



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

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

14 July 2022

DATE

Jehapi

SIGNATURE

CASE NUMBER: 62661/18

In the matter between:

**THE ASSOCIATION OF CONCERNED
PROFESSIONAL ANIMAL CONSULTANTS**

APPLICANT

and

THE MINISTER OF AGRICULTURE, FORESTRY

FIRST RESPONDENT

**THE REGISTRAR OF FERTILIZER, FARM FEEDS
AGRICULTURAL, REMEDIES AND STOCK**

SECOND RESPONDENT

THE MINISTER OF HEALTH

THIRD RESPONDENT

THE SOUTH AFRICAN HEALTH PRODUCTS

FOURTH RESPONDENT

REGULATORY AUTHORITY (SAHPRA)

ANIMATE ANIMAL HEALTH (PTY) LTD

FIFTH RESPONDENT

JUDGMENT - LEAVE TO APPEAL

TLHAPI J

[1] This is an application for leave to appeal to the Full Court of the above Division alternatively to the Supreme Court of Appeal. The application was opposed by the first, second and fifth respondents. The application is premised on section 17(1)(a) of the Superior Courts Act 10 of 2013, ("the Act") and specifically as provided for in section 17(1)(a)(ii) of the Act. For completeness, section 17 (1) of the Act is set out below:

"Section 17(1)

(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 reasonable prospect of success; or

(ii) there is some other compelling reasons why the appeal should be heard, including conflicting judgments on the matter under consideration;

(b) the decision sought on appeal does not fall within the ambit of section 16(2); and

(c) where the decision sought to be appealed does not dispose of all the

issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.”

[2] The test applied previously to similar applications was whether there were reasonable prospects that another court may come to a different conclusion, *Commissioner of Inland Revenue v Tuck*¹. The threshold of reasonable prospects has now been raised by the use and meaning attached to the words ‘only’ in 17(1) and ‘would’ in section 17(1)(a)(i). Therefore, on the entire judgement there should be some certainty that another court would come to a different conclusion from the judgement the applicant seeks to appeal against. In *Mont Chevaux Trus v Tina Goosen and 18 Others*² :

“It is clear that the threshold for granting leave to appeal 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, see *Van Heerden v Cronwright & 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”

[3] In *S v Smith*³ a more stringent test is called for in that an applicant must convince a court, on proper grounds that there are prospects of success which are not remote, a mere possibility is not sufficient. Therefore, where the applicant has satisfied either of the two identified requirements in the Act, leave to appeal should be granted, *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others*⁴. This standard was confirmed in

¹ 1989 (4) SA 888 (T)

² 2014 JDR 2325 (LCC) para [6]

³ 2012 (1) SACR 567 (SCA) para[7]

⁴ 2016 (3) SA 317 (SCA)

*Notshokovu v S*⁵ where it was stated:

“.....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....”

[4] in *Ramakatsa and Others v African National Congress and Another*⁶ Dlodlo JA stated:

“Turning the focus to the relevant provisions of the Superior Courts Act[5] (the SC Act), leave to appeal may only be granted where the judges concerned are of the opinion that the appeal would 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 [6]. The Court in Curatco[7] concerning the provisions s 17(1)(a)(ii) of the SC Act pointed out that if the court 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 the effect on future disputes. However, this Court correctly added that ‘but hereto the merits remain vitally important and are often decisive’.[8] I am mindful of 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 compelling reasons why the appeal should be heard, leave to appeal should be granted. The test of reasonable prospect of success postulates a dispassionate decision based on the facts and the law, that a court of appeal should be heard, leave to appeal could reasonably arrive at a conclusion different to that of the trial court. In other

⁵ (157/15) [2016] ZASCA (7 September 2016) para [2]

⁶ (724/20190 [2021] ZASCA 31 (31 March 2021) para [10]

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 chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist, [9]”

[5] Briefly summarised the applicant raised four grounds of appeal, that:

- a) I failed to identify that the matter raised important constitutional issues on one or more grounds relating to public health; whether the registration or reregistration of Salbutamate 10 was lawful or not and if not lawful, considerations of the exercise of public power at variance with the principle of legality applied, coupled with the imposition of a just and equitable order in terms of section 172 of the Constitution of the Republic of South Africa, 1996; what the proper approach is where the court’s Jurisdiction in terms of the Promotion of Administrative Justice Act 3 of 2000 (“the PAJA”) was ousted but the court retained jurisdiction to hear the matter based on the principle of legality.
- b) that there were fatal procedural irregularities in that I erred in not considering the existing disputes of fact which could not be decided without oral evidence, or that the matter be referred to evidence in terms of rule 6(5)(g) of the Uniforms Rules and whether the *point in limine* could be decided without first deciding the dispute of fact in respect thereof; whether the enrolment of one day was adequate and whether a postponement or removal was not appropriate in the circumstance;
- c) that I erred in determining the issue of delay before the merits and where

there was no application in terms of section 9 of PAJA and that the finding without oral evidence that the delay was four years as opposed to one year and at most seven months and a few days;

- d) that costs on the Bio Watch principle did not fall to be awarded against the applicant, that each party ought to have been ordered to pay its own costs;

[6] Although important and in avoiding the likelihood of again dealing with the issues, I do not deem it necessary to deal all the grounds and submissions in this application, save to state that I have considered them together with the heads of argument filed which were of assistance.

[7] The first, second and fifth respondents denied that any constitutional issues were raised on the papers by the applicant which invoked section 172(1)(a) of the Constitution. Some of the reasons being the failure by the applicant to dispute the allegation that it was motivated by self-interest and not public interest. They contended that the court's jurisdiction in terms of PAJA was not ousted and the principle of legality be retained because of the existence of alleged constitutional issues. Further, they contended that the constitutional challenge was clothed in 'vague terms' there was no amplification on the papers of which clauses in the Constitution were violated or how the decision had impacted the Constitution. Having failed to make out a case in this regard, rendered the constitutional challenge invalid. The first, second and fifth respondents saw ground a) as a disingenuous attempt by the applicant to revive its initial argument on PAJA grounds.

[8] The first, second and fifth respondents denied that there were procedural irregularities. They contended that the court had a discretion to deal first with the *point in limine* before hearing the merits and a decision in their favour would have eliminated the need to refer the matter to oral evidence. Further, that in the absence of an application for condonation the court was correct in dismissing the application.

[9] The issue about the matter been set down for one day only was addressed with the parties. The practice is that the parties liaise with the Deputy Judge President for a special allocation. The applicant was informed of the date well in advance and the joint practice does not identify the duration as a problem to be encountered by the parties. This was a complex matter and not one where an application could be dealt with from the bar.

[10] The applicants were in my view not prejudiced at all when I first dealt with the point *in limine*, because the issue around the unreasonable delay was taken on early in the answering papers and there was no reason why an application for condonation was not forthcoming up to the time of the matter being heard. Regardless of the difference in calculation of the number of days. The applicants did not respond to allegations that they had some of its members who were practitioners in the field and who were identified and, who were aware of the registration and use of Salbutamate 10 a few years before the application was launched. Given this background there was nothing untoward in me dealing with this issue instead of the merits first.

[11] I remain resolute in my view that no legality issue was raised outside of the purview of PAJA which was the case made out by the applicants on paper. The main complaint is that over and above the applicants' assertion that it was a PAJA application, I failed to recognize that inbuilt in the papers issues of legality were raised. It seems to me with respect, that in this application for leave, it is suggested there was an expectation by the applicant for the court to have been speculative about the issues raised, to read into the applicants' papers that which was not articulated with clarity. In this case was the submission that the registration or reregistration of Salbutamate 10 ,if unlawfully registered the decision was unconstitutional which, then would have kicked in a determination according to the principle of legality and not PAJA (my underlining).

[12] Having said the above, I am however of the view that leave be granted to the full court of this division, in that there are compelling reasons to be determined by the court of appeal firstly, on whether I erred in not recognizing that the applicants had also raised a legality issue which would have entailed the matter being referred to oral evidence; secondly whether in this instance I should ordered that each party pay its costs.

[13] In the result the following order is granted:

1. Leave to appeal to the Full Court of this Division is granted with costs in the appeal.



THLAPI VV

(JUDGE OF THE HIGH COURT)

APPEARANCES

LEAVE TO APPEAL HEARD AND

RESERVED	:	27 MAY 2022
COUNSEL FOR THE APPLICANT	:	Adv R Willis SC
INSTRUCTED BY	:	Cranko Karp

COUNSEL FOR THE 1st and 2nd

RESPONDENTS	:	Adv H Mpshe SC with Adv D Sekwakweng
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INSTRUCTED BY	:	Office of the State Attorney
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**COUNSEL FOR THE 5th
RESPONDENT**

: Adv. J Hattingh SC with
Adv. R Arganceli

INSTRUCTED BY

: Bieldermands Inc