

**REPUBLIC OF SOUTH AFRICA**



**GAUTENG LOCAL DIVISION, JOHANNESBURG**

**CASE NO. 2904/17**

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED.
<u>11/02/2020</u> DATE	<u>[Signature]</u> SIGNATURE

In the matter between:

**MOTO MATIKO MABANGA**

Applicant

and

**VODACOM INTERNATIONAL LIMITED**  
**VODACOM GROUP LIMITED**

First Respondent  
Second Respondent

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**JUDGMENT**

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**NOTSHE AJ:**

[1] This is an application for leave to appeal against the judgment and order that I made against the applicant.

[2] The issue of the application for leave to appeal is regulated by the provisions of section 17(1) of the Superior Courts Act, 10 of 2013 ("**the Act**"). The said provision reads as follows:

*"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)<sup>1</sup>; 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] The Act lays down following three requisites, which must all exist and be satisfied before leave to appeal can be granted:

- (a) that the appeal would have a reasonable prospect of success, if not, there is some other compelling reason for having the appeal heard;
- (b) the decision sought to be appealed will have a practical effect or result; and
- (c) the appeal would lead to a just and prompt resolution of the real issues between the parties although the decision does not dispose of all the issues in the case.

[4] If any of the three prerequisites is not satisfied leave appeal cannot be granted.

[5] The Act was promulgated on 12 August 2013. Before that the test for the granting or refusal of an application for leave to appeal was governed by common law.

[6] The first question that arises is whether the provisions of the Act have changed the common law test for granting of leave to appeal.

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<sup>1</sup>This subparagraph makes provision for a situation where the issues on appeal are of such a nature that the decision sought will have no practical effect or result. It provides that the appeal may be dismissed on that ground alone.

[7] The common law test applicable for the granting of leave to appeal is whether there is a reasonable prospect that another court may come to a different conclusion. The other two statutory requirements also formed part of the common law test although subsumed under one test.<sup>2</sup>

[8] In *Mont Chevaux Trust (IT 2012/2008) v Tina Goosen and Others*, an unreported decision of the Land Claims Court under LCC 14R/2014, dated 3 November 2014, the Land Claims Court held that the wording of this subsection of the Act raised the bar of the test that now has to be applied to the merits of the proposed appeal before leave should be granted. Erasmus: Superior Court Practice.<sup>3</sup> states that in an unreported case of the Supreme Court of Appeal, case no. 157/15 dated 7 September 2016, the Supreme Court of Appeal held that an appellant faces a high and stringent threshold in terms of the Act compared to the provisions of the repealed Supreme Court Act, 59 of 1959.

[9] In the *Mont Chevaux Trust* case, Bertelsmann J is reported to have said the following:

"It is clear that the threshold for granting leave to appeal against a judgment of the 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 conclusion: See *Van Heerden v Cronwright and Others* 1985 (2) SA 342 (T) at 342H. 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."

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<sup>2</sup> R v Ngubane 1945 AD 185 at 187, R v Baloi 1949 (1) SA 523 (A) at 524, High School Ermelo v The Head of Department [2008] 1 All SA 139 (T) at 141, African Guarantee & Indemnity Co Ltd v Van Schalkwyk 1956 (1) SA 326 (A) at 329B-C, Zweni v Minister of Law and Order 1993 (1) SA 523 (A) at 531.

<sup>3</sup> RS6-2018, A2-55.

[10] This judgment is referred to with approval in the matter of *Acting National Director of Public Prosecutions and Others v DA In re: DA v Acting National Director of Public Prosecutions and Others*<sup>4</sup>.

[11] Both courts did not refer to the matter of *MEC for Health, Eastern Cape v Mkhitha and Another*.<sup>5</sup> In that case, the Supreme Court of Appeal dealt with the issue of why the court stated that an applicant for leave to appeal must convince the Court on proper grounds that there is a reasonable prospect of a realistic chance of success on appeal. It further said that 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. The Court referred to its earlier judgment in *S v Smith*.<sup>6</sup> It did not say that the bar has been raised by the provisions of the Act.

[12] In the circumstances, I am of the view that the law remains as it was prior to the promulgation of the Superior Courts Act, namely that an applicant for leave to appeal must convince the Court on proper grounds that there is a reasonable prospect or realistic chance of success.

[13] The provisions of s17(1) of the Act and the common law have to be given restrictive interpretation because they limit the right of access to court that is guaranteed by section 34 of the Constitution of the Republic, 1996.<sup>7</sup> The access to Courts includes appeal courts up to and including the apex

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<sup>4</sup> (19577/09) [2016] ZAGPPHC 489 (24 June 2016).

<sup>5</sup> [2016] ZASCA 176 (25 November 2016).

<sup>6</sup> 2012 (1) SACR 567 (SCA) para [7].

<sup>7</sup> S34 provides that:

*"Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."*

court. The limitation thereof will only be justifiable if it is fair, reasonable and justifiable.<sup>8</sup>

[14] As stated by the Supreme Court of Appeal, there must still be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal. The other two requirements must also be satisfied.

[15] The application for leave to appeal has a peculiar feature that leave to appeal is sought from the very same Judge who was satisfied that the order that he/she made is a sound one. Although the court was satisfied that the order made is a sound one, it is required to stand back and look at the order and reasons thereof and ask itself whether there is a reasonable prospect that another court may come to a different conclusion. This requires that the Court, even if it is satisfied that the order is valid in view of the reasons it gave for it, must seriously consider whether there is a reasonable prospect that another Court may come to a different conclusion.

[16] The Court must, for a moment abdicate its judicial position and look at its judgment and order and seriously consider whether there is a reasonable prospect that another Court may come to a different conclusion. This requires judicial maturity, for *"... a [person] in distress wants to pour out [his/her] heart more than the case be won. About him who stops a plea, one says: 'Why does he reject it?'"*<sup>9</sup>

[17] In that event a Court should steer that fine course between a Scylla of easily refusing leave to appeal and the Charybdis of granting leave to appeal in cases where there is no reasonable prospect of success on appeal and/ or other requirements have also not been met.

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<sup>8</sup> Lesapho v North West Agricultural Bank 2000 (1) SA 409 (CC).

<sup>9</sup> Instruction of Ptahhotep, from the 6<sup>th</sup> Dynasty (2300-2150 BC) referred in Baxter:

[18] In this case the grounds for leave to appeal and even argument before me do not satisfy me that there is a reasonable prospect of success on appeal. Instead the grounds of appeal and argument are based on issues the papers that were not before me. An appeal is retrial on the facts that were before the court. An application for leave to appeal is therefore confined to the four corners of the record.

[19] In the circumstances, I am satisfied that there is a no reasonable prospect of success on appeal and there is no other compelling reason why the appeal should be heard.

[20] Accordingly the application for leave to appeal is dismissed, with costs.

A handwritten signature in black ink, appearing to read 'V S NOTSHE', is written over a horizontal line.

**V S NOTSHE**  
Acting Judge of the High Court

Heard: 07 February 2020

Judgment delivered: 11 February 2020

