

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN**

Date heard: 10 November 2021
Date delivered: 25 November 2021

In the matters between:

CASE NO: 991/2019

SEBENZILE SOTSHOZI

Applicant

and

RIAAN DE WIT ATTORNEYS

First Respondent

LOMBARD & KRIEK ATTORNEYS

Second Respondent

AND

CASE NO: 1699/2019

MAKOKO THONGA

Applicant

and

RIAAN DE WIT ATTORNEYS

First Respondent

LOMBARD & KRIEK ATTORNEYS

Second Respondent

AND

CASE NO: 1698/2019

SANDANATHI NOHABA

Applicant

and

RIAAN DE WIT ATTORNEYS

First Respondent

LOMBARD & KRIEK ATTORNEYS

Second Respondent

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

LOWE J:

INTRODUCTION

1. In this matter I heard extensive argument from the parties in an Application in each of three matters in which each Applicant sought in essence to have the relevant Contingency Fee Agreements concluded between each of them and Respondents set aside with ancillary relief. I dismissed each application with costs.
2. In due course the Applicants sought leave to appeal my entire judgment to the Supreme Court of Appeal alternatively the Full Bench of this Court.
3. I heard full argument on the Application for Leave to Appeal and having raised the matter of *Zuma v Democratic Alliance*¹ further Heads of Argument were filed by each of the parties relevant.
4. My judgment in the Application was comprehensive, 73 paragraphs in extent, but when distilled to essential issues concluded that:
 - 4.1 Applicant's argument that the Contingency Fee Agreement Act 66 of 1997 (The Act) does not stipulate for or provide that a stipulated "normal fee" must be set in stone and that a variable scale, as was applied in that matter (which scale itself was not objectionable), was not contrary to the provisions of the Act, was incorrect.

¹ 2021 of ... (SA) 189 (SCA)

- 4.2 In each matter, the fact that a correspondent attorney was utilised in instances (an unfocused complaint), was not out of step with the provisions of the Act and its definitions.
5. In the Application for Leave to Appeal Applicants addressed both of these principle findings and suggest that there is a reasonable prospect that another Court will come to a conclusion different to that which I reached.

THE TEST ON WHETHER LEAVE TO APPEAL SHOULD BE GRANTED

6. I have given careful consideration to the principles, which are applied by our courts in respect of Applications for Leave to Appeal and particularly in terms of Section 17(1) of the Superior Courts Act 10 of 2013 and the slightly changed onus or level that has to be applied thereto as has been suggested in a number of cases particularly in the Labour Court².
7. I wish to make it clear however that I have applied the present test hereto and that is whether there is a reasonable prospect that another court would come to a different conclusion than did I.
8. I have also had careful regard to the decision in the Supreme Court of Appeal, ***Minister of Justice and Constitutional Development and Others v Southern Africa Litigation Centre and Others***³, a judgment given on the 15 March 2016 in which Wallis JA dealt with an application for leave to appeal, commenting on appeals in which there is a particularly important matter to be decided, that is a matter of public importance. At paragraph [23] he outlined the basis underlying what he said in paragraph [24], which I intend to quote selectively, and it was

² ***The Mont Chevaux Trust (IT 2012/28) v Goosen and 18 Others*** LCC14R/2014; ***Fair Trade Tobacco Association v President of the Republic of South Africa and Others*** (21688/2020) [2020] ZAGPPHC 311

³ 2016 (3) SA 317 (SCA)

against this background that it was suggested that in that matter jurisprudence should have been considered as a guide to whether, notwithstanding the High Court's view in that matter as to the prospects of success, leave to appeal should have been granted, having regard to the importance of the matter to various parties and the public.

9. His Lordship said as follows at paragraph [24]:

“That is not to say that merely because the High Court determines an issue of public importance it must grant leave to appeal. The merits of the appeal remain vitally important and will often be decisive.”

10. I drew to both counsels' attention the matter of *Zuma v Democratic Alliance* (supra) in which at paragraph [3] the fact that the Supreme Court of Appeal stated inter alia the following in relation to leave to appeal:

“Inasmuch as the appeal raises a point of statutory interpretation, the application has to succeed.”

THIS ISSUE

11. I have carefully considered the arguments advanced by both Applicants and Respondents.

12. In my view, the crisp issue, in each of the two crucial enquiries, certainly implicates the interpretation of the Act, and a proper understanding thereof, and against that background the application of the facts thereto.

13. That being so, it seems to me, that whilst I am not much persuaded that there is a reasonable prospect upon the two issues which I decided, nevertheless, it cannot be denied that not only is this a question of interpretation of the Act, but that this

clearly involves two issues of very considerable importance not only to the parties in this matter but to the public in relation to contingency litigation, and that accordingly, the Application for Leave to Appeal should be granted.

14. I am not, however, persuaded that this is a matter that cannot be dealt with by the Full Bench of this Court, and it seems to me appropriate to refer it to that Full Bench.

ORDER

15. It is ordered that;
 1. In each of the applications herein 991/2018, 1699/2019 and 1698/2019, Applicants are afforded leave to appeal against the whole of my order and judgment of 20 July 2021 to the Full Bench of the Eastern Cape Division.
 2. The costs relating to each Application for Leave to Appeal in each matter will be costs in the appeal.

M.J. LOWE
JUDGE OF THE HIGH COURT

Appearing on behalf of the Applicants: Adv. H. J. van der Linde S.C.

Instructed by: Phil West Attorneys, Port Elizabeth

c/o Netteltons Attorneys, Grahamstown

Appearing on behalf of the Respondents: Adv. I. Smutz, S.C.

Instructed by: Lombard & Kriek Attorneys, Cape Town

c/o Wheeldon Rushmere and Cole, Grahamstown