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

IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

CASE NUMBER: 3368/2019

In the application for leave to appeal between:-

WERNICH VENTER First Applicant

HARTZER EN STEYN BELEGGING CC Second Applicant

and

OJ STEYN First Respondent

L VAN DER MERWE Second Respondent

MINISTER OF MINERAL AND ENERGY RESCOURCES Third Respondent

In re:-

WERNICH VENTER First Plaintiff

HARTZER EN STEYN BELEGGING CC Second Plaintiff

and

OJ STEYN	First Defendant
L VAN DER MERWE	Second Defendant
MINISTER OF MINERAL AND ENERGY RESCOURCES	Third Defendant

This order is handed down electronically by e-mail to the legal representatives of the parties. The date and time for the handing down of the order is deemed to be Thursday 14 December 2023 at 10h00.

Summary

Application for leave to appeal – test to be applied – full court or Supreme Court of Appeal.

ORDER

The following order is made:

i) Leave to appeal is granted to the Supreme Court of Appeal.

ii) The cost of the appeal is to be cost in the cause, unless the applicant does not proceed with the appeal, in which case the cost is to be paid by the applicant.

JUDGMENT
APPLICATION FOR LEAVE TO APPEAL

FMM REID J

Introduction:

[1] On 27 July 2023 this court handed down its judgment in which the special pleas of prescription as raised by the applicant (defendant *a quo*) in defence of the three claims brought against it.

[2] The applicant now applies for leave to appeal against the judgment. This application is opposed by the respondent (plaintiff *a quo*). The judgment against which leave to appeal is sought, is detailed and I do not intend to rehash my reasoning and findings.

Point *in limine*

[3] The respondents oppose the application for leave to appeal, amongst other reasons, on the basis that the judgment is not final in nature as it is a ruling dismissing the special pleas on prescription. The respondents argue that the trial is to

proceed and only after judgment the defendant can appeal against the outcome which may include the special plea.

3.1. The judgment sought to be appealed against, is an order that had the potential to dispose of the matter *in toto,* in the event that the court found that the claim has become prescribed. A special plea of prescription is by nature thereof a plea *in abatement* that could dispose of the claim *in toto.*

3.2. Put differently, had the court found in favour of the defendants, it would have been the end of the road for the plaintiff and the plaintiff's claims would have been dismissed on the basis that it has become prescribed.

3.3. Should leave to appeal be granted and this judgment is overturned on appeal, the claim has become prescribed and the plaintiffs case will be dismissed. This would result in the judgment being final in nature.

3.4. The purpose of a special plea is to prevent unnecessary time and resources of a matter that

proceeds on trial where the trial should not have started from the beginning. Hence the functioning of a plea *in abatement* that determines the legal position prior to the matter proceeding on trial.

3.5. The normal position in relation to special pleas, are that special pleas are interim in nature. This arises from the standard principle that a matter should not be dealt with in a piecemeal fashion, but only once it is finalised, can the outcome be appealed against.

3.6. In this matter, the legal position concerns that which specifically deals with prescription in claims by and against members of a Close Corporation as well as claims against one another on behalf of the Close Corporation, is yet to be determined. I deem it just and fair that, having regard to the above, this appeal against a point *in limine* should be an exception to the rule and qualifies to be treated as a final order as opposed to an interim order.

[4] On this basis, I agree with the submissions made by the applicant that the judgment is appealable.

Grounds of appeal

[5] The application for leave to appeal is sought on the following grounds (this is my own summary and I do not include all the grounds of appeal due to the volumous and repetitive nature thereofas several are duplicated and repeated):

5.1. That the court did not take into account that the plaintiff, on its own version, agreed that the cause of action commenced on the dates pleaded in the particulars of claim.

5.2. The court erred in the determination of the date that the cause of action arose. This is a question of law and another court could interpret such a point of law differently than the court *a quo* interpreted it.

5.3. In the analysis, the court *a quo* erroneously formulated the identification of the wrong question that was to be determined in whether prescription has taken place.

The ground of appeal is that the court *a quo*, conflated the incorrect question of what the date of the cause of action is, as opposed to the correct question of whether a Close Corporation has a governing body that exists outside the membership of the Close Corporation.

5.4. The court erred in determining whether there was any interruption of prescription. If there was interruption, the court erred in determining what the date of the interruption was as a question of law.

5.5. The court erred in failing to take cognisance of the legal position that a plaintiff who intends to rely on interruption of the prescription, has the onus to file a reply to the special plea and in the reply plead when interruption took place.

[6] The applicant applies for leave to appeal to the Supreme Court of Appeal. This is on the following basis:

6.1. There is no current case law dealing with prescription against a member (or a former member) of a Close

Corporation issues summons on behalf of the Close Corporation, nor where summons is issued against the Close Corporation by a member (or a former member) of the Close Corporation.

6.2. The **Prescription Act** 68 of 1969 has been enacted prior to the **Companies Act** 61 of 1973 and the **Companies Act** 71 of 2008. As such, the Prescription Act has not taken into account the existence and functioning of a Close Corporation as an economical vehicle.

6.3. Being a novel point in law, the applicant argues that the Supreme Court would be appropriate to deal with this legal issue.

[7] I agree that, should leave to appeal be granted, it should be granted to the Supreme Court of Appeal on the basis referred to above.

Legal position

[8] The test to be applied in an application for leave to appeal is

set out in section 17(1)(a) of the **Superior Courts Act** 10 of 2013 which provides that:

> *"(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;"*
>
> (own emphasis)

[9] This application is on the ground that the appeal has a reasonable prospect of success as it deals with a novel point in law as set out in paragraph [6] above.

[10] The Supreme Court of Appeal set out the application for a test to grant leave to appeal in **Cook v Morrisson and Another** 2019 (5) SA 51 (SCA) as follows:

> *"[8] The existence of reasonable prospects of success is a necessary but insufficient precondition for the granting of special leave. Something more, by way of special circumstances, is needed. These may include that the appeal raises a substantial point of law; or that the prospects of success are so strong that a refusal of leave would result in a manifest denial of justice; or that the matter is of very great importance to the parties or to the*

public. This is not a closed list (Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd 1986 (2) SA 555 (A) at 564H – 565E; Director of Public Prosecutions, Gauteng Division, Pretoria v Moabi 2017 (2) SACR 384 (SCA) ([2017] ZASCA 85) para 21).”

[11] In **MEC for Health, Eastern Cape v Mkhita** 2016 JDR 2214 (SCA) the Supreme Court of Appeal emphasised the application for the test for leave to appeal and found as follows in paragraphs [16] to [18]:

“[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****.*

*[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."*
> (own emphasis)

[12] The above legal principles emphasise that the requirement for a successful leave to appeal is more than a mere possibility that another judge might come to a different conclusion. The test is whether there is a reasonable prospect of success that another judge would come to a different conclusion.

[13] The workload in the judiciary is ever increasing and a judge who considers any application for leave to appeal, and specifically an appeal to the Supreme Court of Appeal has a judicial duty to ensure that unmerited appeals do not become part of the workload of the Supreme Court of Appeal. Appeals without merits should simply not be granted leave to appeal.

[14] Having due cognisance of the above, I hold the view that this appeal deals with a novel legal question that has not yet been determined. Legal certainty is necessary on the legal position as set out in paragraph [6] above.

[15] In the premise, I find that the application for leave to appeal deserves to be successful and that leave to appeal to the Supreme Court of Appeal is therefore granted.

Cost

[16] The standard rule in an application for leave to appeal is that the cost of the appeal is to be cost in the cause, unless the applicant does not proceed with the appeal in which case the cost is to be paid by the applicant.

[17] I find no reason to deviate from the abovementioned standard principle.

Order:

[18] In the premise I make the following order:

i) Leave to appeal is granted to the Supreme Court of Appeal.

ii) The cost of the appeal is to be cost in the cause,

unless the applicant does not proceed with the appeal,

in which case the cost is to be paid by the applicant.

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FMM REID
JUDGE OF THE HIGH COURT
NORTH WEST DIVISION MAHIKENG

DATE OF HEARING: **20 OCTOBER 2023**

DATE OF JUDGMENT: **14 DECEMBER 2023**

APPEARANCES:

FOR APPLICANTS: **ADV D HEWITT**

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