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27 November
2023



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

CASE NUMBER: M348/2020

In the matter between:-

JOMANE EIENDOMME (PTY) LTD
(Registration Number: 1997/015458/07)

Applicant

and

MAGISTRATE EM VAN ZYL N.O.

First Respondent

JAN LODEWYK VOSLOO

Second Respondent

This judgment is handed down electronically by e-mail circulated to the attorneys on record for the parties. The date the judgment is handed down is deemed to be **27 NOVEMBER 2023**

ORDER

CORAM: REID J et REDDY AJ

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

FMM REID J:

Introduction:

- [1] This unopposed application for leave to appeal is against a judgment of two (2) judges of the High Court dated 22 June 2023 (the judgment on appeal). The application for leave to appeal deals with a novel question of law relating to the practical steps to be taken after a successful rescission of an order that was obtained by consent or agreement in terms of section 58 of the **Magistrate's Court Act 32 of 1944**, ("the Magistrates Court Act).

[2] The *crux* of the legal question to be determined, is: What are the parties legal standing, and what would be the correct procedure to follow, where, in the Magistrates Court:

2.1. A judgment is obtained by consent between the parties in terms of section 58 of the **Magistrates Court Act** (the section 58 judgment); but

2.2. The party which agreed / consented or acknowledged to the debt in writing in terms of the section 58 judgment, withdraws his/her/its consent and applies to rescind the section 58 judgment in terms of Rule 49(1) and 49(8) Magistrate's Court Rules and

2.3. The section 58 judgment is successfully rescinded.

[3] The acknowledgment of debt judgment was signed by the sole director of Jomane Eiendomme Pty (Ltd) (the defendant in the Magistrate Court) and a letter of demand was served in terms of section 57(1) of the Magistrate's Court Act initiating the court process. No summons was thus issued and the section 58 judgment was issued *ex parte*.

[4] Since no summons were issued, and the section 58 judgment was obtained *ex parte*, the parties were left with no pleadings to proceed to trial. A period after the successful rescission, the learned Magistrate *mero motu* ordered that the plaintiff file a declaration within 10 days after the rescission order. The plaintiff issued same.

[5] This left the parties at an *impasse*:

5.1. The plaintiff contended that the defendant should proceed to file a plea in answer to the declaration;

5.2. The defendant contended that the *mero motu* order of the Magistrate was *functus officio* and the successful rescission brought an end to the issues between the parties in terms of the “once and for all” rule.

[6] The defendant unsuccessfully approached the High Court to review and set aside the Magistrate’s order to file a declaration, and the declaration. This is the judgment under appeal. In addition to dismissing the review application, the

High Court ordered that the declaration is to stand as the particulars of claim in the Magistrate's Court and further proceedings are to be filed in terms of the Rules of the Magistrate's Court.

Appeal

- [7] 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)

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

- [9] The Supreme Court of Appeal set out the application of 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).”

- [10] These principles are echoed in **MEC for Health, Eastern Cape v Mkhita** 2016 JDR 2214 (SCA) where 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)

[11] The above underscores that the requirement is more than a mere possibility than that another judge might come to a different conclusion. The test is whether another judge would come to a different conclusion.

[12] In **S v Smith** 2012 (1) SACR 597 (SCA) at paragraph [7] the concept of reasonable success was posited as follows:

“[7] What the test for reasonable prospects of success postulates is a dispassionate decision, based on facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. 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.”

[13] The bar has been raised and judges considering leave to appeal have a duty to ensure that the appeal has a strong prospect of success. Due to the ever-increasing workload in the judiciary, the judges considering the application for leave to appeal has a duty to ensure that unmeritous appeals do not become part of the workload of full courts or the Supreme Court of Appeal. Appeals without merits should not be granted leave to appeal.

[14] Having due cognisance of the above, I hold the view that this appeal deals with a novel issue that has not been determined before. As described in the judgment under appeal, it deals with an “... *uncharted sphere of the law.*”

[15] I align myself with the view of the applicants that the Supreme Court of Appeal would be the appropriate court to

which leave to appeal should be granted to.

[16] In the premise, the application for leave to appeal to the Supreme Court of Appeal is granted.

Cost

[17] The normal principle is that the costs will be cost in the appeal. Should the applicant not pursue the appeal, the applicant should bear the costs of the application.

[18] I find no reason to deviate from the normal rule in relation to costs.

[19] We therefore find that cost should be cost in the appeal.

Order:

[20] In the premises I make the following order:

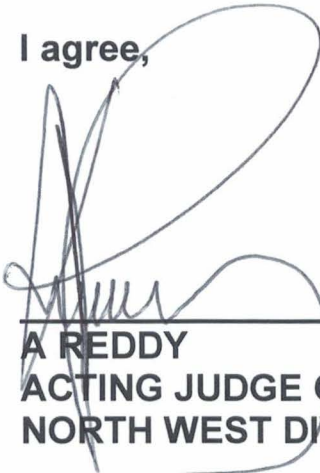
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**FMM REID
JUDGE OF THE HIGH COURT
NORTH WEST DIVISION MAHIKENG**

I agree,



**A REDDY
ACTING JUDGE OF THE HIGH COURT
NORTH WEST DIVISION MAHIKENG**

DATE OF ARGUMENT: 24 NOVEMBER 2023

DATE OF JUDGMENT: 27 NOVEMBER 2023

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