REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

PRETORIA

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

28 OCTOBER 2022 .....

DATE SIGNATURE

CASE NO: 58803/21

In the matter between:

MOTHUSI LUKHELE	**APPLICANT**
AND	
COLLINS LETSOALO	**FIRST RESPONDENT**
THE ROAD ACCIDENT FUND	**SECOND RESPONDENT**

JUDGMENT - LEAVE TO APPEAL

CEYLON , AJ

A. INTRODUCTION:

[1] This is an application for leave to appeal against the judgment and order delivered herein on 01 August 2022. The application is opposed.

[2] The said Order provides as follows:

"[43] In the result, the following order is made:

(a) the condonation application is granted, no order as to costs;

(b) the application in terms of Rule 6 (12) (c) is dismissed and the Respondents are ordered to pay the costs, including costs of counsel in relation thereto;

(c) the Applicant is ordered to pay the reserved costs in relation to the 15 December 2021 on an attorney and client scale including costs of counsel"

[3] This application is premised on the grounds set out in the Application for Leave to Appeal dated 15 August 2022. The grounds raised by the Applicant is fully detailed in said Application and need not be repeated here. In brief, those grounds are that:

(a) the learned Judge erred in finding that the Respondents were willfully absent from the hearing of 23 November 2021;

(b) the learned Judge erred in finding that the explanation provided by the Respondents was not reasonable and they could have briefed attorneys and counsel and applied for a postponement;

(c) the learned Judge misapplied the legal principles in the Zuma, Chess South Africa and Freedom Stationery judgements cited in the said judgment, and thus made material errors of law;

(d) the finding in paragraph 3 of the judgment is not based on any facts that were before the learned Judge.

[4] The Applicant filed brief Heads of Argument ("HOA"), dated 12 September 2022, in opposition to the grounds of appeal of the Respondents. In the HOA, the Applicant submitted as follows:

(a) that the Respondents fall short of the required standards set out in section 17 of the Superior Courts Act and the MEC Health, Eastern Cape v Mkhita decision [(2016) ZASCA 176 at para 17] with regards to leave to appeal.

(b) the Respondents had reasonable opportunity to respond and explore their options upon receipt of service of the application and hearing date thereof.

(c) as a result thereof that the Respondents had sufficient and reasonable opportunity to respond, as set out in sub-paragraph (b) above, this have been dispositive of the application.

(d) the Respondents, in light of the above, does not have reasonable prospects of success on appeal.

B. LEGAL PRINCIPLES:

[5] Applications for leave to appeal are governed by section 17 of the Superior Courts Act 10 of 2013. Section 17 (1) provides as follows:

"*(1) Leave to appeal may only be given where the judge or judges concerned are of the opinions 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 to appeal does not fall within the ambit of section 16 (2) (a); 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."

[6] The traditional test that was applied by the Courts in considering leave to appeal applications have been whether there is a reasonable prospect that another Court may come to a different conclusion to the one reached by the Court *a quo* [Commissioner of Inland Revenue v Tuck 1989 (4) SA 888 (T) at 890B]. With the enactment of section 17, the test obtained statutory force. In terms of section 17 (1) (a) (i), leave to appeal may now only be granted where the Judge or Judges concerned is of the view that the appeal would have a reasonable prospect of success, which made it clear that the threshold to grant leave to appeal has been raised. In Mont Chevant Trust v Tina Goosen and 18 Others 2014 JDR 2325 (LLC), at para 6, it was held that:

"*It is clear that the threshold for granting leave to appeal against a judgment of a 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 at a different conclusion, see Van Heerden v Cronwright & Others 1985 (2) SA 342 (T) at 343H. 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 against.*" In Notshokuvu v S (2016) ZASCA 112 at para 2, it was indicated that an Appellant faces a "higher and stringent" threshold under the Superior Courts Act.

[7] Thus, in relation to said section 17, the test for leave to appeal is not whether another Court "may" come to a different conclusion, but "would" indeed come to a different conclusion.

[8] With Regard to the meaning of reasonable prospects of success, it was held in S v Smith 2012 (1) SACR 567 (SCA) 570, at para 7, as follows:

"*What the test of reasonable prospects of success postulates is a dispassionate decision, based on the fact 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 thee is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal."

C. EVALUATION:

[9] This Court does not intend to repeat the elaborate grounds of appeal contained in the application for leave to appeal, nor does it intend to deal with each of the grounds separately or repeat what is contained in the judgment.

[10] From the application for leave to appeal and other papers before this Court, it does not appear that grounds other than those mentioned at the motion proceedings were raised. Nothing new has, in view of this Court, been raised in the current application. This Court is completely mindful thereof that an appeal is aimed solely at its Order and not its reasoning.

[11] This Court was fully aware of the time of service of the application and the circumstances surrounding such service, including the contents of the return of service. These have been dealt with in the judgment. The contentions of each of the parties with regards to these aspects were duly considered under paragraphs E and F of the judgment, and further also under paragraph H thereof. No argument contrary to that have been persuasive. This Court therefore stands by its findings in the judgment.

[12] This Court further persist with its findings that the absence of the Respondents were not reasonable and with its interpretation of the case authorities cited in this regard, eg Zuma, Chess South Africa and Freedom Stationery. This Court is not convinced that the Respondents satisfied the second jurisdictional fact required by Rule 6 (12) (c) and the Wilmar Continental and ISDN Solutions decisions mentioned in the judgment. Accordingly, this Court is convinced that the failure to satisfy this requirement is dispositive of the application.

[13] This Court further agree with the contention of the Applicant that the facts upon which the judgment was made, was clear from the record and therefore duly before Court. The returns of service was indeed before this Court and was duly considered by it. Accordingly, the argument of the Respondents in this regard cannot be sustained.

[14] After careful consideration of this application, this Court is not convinced that the grounds raised are grounds in respect of which another Court would come to different conclusions to those reached in the judgment – be it on law or fact. This Court is accordingly not convinced that this application satisfied the requirements of said section 17 and those in the Mont Chevant Trust, Notshokuvu and Smith decisions, *supra*.

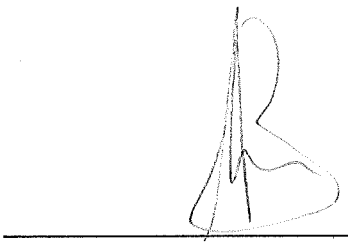
[15] This Court is accordingly not persuaded that any appeal emanating from this application would have a reasonable prospect of success and that there are any

compelling reasons why the appeal should be heard. Therefore, this application stands to fail.

E. ORDER:

[16] In the result, the following order is made:

(a) the application is dismissed with costs, including cost of counsel.



B CEYLON

Acting Judge of the High Court of South Africa

Gauteng Division

Pretoria

Date of hearing:	15 September 2022
Judgment Date:	28 October 2022

APPEARANCES:

For the Applicant:	Adv M Masebalanga
Instructed by:	Mokgehle NC Attorneys
	Pretoria
For the Respondent:	Adv S Khumalo SC
	Malatji & Co Inc.
	Sandton