IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 6629/2015

1. Reportable: ~~Yes~~/No
2. Of interest to other judges: ~~Yes~~/No
3. Revised: Yes/~~No~~

8 June 2017

(Signature)

In the matter between:

GN CHIPWATALI **Plaintiff**

and

ROAD ACCIDENT FUND **Defendant**

JUDGMENT

DE VILLIERS, AJ:

[1] This is an application for leave to appeal against my order issued on 15 December 2016 in which I granted absolution from the instance, each party to pay its own costs (the costs order due to the conduct of the defendant). I refer to the parties as they were referred to in the action.

[2] The plaintiff contends that I erred in not determining the matter only on the plaintiff's evidence, and that for this reason I should grant leave to appeal. The findings that I have made on the merits are not challenged, should I not have erred in deciding the matter on the evidence by both parties.

[3] The appeal was brought out of time. The notice of appeal was due within fifteen days from 15 December 2016 in terms of **Uniform Rule** 49(1)(b). Although that period fell in recess, the notice was delivered only on 12 April 2017. In terms of the rule, I may extend the fifteen-day period upon good cause shown. I do not repeat what is stated in Erasmus, **Superior Court Practice**, Volume 2, at D1-322 and further on this topic. Suffice to say that I have a wide discretion to be exercised with regard to a satisfactorily explanation of the delay and the merits of an appeal.

[4] Counsel for the plaintiff stated that he believed that the founding affidavit in an application for an extension of time had been delivered with the notice of application of leave to appeal, but in fact a draft order had been attached to the notice and not the affidavit. The founding affidavit was commissioned on 31 March 2017. It was handed up from the bar. The Notice of Motion was delivered only on 2 May 2017, the day before the hearing and it too was handed up from the bar. I do not know why the application was not delivered timeously.

[5] The reasons given for the delay in delivering the notice given in the founding affidavit, are poor. In effect, no explanation is given for the period from 17 February 2017 to 12 April 2017 other than that counsel was briefed (only) on 28 February 2017 to prepare the notice. That does not explain the delay, or the late delivery of the application for an extension of time.

[6] The other main aspect to consider in granting an extension of time, is the merits of an appeal. I address it next.

[7] The action was for damages suffered by a cyclist caused by a collision between a cyclist and a motor vehicle. The quantum of the plaintiff's claim was separated in terms of **Uniform Rule** 33(4).

[8] The plaintiff's pleadings were generic ones about a collision, but I must add were not defective. A clarifying amendment was considered by the plaintiff at the time of the second pre-trial conference (minute paragraph 8.1), but it was not persisted with.

[9] The defendant's plea was one of no knowledge of the collision, and in answer to the averments about the insured driver's negligence, it pleaded a bald denial. However it pleaded in the alternative that the plaintiff's negligence caused the collision. At neither of the two pre-trial conferences did the defendant concede the merits, despite being asked to do so.

[10] I regret to say, but during the trial, the defendant's counsel approached the matter hardly better than a layperson would have done. As a result, he in effect failed to cross-examine the plaintiff. He did not allege that the plaintiff was lying or mistaken, he failed to put his client's version to the plaintiff, and he also did not put it to the plaintiff that his version is improbable. He did not explore the conflict between the plaintiff's evidence and the version to which the plaintiff had committed himself to at the second pre-trial conference (minute paragraph 2.1). That version was set out in an affidavit which was contained in the plaintiff's trial bundle. It did not reflect the opening of the door of the insured vehicle as the cause of the collision.

[11] Despite objection by the plaintiff's counsel, I allowed the evidence by the insured driver when he was called. He was cross-examined.

[12] My decision to allow the evidence by the insured driver when he was called, is in issue. The plaintiff contends that I erred in allowing the evidence, I should have refused to allow this to happen based on the pleadings and the omission by the defendant's counsel to put his client's version to the plaintiff during cross-examination.

[13] As to the adequacy of the pleadings, the lenient approach I took in interpreting them is in issue. The argument is that I went too far to read the pleadings a whole (and in context) and leniently where the defendant's counsel failed to put his client's version to the plaintiff during cross-examination.

[14] Initially I considered not giving leave to appeal on the lack of prospects of success.

[15] The obligation on the defendant's counsel to put his client's version is not a mechanical rule, as reflected in para [64] and [65] of the **South African Rugby Football Union** judgment. The same appears from a discussion of the cases by Pretorius, **Cross-examination in South African Law** (Butterworths, Durban, 1997) referred to in footnote 38 of that judgment. The discussion is from page 148.

[16] To my mind, this case is distinguishable of the facts that led to **President of the Republic of South Africa and Others v South African Rugby Football Union and Others** 2000 (1) SA 1 (CC) at para [61] to [63] upon which the applicant relies in seeking leave to appeal. This is not a case where anyone should describe the plaintiff as a liar and a perjurer. His character was not in issue.

[17] The purpose in this case of putting the insured driver's version to the plaintiff during cross-examination, is to prevent litigation by ambush. I found that the plaintiff suffered no prejudice as a result of the poor performance by the defendant's counsel. In my view the simple facts were unlikely to have changed had the defendant's counsel put his client's version to the plaintiff during cross-examination.

[18] At the end of this matter I decided the matter on the probabilities, the third leg of the approach set out in **Stellenbosch Farmers' Winery Group Ltd and Another v Martell Et Cie and Others** 2003 (1) SA 11 (SCA) at Para 5.

Not only did this matter in my view turn on the probabilities, I believe that in so doing I also complied with **Body Corporate of Dumbarton Oaks v Faiga** 1999 (1) SA 975 (SCA) at 979I to 980A dealing with the importance of probabilities in the evaluation of the evidence.

[19] These are all reasons for not granting leave to appeal. Still, the question must be asked was my approach right? Should I not have refused the evidence by the insured driver until the defendant had asked for an opportunity to amend its plea (which it may still do on appeal) and/or to put its version to the plaintiff?

[20] On the one hand, the truth of the matter is that my approach is the approach that one would consider following if a lay-person appeared before one. Why must a plaintiff suffer such a consequence where the defendant was represented by a counsel and an attorney? There is a strong argument that there is no reason why the defendant must not insist on proper representation, representation that prepares for trials and consults with the insured drivers and witnesses.

[21] On the other hand, does it matter that one is dealing with the public's money? What must I make, if anything, of the failure by the defendant to appear at the hearing of the application for leave to appeal? If I erred, must the likely effect of my error on the outcome be considered? If I erred, what would the appropriate remedy be?

[22] The test that I have to apply in considering an application for leave to appeal is set out in section 17(1) of the **Superior Courts Act**[1] (underlining added):

> *"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) ..."*

[23] It is trite that the **Superior Courts Act** has raised the bar in the test to be applied. There now must be a measure of certainty that there is a reasonable prospect of success. This approach has been held to be correct in this division in **Acting National Director of Public Prosecutions and Others v Democratic Alliance, In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others**,[2] a judgment by Ledwaba DJP, Pretorius J and Mothle J concurring in Para 25.[3] I am bound by this decision.

[24] Although the test is high, in the end and upon further reflection, in this case I changed my initial view to refuse leave to appeal based on a lack of prospects of success on appeal. I believe that another court should reconsider this matter. In the light thereof, I should not refuse leave to appeal because of the unexplained delay in seeking leave to appeal.

[25] I make no costs order in the application for an extension of time; the argument focussed on the merits of the application for leave to appeal.

[26] Consequently, I make the following order:

1 The application for the extension of time until 2 May 2017 for the delivery of the notice of application for leave to appeal, is granted;

2 Leave to appeal to the full bench of this division against the whole of my judgment granted in this matter on 15 December 2016, is granted;

3 The costs of the application for leave to appeal are to be costs in the appeal.

DP de Villiers

Acting Judge of the High Court
Gauteng Division

Heard on:	**3 May 2017**
On behalf of the Applicant:	**Adv EJJ Nel**
Instructed by:	**Erasmus-Scheepers**
On behalf of the Respondent:	**No appearance**
Instructed by:	**Maluleke Msimang & Associates**
Judgment handed down:	**8 June 2017**

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[1] 10 of 2013;
[2] (19577/09) [2016] ZAGPPHC 489 (24 June 2016);
[3] *"The Superior Courts Act has raised the bar for granting leave to appeal in **The Mont Chevaux Trust (IT2012/28) v Tina Goosen & 18 Others**, Bertelsmann J held as follow:*

> *"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 to 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.""*