two strangers who had tried to come to her rescue carried her to the security office after she couldn't walk any longer from pain. It was at the security office that she had come into contact with the security personnel for the first time on that day."* I admit I have made a factual mistake here. However, this factual mistake definitely did not have any influence on the issues in dispute and the findings thereof because it is about the Plaintiff being carried by two strangers outside both the train and the platform. This happened when she felt the pain after chasing and trying to catch the man who ran away with her handbag. What the Applicant alleges here has no bearing on any of the issues in dispute and/or findings.

[22] Ground number 3 reads: *"3. The foregoing indicates clearly that the defendant, through its officials, failed to comply with its legal duty to provide security to protect passengers including the plaintiff."* The Respondent's Counsel argued that the alleged failure *"to comply with its legal duty to provide security to protect passengers including the plaintiff"* was not proven in Court as it is not based on evidence. He argued that the Court would not be able to choose among the Applicant's conflicting versions as evidence was not led before Court. He also argued that what is in the pleadings remain allegations as evidence was not led in Court. It is also not clear what the error is on my part as Judge in this ground. The way it is formulated does not show the error made by me and what the correct finding would have been in this regard.

[23] Ground number 4 reads: *"4. The plaintiff testified that she fell from the train as it was moving out of the platform. She was insistent during cross-examination that she did not fall onto the platform but on the ground as the train had already moved out of the platform when she stood up to try to fight for possession of her handbag from the robber. None of them (the robber and herself) let go of the bag up to the stage when the robber jumped off the moving train and she, because of the pulling by the more powerful robber, lost balance and fell from the train as a result while holding on to the string of the bag."* The Plaintiff conceded towards the end of the examination-in-chief that the train was stationary when she fell off from it (train).[14] During cross-examination of the plaintiff, the Defendant's Counsel put to her her that: *"When you were under examination-in-chief, you said the train was stationary during the scuffle inside the coach and this is not what you pleaded in your particulars of claim in caselines 007-7, paragraph 5". This paragraph was read through the court to the plaintiff and reads, 'On or about 13th March 2017 at or around Irene Station an incident occurred when the Plaintiff, whilst being a passenger in a PRASA TRAIN, fell from the moving train after being pulled out of the train by a person who was trying to snatch her handbag.'"*[15] The Plaintiff, in Court *a quo*, said the train was stationary during the scuffle inside the coach and this is not what she pleaded in her particulars of claim and these conflicting versions are a fatal blow to her case. Once again, it is also not clear what the error is on my part. The way it is formulated does not show the error made by me and what the correct finding would have been in this regard.

[24] Ground number 5 reads: *"5. According to the plaintiff's testimony, the carriage doors were open when the train was stationary and when it was moving."* Even here, it is also not clear what the error is on my part. The way it is formulated does not show the error made by me and what the correct finding would have been in this regard.

[25] Ground number 6 reads: *"6. The heavy reliance placed by the Court on the so-called inconsistencies, conflicting, contradictory, unreliable and mutually destructive evidence is mistaken as the other versions that were taken from the ambulance book and medico-legal experts about the circumstances of the incident were all hearsay and not properly*

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[14] Caselines 0010-3, paragraphs 8.
[15] Caselines 0010-3, paragraphs 9.

before Court. (please see, Rautini v Passenger Rail Agency of South Africa (Case no. 853/2020) [2021] ZASCA 158 (8 November 2021). The defendant did not have a counter version." When the contents of these reports were put to the Plaintiff during cross-examination in relation to the conflicting versions, she responded. This part cannot be hearsay evidence hence the Court relied on it. The Plaintiff, in Court *a quo*, said the train was stationary during the scuffle inside the coach and this is not what she pleaded in her particulars of claim and these conflicting versions are a fatal blow to her case. The Court had to draw an inference from Plaintiff's conflicting versions and *Rautini* case does not prevent the Court from drawing an inference from the Plaintiff's conflicting versions. Once again, it is also not clear what the error is on my part. The way it is formulated does not show the error made by me and what the correct finding would have been in this regard.

[26] Ground number 7 reads: *"7. In the light of the above instructive caselaw and given the comparability of the facts between the Supreme Court of Appeal case (supra) and the one before the Court, it is evidently clear that the Court erred in considering inadmissible evidence in order to found contradictions and inconsistencies. The plaintiff was, in any case, the only witness to give evidence at the trial."* When the contents of these reports were put to the Plaintiff during cross-examination in relation to the conflicting versions, she responded. This part cannot be hearsay evidence hence the Court relied on it. The Plaintiff, in Court *a quo*, said the train was stationary during the scuffle inside the coach and this is not what she pleaded in her particulars of claim and these conflicting versions are fatal blow to her case. The Court had to draw an inference on Plaintiff's conflicting versions and *Rautini* case does not prevent the Court from drawing an inference from the Plaintiff's conflicting versions. Once again, it is also not clear what the error is on my part. The way it is formulated does not show the error made by me and what the correct finding would have been in this regard.

[27] Ground number 8 reads: *"8. The facts in South African Rail Commuter Corporation Ltd v Thwala (661/2010) [2011] ZASCA 170 (29 September 2011) are distinguishable from the ones in the case at hand. Moreover, the respondent had led evidence by at least three of its own witnesses against the appellant."* The Respondent's Counsel

argued in the Court *a quo* that it is not sufficient to just make allegations; evidence must be led to prove them. He argued that the onus to prove negligence rests on the Plaintiff. In this regard, he referred the Court to the *South African Rail Commuter Corporation Ltd v Thwala* (661/2010) **[2011] ZASCA 170** (29 September 2011) where the test by which to determine delictual liability was clearly stated in paragraph 11 as quoted below: *"[11] The test by which to determine delictual liability is trite. It involves, depending upon the particular circumstances of each case, the questions whether (a) a reasonable person in the defendant's position would foresee the reasonable possibility of his or her conduct causing harm resulting in patrimonial loss to another; (b) would take reasonable steps to avert the risk of such harm; and (c) the defendant failed to take such steps[16]. But not every act or omission which causes harm is actionable. For liability for patrimonial loss to arise, the negligent act or omission must have been wrongful[17]. And it is the reasonableness or otherwise of imposing liability for such a negligent act or omission that determines whether it is to be regarded as wrongful[18]. The onus to prove negligence rests on the plaintiff and it requires more than merely proving that harm to others was reasonably foreseeable and that a reasonable person would probably have taken measures to avert the risk of such harm. The plaintiff must adduce evidence as to the reasonable measures which could have been taken to prevent or minimise the risk of harm[19]."* Even here, it is also not clear what the error is on my part. The way it is formulated does not show the error made by me and what the correct finding would have been in this regard.

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[16] *Kruger v Coetzee* **1966 (2) SA 428** (A) at 430E-F; *Mkhatshwa v Minister of Defence* **2000 (1) SA 1104** (SCA) paras 19-22; *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd* **2000 (1) SA 827** (SCA) para 22.

[17] See, for example, *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* **2006 (1) SA 461** (SCA) para 12; *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* **2006 (3) SA 138** (SCA) para 10; *Charter Hi (Pty) Ltd v Minister of Transport* **[2011] ZASCA 89.**

[18] *Trustees, Two Oceans* above para 11; *Shabalala v Metrorail* **2008 (3) SA 142** (SCA) para 7.

[19] *Shabalala* para 11.

[28] Ground number 9 reads: *"9. The learned judge was misdirected in assuming that that reports by the plaintiff's experts were meant to used (sic) for determination of merits of the case, particularly the circumstances of the incident."* I do not understand what this ground mean. In the Court *a quo*, there were no issues that should be decided separately in terms of rule 33(4). In other words, the issues of liability and quantum were not separated. As such, the Court *a quo* proceeded with an understanding that both merits and quantum were before Court for determination. I therefore do not understand how I misdirected myself in assuming that the reports by the plaintiff's experts were meant to be used for determination of merits of the case, particularly the circumstances of the incident.

[29] Ground number 10 reads: *"10. The conclusion that failure by the plaintiff to call the experts was fatal is misdirected."* The Respondent's Counsel argued, rightly so, in the Court *a quo* that it is not sufficient to just make allegations; evidence must be led to prove them. He also argued that the contents of the experts' reports were in dispute and the Plaintiff's version in the Court *a quo* was in conflict with some versions in the experts reports. Therefore calling them to come and testify in Court would have dealt with these issues one way or another. In other words, their evidence was necessary to *inter alia* prove allegations of negligence and the alleged Respondent's failure to comply with its legal duty to provide security to protect passengers. Even here, it is also not clear what the error is on my part. The way it is formulated does not show the error made by me and what the correct finding would have been in this regard.

[30] Ground number 11 reads: *"11. At the beginning of the trial, it was indicated that plaintiff had filed expert reports as well as confirmatory affidavits by the same experts which were to be used in respect of the quantum aspect of the case in terms of rule 38(2)."* There was a caveat from the Respondent's Counsel that the contents of the experts' reports are in dispute. When the contents of these reports were put to the Plaintiff during cross-examination in relation to the conflicting versions, she responded. This part cannot be hearsay evidence hence the Court relied on it. The Plaintiff, in Court *a quo*, said the train was stationary during the scuffle inside the coach and this is not

what she pleaded in her particulars of claim and these conflicting versions are fatal blow to her case. The Court had to draw an inference on Plaintiff's conflicting versions and *Rautini* case does not prevent the Court from drawing an inference from the Plaintiff's conflicting versions. Once again, it is also not clear what the error is on my part. The way it is formulated does not show the error made by me and what the correct finding would have been in this regard.

[31] Ground number 12 reads: *"12. The determination goes against His Lordship's own observations and comments in terms of paragraph [11] of His judgement to the effect that "...In the pre-trial held in October 2023, the plaintiff sought an admission of these expert reports and the defendant had apparently not been forthcoming with a denial with reasons. The defendant's counsel ended up admitting the reports in court with a caveat that the contents of the reports are in dispute...."* There was a caveat from the Respondent's Counsel that the contents of the experts' reports are in dispute. Once again, it is also not clear what the error is on my part. The way it is formulated does not show the error made by me and what the correct finding would have been in this regard.

[32] Ground number 13 reads: *"13. Absolution from the instance should not be granted lightly by courts and should only be granted in circumstances where the plaintiff's case is so weak that no reasonable court could find for the plaintiff. This is not the case in the matter before Court. We submit that the Honourable Judge should take cue from the following dicta from the case of G.E.P obo M.L.F v MEC for The Department of Health Gauteng Provincial Government (33632/2014) [2023] ZAGPJHC 535 (22 May 2023) at paragraph [20]: ...endorsing the proposition made by the defendant in this case would deny the plaintiff a fair hearing and would amount to a denial of access to justice in that the plaintiff would be deprived of the opportunity to ventilate all the issues she has raised in the in the (sic) particulars of claim."* In *casu*, I have held that the Applicant has not made out a *prima facie* case requiring, the Respondent to answer in keeping with *Stier*

and Another v Henke[20] and *Soltec CC v Swakopmund Super Spar.*[21] I have taken into account all the reasoning and conclusions from relevant authorities. I have also kept in my mind's eye the judicial counsel that a court ought to be cautiously reluctant to grant an order of absolution from the instance at the close of plaintiff's case, unless the occasion has arisen. If the occasion has arisen, the court should grant absolution from the instance in the interest of justice[22]. Having done all that, I concluded that the Plaintiff has not passed the mark set by the Supreme Court in *Stier v Henke*, which is that for plaintiff to survive absolution, plaintiff must make out a *prima facie* case upon which a court could find for the plaintiff. In the circumstances, based on all the aforementioned reasons, I held that the occasion has surely arisen for the court to make an order granting absolution from the instance in the interest of justice.

Even here, it is also not clear what the error is on my part. The way it is formulated does not show the error made by me and what the correct finding would have been in this regard.

[33] Ground number 14 reads: *"14. Based on the above highlighted errors, it is our submission that there are prospects of success regarding the appeal and that such would lead to a solution of the disputes between the parties."* There are no prospects of success here. In *MEC Health, Eastern Cape v Mkhitha,*[23] the Supreme Court of Appeal held: *"[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 reasonable prospect of success; or there is some other compelling reason why it should*

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[20] *Stier and Another v Henke*, footnote 6.

[21] *Soltec CC v Swakopmund Super Spar*, footnote 7.

[22] *Etienne Erasmus v Gary Erhard Wiechmann and Fule Injunction Repairs & Spares* [2013] NAHCMD 214 (24 July 2013).

[23] (1221/15) [2016] ZASCA 176 (25 November 2016); S v Smith 2012 (1) SACR 567 (SCA) para 7.

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."

[34] The analysis of the Applicant's grounds of appeal and authorities referred to above are, one way or another, illustrating the point that the Applicant's notice for leave to appeal is indeed fatally and gravely defective. Some of the issues raised in the Applicant's notice for leave to appeal were addressed adequately in the Judgment *a quo*, and therefore, there is no need for repetition.

APPEAL COURT'S LIMITED ABILITY TO INTERFERE WITH THE TRIAL COURT'S FINDINGS

[35] The trial court bears the task of analysing and evaluating evidence. An appeal court is limited in its ability to interfere with the trial court's findings or conclusions, and may not do so simply because it would have come to a different finding or conclusion. The trial court has the advantage of seeing and hearing witnesses, which places it in a better position than a court of appeal to assess the evidence, and such assessment must prevail, unless there is a clear and demonstrable misdirection. This is a principle that is well established in our law.

[36] It is trite that a court on appeal should not interfere with the trial judge's findings/conclusions on primary facts unless it is satisfied that the trial court was plainly wrong.[24] The factual and credibility findings of the trial court are presumed to be correct unless they are shown to be wrong with reference to the record.[25] The Supreme Court of

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[24] R v Dhlumayo & another 1948 (2) SA 677 (A) at 705-706.

[25] S v Francis 1991 (1) SACR 198 (SCA) at 204E-D.

Appeal held as follows in *S v Pistorius*:[26] *"It is a time-honoured principle that once a trial court has made credibility findings, an appeal court should be deferential and slow to interfere therewith unless it is convinced on a conspectus of the evidence that the trial court was clearly wrong. R v Dhlumayo and Another 1948 (2) SA 677 (A) at 706; S v Kebana 2010 (1) All SA 310 (SCA) para 12.... As the saying goes, he was steeped in the atmosphere of the trial. Absent any positive finding that he was wrong, this court is not at liberty to interfere with his findings."*

[37] It is trite that the views of Courts may differ but that will not be necessarily interference with the judgment of the Court *a quo*. The vital way of thinking of the Courts of Appeal is that the trial Court experienced the hearing, the conduct of the parties and their Counsel and the evidence in all its forms and that interference will not be a given just for a difference in opinion by the Court sitting on appeal. The Supreme Court of Appeal reiterated this stance in its judgment on 31 July 2020 in *AM and another v MEC Health, Western Cape.*[27]

[38] In *Bee v Road Accident Fund,*[28] the Court said the following with regard to an approach on appeal: *"[46] I start by emphasising two interrelated principles to be observed by an appellate court in an appeal against an award of damages. Firstly, the trial court's factual findings are presumed to be correct in the absence of demonstrable error. To overcome the presumption, an appellant must convince the appellate court on adequate grounds that the trial court's factual findings were plainly wrong. Bearing in mind the advantages enjoyed by the trial court of seeing, hearing and appraising the witnesses, it is only in exceptional circumstances that an appellate court will interfere with the trial court's evaluation of oral evidence (R v Dhlumayo & another* ***1948 (2) SA 677*** *(A) at 705-706; Sanlam Bpk v Biddulph* ***2004 (5) SA 586*** *(SCA) para 5; Roux v Hattingh* ***[2012] ZASCA 132****; 2012 (6) 428 (SCA) para 12). [47] Second, where damages are a matter of*

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[26] 2014 (2) SACR 315 (SCA) par [30]

[27] (1258/2018) [2020] ZASCA 89; 2021 (3) SA 337 (SCA) (31 July 2020)

[28] (093/2017) [2018] ZASCA 52; 2018 (4) SA 366 (SCA) (29 March 2018)

estimate, an appellate court will not interfere with the trial court's assessment unless there was a misdirection or unless there is a substantial variation between the trial court's award and what the appellate court would have awarded or unless the appellate court thinks that there is no sound basis for the award (Sandler v Wholesale Coal Supplies Ltd ***1941 AD 194*** *at 200; AA Mutual Insurance Association Ltd v Maqula* ***1978 (1) SA 805*** *(A) at 809B-D)."*

[39] In the matter of *Makate v Vodacom Ltd,*[29] the Constitutional Court, with reference to the well-known principles established in the matter of *R v Dhlumayo*,[30] held the following regarding the findings of the *court a quo*, (more specifically where findings on credibility were made) and the role of the Appeal Court in such instances: "*Ordinarily, appeal courts in our law are reluctant to interfere with factual findings made by trial courts, more particularly if the factual findings depended upon the credibility of the witnesses who testified at the trial. In Bitcon Wessels CJ said: '(T)he trial judge is not concerned with what is or is not probable when dealing with abstract business men or normal men, but is concerned with what is probable and what is not probable as regards to the particular individuals situated in the particular circumstances in which they were.'*"

[40] Importantly, the Constitutional Court further held in *Makate* judgment that: "*[40] But even in the appeal the deference afforded to a trial court's credibility findings must not be overstated. If it emerges from the record that the trial court misdirected itself on the facts or that it came to a wrong conclusion, the appellate court is duty-bound to overrule factual findings of the trial court so as to do justice to the case. In Bernert this court affirmed: 'What must be stressed here, is the point that has been repeatedly made. The principle that an appellate court will not ordinarily interfere with a factual finding by a trial court is not an inflexible rule. It is a recognition of the advantages that the trial court enjoys, which the appellate court does not. These advantages flow from observing and hearing witnesses as opposed to reading the cold printed word. The main advantage being the opportunity to observe the demeanour of the witnesses. But this rule of practice should*

[29] 2016 (4) SA 121 (CC)
[30] 1948 (2) SA 677 (A)

not be used to tie the hands of the appellate courts. It should be used to assist, and not to hamper, an appellate court to do justice to the case before it. Thus, where there is a misdirection on the facts by the trial court, the appellate court is entitled to disregard the findings on facts and come to its own conclusion on the facts as they appear on the record. Similarly, where the appellate court is convinced that the conclusion reached by the trial court is clearly wrong, it will reverse it.'"

CONCLUSION

[41] The leave to appeal procedure ensures that the appeal process is not abused and that only meritorious cases proceed to appeal. Understanding the requirements for leave to appeal can save time and resources for litigants. It is essential to comply with the relevant rules and procedures when seeking leave to appeal to avoid the dismissal of the application. Failure to comply with these requirements may result in the dismissal of the application.

[42] In *Van Den Berg v Land and Agricultural Development Bank of South Africa and Others*,[31] the Court held: *"[14] The grounds for appeal are out of context and fatally defective. The general arrangement of the grounds on which the applicant seeks leave to appeal is to criticise the judgment on an almost paragraph-by-paragraph and word-by-word basis without specifying what effect any asserted erroneous finding or conclusion has on the correctness of the substantive order. The disjointed approach in which the applicant has expressed his application for leave to appeal influences against the importance of interpreting the judgment of the court as a whole and in context. The first and second respondents are correct where they stated that the grounds on which the applicant seeks leave to appeal are not set out in precise, and succinct and unambiguous terms. It is difficult to distinguish what and on what basis the applicant seeks to impugn the substantive order made by the Court. [15] In Democratic Alliance v President of the Republic of South Africa and Others (2124/ 2020) [2020] ZAGPPHC 326 (29 July 2020) at paragraphs [4] – [5] the Full Court held as follows: '…This dictum serves to emphasise*

[31] (1955/2016) [2023] ZAFSHC 504 (22 December 2023).

a vital point: Leave to appeal is not simply for the taking. A balance between the rights of the party which was successful before the court a quo and the rights of the losing party seeking leave to appeal need to be established so that the absence of a realistic chance of succeeding on appeal dictates that the balance must be struck in favour of the party which was initially successful.'"(Accentuation added)

[43] In *Songono* case *supra,* Leach J said the following: *"It seems to me that, by a parity of reasoning, the grounds of appeal required under Rule 49 (1)(b) must similarly be clearly and succinctly set out in clear and unambiguous terms so as to enable the Court and the respondent to be fully and properly informed of the case which the applicant seeks to make out and which the respondent is to meet in opposing the application for leave to appeal." It is therefore trite that leave to appeal may also be dismissed if the grounds of appeal fail to comply with the requirements of Rule 49(1)(b), by being couched in ambiguous and vague terms."* The Applicant's grounds of appeal, in *casu*, failed to comply with the requirements of Rule 49(1)(b) and as such, this is a legal basis to dismiss the application.

[44] It is common cause that section 17(1)(a)(i) has now "raised the bar for granting leave to appeal" requiring that the matter "would" have reasonable prospects of success, not merely that it "may" have such prospects.[32] This has been confirmed by the SCA.[33] The Applicant is required to satisfy the test for leave to appeal under section 17(1) of the Superior Courts Act. In *casu*, the Applicant has failed the test for leave to appeal as set out in the 2013 Act. As such, this is a legal basis to dismiss the application.

[45] The Applicant has tendered no compelling grounds for application for leave appeal to be granted. The Applicant has provided no basis to suggest that this Court's assessment of the evidence was misdirected, nor has it shown that there are reasons that would convince a

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[32] Acting National Director of Public Prosecution and Others v Democratic Alliance; In re Democratic Alliance v Acting National Director of Public Prosecution and Others 2016 ZAGPPHC 489 (24 June 2016) at paras 25, 29 (Full Court), citing The Mont Chevaux Trust (IT2012/28) v Tina Goosen & 18 Others LCC 14R/2004 at para 6.

[33] Mothuloe Incorporated Attorneys v The Law Society of the Northern Provinces & another [2017] ZASCA 17 (22 March 2017) at para 18; Notshokovu v S [2016] ZASCA 112 (7 September 2016) at para 2: "[a]n appellant ... faces a higher and stringent threshold, in terms of the Act compared to the provisions of the repealed Supreme Court Act 59 of 1959."

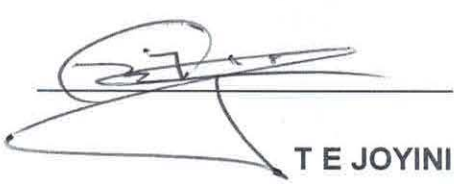
court of appeal that this Court was wrong. As such, this is a legal basis to dismiss the application.

[46] In my view, after careful consideration of the Applicant's grounds for leave to appeal and the submissions from both parties through their Counsel, there is nothing that persuades me that this appeal would have a reasonable prospect of success. There are also no compelling reasons why leave to appeal should be granted. Therefore, the application for leave to appeal cannot be sustained and as such, it stands to be refused. Firstly, because it is fatally flawed; and secondly, because there is no sound and rational basis for the conclusion that there are prospects of success on appeal. The Respondent has therefore successfully opposed the Applicant's application for leave to appeal.

ORDER

[47] As a result, the following order is made:

(a) The application for leave to appeal is refused;
(b) The parties are ordered to bear their own costs.



T E JOYINI

ACTING JUDGE OF THE HIGH COURT, PRETORIA

APPEARANCES

Counsel for the Applicant:	Adv E Moukangwe
Instructed by:	Mr Linda Nkuna of Linda Nkuna Inc.
Counsel for the Respondent:	Adv RB Mphela
Instructed by:	Ms M Wilsnach of Daile Mogashoa Inc.
Date of Hearing:	28 February 2024
Date of Judgment:	1 March 2024

This Judgment has been delivered by uploading it to the Court online digital data base of the Gauteng Division, Pretoria and by e-mail to the Attorneys of record of the parties. The deemed date and time for the delivery is 1st of March 2024 at 10h00.