

REPUBLIC OF SOUTH AFRICA



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

Case Number: **51959/2021**

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO

17 MAY 2024
DATE

ML SENYATSI
SIGNATURE

In the matter between:

**BETAPOINT MANAGEMENT
CONSULTANTS
(PTY) LTD**

Plaintiff/Respondent

and

**KPMG SERVICES (PTY)
LIMITED SA**

Defendant/Excipient

JUDGMENT

(Leave to Appeal Application)

SENYATSI, J

- [1] This is an application for leave to appeal to the Supreme Court of Appeal alternatively the Full Court against paragraphs 1 and 3 of the order I granted on 24 January 2024, in which I upheld the defendant’s first ground of exception and directed that there would be no order as to costs.
- [2] The applicant raises various grounds for leave to appeal the judgment and contends that there are reasonable prospects that the appeal would succeed as envisaged by section 17(1)(a) of the Superior Courts Act No. 10 of 2013. The grounds of leave to appeal will not be repeated in this judgment.
- [3] The applicant contends that I ought to grant leave to appeal because there are reasonable prospects that the appeal would succeed as contemplated by s 17(1)(i) of the Superior Courts Act, 10 of 2013 (the Act).
- [4] The requirement and the test for granting leave to appeal are regulated by section 17(1)(a) of the Superior Courts Act No. 10 of 2013 which states as follows:
- “(1) 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.”

[5] In *Mont Chevaux Trust v Goosen and Others*¹ Bertelsman J interpreted the test as follows:

“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] In *Acting National Director of Public Prosecutions and Others v Democratic Alliance: In re: Democratic Alliance v Acting National Director of Public Prosecutions*² the court acknowledged the test by Bestertsman J.

[7] In *Mothule Inc Attorneys v The Law Society of the Northern Provinces and Another*³, the Supreme Court of Appeal stated as follows regarding the trial court’s liberal approach on granting leave to appeal:

“It is important to mention my dissatisfaction with the court a quo’s granting of leave to appeal to this court. The test is simply whether there are any reasonable prospects of success in an appeal. It is not whether a litigant has an arguable case or mere possible of success.”

[8] In *Matoto v Free State Gambling and Liquor Authority*⁴, the court referred to *Mount Chevaux Trust* with approval and said that:

¹ 2014 2325 (LCC)

² (Case no: 19577/09) ZAGPPHC 489 at para 25

³ (213/16) [2017] ZASCA 17 (22 March 2017)

⁴ [2017] ZAFSHC 80 at para 5

“...there can be no doubt that the bar for granting leave to appeal has been raised. The use by the legislature of the word ‘only’ ... is a further indication of a more stringent test.”

[9] In *S v Notshokovu*⁵ the Supreme Court of Appeal reaffirmed that:

“an appellant ...faces a higher and stringent threshold in terms of the Act compared to the provisions of the repealed Supreme Court Act 59 of 1959”

[10] In *S v Smith Plasket*⁶ AJA explained the meaning of ‘a reasonable prospect of success’ as follows:

“What the test of reasonable prospect 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, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that these prospects are not remote but have a realistic chance of succeeding. More is required to be established than there is 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.”

[11] In *Pretoria Society of Advocates and Others v Nthai*⁷ the court held that:

“The enquiry as to whether leave should be granted is twofold. The first step that a court seized with such application should do is to investigate whether there are any reasonable prospects that another court seized with the same set of facts would reach a different conclusion. If the answer is in the positive the court should grant leave to appeal. But if the answer is negative, the next step of the enquiry is to determine the existence of any compelling reason why the appeal should be heard.”

⁵ [2016] ZASCA 112 para 2

⁶ 2012 (1) SACR 567 (SCA) at para 7

⁷ 2020 (1) SA 267 (LP) at [4]

[12] Based on the authorities referred to above it is apparent that our courts have been consistent in the application of the test on whether leave to appeal should be granted.

[13] Having regard to the grounds of appeal by the applicants and supplemented on the heads of argument filed of record, as well as the reasons advanced in the judgment, the court is not persuaded that there is a reasonable prospect that the appeal would succeed. The application for leave to appeal must therefore fail.

Order

[15] The following order is made:

(a) Application for leave to appeal is dismissed with costs.

ML SENYATSI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Appearances:

For the applicants: Adv G Marcus SC

Adv D Watson

Instructed by Harris Nupen Molebatsi Inc

For the respondent: Adv D Linde

Instructed by Bowmans Gilfillan

Date of Judgment reserved: 6 March 2024

Date of Judgment: 17 May 2024

