

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED:
Date: <u>21st October 2022</u> Signature: _____	

DATE: 21ST OCTOBER 2022

(1) CASE NO: 5798/2021

In the matter between:

WACO AFRICA (PTY) LIMITED t/a SGB-CAPE

Applicant

and

ESKOM SOC LIMITED

First Respondent

**KAEFER THERMAL CONTRACTING
SERVICES (PTY) LIMITED**

Second Respondent

ELECTROHEAT ENERGY (PTY) LIMITED

Third Respondent

ORAM INDUSTRIALS (PTY) LIMITED

Fourth Respondent

RSC INDUSTRIAL SERVICES (PTY) LIMITED

Fifth Respondent

(2) CASE NO: 3047/2022

In the matter between:

SOUTHEY CONTRACTING (PTY) LIMITED

Applicant

and

**ESKOM SOC LIMITED & THE SECOND TO FIFTH
RESPONDENTS AS PER CASE (1) HEADING ABOVE**

Respondents

Coram: Adams J

Heard: 20 October 2022 – The ‘virtual hearing’ of these opposed Applications for Leave to Appeal were conducted as a videoconference on *Microsoft Teams*.

Delivered: 21 October 2022 – This judgment was handed down electronically by circulation to the parties' representatives *via* email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 12:00 on 21 October 2022.

Summary: Applications for leave to appeal – s 17(1)(a)(i) of the Superior Courts Act 10 of 2013 – an applicant now faces a higher and a more stringent threshold – leave to appeal granted in both applications.

ORDER

- (1) Under Case number: 5798/2021: -
- (a) The applicant's application for leave to appeal succeeds.
 - (b) The applicant is granted leave to appeal to the Full Court of this Division.
 - (c) The costs of this application for leave to appeal shall be costs in the appeal.
- (2) Under Case number: 3047/2022: -
- (a) The applicant's application for leave to appeal succeeds.
 - (b) The applicant is granted leave to appeal to the Full Court of this Division.
 - (c) The costs of this application for leave to appeal shall be costs in the appeal.

JUDGMENT [APPLICATION FOR LEAVE TO APPEAL]

Adams J:

[1]. I have before me two separate and distinct applications for leave to appeal under two different case numbers, which arise from one judgment which I had

handed down in respect of three opposed review applications against Eskom and four other respondents, all of whom played no part in the main applications. I shall refer to the parties as referred to in the original applications. The applicant in the first application is SGB-Cape and Southey is the applicant in the second application, with Eskom being the first respondent in both these applications for leave to appeal. SGB-Cape and Southey apply for leave to appeal against the judgment and the order, as well as the reasons therefor, which I granted on 2 September 2022, in terms of which I had dismissed, with costs, the applicants' review applications to have set aside the award of a public tender by Eskom in favour of the other respondents.

[2]. The applications for leave to appeal is mainly against my factual and legal findings that Eskom, in awarding the tender to the other respondents and not to SGB-Cape and Southey, complied with their constitutional and legislative obligations relating to public procurement in relation to the tender in question and that there were no grounds for the setting aside of the award of the tender.

[3]. As was the case in the main application, SGB-Cape and Southey make common ground in respect of a number of the bases on which leave to appeal is sought. On the whole, both applicants contend for leave to appeal on two categories of grounds, namely: - (1) The first includes material grounds of review which were raised, but which were not considered by me in my judgment; and (2) Those grounds of review which were considered by the Court *a quo*, but were however incorrectly decided, so the applicants contend, against the applicants in favour of Eskom.

[4]. So, for instance, SGB-Cape argued and contended before me that the rejection of its tender bid on the basis that its pricing is 'exorbitantly high and not market-related when compared to the lowest tendered' is irrational and unlawful, as the pricing of the successful bidders (as well as Eskom's aspirational rates) are so seriously below market-related that no service provider would in fact be able to execute the tendered services at those rates. This ground of review, so SGB-Cape submitted in this application for leave to appeal, was not at all considered by me. If I had consider this ground, so the SGB-Cape contends, I

would have found that the prices of SGB-Cape are market-related and I would have upheld this ground of review. The net effect of all of this, so the argument continues, is that Eskom would run the risk that the tender may not be executed at the awarded rates and that the awarded rates may be escalated during the subsistence of the contract. The applicants referred me to other examples of grounds of review argued by them in the main application, which were apparently not considered by me. I do not deem it necessary to mention all of those grounds. Suffice to say that there may very well be merit in the applicants' contentions in that regard. As contended by Mr Mokhari SC, who appeared on behalf of the SGB-Cape with Mr Mathiba, the mere fact that the grounds of review were not considered by the Court is a compelling reason for the appeal to be heard.

[5]. An example of a ground considered by me, but in respect of which I had erred according to the applicants, relates to my treatment of the alleged unlawfulness of the tender award because the provisions of the Construction Industry Development Board Act, Act 38 of 2000 ('the CIDB Act') had been contravened. I erred, so it was contended on behalf of the applicants, because I should simply have found that the value of the contract required of the successful bidders that they have a CIDB Grading Level of at least 8SL or higher, which some of the successful bidders did not have. Again, there are additional grounds which, according to the applicants, I should have upheld. I also do not intend to deal with those in detail. I do however accept that it may very well be that another court will agree with these contentions.

[6]. It is so that nothing new has been raised by the applicants in these applications for leave to appeal. In my original judgment, I have dealt with most of the issues raised, which in my view were the crucial and decisive ones in the application, and it is not necessary to repeat those in full. Suffice to restate what I said in my judgment, namely that, in my view, Eskom's impugned decision to award the tender to second to fifth respondents is not invalid and therefore cannot and should not be declared to be constitutionally invalid or set aside.

[7]. The traditional test in deciding whether leave to appeal should be granted was whether there is a reasonable prospect that another court may come to a

different conclusion to that reached by me in my judgment. This approach has now been codified in s 17(1)(a)(i) of the Superior Courts Act 10 of 2013, which came into operation on the 23rd of August 2013, and which provides that leave to appeal may only be given where the judges concerned are of the opinion that ‘the appeal would have a reasonable prospect of success’.

[8]. In *Ramakatsa and Others v African National Congress and Another*¹, the SCA held that 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. These prospects of success must not be remote, but there must exist a reasonable chance of succeeding. An applicant who applies for leave to appeal must show that there is a sound and rational basis for the conclusion that there are prospects of success.

[9]. The ratio in *Ramakatsa* simply followed *S v Smith* 2012 (1) SACR 567 (SCA), [2011] ZASCA 15, in which Plasket AJA (Cloete JA and Maya JA concurring), held as follows at para 7:

‘What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that the 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.’

[10]. In *Mont Chevaux Trust v Tina Goosen*², the Land Claims Court held (in an *obiter dictum*) that the wording of this subsection raised the bar of the test that now has to be applied to the merits of the proposed appeal before leave should be granted. I agree with that view, which has also now been endorsed by the

¹ *Ramakatsa and Others v African National Congress and Another* (724/2019) [2021] ZASCA 31 (31 March 2021);

² *Mont Chevaux Trust v Tina Goosen*, LCC 14R/2014 (unreported).

SCA in an unreported judgment in *Notshokovu v S*³. In that matter the SCA remarked that an appellant now faces a higher and a more stringent threshold, in terms of the Superior Court Act 10 of 2013 compared to that under the provisions of the repealed Supreme Court Act 59 of 1959. The applicable legal principle as enunciated in *Mont Chevaux* has also now been endorsed by the Full Court of the Gauteng Division of the High Court in Pretoria in *Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others*⁴.

[11]. I am persuaded that the issues raised by the applicants in their applications for leave to appeal are issues in respect of which another court is likely to reach conclusions different to those reached by me. Those issues include material grounds of review which SGB-Cape and Southey raised, which were not considered by the Court *a quo* in its judgment. I am therefore of the view that there are reasonable prospects of another court making factual findings and coming to legal conclusions at variance with my factual findings and legal conclusions. The appeals therefore, in my view, have a reasonable prospect of success.

[12]. Having said that, this matter is not of such a complex nature that it should be referred to the Supreme Court of Appeal, as was submitted on behalf of the applicants. And I therefore intend granting leave to appeal to the Full Court of this Division.

Order

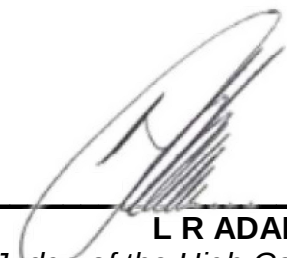
[13]. In the result, the following order is made: -

- (1) Under Case number: 5798/2021: -
 - (a) The applicant's application for leave to appeal succeeds.
 - (b) The applicant is granted leave to appeal to the Full Court of this Division.

³ *Notshokovu v S*, case no: 157/2015 [2016] ZASCA 112 (7 September 2016).

⁴ *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).

- (c) The costs of this application for leave to appeal shall be costs in the appeal.
- (2) Under Case number: 3047/2022: -
 - (a) The applicant's application for leave to appeal succeeds.
 - (b) The applicant is granted leave to appeal to the Full Court of this Division.
 - (c) The costs of this application for leave to appeal shall be costs in the appeal.



L R ADAMS
Judge of the High Court
Gauteng Division, Johannesburg

HEARD ON:	20 October 2022 – in a ‘virtual hearing’ during a videoconference on the <i>Microsoft Teams</i> .
JUDGMENT DATE:	21 October 2022 – judgment handed down electronically
FOR THE APPLICANT (SGB-CAPE) IN THE FIRST MATTER:	Adv W Mokhari SC, together with Advocate S Mathiba
INSTRUCTED BY:	Werksmans Attorneys, Sandton.
FOR THE APPLICANT (SOUTHEY CONTRACTING) IN THE SECOND MATTER:	Adv Andrew Kemack SC, together with Advocate Maryke Nieuwoudt
INSTRUCTED BY:	MDA Attorneys, Houghton, Johannesburg
FOR THE FIRST RESPONDENT (ESKOM) IN BOTH APPLICATIONS FOR LEAVE TO APPEAL:	Adv Ngwako Maenetje SC, with Advocate Hephzibah Rajah
INSTRUCTED BY:	Mchunu Attorneys, Rosebank, Johannesburg
FOR THE SECOND TO FIFTH RESPONDENTS IN ALL THREE MATTERS:	No Appearance
INSTRUCTED BY:	No appearance