| Reportable: | YES / **NO** |
| --- | --- |
| Circulate to Judges: | YES / **NO** |
| Circulate to Regional Magistrates: | YES / **NO** |
| Circulate to Magistrates: | YES / **NO** |

**IN THE HIGH COURT OF SOUTH AFRICA**
**NORTHERN CAPE DIVISION, KIMBERLEY**

Case No.: 457/2019
Date Heard: 16 August 2023
Date Delivered: 5 September 2023

In the matter between:

**ROAD ACCIDENT FUND**
Applicant

and

**NICOLAAS CONLEY MIENIE** Respondent

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**RULING ON THE APPLICATION FOR LEAVE TO APPEAL**

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**Tlaletsi JP**

1. This is an opposed application for leave to appeal against the judgment and order I handed down on 12 May 2023. The order I made is on the following terms:

   a. The defendant is ordered to pay the plaintiff the sum of R1 050 412,06 and costs of suit, which shall exclude the costs already awarded by Sieberhagen AJ on 10 November 2022.

b. Interest on the amount of R1 050 412,06 from the date of this order until the date of payment on the applicable scale.

2. I first outline the legal position relating to applications for leave to appeal. The test of what needs to be established in order to be granted leave to appeal is set out in section 17(1) of the Superior Courts Act[1] ("the Act"), which provides:

> *"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) the decision sought on 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. "*

3. Section 17(1) of the Act was a subject of interpretation in *Mont Chevaux Trust v Goosen*,[2] wherein Bertelsmann J held:

> *"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".*[3]

[1] Act No 10 of 2013

[2] 2014 JDR 2325 (LCC).

[3] *Supra* at para 6.

4. The Supreme Court of Appeal in *Smith v S*[4], per Plasket AJA, considered what constituted reasonable prospects of success in section 17(1)(a)(i) and held:

> *". . .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."*

5. Previously, reasonable prospects of success on appeal was determined by considering whether another court might reasonably arrive at a different conclusion. However, the language of section 17(1)(a)(i) quoted above makes it clear that the threshold for granting leave to appeal has been raised. It is therefore important for this Court to remain cognizant of the higher threshold that needs to be met before leave to appeal may be granted. There must be a reasonable prospect that another court would, not might, find differently on both the facts and the law. The defendant is required to establish a sound and rational basis for the contention that there are reasonable prospects of success. That the case is arguable is simply not enough.

6. The applicant has listed a number of grounds in its application for leave to appeal. Properly summarised, they are in essence, twofold:

   6.1. The Court erred in accepting Mr Boshoff's evidence that in calculating the plaintiff's pre-morbid earnings, the same actuarial basis/principles used by the Compensation Director-General in calculating the capitalised value of the pension which the plaintiff receives in terms of section 36(2) of the Compensation for Occupational Injuries and Diseases Act, No. 130 of 1993, should be used and that from an

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[4] 2012 (1) SACR 567 (SCA) at para 7; See also *MEC for Health, Eastern Cape v Mkhitha and Another* [2016] ZASCA 176 at para 17.

actuarial perspective, it would be the only reasonable and fair approach which could be adopted.[5]

6.2. The Court erred in rejecting the defendant's argument based on the SCA judgment in *Maphiri*.[6]

7. Mr FJ Nalane SC appeared on behalf of the applicant in this application[7]. He submitted that the principle on which the application for leave to appeal is grounded revolves around the application of section 36 of the Compensation for Occupational Injury and Diseases Act (COIDA). Counsel relied on what he termed 'three essential submissions', namely: a) that the judgment does not make a proper distinction between COIDA and the Road Accident Fund; b) no proper distinction is made between damages and compensation, and c) that the matter is of such importance and compelling to the applicant that it should be heard by a higher court, in this instance, the Full Court.

8. In a nutshell, Mr Nalane contended that the respondent's actuary, Mr Boshoff, was not supposed to have computed the damages to be paid to the respondent by using the capitalisation factors that were used by the Compensation Commissioner when determining the pension that was awarded to the respondent. By doing so, it was contended, the distinction between compensation and damages was blurred.

9. The contentions raised are a repetition of what was contended during the trial and have been addressed in the judgment sought to be appealed against. I can do no better than refer to paragraphs [19] and [20] of the aforementioned judgment which reads thus:

> *"[19] The decision in Maphiri does not support Ms Rabie's argument. The court in that case did not deal with the question whether the plaintiff could use the same capitalisation factors used by the Compensation Commissioner to determine the plaintiff's loss of earnings. Nowhere does the decision suggests that an actuary should not rely on the capitalisation factors used by the Compensation*

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[5] See paragraphs 1, 2, 3, 5, 6, 7 and 8 of the notice of application for leave to appeal.

[6] Paragraph 4 of the notice of application for leave to appeal.

[7] He only got involved in the matter to argue the application for leave to appeal.

*Commissioner. In that case, the Supreme Court of Appeal rejected the 'like for like' principle where the respondent in that case contended that compensation must be deducted against certain heads of damages and not against the general damages.*

*[20] Mr Boshoff gave reasons why he used the Compensation Commissioner's capitalisation factors. He reasoned that failure to use the same or similar factors would prejudice [the Road Accident Fund] and the claimant. The only way to mitigate against any prejudice would be to use the same actuarial basis used by the Compensation Commissioner. The [Road Accident Fund] did not tender any evidence to controvert Mr Boshoff's evidence. The advantage of using the same capitalisation used by the Compensation Commissioner makes sense. There can be no reasonable explanation as to why different capitalisation factors should be used for the same purpose, which is the computation of loss of earnings for one person. Fairness and consistency will be guaranteed if the same capitalisation factors are used. The defendant's contention is therefore without merit and falls to be rejected."*

10. As I had indicated in the judgment, the difficulty confronting the applicant is that no evidence was tendered to challenge the evidence of the respondent's actuary. It was open to the applicant to present such evidence to demonstrate why Mr Boshoff's evidence, in its view, should not be accepted. Neither was any evidence presented by the applicant as to how the loss of earnings should be computed. This case centred on an evidential issue and not necessarily a legal issue. It is not the applicant's contention that the evidence of the actuary was misinterpreted or misunderstood. Neither can it be contended that an established practice or procedure which have been in place were not followed.

11. I am not persuaded that the applicant has shown that the appeal would have reasonable prospects of success. Neither has it been established that there is some compelling reason why the appeal should be heard or, that there are conflicting judgments on the matter that was under consideration. The application for leave to appeal should therefore fail. There is no reason why costs should not follow the result.

**12. In the result the following order is made:**

The application for leave to appeal is dismissed with costs.

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**LP TLALETSI**

**JUDGE PRESIDENT**

**APPEARANCES**

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| For the Applicant: | FJ Nalane SC<br>Instructed by: The State Attorney, Kimberley |
| For the Respondent: | JH Roux SC<br>Instructed by: Engelsman Magabane Inc |