

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1)	REPORTABLE: No
(2)	OF INTEREST TO OTHER JUDGES: No
	
11/11/2022	
DATE	SIGNATURE

CASE NO: 2021/31083

In the application for leave to appeal between:

CAPE 26 (PTY) LIMITED

Applicant

and

THE COMPANIES AND INTELLECTUAL
PROPERTY COMMISSION

First Respondent

ALL AFFECTED PERSONS

Second Respondents

CAPE 26 (PTY) LIMITED

Third Respondent

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

This judgment is deemed to be handed down upon uploading by the Registrar to the electronic court file.

Gilbert AJ:

1. The applicant, or more accurately, Mahomed Mahier Tayob (“Mr Tayob”), ostensibly as the business rescue practitioner of Cape 26 (Pty) Limited (“the Company”) seeks leave to appeal the whole of my order delivered on 28 July 2022 dismissing the application in which Mr Tayob sought of the court an extension of the period in which a business rescue plan is to be published, as provided for in section 150(5)(a) of the Companies Act, 2008, and ordering that he pay the costs personally.
2. There was some delay between the delivery of the application for leave to appeal in August 2022 and the hearing of the application. It was at the instance of the court that this application for leave to appeal was set down for hearing to advance the matter to finality.
3. The primary basis for my dismissing the application was that Mr Tayob had not established that he was the business rescue practitioner of the Company and so was not in a position to seek an extension of the period in which a business rescue plan is to be published. As reasoned in my judgment, whether Mr Tayob can demonstrate that he is the business rescue practitioner of the company is antecedent to a determination as to whether he is entitled to an extension of the period in which a plan to be published.
4. At all material times the parties accepted, and continued to accept, that whether Mr Tayob is the business rescue practitioner of the Company is a matter of factual dispute. It is because of that factual dispute that Mr Tayob sought a

postponement of the application before me on the basis that that factual dispute first needed to be resolved. In so seeking the postponement, Mr Tayob accepted that that factual dispute was sufficiently relevant to a determination of the main application as that was the basis for the postponement.

5. After I refused the postponement of the application, Mr Tayob would then adopt the incongruent position that that factual dispute was irrelevant and that the matter must be determined on the basis that he was the practitioner of the Company. The argument continued, and which was repeated during the application for leave to appeal, that until a successful counter-application was made by one or other of the parties declaring that he was not the practitioner, the court must proceed on the basis that he is the practitioner. I rejected this argument based upon the reasoning in my judgment. The fact that Mr Tayob sought a postponement to address that same factual issue is, as stated in my judgment, self-destructive of an argument that the same factual issue was irrelevant once the application was to be determined on its merits.
6. During argument of this application for leave to appeal, emphasis was made that some or other administrative action had taken place at the instance of the CIPC and until that administrative action was set aside, the court was bound to accept that Mr Tayob was a practitioner and so that I erred in not doing so. My reasoning for having rejected this argument appears in my judgment, particularly in paragraphs 43 to 45.
7. In paragraph 44 of my judgment, I pointed out that whether the CIPC made a decision that would constitute administrative action is not an issue that was

raised on the papers. I enquired of counsel during the hearing of the application for leave to appeal whether I had erred in finding that this issue had not been raised in the papers. Counsel accepted that this issue had not been raised on the papers, other than with reference to a letter from the CIPC attached to the postponement application. I have reasoned in my judgment why that is an insufficient basis for this issue to be properly before the court for determination.

8. Section 17(1)(a)(i) of the Superior Courts Act provides that leave to appeal may only be given where the judge is of the opinion that the appeal ‘would’ have reasonable prospects of success. This is in (apparent) contrast to the test under the previous Supreme Court Act, 1959 that leave to appeal is to be granted where a reasonable prospect was that another court ‘might’ come to a different conclusion.¹
9. The Supreme Court of Appeal in *Notshokovu v S*² 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*”.
10. To similar effect is *Acting National Director of Public Prosecutions and others v Democratic Alliance in re: Democratic Alliance v Acting National Director of Public Prosecutions and others*³ where the full court of this Division held that the Superior Courts Act had “*raised the bar for granting leave to appeal*”,

¹ See, for example, *Commissioner of Inland Revenue v Tuck* 1989 (4) SA 888 (T) at 890B/C.

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

³ [2016] ZAGPHC489 (24 June 2016), at para 25.

referring with approval to the following oft-cited passage from the judgment of Bertelsmann J in *Mont Chevaux Trust v Goosen*:⁴

“It is clear that the threshold for granting leave to appeal against the 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, see Van Heerden v Cronwright and others 1985 (2) SA 342 (T) at 343H. 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.”

11. Notwithstanding the difficulties in appreciating the contours of such a more stringent test (in contrast to the previous test), I am not of the opinion that an appeal would have a reasonable prospect of success insofar as there must be a measure of certainty that another court would differ from my decision.
12. But does section 17(1)(a)(i) raise the threshold so as to require a measure of certainty that the appeal court will differ from the court *a quo*? Subsequent to *Notshokovu v S* but without reference thereto, Dlodlo J for the Supreme Court of Appeal in *Ramakatsa and Others v African National Congress and Another*⁵ said that:

⁴ 2014 JDR 2325 (LCC).

⁵ [2021] ZASCA 31 (31 March 2021), para 10.

“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.⁶ 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.” (my emphasis).

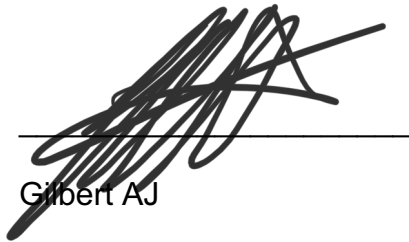
13. I am not persuaded that there is a sound rationale basis to reach a conclusion that there are prospects of success, whether on the grounds argued during the application for leave to appeal or set out in the application for leave to appeal.

⁶ My footnote: see the cited cases in the discussion on this topic in *Pollak: The South African Law of Jurisdiction* (Juta) loose-leaf (2021) at 192A, 192B.

14. And so whether the application for leave to appeal is approached on the basis of *Notshokovu* or *Ramakatsa*, I am not of the opinion that the appeal would have a reasonable prospect of success.
15. It was also submitted that I had erred in refusing the postponement. Assuming that the refusal of a postponement is appealable, whether or not to grant a postponement is the exercise of a discretion, which will only be interfered with if it had not been exercised judicially.⁷ In my opinion, there is no reasonable prospect that another court would (or might) find that the exercise of my discretion in refusing the postponement was not exercised judicially, in the circumstances described in my judgment.
16. The applicant has not advanced some other compelling reason why the appeal should be heard.
17. The opposing respondents submitted that the costs of this application should be borne by Mr Tayob personally, for the same reasons as set out in my judgment, namely that as he has not established that he litigates on behalf of the Company. I agree that the same reasoning would apply to this application for leave to appeal.

⁷ *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC), para 11.

18. An order is made that the application for leave to appeal is dismissed, and that the costs of David Bannai as the second respondent in opposing this application for leave to appeal are to be paid by Mr Tayob personally.



Gilbert AJ

Date of hearing:	9 November 2022
Date of judgment:	11 November 2022
Counsel for the applicant:	Advocate N Mhlongo
Instructed by:	A Mothilal Attorneys Inc.
Counsel for the second respondent (David Bannai):	Advocate M Smit
Instructed by:	Cliffe Dekker Hofmeyr