IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE PROVINCIAL DIVISION

Reportable:	**YES/NO**
Of interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case No.: 3683/2018

In the matter between:

PHATSHOANE HENNEY ATTORNEYS First Applicant[1]
SKEIN, PIETER LABUSHAGNE Second Applicant

and

TROLLIP, JUANITA Respondent[2]

Coram: Opperman, J

Date of hearing: 5 February 2021 on virtual platform on application by both parties and as authorised by the court.

Delivered: The judgment was handed down electronically by circulation to the parties' legal representatives by email and released to SAFLII on 12 February 2021. The date and time for hand-down is deemed to be 12 February 2021.

Summary: Application for leave to appeal - separate adjudication - special plea of prescription from liability - and quantum - Rule 33(4)

ORDER

Having considered the documents filed on record and having heard Counsel for the Applicants and the Respondent:

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[1] First and Second Applicants will be referred to as "Applicants".
[2] "Respondent"

IT IS ORDERED THAT:

The Applicant's motion for Leave to Appeal is dismissed with costs including the costs of two Counsel.

JUDGMENT

INTRODUCTION

[1] This is an application for leave to appeal and to the Supreme Court of Appeal alternatively to a Full Bench of this court on the refusal of the court to grant a separation of trials in terms of Rule 33(4). The separation seek was of the special plea of prescription from the liability- and quantum portion of the matter.

[2] The right to appeal is, among others, managed by the application for leave to appeal. It may not be abused but the hurdle of an application for leave to appeal may never become an obstacle to justice in the post-constitutional era. The Superior Courts Act 10 of 2013 regulates the adjudication for leave to appeal specifically. The interpretation of the legislative test evolved in case law.

[3] The above is applicable to both sections 16 and 17 of the Superior Courts Act. Three aspects came to the fore: First, is an order in terms of the refusing of the separation of issues in terms of Rule 33(4) appealable in terms of section 16 of the Superior Courts Act and the *Zweni v Minister of Law and Order of the Republic of South Africa* 1993 (1) SA 523 (A) and second, what is the test to be applied in terms of section 17 as it evolved through case law?

[4] It is imperative to distinguish between the issues in law and the facts of the case *in casu*. There are three clear legal phenomena. The legal issues of prescription, liability and quantum. Then there are the facts that make this case unique in that there are allegations that the facts to adjudicate liability and the quantum are intrinsically woven into the issue of prescription. Allegedly the one cannot be adjudicated without the other. This is the third and vital aspect.

[5] I will first deal with whether the refusal of the separation of issues are appealable, hereafter the test to apply on an application for Leave to Appeal and then with the matters intimate to this case.

APPEALABILITY

[6] There is a subtle movement in case law away from the rigid "three attributes-rule" laid down in the *Zweni v Minister of Law-and-Order* 1993 (1) 523 (A) at 532l to 533B on the appealability of an issue. It used to be that in terms of the Superior Courts Act a "decision" which may be appealed as contemplated in section 16 are the following:

> "A 'judgment or order' is a decision which, as a general principle, has three attributes, first, the decision must be final in effect and not susceptible of alteration by the Court of first instance; second, it must be definitive of the rights of the parties; and, third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings (Van Streepen & Germs (Pty) Ltd case supra at 586I-587B; Marsay v Dilley1992 (3) SA 944 (A) at 962C-F). The second is the same as the oft-stated requirement that a decision, in order to qualify as a judgment or order, must grant definite and distinct relief (Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue and Another1992 (4) SA 202 (A) at 214D-G)."[3]

[7] More recently and in the spirit of the Constitution of the Republic of South Africa, 1996 it was held in *Centre for Child Law v Governing Body of Hoërskool Fochville and another* [2015] JOL 34250 (SCA) that section 16(2)(a)(i) of the Superior Courts Act 10 of 2013 allows the appeal court to dismiss an appeal where the issues are of such a nature that the decision sought will have no practical effect or result. The Court does however have a discretion and will generally entertain an appeal where there is a discrete legal issue of public importance that would affect matters in the future and on which the adjudication of the court was required.[4]

[8] In *FirstRand Bank Ltd v Clear Creek Trading 12 (Pty) Ltd and Another* 2018 (5) SA 300 (SCA) the Supreme Court of Appeal went as far as to entertain an appeal on a rule 33(4)-issue and ruled upon it.

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[3] *Elida Gibbs (Pty) Ltd v Colgate Palmolive (Pty) Ltd (2)* 1988 (2) SA 360 (W); *Maize Board v Tiger Oats Ltd* 2002 (5) SA 365 (SCA) at 373I–374A and 374A–B.

[4] *Van Streepen & Germs (Pty) Ltd v Transvaal Provincial Administration* 1987 (4) SA 569 (A); *Marsay v Dilley* 1992 (3) SA 944 (A); *SA Eagle Versekeringsmaatskappy Bpk v Harford* 1992 (2) SA 786 (A) at 792C–H.

[9] The golden threat that runs through these cases are that the interest of justice must prevail and that each case must be adjudicated on its own unique and peculiar merits.

[10] As will be pointed out later; the separation of the prescription issue from the liability and quantum is not appealable due to the unique circumstances of the case. Again; although there are three different issues in law, the facts are unique on both the evidence adduced in the application as well as the main case itself. This brings me to the adjudication of an application for leave to appeal.

APPLICATION FOR LEAVE TO APPEAL

[11] Historically the rule was: "In that reasonable prospects exists that another Court, sitting as the Court of Appeal, would come to different findings and conclusions on the facts and the law."[5] It is being worded differently in The Superior Courts Act 10 of 2013[6] per section 17(1) to read:

> "(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that—
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> (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;
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> (b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and
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> (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.
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> (2) (a) Leave to appeal may be granted by the judge or judges against whose decision an appeal is to be made or, if not readily available, by any other judge or judges of the same court or Division."

[12] In *Shinga v The State & Another (Society of Advocates (Pietermaritzburg Bar intervening as Amicus Curiae); S v O'Connell & Others* 2007 (2) SACR 28 (CC) at [53] it was held that applications for leave to appeal is a judicial task of some delicacy and expertise. This task requires a careful analysis of both the facts and the law that provided the basis for the judgement. Presiding officers should approach the question whether another court may reach a different conclusion with "intellectual

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5 *S v Smith* 2012 (1) SACR 567 (SCA) at [7].

6 See Proclamation R. 36 of 2013 dated 22 August 2013 (Government Gazette 36774).

humility and integrity, neither over-zealously endorsing the ineluctable correctness of the decision that has been reached, nor overanxiously referring decisions that are indubitably correct to an appellate Court."

[13] In *S v Smith* 2012 (1) SACR 567 (SCA) the court laid down the approach to an application for leave to appeal as follows:

"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."

[14] With reference to the Smith-case Schippers AJA in *MEC Health, Eastern Cape v Mkhitha* (2016) ZASCA 176 (25 November 2016); JDR 2214 SCA noted that:

"[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 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.

[18] In this case the requirements of section 17(1)(a) of the Superior Courts Act were simply not met. The uncontradicted evidence is that the medical staff at BOH were negligent and caused the plaintiff to suffer harm. The special plea was plainly unmeritorious. Leave to appeal should have been refused."

[15] Should it be found that the Rule 33(4)-issue is appealable I went further to adjudicate the application on the basis that there must be a sound, rational basis for the conclusion that there are prospects of success on appeal and another court would come to another conclusion.

THE MATTER *IN CASU*

[16] With due cognisance to the factors relied upon in the Application for Leave to Appeal, the Heads of Argument and arguments of both Counsel and after careful perusal and pondering of the Founding Affidavit, Answering Affidavit and Replying Affidavit of Mr Ditsela and Ms Vermaak, the fact remains that this is a case with its own specific and peculiar circumstances when the issue of prescription is evaluated. The statements of Mr Ditsela are general and in an atmosphere of capricious "I say so" without detailed corroboration. The case described in the Answering Affidavit[7] from the side of Trollip weighs heavier on the side of a refusal of the separation. I quote:

"10.2 On 19 July 2016 I consulted with Plaintiff regarding her Road Accident Fund claim in respect of injuries sustained in a motor vehicle accident on 28 November 2008 which was prosecuted by First and Second Defendant. Plaintiff came to me as she was dissatisfied with the outcome of the claim which had been handled by Second Defendant acting in the course and scope of his employment at First Defendant.

During the course of the consultation, I advised Plaintiff that she may potentially have a claim against First and/or Second Defendant for under settling her claim and prescribing the claim in the High Court based on the information provided to me but that I would need to conduct a proper investigation to properly advise her. I investigated Plaintiff's injuries and what Second Defendant had done to prosecute her claim and reported to her that I was of the view that she had a claim against the First and/or Second Defendant based on the fact that there had been insufficient investigation of her injuries and overly conservative investigation of the claim resulting in summons being issued in the Regional Magistrate's Court with a jurisdictional limit of R400 000.

10.3 Following my investigations and on 23 July 2018 summons was served on First and Second Defendant wherein Plaintiff alleged that First and/or Second Defendant were negligent in issuing summons against the Road Accident Fund out of the Regional Magistrate's Court and allowing the matter to become prescribed in the High Court as well as an incorrect and inadequate assessment of the damages suffered by Plaintiff.

10.4 First and Second Defendants raised Special Pleas of prescription wherein it was alleged that on 10 June 2015 alternatively 9 July 2015 Plaintiff had knowledge of the identity of her debtor and the facts giving rise to her claim against First and/or Second Defendant. It is further alleged that summons was only served on 23 July 2018, more than 3 years after 10 June 2015 alternatively 9 July 2015, and therefore the matter against them had become prescribed.

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[7] "Karen Vermaak"

10.5 On 8 July 2020 a Pre-Trial Conference was held and specifically the issue of separation of the issues in terms of Rule 33(4) was discussed between the parties. On behalf of Plaintiff, I advised First and Second Defendants that it is our view that the Special Pleas and liability portion of the matter cannot be conveniently separated and that the matter should proceed on those two issues first. First and Second Defendants advised that they are of the view that the issues can be conveniently separated and would bring an application to that effect should there not be agreement.

10.6 Sections 12(2) & (3) of the Prescribed Act 69 of 1969 are pertinent to this matter namely; -

10.6.1 Section 12(2) reads –

"If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor become aware of the existence of the debt";

10.6.2 Section 12(3) reads –

"A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care".

10.7 In order to determine whether the requirements of Section 12(2) have been met, it will be essential to lead advice on exactly what the conduct of Second Defendant was during the course of the preparation of Plaintiff's case against the Road Accident Fund, how Second Defendant prepared the matter and what expert evidence he had obtained to assess the quantum of Plaintiff's claim. It is also relevant what Second Defendant presented to Plaintiff and what her quantum would be if the case had been properly prosecuted in the correct forum namely, the High Court. To properly consider this issue, the evidence cannot be limited to as Defendants have stated in paragraph 7.3 of the Founding Affidavit "The factual evidence will probably mainly relate to communications between the Plaintiff and Defendants in the period leading up to the consultations and at the consultations of 10 June 2015 and 9 July 2015."

10.8 The First and Second Defendants acted for Plaintiff over the course of over seven (7) years in the prosecution of the claim on behalf of Plaintiff against the Road Accident Fund. Their conduct and communications with Plaintiff during this entire period become pertinent to whether they wilfully prevented Plaintiff from coming to know of the existence of the true debtor herein. Plaintiff's defence of the Special Pleas of prescription will be severely prejudiced if she is limited to a period of communications spanning a few months.

10.9 Likewise, in terms of Section 12(3) of the Prescription Act, in order to determine what was Plaintiff's knowledge of the identity of the debtor and the facts from which the debt arises,

it would be inherently detrimental and prejudicial to Plaintiff's case to limit the evidence to the communications between Plaintiff and Defendants "in the period leading up to the consultations and at the consultations of 10 June 2015 and 9 July 2015". This period presumably spans a few months of a claim which spanned over seven (7) years.

10.10 What knowledge of facts (or lack thereof) from which the debt arises cannot be determined by over restricting the evidence to be led in this matter. What Defendants did in the prosecution of the third party claim against the Road Accident Fund, the timing thereof and what was conveyed to Plaintiff can unfortunately not be ignored in determining exactly when Plaintiff ought reasonably to have gained the knowledge of both the facts from which the debt arises and the correct debtor, being the First and Second Defendant.

10.11 It is therefore submitted that it is not convenient to separate the determination of First and Second Defendant's Special Pleas of prescription and Plaintiff's Replications thereto from the liability and quantum portions of the matter. By the nature of this claim there is going to be overlapping of evidence. It is to be noted that most of the facta probanda on the Particulars of Claim are denied by the Defendants. For a proper ventilation of the facts relating to the prescription issue, factual evidence relating to Defendant's prosecution of the claim and the quantum of the claim will be relevant. It is to be borne in mind whilst the onus is on Defendants to prove prescription, the onus rests on Plaintiff to prove liability and quantum.

10.12 It is also submitted that the First and Second Defendants' contentions as contained in the Founding Affidavit at paragraphs 7 and 8 are an over simplification of the issues pertaining to the Special Plea of prescription and the issue of liability in this matter. It is Plaintiff's view that the conduct of First and Second Defendant in the entire prosecution of the third-party claim leading up to 10 June 2015 alternatively 9 July 2015 and thereafter is pertinent in assessing the date on which prescription commenced to run and that evidence is required to be led which is material to what knowledge of facts First and Second Defendants furnished to Plaintiff at that time. It is further submitted that the issues of when prescription commenced, what knowledge Respondent/Plaintiff had at the time of the alleged negligent conduct of First and Second Defendant are intrinsically related and intertwined and cannot be conveniently separated in this matter.

10.13 It is further submitted that Plaintiff's claim and her defence of the Defendant's Special Pleas of Prescription will be severely prejudiced if the above Honourable Court orders that the issues raised in First and Second Defendant's Special Pleas of Prescription and Plaintiff's Replications thereto are to be separated from the determination of the liability and quantum portions of the matter."

[17] It remains that the danger of a calamity for both parties and the interest of justice should the matter be separated, is just too real on the facts released by the Applicants and Respondent in the papers. The grant of the application, although it may result in the saving of two to five days, may cause a delay in the reaching of a final decision in the case because of the possibility of a lengthy interlude between the first hearing and the main hearing. This matter is old; it hales from 2009. Most important are the dangers that were described by Erasmus with reference to case law and that have already started to show itself in this case. History and law prove that the case must proceed unseparated:

"An important consideration will usually be whether or not a preliminary hearing for the separate decision of specified issues will materially shorten the proceedings, though the nature of a particular case may be such that proper consideration of overall convenience may involve factors other than those relating only to the actual duration of a hearing. The grant of the application, although it may result in the saving of many days of evidence in court, may nevertheless cause considerable delay in the reaching of a final decision in the case because of the possibility of a lengthy interval between the first hearing at which the special questions are canvassed and the commencement of the trial proper.

Another consideration would be that the plaintiff's case does not appear to be strong and the defendant's prospects of recovering costs poor. In fact, it has been suggested that a plaintiff, as dominus litis, will rarely be able to persuade the court, contrary to the wishes of the defendant, to grant an application under the subrule for the very reason that the weaker the plaintiff's case the better his prospects of obtaining a separation of issues.

Another consideration is whether there are prospects of an appeal on the separated issues, particularly if the issues sought to be separated are controversial and appear to be of importance: if so, an appeal will only exacerbate any delay and negate the rationale for a separation. Another consideration is whether the evidence required to prove any of the issues in respect of which a separation is sought will overlap with the evidence required to prove any of the remaining issues: a court will not grant a separation where it is apparent that such an overlap will occur. Such a situation will result in witnesses having to be recalled to cover issues which they had already testified about. Where there is such a duplication of evidence, a court will not grant a separation because it will result in the lengthening of the trial, the wasting of costs, potential conflicting findings of fact and credibility of witnesses, and it will also hinder the opposing party in cross-examination.

The convenience must be demonstrated and sufficient information must be placed before the court to enable it to exercise its discretion in a proper and meaningful way. The relief is not a mere formality and the convenience must be demonstrated. If grave prejudice may result for the opposing party should separation be ordered, it would be a further factor, which the court will take into account when

considering a separation. Ultimately, the court must be satisfied that it is convenient and proper to try an issue separately."[8]

[18] Separation of the special plea of prescription from the liability- and quantum portion of the matter is not convenient in law. The application for leave to appeal is not based on a sound, rational basis that convinces that there are prospects of success on appeal and another court would come to another conclusion.[9]

[19] ORDER

The Applicant's motion for Leave to Appeal is dismissed with costs including the costs of two Counsel.

M OPPERMAN, J

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[8] Erasmus Superior Court Practice/Volume 2: Uniform Rules and Appendices/Part D Rules/D1 Uniform Rules of Court/Rules regulating the conduct of the proceedings of the several provincial and local divisions - GN R48 of 1965/Rules of court/33 Special cases and adjudication upon points of law. URL: http://jutastat.juta.co.za/nxt/gateway.dll/scpr/347/370/371/372/373/411?f=templates$fn=default.htm 33 Special at RS 13, 2020, D1438 to RS 13, 2020, D1439.

[9] *FirstRand Bank Ltd v Clear Creek Trading 12 (Pty) Ltd and Another* 2018 (5) SA 300 (SCA).

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