

REPUBLIC OF SOUTH AFRICA



HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

12/2/2016

In the matter between:

Not reportable

Not of interest to other Judges

CASE NO: 52777/2011

MKM ATTORNEYS

Applicant

and

INNOCENTIA MOSIMA MAREDI

First Respondent

EXECUTOR (in the Estate of late H.M Nkosi)

Second Respondent

MASTER OF THE NORTH GAUTENG HIGH COURT

Third Respondent

CASE NO: 52778/2011

MKM ATTORNEYS

Applicant

and

NAOMI MORONGWA MAREDI

First Respondent

EXECUTOR (in the Estate of late H.M Nkosi)

Second Respondent

MASTER OF THE NORTH GAUTENG HIGH COURT

Third Respondent

J U D G M E N T – Leave to appeal

MAKGOKA, J

[1] This is an application for leave to appeal against the judgment of this court delivered on 2 July 2015. In terms of the order of that judgment, the applicant, a firm of attorneys, was found to have been negligent in handling of the mandate entrusted to it, respectively, by the second respondents in the consolidated actions. The application is opposed by those respondents, the victorious plaintiffs in the consolidated actions.

[2] The common law test in an application for leave to appeal has always been whether there are reasonable prospects that another court, given the same set of facts, might arrive to a different conclusion. That test has been codified by s 17 of the Superior Court Act 10 of 2013, in terms of which leave to appeal may only be given where a judge is of the opinion that the appeal would come to a different conclusion. During argument I debated with Mr Vorster SC, for the applicant, whether the use of 'would' in the s 17 did not indicate a heightened threshold than the common law one of a reasonable prospect. Counsel contended that despite the wording of the section, the test remains that of reasonable prospect of success at common law.

(My underlining for emphasis).

[3] I have had careful and dispassionate regard to the applicants' grounds of appeal, which amount to no more than a regurgitation of the arguments advanced in the main application. Each of the grounds has been dealt with fully in the judgment, and it would serve no purpose to repeat what is stated there. The applicant's insurmountable obstacles include, among others, the finding that the letter it addressed to the executor of the estate of Nkosi did not constitute a claim against that estate. Factually and legally, the letter falls far short of a claim. At best, it amounts to an intention to lodge a claim. The other obstacle is the failure of the attorneys to formally terminate their relationship with Mrs Maredi, thereby creating an impression that she was still a client of the firm, thereby denying her an opportunity to timeously seek second opinion. This aspect is fully dealt with in paras [39] – [42] of the judgment.

[4] On aspect worth mentioning is that the applicant seeks to appeal largely against the factual findings of the court. The approach to be adopted by a court of appeal when it deals with the factual findings of a trial court trite. A court of appeal will not disturb the factual finding of a trial court unless the latter had committed a misdirection. Where there has been no misdirection on fact by the trial Judge, the presumption is that his conclusion is correct. The appeal court will only reverse it where it is convinced that it is wrong. In such a case, if the appeal court is merely left in doubt as to the correctness of the conclusion, then it will uphold it. See for example, *JMYK Investments CC v 600 SA Holdings (Pty) Ltd* 2003 (3) SA 470 (W) at 472.

[5] In the present case, I am not persuaded that there has been any misdirection as far as the factual findings are concerned. For all the above considerations, I am not persuaded that any other court would come to a different conclusion. Even if one adopts Mr Vorster's proposition that the ultimate test remains one of reasonable prospects of success, I am not persuaded there are such prospects.

[6] In the result the application falls to fail, and the following order is therefore made:

1. The application for leave to appeal is dismissed with costs.



T.M. Makgoka
Judge of the High Court

Heard: 5 February 2016

Judgment delivered: 12 February 2016

Appearances:

For the Applicant: Adv. J. Vorster SC

Instructed by: Savage Jooste & Adams Inc., Pretoria

For the Second Respondents in
the consolidated actions:

Adv. J. Viljoen

Instructed by: Malan & Mohale Attorneys, Pretoria