

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2022/4340

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

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R.S. SHEPSTONE
OCTOBER 2023

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In the matter between:

NORMAN OGANA

Applicant

and

GREEN OUTDOOR GYMS (PTY) LTD
Respondent

First

TIMOTHY PAUL HOGINS

Second Respondent

JUDGMENT
(LEAVE TO APPEAL)

SHEPSTONE AJ

- [1] The applicant applies to this Court for leave to appeal in terms of section 17(1)(a) of the Superior Courts Act 10 of 2013 ("**the Act**").

The law

- [2] The test for leave to appeal is not controversial.

[3] In terms section 17(1)(a) of the Act, leave **may only** be granted where the judge or judges concerned are of the opinion that:

3.1 the appeal would have a reasonable prospect of success; or

3.2 there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.

[4] In **Caratco (Pty) Ltd v Independent Advisory Ltd**¹ the Supreme Court of Appeal held as follows regarding the threshold which a party seeking leave to appeal is required to satisfy:

“[2] In order to be granted leave to appeal in terms of s 17(1)(a)(i) and s 17(1)(a)(ii) of the Superior Courts Act an applicant for leave must satisfy the court that the appeal would have a reasonable prospect of success or that there is some other compelling reason why the appeal should be heard. If the court is unpersuaded of the prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal. A compelling reason includes an important question of law or a discrete issue of public importance that will have an effect on future disputes. But here too, the merits remain vitally important and are often decisive. Caratco must satisfy this court that it has met this threshold.”

[5] The test applied in **Caratco** was referred to with approval by the SCA in **Ramakatsa and Others v African National Congress and Others**,² in which the SCA held as follows:

“[10] Turning the focus to the relevant provisions of the Superior Courts Act (the SC Act), leave to appeal may only be granted where the judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there are compelling reasons which exist why the appeal should be heard such as the interests of justice.³ This Court in Caratco, concerning the provisions of s 17(1)(a)(ii) of the Act pointed out that if the court is unpersuaded that there are prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal. Compelling reason

¹ 2020 (5) SA 35 SCA.

² Unreported SCA case no. 724/2019 dated 31 March 2021.

³ **Nova Property Holdings Limited v Cobbett & Others** 2016 (4) SA 317 (SCA) para 8.

would of course include an important question of law or a discreet issue of public importance that will have an effect on future disputes. However, this Court correctly added that 'but here too the merits remain vitally important and are often decisive'. I am mindful of the decisions at high court level debating whether the use of the word 'would' as opposed to 'could' possibly means that the threshold for granting the appeal has been raised. If a reasonable prospect of success is established, leave to appeal should be granted. Similarly, if there are some other compelling reasons why the appeal should be heard, leave to appeal should be granted. The test of reasonable prospects of success postulates 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 other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist." (My emphasis)

[6] Importantly, a Judge hearing an application for leave to appeal is not called upon to decide if his or her decision was right or wrong.⁴

[7] In the matter of **Dexgroup (Pty)Ltd vs TrustCo Group International (Pty) Ltd and others**⁵, Justice Wallis observed that a court should not grant leave to appeal and indeed is under a duty not to do so where the threshold which warrants such leave has not been cleared. In paragraph [24] the court held as follows: -

*"Although points of some interest in arbitration law have been canvassed in this judgment, they would have arisen on some other occasion and has been demonstrated. The appeal was bound to fail on the facts. **The need to obtain leave to appeal is a valuable tool in ensuring that scarce judicial resources are not spent on appeals that lack merit.** It should in this case have been deployed by refusing leave to appeal."*

[8] There must be a compelling reason that warrants the attention of another court before leave to appeal ought to be granted. In **Four Wheel Drive**

⁴ **Altech Radio Holdings (Pty) Ltd v Aeonova360 Management Services (Pty) Ltd and Another** (2023/001585) [2023] ZAGPJHC 1082 (28 September 2023).

⁵ 2013 (6) SA 520.

Accessory Distributors v Rattan N.O. 2019 (3) SA 451 at [34] the SCA held as follows: -

*“There is a further principle that the Court a quo seems to have overlooked. **Leave to appeal should be granted only when there is a sound, rational basis for the conclusion that there are prospects of success on appeal.** In the light of its findings that the plaintiff filed to prove locus standi or the conclusion of the agreement, I do not think that there was a reasonable prospect of an appeal to this court succeeding or that there was a compelling reason to hear an appeal. In the result, the parties were put through the inconvenience and expense of an appeal without any merit.”*

Grounds

- [9] Mr. Mashao, on behalf the applicant, submitted that a Magistrate’s Court which does not have jurisdiction in the main matter, has the competence to transfer the matter to another court. I asked him to direct me to any authority for this proposition.
- [10] He referred me to **Botha v Singh and Others**,⁶ **Amalgamated Services v Bojanala Platinum District Municipality**,⁷ **Road Accident Fund v Rampukar; Road Accident Fund v Gumede**,⁸ and **Seloana and Others v Director of Public Prosecutions and Others**.⁹
- [11] These authorities are not on point. The **Seloana** matter related to criminal proceedings and specifically the provisions of Section 75 of the Criminal Procedure Act, Act 51 of 1977.
- [12] In **Rampukar** and **Amalgamated Services** the courts’ judgment was based on an interpretation of the Interim Rationalisation of jurisdiction of High Courts Act 41 of 2001 conferring jurisdiction on the High Court to transfer matters to another Division of High Court which it would otherwise not have. These matters are not applicable to the Magistrates’ Courts.
- [13] In **Botha** the court interpreted section 35(1) of the Magistrates’ Courts Act 32 of 1944 and concluded that “*any other court*” may include a Magistrates’ Court, Regional Court or High Court. This case did not pronounce on the issue whether a Magistrates’ Court without jurisdiction may transfer a matter to another court.

⁶ (30761/14) [2015] ZAGPHC 447 (21 May 2015).

⁷ 2007 (6) SA 143 (T).

⁸ 2008 (2) SA 534 (SCA).

⁹ (4019/2020) [2021] ZAFSHC 176 (24 August 2021).

[14] There is no sound, rational basis for the conclusion that there are prospects of success on appeal.

[15] There is no merit in this application.

Conclusion

[16] In the result, the following order is made:

1. The application for leave to appeal is dismissed with costs.

R.S. SHEPSTONE
Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard: 26 October 2023
Judgment: 30 October 2023

Appearances:

For Applicant: C Mashao
Instructed by: Z & Z Ngogodo Attorneys Inc.

For Respondents: M Jacobs
Instructed by: Phillip Venter Attorneys