Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA

NORTHERN CAPE DIVISION, KIMBERLEY

Case No: 918/2011
Heard on: 22/09/2017
Delivered on: 06/10/2017

In the matter between:

HEIN AUGUSTYN **APPLICANT**

And

THE MINISTER OF DEFENCE **RESPONDENT**

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

MAMOSEBO J

[1] The applicant, Hein Augustyn, seeks leave to appeal to the Full Bench of the Northern Cape Division against the whole of my judgment and order granted on 07 July 2017 in which I dismissed his special plea with costs.

[2] The grounds upon which the applicant relies are that I erred in finding:

2.1 That the matter of *Holeni v Land Agricultural development Bank of SA* [1] finds application *in casu* while the facts are distinguishable;

2.2 That the claim arose from an advance or loan granted by the respondent to the applicant;

2.3 That the debt does not fall under s 11(d)[2] which prescribes after a period of three years;

2.4 That the respondent has made out a case that his debt is covered under s 11(b) of the Act.

[3] The contention by the applicant is that another Court could reasonably arrive at a different conclusion than that which I have reached. The test to be applied in determining whether an application for leave to appeal should be granted or not is governed by s 17[3] which stipulates:

"(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that –

(a) (i) the appeal would have reasonable prospects 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 s 16(2)(a); and

(c) Where the decision sought to be appealed does not dispose of all issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties."

[4] In *S v Smith*[4] Plasket AJA stressed:

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[1] [2009] 3 All SA 22 (SCA)
[2] Of the Prescription Act, 68 of 1969
[3] Of the Superior Courts Act, 10 of 2013
[4] 2012 (1) SACR 567 (SCA) para 7

"[7] What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts 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 there 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."

As reiterated by Leach JA in *S v Kruger*[5] the Courts should follow the aforementioned test scrupulously in the interests of justice.

[5] Following the submissions by counsel the crux of the dispute in this matter is whether this claim falls under s 11(b) or (d) of the Prescription Act[6]. Adv Olivier, for the applicant, reiterated the common cause in as far as the respondent being the State and therefore meeting the first leg of the requirement in 11(b). Counsel's further submission was that the use of the conjunction "and" between the first leg of the requirement and the second leg, that is, *"and arising out of an advance or loan of money"*, makes it imperative for the second requirement to also be met, which has not been met and therefore the dispute must fail. I do not agree for the reasons that follow.

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[5] 2014 (1) SACR 647 (SCA) at 649d (para 3)

[6] Sec 11 of the Prescription Act, 68 of 1969, deals with the periods of prescription of debts and stipulates that:
"The periods of prescription of debts shall be the following:
(b) Fifteen years in respect of any debt owed to the State and arising out of an advance or loan of money or a sale or lease of land by the State to the debtor, unless a longer period applies in respect of the debt in question in terms of paragraph (a);
(c) –
(d) Save where an Act of Parliament provides otherwise, three years in respect of any other debt".

[6] It is common cause that the respondent is the state. This means that a determinable amount of money came from the *fiscus* or budget of the state to pay for the training of the applicant in return for his services for a determined period. The condition attached was that should he leave before the expiry of that period he will have to repay, not to an individual but the state, the apportioned amount of what was due and owing to the state. The applicant sought to convince me that this second leg of the requirement was not met because there was no advance or loan awarded to the applicant. This argument misses the mark. What is not in contention is that an amount of money was allocated for his training on terms and conditions he agreed to and which amount is now due and payable because he breached them.

[7] Having regard to the above guidance by the Supreme Court of Appeal and having dispassionately considered the application I am of the view that the main judgment has adequately dealt with the aspect that the period of prescription is indeed 15 years under s 11(b) of the Prescription Act. The main judgment demonstrates adequately how I followed the *Holeni* judgment and requires no repetition. I am satisfied that the applicant has no reasonable prospects of success on appeal and his application stands to fail. I am not swayed that a court of appeal could reasonably arrive at a conclusion different to the one that I have reached.

[8] In the result the following order is made:

The application for leave to appeal is dismissed with costs.

MAMOSEBO J
NORTHERN CAPE HIGH COURT

For the applicant:	Adv AD Olivier
Instructed by:	Haarhoffs Inc
For the respondent:	Adv S Motloung
Instructed by:	The State Attorney