



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

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
13/02/2024 DATE	
 SIGNATURE	

**Case Number: 21369/2023
B1092/2023**

In the matter between:

DR JOHN MARITE

Applicant

and

**MINISTER OF JUSTICE AND CORRECTIONAL
SERVICES**

First Respondent

MALWANDLA SOLLY SIWEYA

Second Respondent

HEAD OF SPECIAL INVESTIGATING UNIT

Third Respondent

THE SPECIAL INVESTIGATING UNIT

Fourth Respondent

JUDGMENT: LEAVE TO APPEAL

H G A SNYMAN AJ

INTRODUCTION

- [1] I dismissed the applicant ("*Dr Marite's*") application for a final interdict against the first respondent ("*the Minister*"), the second respondent ("*Mr Siweya*"), the third respondent ("*the head of the SIU*"), and the fourth respondent ("*the SIU*") on 5 September 2023. Dr Marite seeks leave to appeal against the whole of my judgment and order. The head of the SIU and the SIU will where applicable, collectively be referred to herein as "*the SIU respondents*".
- [2] In the notice of application for leave to appeal, Dr Marite sought leave to appeal to the full court, alternatively the Supreme Court of Appeal. In argument before me, however, Dr Marite only sought leave to appeal to the full court. It appears from the application for leave to appeal, which was served and filed on 26 September 2023, that Dr Marite relies on 20 grounds listed in as many paragraphs for leave to appeal against my judgment.
- [3] The grounds relied upon were the following:
- "1. *By finding inter alia that Section 5(2)(b) of the Special Investigating Units and Special Tribunals Act No. 74 of 1996 was complied with by the relevant respondents, alternately by not finding that the aforesaid section was not complied with, whereby the relevant questioning of the applicant was inter alia contrary to the Act;*
 2. *By finding inter alia that Section 5(3)(a) applies to the matter at hand, through finding that the applicant may ask for immunity at a criminal hearing, despite the applicant not having been subpoenaed in terms of the relevant section, alternately by not*

finding that the relevant respondents had not complied with said section of the Act;

3. *By not finding that Section 5(3)(b) would be inapplicable through the respondents' non-compliance with Section 5(2)(b) of the aforesaid Act;*
4. *By finding inter alia that Section 217 of the Criminal Procedure Act finds applicability to the matter at hand, despite there being no finding that the relevant respondents' representatives are peace officers, as referred to in the Act;*
5. *By not finding that the relevant respondents inter alia interrogated the applicant, and by not finding that information was inter alia leaked to third parties by the relevant respondents;*
6. *By finding inter alia that the applicant seeks a final interdict;*
7. *By finding inter alia that there was a dispute of fact;*
8. *By not ordering, where there is a dispute of fact, that the matter be transferred for evidence alternately trial;*
9. *By finding the matter of Liesl Joy Moses v Special Investigating Unit (unreported, and under case number 28999/2021) to be applicable to the relief sought and/or to the matter at hand, where it is clearly distinguishable;*
10. *By, in following on the above, finding that the applicant sought to interdict the relevant respondents from investigating him in toto, where in fact the respondent simply sought compliance with the prescribed procedures;*
11. *By inter alia finding Section 5(2)(a) of the SIU Act to be applicable to the matter, when the SIU did not request particulars and information in regards to such section, but sought to question the applicant;*
12. *By finding that the right to silence (and/or the right not to self-incriminate) is only provided to an arrested, detained, or*

accused person and not finding that such right vests in any person even if only questioned or interrogated;

13. *By finding the above where the SIU cannot criminally charge a party in terms of its mandate;*
14. *By finding that granting the relief sought by the applicant would hamstring the SIU in investigating;*
15. *By finding that the applicant does not have a reasonable apprehension of injury, and/or by inter alia finding that a reasonable man, in the same circumstances (being faced by an SIU investigation) would not deem there to be a reasonable apprehension of injury, where in fact the applicant's rights, inter alia as protected in the Constitution, may be violated if forced to provide incriminating answers to questions by the members of the SIU;*
16. *By finding that Mr Sewiya could not have learned of the meeting with the SIU, from the SIU, where in fact the SIU's members, on the papers before the court, were the person to have had knowledge of the discussions;*
17. *By finding that the applicant could have approached the SAPS or register an 'appropriate complaint' as against Mr Sewiya;*
18. *By not ordering costs in accordance with the Biowatch principle;*
19. *By ordering costs as against the applicant;*
20. *By ordering punitive costs as against the applicant."*

[4] At the hearing of the application for leave to appeal, not all of the above grounds of the intended appeal were persisted with. Some of them were even abandoned, for instance ground 6 where it is contended that I, as part of my judgment, erred in finding that Dr Marite sought a final interdict.

- [5] For reasons not known to me, Mr Siweya did not take part in the oral hearing of the application for leave to appeal. However, subsequent to the hearing of the matter, i.e. by 18 December 2023, heads of argument on Mr Siweya's behalf were uploaded to CaseLines. At the same time, a practice note was uploaded. From the practice note (CaseLines page 9-19) it appears that counsel for Mr Siweya was at that stage under the misapprehension that the matter was by then still due to be argued. I have taken due regard of the heads of argument filed on behalf of Mr Siweya and considered it in preparing this judgment.

BACKGROUND

- [6] The background to this matter is set out in detail in my judgment dated 5 September 2023.
- [7] In summary, Dr Marite sought an interdict that Mr Siweya be interdicted and restrained from harassing and intimidating him in any manner whatsoever, contacting him in any form or manner whatsoever (save through his attorneys of record, and then only during usual business hours); contacting, intimidating or harassing Dr Marite's family, employees, businesses or any party related to him in any form or manner whatsoever; and attending at Dr Marite's residential address situated in an estate in the east of Pretoria.
- [8] At the hearing of the main application, Dr Marite abandoned some of the relief

which he initially sought as part of his notice of motion against the SIU respondents.

- [9] Dr Marite only persisted with the relief that the SIU respondents be interdicted from revealing or discussing any disclosures made by Dr Marite to them with any third party, including Mr Siweya, until such time as a final decision may be taken by them regarding Dr Marite, in which event Dr Marite must be given notice of such decision within five days prior to the release or discussion of such information, which notice is to be provided to Dr Marite's attorney of record. Moreover, that the SIU respondents be interdicted and restrained from continuing with questioning of Dr Marite without the aforesaid having been complied with, and without the SIU respondents advising Dr Marite of his rights, in writing, regarding such questioning and to confirm in writing whether Dr Marite is being investigated.

- [10] I dismissed the application for the reasons set out in my judgment. This was *inter alia* on the basis that Dr Marite failed to satisfy the requirements for the final interdict that he seeks. This included that Dr Marite has in view of the disputes of fact raised on the papers failed to make out a case on a balance probability against the SIU, taking into account the Plascon Evans rule. This equally applies in so far as the case against Mr Siweya is concerned.

THE TEST FOR APPLICATIONS FOR LEAVE TO APPEAL

[11] Section 17(1) of the Superior Courts Act 10 of 2013 (*“the Superior Courts Act”*) provides to the extent relevant for the following test to be applied in considering whether leave to appeal ought to be granted:

“(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;”

[12] Dr Marite relies on both the grounds in section 17(1)(a)(i) and (ii) in applying for leave to appeal, i.e. that the appeal would have a reasonable prospect of success, or that there is a compelling reason for the appeal to be heard.

[13] The Supreme Court of Appeal interpreted the test for leave to appeal in terms of section 17(1)(a)(i) as follows:¹

*“[16] Once again it is necessary to say that leave to appeal, especially to this court, must not be granted unless there truly is a reasonable prospect of success. Section 17(1)(a) of the [Superior Courts Act] makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal **would** have a reasonable prospect of success; or*

¹ MEC for Health, Eastern Cape v Mkhitha 2016 JDR 2214 (SCA).

there is some other compelling reason why it should be heard.

[17] *An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, it is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal."*

[14] In the heads of argument filed on behalf of Dr Marite for purposes of the application for leave to appeal, reference was made to the judgment of Bertelsmann J in **The Mont Chevaux Trust v Tina Goosen and 18 others**.² In that matter it was held that the threshold for granting leave to appeal against a judgment of a High Court has been raised since the advent of the Superior Courts Act. The court held that 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.

[15] Reference was also made in the heads of argument on behalf of Dr Marite to the judgment of **Ramakatsa and others v African National Congress and another** where it was held that:³

"[10] Turning the focus to the relevant provisions of [the Superior Courts Act], leave to appeal may only be granted where the judges concerned are of the opinion that the appeal would

² See **The Mont Chevaux Trust v Tina Goosen and 18 others** JDR 2325 (LCC) at paragraph 6.

³ (724/2019) [2021] ZASCA 31 (31 March 2021) at paragraph [10].

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. This Court in Caratco, concerning the provisions of s 17(1)(a)(ii) of [the Superior Courts 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 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."

DR MARITE'S APPLICATION FOR LEAVE TO APPEAL

- [16] Notwithstanding the 20 grounds listed in the application for leave to appeal referred to above, some of which were neither pursued in the heads of argument nor in the oral address before me, it upon analysis seems that Dr Marite's application for leave to appeal is focused on section 5(2)(b) of the Special Investigating Units And Professional Tribunals Act 74 of 1996 ("the SIU Act"). That section reads as follows:

“(2) For the performance of the functions referred to in section 4, a Special Investigating Unit may-

(a) ...

(b) order any person by notice in writing under the hand of the Head of the Special Investigating Unit or a member delegated thereto by him or her, addressed and delivered by a member, a police officer or a sheriff, to appear before it at a time and place specified in the notice and to produce to it specified books, documents or objects in the possession or custody or under the control of any such person: Provided that the notice shall contain the reasons why such person's presence is needed;

(c) through a member of the Special Investigating Unit, administer an oath to or accept an affirmation from any person referred to in paragraph (b), or any person present at the place referred to in paragraph (b), irrespective of whether or not such person has been required under the said paragraph to appear before it, and question him or her under oath or affirmation.”

[17] Based on this, it was argued that the precursor of Dr Marite being compelled to answer any question inclusive of questions which may be self-incriminating at the meeting held at the SIU was that he had to be “subpoenaed” as envisaged in section 5(2)(b). Accordingly, it is argued that the matter at hand does not fall within this ambit.

[18] As I see it, the argument on behalf of Dr Marite simply ignores the provisions of section 5(2)(a) of the SIU Act, which provides that:

“(2) For the performance of the functions referred to in section 4, a Special Investigating Unit may-

- (a) *through a member require from any person such particulars and information as may be reasonably necessary;"*

- [19] I for instance dealt with this aspect at paragraph [52] of my judgment where I held that what was at stake, insofar as Dr Marite meeting up with the SIU was concerned, was section 5(2)(a) of the SIU Act. I specifically held that it was not an occasion as envisaged in section 5(2)(b) of the SIU Act in terms of which Dr Marite was ordered to appear, administer an oath, directed to produce specific books, documents or objects, and was compelled to answer questions.
- [20] As I see it, Dr Marite does not have reasonable prospects of persuading a court on appeal that section 5(2)(b) was at stake and not section 5(2)(a).
- [21] This is particularly so, in my view, since the disputes of fact raised by Mr Siweya and the SIU respondents seriously challenge the case Dr Marite attempted to make out.
- [22] I remain of the view that taking into account those facts which Dr Marite averred, together with the facts as alleged by the SIU respondents, these simply do not justify that an interdict be granted against the SIU. Also not against Mr Siweya. As I see it, there are no reasonable prospects that Dr Marite will persuade a court of appeal otherwise.
- [23] For the same reason section 5(3) also does not apply since Dr Marite was

not subpoenaed to appear. He attended the meeting voluntarily. It is common cause that at no stage did he complain or raise alarm.

[24] In support of his contention that the application for leave ought still to be allowed since there is some other compelling reason why the appeal should be heard, the argument was that having regard to the interpretation of the relevant legislation at stake in this matter, the matter is of such importance that leave ought nevertheless to be granted. I do not agree.

[25] As I see it, the judgment of Liesl Joy Moses v Special Investigation Unit⁴ already elaborately dealt with this aspect of our law. I am of the view that Dr Marite's argument that the Liesl Joy Moses matter can be distinguished from the present on the basis that in that matter the applicant sought to interdict the SIU from investigating (*in toto*), lacks merit.

[26] In the present instance properly construed, the notice of motion even after some of the relief was abandoned and only some of it persisted with, had the effect of a final interdict against the SIU.

[27] With reference to ground 8 for leave to appeal referred to above, namely that this Court erred by finding that there is a dispute of fact and then not referring the matter for evidence, alternatively trial, I agree with the submissions made in the heads of argument on behalf of Mr Siweya. These were namely that

⁴ Case number 28999/2021, judgment delivered on 22 July 2021 in this Court per Baqwa J.

the consideration of referral to oral evidence must be made timeously, not as an afterthought at the stage for leave to appeal, which Dr Marite attempts to do. This is to enable the parties and the court to have the issues in dispute and the evidence to be adduced to be identified. The reason for this requirement is that there be an identification of the issues on which referral is sought, to avoid the situation where referral is transformed into a trial.

[28] In the result, I am not convinced that Dr Marite on proper grounds has prospects of success on appeal. As I see it, Dr Marite has failed to show a sound rational basis for the conclusion that there are prospects of success. Neither is there, in my view, a compelling reason why the appeal should be heard.

[29] I therefore find that Dr Marite's application for leave to appeal ought to fail.

COSTS

[30] I see no reason why costs ought not to follow the event.

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

ORDER

1. The applicant's application for leave to appeal is dismissed, with costs.

Acting Judge of the High Court of
South Africa, Gauteng Division,
Pretoria

Delivered and uploaded to CaseLines: 13 February 2024

For the applicant: Adv Marius Snyman SC
Instructed by Elliott Attorneys

For the second respondent: No appearance. Heads of argument filed by L Molete.
Notice of intention to oppose filed by Nemasisi (N) Attorneys

For third and fourth
respondents:

Adv S Poswa-Lerotholi SC
Adv N Ncube
Instructed by State Attorney, Pretoria