

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



Case No. 35659/2021

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|------------------------------------|
| 1. REPORTABLE: NO |
| 2. OF INTEREST TO OTHER JUDGES: NO |
| 3. REVISED: Yes |

 <u>JULIAN YENDE</u>	<u>18 June 2024</u>
SIGNATURE	DATE

In the matter between:

THE CHIEF LAND CLAIMS COMMISSIONER

First Applicant

**THE MINISTER OF AGRICULTURE, RURAL
DEVELOPMENT AND LAND REFORM**

Second Applicant

**THE INFORMATION OFFICE: DEPARTMENT
OF AGRICULTURE, LAND REFORM AND
RURAL DEVELOPMENT**

Third Applicant

and

THE SOUTH AFRICAN AGRI INITIATIVE

Respondent

In re:

Applicant

**THE SOUTH AFRICAN AGRI INITIATIVE
And
THE MINISTER OF AGRICULTURE, RURAL
DEVELOPMENT AND LAND REFORM**

First Respondent

**THE INFORMATION OFFICE: DEPARTMENT OF
AGRICULTURE, RURAL DEVELOPMENT AND LAND
REFORM**

Second Respondent

THE CHIEF LAND CLAIMS COMMISSIONER

Third Respondent

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

YENDE AJ

[1] This is an application for leave to appeal the judgment and order of this court dated 19 September 2023. The application is brought in terms of section 17(1)(a)(i) and (ii) of the Superior Courts Act, to wit, that the appeal would have a reasonable prospect of success and/ or there is some compelling reason why the appeal should be heard. Having carefully considered the grounds of appeal, I am of the view that the grounds of appeal do not meet the threshold contained in section 17(1)(i) nor does a compelling reason exist to grant leave to appeal in lieu of the legal precepts and judicial precedence adumbrated below.

[2] It is now trite that the Superior Courts Act 10 of 2013 provides for leave to appeal to be granted only in two circumstances¹. The first envisaged circumstance is where the Judge concerned is of the opinion that an appeal would have a reasonable prospect of success. The second envisaged circumstance is where there are some compelling reasons why the appeal should be granted and now, I turn to consider the legal principles applicable in this application.

[3] Section 17(1)(a) of the Superior Courts Act² (“the Superior Courts Act”) provides that leave to appeal may be granted where the judge concerned is of the opinion that:

[3.1] “the appeal would have a reasonable prospect of success (section 17(1)(a)(i); or

¹ Section 17 of Act NO 10 of 2013

² Act no 10 of 2013.

[3.2] there is some other compelling reason why the appeal should be heard (section 17(1)(a)(ii)).

[4] When considering the judicial precedence, the Supreme Court of Appeal has held that the test for granting leave to appeal is as follows;

[4.1] In the matter of *MEC for Health, Eastern Cape v Mkhitha and Another*³ it was held (footnotes omitted)-

“[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 10 of 2013 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 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 is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal”.

[4.2] The Full Court of this Division, Pretoria when dealing with section 17(1)(a)(i) of the Superior Courts Act, in the matter of *Acting National Director of Public Prosecutions and Others v Democratic Alliance*⁴ it was held that-

“[25] The Superior Courts Act has raised the bar for granting leave to appeal. In The Mont Chevaux Trust (IT2012/28) v Tina Goosen & 18 Others, Bertelsmann J held as follows:

‘It is clear that the threshold for granting leave to appeal against 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..... 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 [2016] ZASCA 176 (25 November 2016).

⁴ [2016] ZAGPPHC 489 (24 June 2016).

[4.3] *Four years later, the Full Court of this Division, Pretoria in Fairtrade Tobacco Association v President of the Republic of South Africa*⁵ likewise held that-

“As such, in considering the application for leave to appeal, it is crucial for this Court to remain cognisant of the higher threshold that needs to be met before leave to appeal may be granted. There must exist more than just a mere possibility that another court, the SCA in this instance, will, not might, find differently on facts on law”

[4.4] *In Fusion Properties 233 CC v Stellenbosch Municipality*⁶, it was held that –

“[18] Since the coming into operation of the Superior Courts Act, there have been a number of decisions of our courts which dealt with the requirements that an application for leave to appeal in terms of ss 17(1)(a)(i) and 17 (1)(a)(ii) must satisfy in order for leave to be granted. The applicable principles have over time crystallised and are now well established. Section 17(1) provides, in material part, that leave to appeal may only be granted ‘Where the judge or judges concerned are of the opinion that-

(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.’

It is manifest from the text of s 17(1)(a) that an applicant seeking leave to appeal must demonstrate that the envisaged appeal would either have a reasonable prospect of success, or, alternatively, that ‘there is some compelling reason why an appeal should be heard’. Accordingly, if neither of these discrete requirements is met, there would be no basis to grant leave.....”.

[4.5] Later, eight (8) months after the decision in *Fusion Properties 233 CC v Stellenbosch Municipality*, the very same court in *Chithi and Others; In re: Luhlweni Mchunu Community v Hancock and Others*⁷ held that –

“[10] The threshold for an application for leave to appeal is set out in s 17(1) of the Superior Courts Act, which provides that leave to appeal may only be given if the judge or judges are of the opinion that the appeal would have a reasonable prospect of success....”.

[5] It is worthy to observe that all the decisions mentioned *supra* are in accordance

⁵ (21688/2020) [2020] ZAGPPHC 311 (24 July 2020).

⁶ [2021] ZASCA 10 (29 January 2021).

⁷ [2021] ZASCA 123 (23 September 2021).

with the judgment of the Supreme Court of Appeal In the matter of *Notshokovu v S*⁸ in which it was held that – “an applicant in an application for leave to appeal faces a higher and stringent threshold, in terms of the Act compared to the provisions of the repealed Supreme Court Act 59 of 1959”.

[6] I am however constrained to grant leave to appeal in so far as I have omitted to include in my judgment reasons for dismissing the application *a quo* in respect of the applicant’s alternative ground for rescission in terms of Rule 42(1)(a) of the Uniform Rules.

Order.

In the result, the following order is granted:

[7] Leave to appeal to the Full Court of this Honourable Court is granted.

[8] Costs are to be costs in the appeal.



J YENDE

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Yende AJ prepared this judgment. It is handed down electronically by circulation to the parties or their legal representatives by e-mail, by uploading the electronic file on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date of hand-down is deemed **18 June 2024**.

⁸ [2016] ZASCA 112.

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Date heard:

4 April 2024

Date of Judgment:

19 June 2024