

SOUTH AFRICA / JUDGMENT

Sithole v MEC for Health: KwaZulu-Natal (Leave to appeal) (10018/2016P) [2025] ZAKZPHC 63 (27 June 2025)

[2025] ZAKZPHC 63

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Pietersen

CASE / FILE NUMBER

10018/2016P

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

DIVISION, PIETERMARITZBURG

CASE

NO: 10018/2016P

In

the matter of:

THULANI
ERIC SITHOLE
PLAINTIFF/RESPONDENT
and
THE
MEC FOR HEALTH: KWAZULU-NATAL
DEFENDANT/APPLICANT
ORDER
The

following order is granted:

1.
Leave to appeal is refused.
2.
The defendant shall pay the costs of this application.

JUDGMENT

PIETERSEN AJ:

- [1] This is an application for leave to appeal against the whole judgment and order, which was handed down on 26 April 2024, in which I dismissed the defendant's application with costs.
- [2] The defendant seeks leave to appeal on no fewer than eleven grounds of appeal. Some, if not most, of these grounds of appeal are simply incorrect insofar as they refer to findings in my judgment which do not exist. In a nutshell, the defendant submits that the court erred in finding that there was no written agreement between the parties that the plaintiff's claim would be determined in a trial, that the plaintiff did not waive his right to proceed by way of default judgment in respect of quantum, and that the plaintiff is not estopped from relying on the order striking out the defendant's defence.
- [3] In terms of section 17(1)(a) of the Superior Courts Act 10 of 2013 ('the Act'),
- '(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...'

Prior to the coming into effect of the Act, the test to be applied in an application for leave to appeal was whether there were reasonable prospects that another court may come to a different conclusion.[1] This position has changed under the Act, as section 17(1)(a)(i) provides for leave to appeal to be given only where the judge is of the opinion that the appeal would have a reasonable prospect of success.

- [4] The Supreme Court of Appeal held in *Notshokovu v S*[2] that an appellant faces a higher and more stringent threshold in terms of the Act, compared to the provisions of the repealed Supreme

Court Act 59 of 1959. *Plasket AJA in S v Smith*[3] held that '[m]ore 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'. He held further that there must 'be a sound, rational basis for the conclusion that there are prospects of success on appeal'. [4] This finding was confirmed by the Supreme Court of Appeal in *Four Wheel Drive Accessory Distributors CC v Rattan NO*. [5]

- [5] In *Mont Chevaux Trust v Goosen*, [6] *Bertelsmann J* also held that the threshold for granting leave to appeal has been raised in the Act. He found that the use of the word 'would' indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.

[6] In argument before me, Mr Nankan, who appeared for the defendant (it needs to be mentioned that Mr Nankan did not appear at the hearing of the application which is the subject of this leave to appeal and is not the author of the defendant's notice of application for leave to appeal), further submitted that in terms of section 17(1)(a)(ii) of the Act, leave to appeal should also be granted, as a compelling reason why the appeal should be heard exists and there are conflicting judgments on the matter under consideration. In this regard, Mr Nankan referred to *Ramakatsa and others v African National Congress and another*,^[7] where the Supreme Court of Appeal that:

'Turning the focus to the relevant provisions of the Superior Courts Act (the SC Act), leave to appeal may only be granted where the judges concerned are of the opinion that the appeal would have a reasonable

prospect of success or there are compelling reasons which exist why the appeal should be heard such as the interests of justice. This Court in *Caratco*, concerning the provisions of s 17(1)(a)(ii) of the SC Act pointed out that if the court is unpersuaded that there are prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal.'

[7] In building on his argument of conflicting judgments, Mr Nankan referred to *Motala NO v Road Accident Fund*,^[8] where Hitchings AJ held that a party whose defence had been struck out is not precluded from participating at the trial in order to test the veracity of the plaintiff's version by cross-examining any witnesses and that its position is 'analogous to that of a respondent who has filed a notice in terms of Rule 6(5)(d)(iii) that it intends to oppose the applicant's application on a question of law only'.^[9]

[8] It was further submitted on behalf of the defendant that the plaintiff's representatives' conduct by, inter alia, participating in pre-trial conferences, responding to a request for further particulars, the assessment of the plaintiff by the defendant's expert witnesses, and the experts meeting for purposes of compiling joint minutes, created the impression in the

mind of the defendant that the plaintiff was not going to rely on the striking-out order, particularly insofar as the plaintiff at no stage delivered a notice in terms of rule 30A of the Uniform Rules of Court. It was submitted that the plaintiff's representatives' conduct was consistent with that of a party who was proceeding towards trial on the issue of quantum.

[9] Lastly, on the issue of compelling reasons to grant leave to appeal, Mr Nankan submitted that the order of Hadebe AJ (as she then was) of 29 November 2017 was and remains subject to an application for leave to appeal ('the first application for leave to appeal'). As a result, the defendant submitted that the operation of that order remains suspended in terms of section 18(1) of the Act. The defendant's application for the declaratory order was therefore never necessary.

[10] On the issue of the alleged written agreement, it should be noted that the defendant limited her case in the founding affidavit to a written agreement concluded between the parties, which was apparently recorded in the minutes of the pre-trial conference held on 7

February 2019. The defendant also indicated in her founding affidavit that the written agreement provided for an undertaking by the plaintiff that he would not bring an application for default judgment. However, neither such an undertaking nor such an agreement is apparent from the pre-trial minutes.

[11] In respect of waiver, I remain unpersuaded that there was a tacit abandonment of rights by the plaintiff involving conduct plainly inconsistent with an intention to enforce the order of Hadebe AJ. Furthermore, there is no evidence before me that the plaintiff communicated to the defendant his decision to abandon the right to enforce the order.

[12] Lastly, in respect of estoppel, both parties proceeded to participate in, inter alia, pre-trial conferences, a request for further particulars, a response thereto, and an exchange of medico-legal expert reports. The fact that the parties participated in the various pre-trial procedures does not constitute representations by the plaintiff to the defendant that the defendant can lead evidence at the trial, notwithstanding the order of Hadebe AJ. Therefore, there is also no merit in the defendant's reliance on estoppel. I am, accordingly, not persuaded that an appeal would have a reasonable

prospect of success.

[13] As previously mentioned, in support of the argument that conflicting judgments exist regarding the effect on the proceedings when a pleading has been struck out, the defendant relied on *Motala*. In *Motala*, the court held that the striking out of a defendant's defence is only 'a bar to the defendant tendering evidence which had been pleaded in its plea'.^[10] It was held that '[t]he defendant's position is conceptually analogous to that of a respondent who has filed a notice

in terms of Rule 6(5) (d) (iii) that it intends to oppose the applicant's application on a question of law only'.^[11] The court further held that the defendant is not precluded from cross-examining the plaintiff's witnesses but may not 'put

a different factual version to any witness because it is barred from leading evidence to substantiate its alternative version'.^[12]

[14] In making the above findings, the court in *Motala* relied on *Minister of Police v Michillies*,^[13] where the court, without referring to authority, held that:

'On my understanding, when a plea has been struck, it does not bar the defendant from proceeding to defend the action. The merits are not determined in favour of the plaintiff on the striking of the defendant's plea. The plaintiff remains with the onus to prove its case on a balance of probabilities. These probabilities can be attacked during cross-examination of the plaintiff in the trial and on behalf of the defendant. The same argument is applicable to quantum.'

[15] The court in *Motala* also relied on *Stevens and another v Road Accident Fund*,^[14] where the same finding was made, also without any reference to authority. In my judgment, I had relied on *Wilson v Die Afrikaanse Pers Publikasies (Edms) Bpk*^[15] and *Langley v Williams*.

[16] These decisions have also recently been followed in a number of judgments,[17] supporting my conclusion that the effect of a striking-out order means that the defendant has no defence and no version before a court and the plaintiff is therefore entitled to request judgment.

[16] It has further been held in MEC, Department of Public Works v Ikamva Architects[18] that ‘the dismissal of a claim or the striking of a defence is a drastic remedy, and the power to grant such a remedy is

discretionary, a discretion that must be exercised judicially’. The court explained that the striking out of a plaintiff’s

claim or a defendant’s defence has a far-reaching impact on the right to have a dispute resolved by a court or a tribunal in a public hearing. ‘It has the potential to deprive a litigant of a fair trial, bringing an end to a claim or defence.’[19] In the case of a defendant, the court held, ‘the usual effect of a striking-out is to prevent the presentation of a defence so that judgment will be entered for the plaintiff’. I agree with these findings.

[17] As a result, the legal position is clear and I am not satisfied that conflicting judgments on the effect of the striking-out of a defendant’s defence constitute a compelling reason why leave to appeal should be granted.

[18] The suspension of the effect of the order of Hadebe AJ was raised for the first time before me at the hearing of this application for leave to appeal. Both counsel assured me that the first application for leave to appeal has never been prosecuted or withdrawn and that it is, therefore, still pending. I make no finding as to the correctness of this submission in circumstances where the application for leave to appeal was delivered during December 2017, being close to seven years ago (at the time of hearing this application), and where neither of the parties took any steps to finalise the application for leave to appeal. Both counsel also agreed that either party had the right to enrol the first application for leave to appeal, but failed

to do so.

[19] Mr Nankan submitted that the order of Hadebe AJ thus remains suspended in terms of section 18(1) of the Act. There was thus never a need to bring the application which served before me, as the order remains suspended until the first application for leave to appeal has been decided. Ms Ploos van Amstel disagreed with this submission and referred to the provisions of Uniform rule 49. Ms Ploos van Amstel submitted that the appeal in respect of the order of Hadebe AJ had lapsed in terms of the provisions of rule 49(6).

- [20] The provisions of rule 49(6) provide for the lapsing of an appeal. It does not deal with an application for leave to appeal. I am therefore unable to agree with Ms Ploos van Amstel's submission. It has to be noted that Ms Ploos van Amstel was confronted with this argument for the first time at the hearing of this application. It was not raised in the defendant's notice of application for leave to appeal or in the defendant's heads of argument, despite such heads of argument consisting of no less than 57 pages.
- [21] Regardless, it remains that the first application for leave to appeal has not been prosecuted. That application is not before me but it is possible that a court hearing it may find that it had lapsed as a result of the failure to timeously prosecute it. It was held by Notshe AJ in *Absa Bank Ltd v Howell*[20] that it is 'in the public interest that finality must be reached within a reasonable time in respect of litigation'. I agree with Notshe AJ that '[t]he courts have the power, as part of their inherent jurisdiction, to regulate their own proceedings to refuse and regarded as lapsed, an application that has not been prosecuted after an unreasonable delay'. [21] In *Benson v The Standard Bank of South Africa and others*, [22] Weiner J (as she then was) stated that 'a matter cannot be held in abeyance indefinitely' and that a delay in prosecuting an application for leave to appeal must be reasonable and fully explained.
- [22] As a result, whilst I make no findings in respect of the defendant's first application for leave to appeal against the order of Hadebe AJ, I am unable to agree with counsel that I can simply accept that the application is still pending and that the suspension in terms of section 18(1) is still in effect.
- [23] It is unfortunate that the argument that the first application for leave to appeal suspended the order of Hadebe AJ was not raised before P Bezuidenhout J when he directed the defendant to bring the application, which ultimately came before me, or raised before me when I subsequently heard the application. During argument, both parties sought to place the blame at the other's door. Regardless, both parties were in agreement that if the order of Hadebe AJ is in fact suspended, it was never necessary to bring the application.
- [24] As a result, even if it is accepted that the first application for leave to appeal is still pending, it has the result that the order granted has no force or effect and that any appeal will be moot as the application would have been stillborn from the outset. As indicated above, I make no such findings in respect of the first application for leave to appeal.
- [25] In the circumstances, the application for leave to appeal must fail. There is no reason why the usual rule that costs should follow the result shall not apply. On the contrary, it is the defendant who brought the application after failing to raise the argument regarding the first application for leave to appeal before P Bezuidenhout J on 13 February 2023. It was also the defendant who failed to raise the same argument before me at the hearing of the main application. It is therefore fair and reasonable for the defendant to pay the costs of this application.
- [26] I make the following order:

1. Leave to appeal is refused.
2. The defendant shall pay the costs of this application.

PIETERSEN AJ

Date of hearing: 2 September 2024

Date of Judgment: 27 June 2025

APPEARANCES

Applicant/Defendant: Mr Nankan Instructed by: The State Attorney 6th Floor, Metlife Building 391 Anton Lembede Street Durban Ref: Mr M Ngubane/vp/24/005694/15/S/P18 c/o Cajee Setsubi Chetty Inc 195 Boshoff Street Pietermaritzburg Plaintiff/Respondent : Ms Ploos Van Amstel Instructed by: Malcolm Lyons & Brivik Inc Per: T Brivik Suite 501, 5th Floor The Colosseum 3 St Georges Mall Cape Town (Ref: TB/al/S255) c/o Morne Du Plessis Attorneys 32 Taunton Road Wembley Pietermaritzburg 3201 Ref: 01/M016/002/Mdp/sj

- [1] Section 20 of the Supreme Court Act 59 of 1959 and Commissioner of Inland Revenue v Tuck 1989 (4) SA 888 (T).
- [2] Notshokovu v S [2016] ZASCA 112 para 2.
- [3] S v Smith [2011] ZASCA 15; 2012 (1) SACR 567 (SCA) para 7.
- [4] Ibid.
- [5] Four Wheel Drive Accessory Distributors CC v Rattan NO [2018] ZASCA 124; 2019 (3) SA 451 (SCA) para 34.
- [6] Mont Chevaux Trust v Goosen 2014 JDR 2325 (LCC).
- [7] Ramakatsa and others v African National Congress and another [2021] ZASCA 31 para 10.
- [8] Motala NO v Road Accident Fund [2023] ZAGPJHC 1323 ('Motala').
- [9] Ibid para 17.
- [10] Motala para 17.
- [11] Ibid.
- [12] Ibid para 19.
- [13] Minister of Police v Michillies [2023] ZANWHC 90 para 4.
- [14] Stevens and another v Road Accident Fund [2022] ZAGPJHC 864.
- [15] Wilson v Die Afrikaanse Pers Publikasies (Edms) Bpk 1971 (3) SA 455 (T) at 462H-463A.

[16] Langley v Williams 1907 TH 197.

[17] See for instance the following judgments where either of them or both of them have been referred to: Minister of Safety and Security and another v Burger [2015] ZAGPPHC 346; WHB v Road Accident Fund

[2024] ZAGPPHC 583; Kritzinger v Road Accident Fund

[2023] ZAGPPHC 730; 2023 JDR 3187 (GP); Mene v Minister of Police

[2023] ZAECMHC 47.

[18] MEC, Department of Public Works and others v Ikamva Architects and others 2022

(6) SA 275 (ECB) para 18. The subsequent appeal to the SCA was dismissed – see MEC for the Department of Public Works and others v Ikamva Architects CC and others

[2024] ZASCA 95.

[19] Ibid.

[20] Absa Bank Ltd v Howell [2019] ZAGPJHC 550; 2020 JDR 1389 (GJ) para 7.

[21] Ibid.

[22] Benson v The Standard Bank of South Africa and others

[2022] ZAGPJHC 334; 2022 JDR 1243 (GJ) para 7.

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