REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 22121/2022

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

[redacted]

M.P.N. NKUTHA-NKONTWANA **27 MAY 2024**

In the matter between:

ELLEN VICTORIA JACOBS N.O. Plaintiff/Respondent

and

ROAD ACCIDENT FUND Defendant/Applicant

JUDGMENT: LEAVE TO APPEAL

NKUTHA-NKONTWANA AJ:

[1] In this application, the applicant (the RAF), defendant in the main action, seeks leave to appeal the judgment and order of this Court handed down on 5 January 2024 on several grounds that are articulated in the notice of the application for leave to appeal. The RAF also seeks indulgence for the late filing of this application. There is no opposition by the respondent (Ms Jacobs), the plaintiff in the main action. That is so despite the reminder by Ms Keletso Mofikwe, this Court's clerk.

[2] The hearing took place virtually through the Microsoft Teams platform on notice to both parties. Ms David appeared on behalf of the RAF. While, Mr Jordaan, an attorney apparently briefed by Ms Jacobs, joined the proceedings few minutes after they commenced due to his other commitments, so he told the Court. Since there were no opposing papers filed and the matter commenced on the basis that it was unopposed, Mr Jordaan's appearance was very peculiar.

[3] Mr Jordaan submitted that Ms Jacobs wanted to oppose the application for leave to appeal but he (Mr Jordaan) was too busy to attend to the opposing papers. To me that is a sheer inexcusable remiss. Worse still, Mr Jordaan was late to join the proceedings. There was, therefore, no reason to postpone the proceedings that were already underway especially since Mr Jordaan treated them with total derision. Thus, I ruled that the matter proceeds on unopposed basis. Consequently, Mr Jordaan left the proceedings unceremoniously.

[4] I deal first with the issue of condonation, which, given the turn of events, remains unopposed. As such, there is no reason why it should not be granted as the explanation is acceptable and the extent of the delay is negligible.

[5] Turning to the merits, this application is hinged on several grounds which are articulated in detail in the RAF's written submissions and I do not intend to reiterate them in this judgment, save to state that I have considered all of them. In the same way, I am of the view that I have clearly addressed all the issues canvased in this application in the impugned judgment and I stand by my findings.

[6] Yet I deem it expedient that I address the RAF's assail on the ground that I erred in the construction of the section 17(3) of the Road Accident Fund Act[1] (the RAF Act) and to the extent that I did not consider section 17(4)(b) of the RAF Act. Ms Davis submitted that the legislator only dealt with issue of mora interest and when it would be due; and, to the extent that section 17(3) is silent on when the amount awarded per the court order would be due, the legislator intended that it be canvassed between parties or be ordered by the honourable court dealing with the matter. Moreover, read with section 17(4)(b), the court has a discretion to direct parties in respect of how and when payments should be made. Therefore, the legislator never intended that payment would be due after 14 days of the order of court.

[7] The fallacy of these submissions lies in the oblivion by the RAF that the main issue that served before this Court and led to the impugned judgment was the

[1] Act 56 of 1996, as amended.

interpretation of section 17(3) which patently deals with the mora interest. Obviously, the RAF's reliance on the dictum in *Road Accident Fund v Legal Practice Council and others (LPC)*[2] to support the argument that mora interest commences to run after 180 days of the order is untenable hence it was rejected. Now, the RAF impugns the order that it had to pay Ms Jacobs the total amount per the order immediately after 14 days of the order on the basis of section 17(4)(b).

[8] Section 17(4)(b) provide:

> "Where a claim for compensation under subsection (1).. includes a claim for future loss of income or support, the Fund or an agent shall be entitled, after furnishing the third party in question with an undertaking to that effect or a competent court has directed the Fund or the agent to furnish such undertaking, to pay the amount payable by it or the agent in respect of the said loss, by instalments in arrear as agreed upon."

[9] It is clear that section 17(4)(b) deals with future loss of income or support and, subject to an undertaking by the RAF, the amount due be paid by way of instalments in arrears per the agreement between the parties. The construction accorded to this provision by the RAF is therefore patently irrational and undermines the apparent purpose of the RAF Act[3] and the corollary is the affront to the constitutional imperatives which are aptly captured in the Constitutional Court decisions, referred with approval in *LPC*:

> "As was said by Mokgoro J in *Chief Lesapo v North West Agricultural Bank and another* [1999] ZACC 16; 2000 (1) SA 409 (CC) para 13:
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> 'An important purpose of s 34 is to guarantee the protection of the judicial process to persons who have disputes that can be resolved by law. Execution is a means of enforcing a judgment or order of court and is incidental to the judicial process. It is regulated by statute and the rules of Court and is subject to the supervision of the court which has an inherent jurisdiction to stay the execution if the interests of justice so require.'
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> And Jafta J put it as follows in *Mieni v Minister of Health and Welfare, Eastern Cape* 2000 (4) SA 446 (Tk) at 452G-H and 453C-D:
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> > 'The constitutional right of access to courts would remain an illusion unless orders made by courts are capable of being enforced by those in whose favour such orders were made. The process of adjudication and the resolution of disputes in courts of law is not an end in itself but

[2] 2021 (6) SA 230 (GP) para 28
[3] See: *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) at para 18.

only a means thereto; the end being the enforcement of rights or obligations defined in the court order.'"

[10] Notwithstanding, I am alive to the constitutional crisis faced by the RAF and its inability to expeditiously honour the court orders. Yet, the RAF cannot clothe this Court with powers that are strictly reserved for the legislature. I say this to point to the RAF that at heart in its predicament, it would seem, is the issue of a stay of the writ of execution and mora interest for at least 180 days of the date of the court order. Well, that is possible when there is an agreement between parties.

[11] However, absent an agreement, a default position is section 17(3) when it comes to mora interest and immediate payment of the amount payable per the court order. In such instances, as remarked in *LPC*, the RAF "*should approach the court, on a case-by-case basis, if it believes or is advised that it has valid grounds to obtain an order suspending writs of execution and warrants of attachment against it*"[4]. Even though this proposition was consequent to a submission pertaining to the alleged fraudulent claims, it should, I think, also apply in all instances where there is a proper case made for a stay of writ of execution and warrant of attachment against RAF. Ms Davis could not provide a convincing reason as to why RAF did not avail itself to this recourse when faced with a writ of execution and warrant of attachment in this matter.

[12] Ms Davis, nonetheless, submitted that even if I am not with the RAF on all the other grounds, the leave to appeal should still be granted given the fact that the impugned judgment constitutes a first pronouncement on this issue in this Division. As such, the full bench may come to a different construction of the impugned provisions. I disagree.

[13] The test for granting leave to appeal is well accepted and stringent. It was aptly expounded by the Supreme Court of Appeal in *Member of the Executive Council for Health, Eastern Cape v Mkhitha and Another*[5] as follows:

> '[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

[4] *LPC supra* fn2 at para 39.
[5] [2016] ZASCA 176; [2016] JOL 36940 (SCA) at paras [16]- [17]. See also *Smith v S* [2011] JOL 26908 (SCA) at para [7]*; Greenwood v S* [2015] JOL 33082 (SCA) at para [4]; *Kruger v S* [2014] JOL 31809 (SCA) at para [2]; *Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others* [2016] ZAGPPHC 489 (24 June 2016).

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.'

[14] Having assessed all the grounds of appeal, I am not persuaded that there is a realistic chance of success on appeal. Put otherwise, there is no prospect that another court would reasonably arrive at a decision different to the one reached by this Court.

[15] In the circumstances, the following order is made:

1. Condonation for the late filing of the application for leave to appeal is granted.

2. The application for leave to appeal is dismissed.

3. There is no order as to costs.

M.P.N. NKUTHA-NKONTWANA
Acting Judge of the High Court,
Gauteng Division, Johannesburg

Hearing:	16 May 2024
Judgment:	27 May 2024

Appearances:

For Applicant:	R David Instructed by The State Attorney