

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case No: 2023/062380

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

.....
SIGNATURE

.....
DATE

In the matter between :

BROADBAND INFRACO SOC LIMITED

Applicant

and

ESKOM HOLDINGS SOC LIMITED

First Respondent

CALIB CASSIM

Second Respondent

Coram: Ingrid Opperman J

Heard: 7 December 2023

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 10h00 on 8 December 2023

ORDER

The application for leave to appeal is dismissed with costs such costs to include the costs of two counsel where so employed.

JUDGMENT – LEAVE TO APPEAL

INGRID OPPERMAN J.

[1] This is an application for leave to appeal against a judgment handed down by this court on 13 November 2023 (*'the judgment'*). This judgment should be read with the judgment of 13 November 2023.

[2] Leave to appeal is sought against the whole of the judgment. The parties are referred to as in the judgment and all abbreviated descriptions used herein are defined in the judgment.

[3] Section 17(1) of the Superior Courts Act 10 of 2013 provides that the test to be applied in determining whether leave to appeal should be granted is whether the judge is of the opinion that the appeal would have a reasonable prospect of success or there is some other compelling reason why the appeal should be heard.¹

¹ The section provides in full:

'Leave to appeal may only be given where the judge or judges concerned are of the opinion that –

- (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;
- (b) the decision sought on appeal does not fall within the ambit of section 16 (2) (a); and
- (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.'

[4] There appears to be still some debate about whether the threshold for the granting of leave to appeal under that section is higher than it was under the previous Supreme Court Act, 1959.

[5] In *Notshovu v S*,² the Supreme Court of Appeal expressly held that an appellant ‘faces a higher and stringent threshold, in terms of the present Superior Courts Act compared to the provisions of the repealed Supreme Court Act’. The new Act has ‘raised the bar for granting leave to appeal’:³

‘It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion ... The use of the word ‘would’ in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.’

[6] The aforesaid principles have been repeatedly affirmed, including by the full court of this Division.⁴

[7] Mr Notsche SC, representing Eskom in this application for leave to appeal, relied on the *dicta* in *Ramakatsa v African National Congress*⁵, which suggests that the bar has not been raised:

² [2016] ZASCA112 (7 September 2016), unreported, para 2.

³ *Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others* (19577/09) [2016] ZAGPPHC 489 (24 June 2016) 2016 JDR 1211 (GP), para 25, quoting *The Mont Chevaux Trust v Tina Goosen & 18 Others* 2014 JDR 2325 (LCC) at para 6. The test was not interfered with on the further appeal to the Supreme Court of Appeal – See *Zuma v Democratic Alliance and Others* 2018 (1) SA 200 (SCA) at p227 D-G [57].

⁴ Most recently in *Farber and others v Kgaboesele NO and others and a related matter (Leave to Appeal)* [2023] JOL 60230 (GJ). See also: *Coetzee N.O. and others v RMB Private Bank Limited* [2021] JOL 50671 (GP); *Madisha and others v Mashawana (Leave to Appeal)* [2020] JOL 49356 (GP) at para 4; *Nedbank Limited v Houtbosplaas (Pty) Ltd and another (Leave to Appeal)* [2020] JOL 47739 (GP); *Starways Trading 21 CC v Pearl Island 714 (Pty) Ltd* [2017] All SA 568 (WCC) at 572, para [10]; *Mziako v Northern Cape Society of Advocates* [2018] JOL 40386 (NCK) at para 4; *Myburgh NO and another v Standard Bank of South Africa Limited* [2019] JOL 40672 (FB) at paras 9 – 10; *Fair-Trade Independent Tobacco Association v President of the Republic of South Africa and another (Leave to Appeal)* [2020] JOL 47868 (GP) at para 6; *Nortje v Nortje* [2021] JOL 50318 (GP) at paras 3 to 5.

⁵ *Ramakatsa v African National Congress* [2021] ZASCA 31

'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.'

[8] In *Smith v S*,⁶ the SCA had occasion to consider what constituted reasonable prospects of success in section 17(1)(a)(i) of the Superior Courts Act and held (*per Plasket AJA*) as follows: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.'

[9] Leave to appeal cannot be had for the mere asking:

'Whilst there may be a tendency to seek to grant leave to appeal simply to allow outstanding questions to be finally determined, it seems to me that, in balancing the rights of the parties to the litigation, the Court's responsibility

⁶ 2012 (1) SACR 567 (SCA).

⁷ At para 7.

is to avoid the temptation simply to take the opportunity to have the question answered and rather to apply its mind as to whether or not the answer will probably be in favour of the applicant for leave to appeal.’⁸

[10] Trial judges have a duty to be vigilant and not allow appeals unless they are satisfied that there is a reasonable prospect that another Court would (or might) come to a different conclusion. In *Rail Commuter Action Group and Others v Transnet Ltd t/a Metrorail and Others (No 2)*⁹ it was pointed out that the fact that an application for leave to appeal is not opposed by the counterparty does not relieve the trial judge of this duty. In *Janit v Van Den Heever and Another NNO (No 2)*¹⁰ the threshold for sanctioning appeal proceedings (with reference to the then prescribed threshold) was explained thus: “*if the decision against which leave to appeal is sought is wrong, leave to appeal can be granted on petition; but it is not for a lower Court to sanction appeal proceedings unless there are reasonable prospects that the appeal might succeed.*”

[11] For a given point to be arguable for these purposes, so that there is a realistic prospect that the court of appeal would (or might) come to a different conclusion, it is not sufficient if it is arguable in the wide sense of the word; there must be substance and weight to it. (This was also the case under the previous regime – see *R v Baloi*¹¹). Any other approach would amount to circular reasoning; a would-be appellant could then obtain the necessary leave by merely alleging that the judgment reached by the court *a quo* is open to criticism in some or other respect.

[12] Section 17(1) of the Act imposes substantive requirements. The correct approach is as follows:¹² Leave to appeal may only be given if the judge is of the

⁸ *Goodwin Stable Trust v Duohex (Pty) Ltd and another* 1999 (3) SA 353 (C) 354-355.

⁹ 2003 (5) SA 593 (C) at 595G.

¹⁰ 2001 (1) SA 1062 (W) at para 6.

¹¹ 1949 (1) 523 (A) at 524.

¹² *Hunter v Financial Services Board* 2017 (JDR) 0941 (GP) at para 3.

opinion that certain jurisdictional facts exist, in other words, the judge sitting as a court of first instance has a fettered discretion; the jurisdictional facts required to be present are: the appeal has reasonable prospects of success; or the existence of some compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.

[13] I can do no better than to quote Mr Notsche's colourful description of my task as he formulated it in his heads of argument:

15. The Court must, for a moment abdicate its judicial position and look at its judgment and order and seriously consider whether there is a reasonable prospect that another Court will come to a different conclusion. This requires judicial maturity, because "... a [person] in distress wants to pour out [his/her] heart more than the case be won. About him who stops a plea, one says: 'Why does he reject it?'"
16. In that event a Court should steer that fine course between a Scylla of easily refusing leave to appeal and the Charybdis of granting leave to appeal in cases where there is no reasonable prospect of success on appeal and/ or other requirements have also not been met.' (footnotes omitted)

[14] I have considered the grounds for leave to appeal dispassionately and nothing argued has persuaded me that there is a reasonable prospect that another Court would (new test) or might (old test) come to a different conclusion (applying either test). Most of the issues raised in the notice of application for leave to appeal have been dealt with in the judgment and I need not deal with those aspects again herein.

[15] In my view the law is settled on the function of section 18 being to allow for different suspension regimes of application to decisions and interlocutory orders.¹³ The SCA held expressly that :*'The provision has nothing to say about when an interlocutory order might be appealable.'*

¹³ *TWK Agriculture Holdings (Pty)Ltd v Hoogveld Boerderybeleggings (Pty) Ltd*, 2023 (5) SA 163 (SCA)

[16] Mr Cook SC argued that until the findings of this court in paragraph [13] of the judgment can be overcome, leave cannot be granted. I agree. All the relief will be revisited by the court hearing Part B of the notice of motion either because it has been asked to do so expressly in the notice of motion or because it will be required to do so in determining just an equitable relief. The relief granted by Du Plessis AJ will be revisited. That being so, there are no prospects of success.

[17] There are no legal issues which require the attention of the Supreme Court of Appeal, as suggested. I reminded of the caution expressed by Wallis JA: '*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.*'¹⁴

[18] Mr Cook argued that the application for leave to appeal is frivolous and that it should attract a punitive costs order because it lacks all merit. He reminded this court of the comments in paragraph [38] of the judgment to the effect that had the court been asked to grant punitive costs in respect of a finding limited to coercive relief, it would have.

[19] In my view, a court should be slow to grant punitive costs based on the merits of a case i.e. the legal soundness of a case. There are exceptions but I do not intend traversing this topic in this judgment. Conduct of the parties is of course another matter. I did not grant punitive costs in the judgment because I was not asked to do so if the relief granted were limited. The issue of costs remains discretionary and having regard to all that has been said and although Mr Cassim's conduct towards his colleague Mr Zowa as described in the judgment is worthy of censure, I drew a line in the sand with my previous order and intend being consistent in respect of the scale of the costs.

[20] I accordingly grant the following order:

¹⁴ *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and Others*, 2013 (6) SA 520 (SCA)

The application for leave to appeal is dismissed with costs, such costs to include the costs of two counsel where so employed.

I OPPERMAN
Judge of the High Court
Gauteng Division, Johannesburg

Counsel for the applicants in leave to appeal: Adv VS Notshe SC and Adv T Mlambo

Instructed by: TKN Inc Attorneys

Counsel for the respondent in leave to appeal: Adv AO Cook SC and Adv M Seape

Instructed by: Adams & Adams

Date of hearing: 7 December 2023

Date of Judgment: 8 December 2023