



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

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

In the matter between

CASE

NUMBER: 40858/2019

DATE: 20 December 2022

**ZIPHIWO MADODODWA MHLWANA**

**First Applicant**

**ZWELAKHE NTSHEPE**

**Applicant**

**Second**

**and**

**DENEL SOC LIMITED**

**Respondent**

## JUDGMENT

---

### MABUSE J

[1] This matter came before me as an application by the Applicants for leave to appeal against the whole judgement and the order that this Court granted on 19 March 2021.

[2] In a written judgement of the same date I granted the following order:

*“1. The application is hereby dismissed, with costs.*

*2. The resolutions adopted by the Respondent’s board of directors on 7 June 2017 and 15 November 2017 are hereby reviewed and set aside.*

*3. The counterapplication is hereby granted.*

*4. The First Applicant, Ziphiwo Madododwa Mhlwana, is hereby ordered to repay, within 30 days of this order, the Respondent (Denel Soc Ltd), the sum of R1, 652,718.60.*

*5. The application for condonation by the Respondent for the late filing of its answering affidavit is hereby granted.”*

[3] The Applicants in this application, who were the Applicants still, in the main application that resulted in the above order, are disgruntled by the foregoing order. Despite having filed comprehensive grounds for the leave to appeal, Advocate B Stevens, who appeared for the Applicants in this application, informed this court that the point he wanted to take on behalf of Applicants related to one point only and that is the Respondent’s counterclaim in the main application. He argued that the finding by this Court in the main application that the Applicants did not have a cause of action, applies in equal measures to the Respondent’s counterclaim in the main application. According to him, the Respondent had no cause of action in its counterclaim.

The Applicants are unhappy about the order that this court granted in respect of the Respondent's counterclaim (and not the Applicants counterclaim as set out in the first paragraph of the Applicants' counsel's heads of argument). I accept that it was in error.

[4] The point of departure was the finding by the Court that the shareholder of the Respondent is the Minister of Public Enterprises and that therefore approval was necessary in terms of the Companies Act 71 of 2008 for the resolutions in question to be valid. The Applicants hold a different view.

[5] According to counsel for the Applicants, the First Applicant was not a director of the Respondent, when the resolution of 7 June 2017 was passed, but was the divisional CFO, having been employed by BAE Land Systems. This contention by counsel for the Applicants that the First Applicant was never a director when the resolution was passed on 7 June 2017 lacks merit. I demonstrated in paragraphs [39] to [43] of the judgment in the main application that the First Applicant was indeed a director during the period in question.

[6] Another point raised by counsel for the Applicants in his heads of argument is the argument that reliance on the Ministerial Guidelines by the Respondent in support of its counterclaim is misguided. According to him, the Ministerial Guidelines find no application in the Board of the Respondent approving salaries or separation agreements with employees of its divisions or subsidiaries. His view is that the Respondent has painted all its subsidiaries with the Ministerial paint brush despite the Board of the Respondent having been authorised to pass resolutions regulating its wholly owned subsidiaries. There is no merit in this argument. Mr Daniel du Toit, who deposed to the Respondent's answering affidavit of the main application, referred to Annexure "AA1", the Remuneration Guidelines, and explained

fully their extent and how they operate. The Applicants have not disputed how these guidelines operate. No other court seized with this aspect will decide it any differently.

[7] Advocate Tshidiso Ramogale, counsel for the Respondent, argued that counsel for the Applicants has put forward a completely new case. He pointed out that no reference to such a case was made out in the heads of argument presented on behalf of the Applicants nor in the papers before the court.

[8] In the above regard I agree with counsel for the Respondent. Nowhere in their replying affidavit did the Applicants plead that the counterclaim did not reflect any cause of action. All that the Applicants did in the replying affidavit was to deny the allegations set out in answering affidavit without pleading specifically that the counterclaim disclosed no cause of action. In my opinion, the counterclaim disclosed a cause of action. No other Court seized with this aspect will decide it any differently. No other ground of appeal set out in the application for leave to appeal was argued.

[9] To succeed with their application for leave to appeal, the Applicants must satisfy the test set out in s 17(1)(a)(i) of the Superior Courts Act 10 of 2013 which provides as follows:

“17(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 compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.”

[10] The inquiry as to whether leave should be granted is twofold. A Court that decides an application for leave to appeal under s 17(1)(a)(i) and (ii) will investigate firstly, whether there are any reasonable prospects that another Court seized with the same set of facts will reach a different conclusion. Should the answer be in the positive, the court should grant the application for leave to appeal, but should the answer be in the negative, the next step in the inquiry is to determine whether there is any compelling reason why the appeal should also be heard.

[11] S 17 sets out a strict threshold to grant leave to appeal. Accordingly, the applicant must of this necessity meet this stringent threshold set out in s 17 of the Superior Courts Act, to be successful with his application for the appeal. This threshold is, under the Superior Courts Act, even more stringent than it was under the old Supreme Court Act 59 of 1959. A demonstration of the stringent threshold is aptly demonstrated **Notshokovu v S (157/15) [2016] ZASCA 112 [7 September 2016] par 2**, in the main application where Shongwe J, as he then was, writing for the Court, stated as follows:

*“An appellant, on the other hand, faces a higher and stringent threshold, in terms of the Act, compared to the provisions of the repealed Supreme Court Act 59 of 1959. (See Van Wyk v S, Galela vS [2014] ZASCA 152; 2015 (1) SACR 584 (SCA) par. 14.”*

[12] S 17(1) uses the words “*may only be given*” and thereafter sets out the circumstances under which a Judge or Judges seized with an application for leave to appeal may grant the application. In **South African Breweries (Pty) Ltd v The Commissioner of South African Revenue Services (SARS) 2017 (2) GPPHC 340 (28 March 2017)**, par 5 Hughs J, had the following to say about applicable test:

*“The test which was applied previously in applications of this nature was whether there were reasonable prospects that another court may come to a different conclusion. See*

*Commissioner of Inland Revenue v Tuck 1989(4) SA 888 (T) at 899. What emerges from section 17(1) is that the threshold to grant a party leave to appeal has been raised. It is now only granted in the circumstances set out and deduced from the words ‘only’ in the said section.*

See **The Mont Chevaux Trust v Tina Goosen and 18 Others 2014 JDR 2325 (LCC) at par. [6], where** Bertelsman J held as follows:

*“It is clear that the threshold for granting leave to appeal against a judgement 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 different conclusion. See Van Heerden v Cronwright and Others 1985(2) SA 342 (T) at 342H. The use of the word “would” in the new statute indicates a measure of certainty that another Court will differ from the Court whose judgement in is sought to be appealed against.”*

[13] Apropos the rigidity of the threshold, Plasket AJA, as he then was, wrote a judgement, **Smith v S 2012(1) SACR 567 SCA 570 par [7]** in which Cloete JA and Maya JA, as she then was, concurred. He had the following to say:

*“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 the 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 or that the case cannot be categorised as hopeless. There must be, in other words, a sound, rational basis for the conclusion that there are prospects of successful appeal.”*

[13] In this application, I have not been persuaded that the Applicants have satisfied the requirements of an application for leave to appeal as set out in s 17(1)(a)(i) and (ii) of Superior Courts Act 10 of 2013. The application can therefore not succeed.

The following order is accordingly made:

**The application for leave to appeal is hereby refused, with costs.**

-----  
**P M MABUSE**  
**JUDGE OF THE HIGH COURT**

**Appearances:**

**Counsel for the Applicants**

**Adv B Stevens**

**Instructed by**

**Morgan Law Inc**

**c/o Hammel Attorneys**

**Counsel for the Respondent**

**Adv T Ramogale**

**Instructed by**

**Edward Nathan Sonnenberg Inc;**

**Date Heard**

**13 December 2022**

**Date of Judgment**

**20 December 2022.**