



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

Case number: 4204/2019

In the action between:

MAGDALENA MARIA SCHAEFER

Plaintiff

and

THE CITY OF CAPE TOWN

Defendant

Before: The Hon. Mr Acting Justice Montzinger

Hearing: 26 March 2025

Judgment delivered electronically: 26 March 2025

JUDGMENT

(LEAVE TO APPEAL)

Montzinger AJ

Summary Introduction

1. On 17 February 2025, I delivered judgment dismissing the plaintiff's delictual claim against the City of Cape Town ("the City"). The claim arose

from the plaintiff's fall on a protruding pavement brick in Victoria Road, Camps Bay, Cape Town.

2. The plaintiff now seeks leave to appeal to either a Full Bench of this Court or the Supreme Court of Appeal, contending that another court would likely arrive at a different conclusion.

Requirements for leave to appeal

3. Section 17(1) of the Superior Courts Act¹ provides that leave to appeal may be granted only where the court is satisfied that the appeal would have a reasonable prospect of success.
4. In addition to the test laid down in the statute the case law from courts higher up in the decision-making hierarchy have given some further guidance on how a court hearing an application for leave to appeal should assess it. I set out what I could glean from these authorities the approach should be:
 - 4.1 The application should be approached dispassionately and with reference to the facts and law to determine whether an appellate court could reasonably arrive at a different conclusion².

¹ 10 of 2013

² *Minister of Justice and Constitutional Development and Others v Southern Africa Litigation Centre and Others* [\[2016\] ZASCA 17](#); [2016 \(3\) SA 317](#) (SCA);

- 4.2 An applicant seeking leave must advance proper grounds that a sound, rational basis exists³ for concluding that there is a reasonable rather than a remote chance of success on appeal⁴. This means that the merits of the case remain crucial. A bare or speculative contention of error is insufficient. The applicant must establish a credible premise for believing that another court could arrive at a different outcome.
- 4.3 Reasonable prospects will not exist if the applicant seeking leave is focussed on the reasons of the trial court's judgment. Reasonable prospects relate to the substantive order of the court and not the reasons given in the judgment⁵. This means that whether an appeal court's reasoning may differ with that of the trial court, does not necessarily mean that leave should be granted, as a different reasoning would be of no consequence, if the result remains the same⁶. To rely on this ground to justify why leave should be granted an applicant must show that the trial judge committed a clear misdirection, and the findings were clearly erroneous⁷.
- 4.4 An application for leave that requires an interference in the findings of fact of the trial judge must be considered in mind with the

³ *Ramakatsa v African National Congress* (Case no 724/2019) ("Ramakatsa")

⁴ *Four Wheel Drive Accessory Distributors CC v Rattan NO* 2019 (3) SA 451 (SCA) par 34

⁵ *Starways Trading 21 CC and Others v Pearl Island Trading 714 (Pty) Ltd and Another* 2019 (2) SA 650 (SCA) [10]

⁶ *Tecmed Africa (Pty) Ltd v Minister of Health and Another* [2012] 4 All SA 149 (SCA) [17]

⁷ *A M and Another v MEC for Health, Western Cape* (1258/2018) [2020] ZASCA 89; 2021 (3) SA 337 (SCA)

principle that Courts of Appeal are slow to interfere with findings of fact of a trial court⁸, unless a demonstrable error can be shown or that the trial court's factual findings were plainly wrong.

5. I will therefore consider the application with the above stated considerations in mind.
6. Furthermore, an applicant can also seek leave on the basis that there are compelling reasons that justify leave being granted⁹. Compelling reasons include, among others, the involvement of substantial public interest, an important question of law, differing judicial interpretations, or a discrete issue of statutory interpretation with implications for future cases¹⁰. However, where it is proposed that compelling reasons exist why leave should be granted, I am required to consider the compelling reasons also in conjunction with the merits of the appeal, which remain often decisive¹¹.
7. In this matter no reliance was placed on the existence of compelling reasons to grant leave.

The plaintiff's application for leave to appeal

8. The notice of application contains more than 30 grounds, each purporting to show errors in the main judgment. These grounds range from

⁸ *Bee v Road Accident Fund* 2018 (4) SA 366 (SCA) [46]

⁹ Section 17(1)(a) of the Superior Court Act

¹⁰ Van Loggerenberg: *Erasmus* Superior Court Practice (3rd ed) Vol 1 D106-108

¹¹ *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* 2020 (5) SA 35 (SCA) at para 2

challenges to factual findings I have made, such as my assessment of the defect in the pavement and on non-pleaded issues.

9. This “scatter or shot-gun” approach has unfortunately buried the merits of the argument in a host of repetitive points, rather than articulating a small number of cogent misdirections. The notice also re-states or overlaps on the same core contentions. Practitioners should note that an unduly expansive approach can make it difficult for the court to discern precisely where the alleged misdirections lie. A scatter of grounds seldom bolsters a case; instead, it can convey uncertainty about whether any single ground truly has merit.
10. Counsel is, of course, obliged to do his or her best for the client, but clarity and focus, rather than volume, in my view, should accompany a leave to appeal application. If there truly is an error that “would” alter the outcome, that error should be identified with reasonable precision. That was not the case in this instance.

WHY THE APPLICATION MUST FAIL

11. The plaintiff’s notice does not clearly demonstrate how my statement of the legal principles was incorrect or how I misapplied legal precedent. As I have found in the main judgment, the “wrongfulness” inquiry in municipal liability cases is well-established. Nowhere in the leave to appeal application is there a pin-pointed criticism of how I misstated or misunderstood these principles.

12. Certain grounds complain that some issues, particularly the City's resource constraints or the lack of prior notice or knowledge of the defective pavement were not pleaded. The question of whether a plaintiff or defendant should have pleaded a given issue is blurred in the application. However, this criticism also lacks support in the record. First, a plaintiff bears the onus to proof all the elements of delict. If notice or knowledge was relevant to either wrongfulness or negligence, the plaintiff should at least produce evidence that the defendant knew or should reasonably have known of the defective paver on the pavement. In any event, as was pointed out during argument of the leave to appeal these issues were pertinently raised the City's amended plea, to which the plaintiff did not object.
13. The main judgment held that imposing liability on the City for a single, relatively minor pavement defect, of which it did not have knowledge and where there was no evidence that it was previously reported, would be undesirable. The plaintiff's application does not address why it is unreasonable to consider resource constraints or the broader constitutional obligations resting on local government. Nor does it show how an appellate court is likely to overturn my reasoning for arriving at a policy-based conclusion.
14. I have found in the main judgment that the first element of the negligence inquiry (reasonable foreseeability of harm) was not established on the evidence. Without actual or constructive knowledge of the protrusion, the City could not reasonably be expected to repair it. The plaintiff's reliance

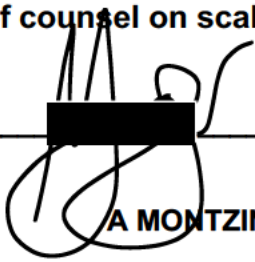
on having witnessed other individuals stumble after her accident does not, in itself, show that the City “should have known” or could reasonably have known of the defective pavement sooner.

15. The leave to appeal application cites no new factual basis or authority showing how another court would likely find differently on the foreseeability aspect. The contention that the City should systematically discover every pavement irregularity does not negate my finding that on the fact of this matter, where there were no complaints or reports, the defect was neither clearly foreseeable nor unreasonably ignored.
16. While the application lists many grounds, none persuasively isolates a single misdirection in my factual findings or the legal inferences I drew. The enumerated grounds thus fail to establish a credible risk that a Court of Appeal “would” overturn the main judgment.

Conclusion

17. I am therefore not persuaded to grant leave and, in the circumstances, make the following order:

“The application for leave to appeal is dismissed with costs on a party and party scale, including the costs of counsel on scale B.”



A. MONTZINGER
Acting Judge of the High Court

Appearances:

Applicant's counsel:

Mr. P Eia

Applicant's attorney:

Batchelor & Associates

Respondent's counsel:

Mr. M De Wet

Respondent's attorney:

Regal Brown Inc