



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

Case number: **23514/2020**

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO	YES
(2) OF INTEREST TO OTHERS JUDGES: YES/NO	YES
(3) REVISED	
11/9/2024	[Redacted Signature]
DATE	SIGNATURE

In the matter of:

GLANCINAH SHASHA MODINGWANA

Applicant

and

THE BODY CORPORATE AMBER HILL

Respondent

JUDGMENT: LEAVE TO APPEAL

Summary: Application for leave to appeal.

Accusations of non-compliance with the Code of Judicial Conduct.

Application for recusal.

Introduction

1. In an *ex-tempore* judgment granted on 6 March 2024, the applicant's rescission application was dismissed with costs. The written reasons followed on 3 June 2024. The applicant has applied for leave to appeal which is opposed by the respondent.

Mr Modingwana's standing/status to represent the applicant

2. As dealt with in paragraphs 7 and 8 of the judgment on the merits in the rescission application, Mr Modingwana is the applicant's brother. The court allowed argument to be advanced on behalf of the applicant (his sister) in the interest of justice and to comply with the *audi alteram partem* rule of natural justice. He is not an admitted legal representative. On this basis alone, the court may dismiss this application for leave to appeal. Nevertheless, the merits of the leave to appeal and the grounds upon which it is sought are dealt with comprehensively below.

The Test For Leave To Appeal

3. The full court held as follows:¹ *"This dictum serves to emphasise a vital point: Leave to appeal is not simply for the taking. A balance between the rights of the party which was successful before the Court a quo and the rights of the losing party seeking leave to appeal needs to be established so that the*

¹ In *Democratic Alliance v President of the Republic of South Africa and Others* 2124/2020 [2020] ZAGPPHC 326 (29 July 2020) at paragraphs [4] – [5].

absence of a realistic chance of succeeding on appeal dictates that the balance must be struck in favour of the party which was initially successful”.

4. An application for leave to appeal the judgment of this court must fulfil and comply with the requirements stipulated in section 17 of the Superiors Courts Act, 10 of 2013 (“*The Act*”), which reads as follows:

“17. Leave to appeal

(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;

(b) the decision sought on appeal does not fall within the ambit of section 16; 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.” (own underlining)

5. Applications for leave to appeal are governed by rule 49(1) of the Uniform Rules of Court and sections 16 and 17 of the Act. In terms of rule 49(1)(b) “*when leave to appeal is required and it had not been requested at the time of*

the judgment or order, application for such leave shall be made and the grounds therefor shall be furnished within fifteen days after the date of the order appealed against.”

6. In terms of section 16(1)(a)(i) of the Act, an appeal against any decision of a division as a court of first instance lies, upon leave having been granted if the court consisted of a single judge, either to the SCA or to a full court of that division, depending on the discretion issued in terms of section 17(6). Section 17(6)(a) of the Act provides:

“If leave is granted under subsection (2)(a) or (b) to appeal against a decision of a division as a court of first instance consisting of a single judge, the judge or judges granting leave must direct that the appeal be heard by a full court of that Division, unless they consider-

- (i) That the decision to be appealed involves a question of law of importance, whether because of its general application or otherwise, or in respect of which a decision of the Supreme Court of Appeal is required to resolve differences of opinion; or*
- (ii) That the administration of justice, either generally or in the particular case, requires consideration by the Supreme Court of Appeal of the decision, in which case they must direct that the appeal be heard by the Supreme Court of Appeal.”*

7. Section 17 makes provision for leave to appeal to be granted where the presiding judge is of the opinion that either the appeal would have a reasonable prospect of success or there is some other compelling reason why

the appeal should be heard, including whether there are conflicting judgments on the matter under consideration.

8. Considering the statutory and regulatory matrix, three questions for consideration arise in the application for leave to appeal. These questions are not distinct but interrelated. The first question is whether the applicant filed a proper notice of application for leave to appeal which concisely and succinctly set out the grounds upon which leave to appeal is sought. The second question is whether the appeal would have a reasonable prospect of success or whether there are compelling reasons that exist why the appeal should be heard such as the interests of justice. The third question is whether the application for leave to appeal sets out expressly why the default position of an appeal to a full court of the Division should not prevail, as well as the questions of law or fact or other considerations involved that dictate that the matter should be decided by the SCA.
9. Previously, under the common law, the test for leave to appeal was whether a respondent may or might have reasonable prospects of success on appeal.
10. However, subsequent to the promulgation of the Act, the legislator has introduced a jurisdictional requirement to applications for leave to appeal.
11. Leave to appeal may only be given, when the appeal would have reasonable prospects of success, *alternatively*, if there is some other compelling reason why the appeal should be heard.
12. The new statutory test is more stringent than its common law predecessor.

13. Section 17(1)(a)(i) of the Act, amended the common law test that has been applicable in approaching the application for leave to appeal. The new test as provided for in the Act/statute/jurisdictional requirement replaced the word “might” or “may” in the common law test with the word “*would*”. It is thus clear that the test that is outlined in terms of the Act/statute is more stringent.
14. That an appeal “*would*” have reasonable prospects of success is a more searching inquiry than a mere possibility that another court might come to a different conclusion. It is equally insufficient that an applicant’s case is merely arguable.
15. This accords with the purpose of provisions in the Act dealing with appeals, being a bold step by the legislator to **limit** unnecessarily protracted litigation and/or frivolous applications for leave to appeal.
16. The Honourable Justice Prinsloo in *E-TV v Minister of Communications*,² stated the following in paragraph 11 of the judgment: “*It has been held that the test to be applied before leave to appeal may be granted, is **more stringent** than what it was **before**. The test was codified in Act 10 of 2013 which came into operation on 23 August 2013.*” (own emphasis added)
17. The full bench in *Minister of Justice and Constitutional Development v Southern Africa Litigation Centre*,³ stated the following regarding the previous test applied: “*The traditional approach which our courts have followed in the past when confronted with applications of this nature is to determine whether there is a reasonable prospect that another court may come to a different*

² 2015 JDR 2418 (GP).

³ 2015 JDR 2102 (GP).

conclusion.” (see: Commissioner of Revenue v Tuck 1989 (4) SA 888 (T) at 890 B).

18. At paragraph 9 of this judgment, the Court stated that: “Section 17(1)(a)(i) provides that leave to appeal may only be given where the court concerned is of the opinion that the appeal would have a reasonable prospect of success.” (own emphasis)
19. This criteria, which over many years have been adopted in regard to the question of leave to appeal, has now obtained statutory force. To this must be added the consideration that in this subsection, the word “**would**” is used in determining the conclusion to which the judge/judges must come before leave to appeal can be granted. In *Mont Chaevaux Trust (IT2012/2008) v Tina Goosen*,⁴ the Land Claims Court held (in an *obiter dictum*⁵) 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.
20. In *Notshokovu v S*,⁶ it was held⁷ that an appellant (in an application for leave to appeal) faces a **higher** and **stringent** threshold, in terms of the Act (i.e., this subsection), compared to the provisions of the Repealed Supreme Court Act, 59 of 1959. The SCA stated that “*This Court has to decide whether or not the Courts below, including the two judges in this Court, or to have found that*

⁴ Unreported, LCC Case No LCC 14R/2014 dated 3 November 2014 cited with approval by the full bench in the Acting National Director of Public Prosecution v Democratic Alliance (unreported, GP Case no: 19577/09 dated 24 June 2016) at para 25.

⁵ In the distinction between *ratio decidendi* and *obiter dicta*, see *Pretoria Council v Levinson* 1949 (3) SA 305 (A) at 316 – 17; *Santam Versekeringsmaatskappy Bpk v Roux* 1978 (SA) 856 (A) at 871 H – 872 B; *True Motives 84 (Pty) Ltd v Mahdi* 2009 (4) SA 153 (SCA) at 168 A – F and 186C – 188D; *Hardenburg v Nedbank Ltd* 2015 (3) SA 470 (WCC) at 477 A – I; *BSB International Link CC v Readam South Africa (Pty) Ltd* 2016 (4) SA 83 (SCA) at 87B – 89B.

⁶ Unreported, SCA Case no: 157/15 dated 7 September 2016.

⁷ At para 2.

reasonable prospects of success existed to grant leave or special leave respectively. (see S v Khoasasa [2002] ZASCA 113; 2003 (1) SACR 123 (SCA); S v Matshona [2008] ZASCA 58; 2013 (2) SACR 126 (SCA)).

21. The Honourable Justice Bertelsmann in *Mont Chaevaux Trust (IT2012/2008) v Tina Goosen and 18 Others*⁸ 2014 GDR 2325 (LCC) at para 6 found the following: *"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, see Van Heerden v Cronwright and Others 1985 (2) SA 342 (T) at 343 H. 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."*
22. As was stated by the Honourable Justice Plaskett JA, in *S v Smit*,⁹ the test is now more stringent in that: *"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 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."*
23. An appellant faces a higher and more stringent threshold, in terms of the Act, compared to the provisions of the Repealed Supreme Court Act, 59 of 1959

⁸ 2014 GDR 2325 (LCC) at para 6.

⁹ 2012 (1) SACR 567 (SCA) at para 7.

(see *Van Wyk v S Galela v S* [2014] ZASCA 152; 2015 (1) SACR 584 (SCA) para [14]) guides an application for leave to appeal.

24. The criteria laid down in *Ramakatsa v African National Congress* [2021] JOL 49993 (SCA) at par 10 guides an application for leave to appeal: *"Turning the focus to the relevant provisions of the Superior Courts Act (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. This Court in Caratco, concerning the provisions of section 17(1)(a)(ii) of the SC 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 prospect 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.”

25. In *MEC (Health) Eastern Cape v Mkhitha*¹⁰ the SCA stated that “*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.*”

Grounds Of Appeal

26. The following are the grounds of appeal as per the notice:¹¹

- “1. *The Court erred in not addressing irregularities in Court procedures leading up to the hearing raised by the Applicant during the hearing of 6 March 2024.*
2. *The recusal application needs special consideration from the Court, contrary to what is stated in paragraph 13 of the judgment. The presiding Acting Judge De Beer, should have recused himself as he was aware during the recusal application that his law firm was representing one of the litigating parties.*
3. *The Hearing of 6 March 2024 was not impartial. The Honourable Acting Judge de Beer put across defences on behalf of the opposing*

¹⁰ 2016 (ZASCA) 176.

¹¹ CaseLines: V1 – V2.

party that were unlawful, yet they are nowhere to be found in the Judgment.

4. *The Honourable Acting Justice de Beer erred in the interpretation and application of Rule 31 and chose to exclude Rule 42, the erroneous use of Rule 31 collapses the entire judgment as the reasons are not based on the actual Rule.”*

27. The correct statutory basis for an application for leave to appeal has been detailed above. I requested Mr Modingwana to provide the basis for the application for leave to appeal. Mr Modingwana responded that the basis for the application for leave to appeal was an “*unfair trial*”. However, he could not submit whether the basis was rooted in statute or the common law. Mr Modingwana also made the following submissions from the bar and in his heads of argument¹² worth mentioning.

27.1. That a procedural irregularity occurred and that the court was asked for transparency and to provide an explanation why communication was effected via the respondent’s attorney of record.

27.2. That a duplicate case (presumably on CourtOnline or CaseLines) was created during the previous hearing of the rescission application and was uploaded on CaseLines on 24 February 2024 and accused the respondent’s attorneys of manipulating the CourtOnline process, that it was an abuse of process and that it was irregular.

¹² CaseLines: V4 – V8.

- 27.3. That Adv RG Wells previously appeared in the matter before Judge Baqwa and that I practise *“under”* the same *“Law Firm”* where Ryan Wells practises and that I was in violation of the Code of Judicial Conduct issued by the Chief Justice. I was accused of violating article 12 thereof by sitting in a matter involving my own law firm as *“Acting Judge De Beer practises under the law firm, Club Advocates, yet he’s presiding over the matter”* and that as a *“Practising Attorney, on a case involving his Law Firm as Counsel for the Respondent, but currently sits as the Presiding Judge.”* This novel attack was previously limited to my alleged involvement with the respondent’s attorney of record.
- 27.4. That I failed to explain in the judgment that the Body Corporate (the respondent) is in fact a company.
- 27.5. That the record will show that I agreed with counsel for the respondent that money laundering and illicit transactions are acceptable when it is *“administratively convenient”*. Mr Modingwana continued to request an answer from the court whether the court was still *“of the opinion that money laundering is acceptable if [sic] administratively convenient.”*
- 27.6. That the entire judgment *“collapses”* in that the court’s findings regarding Rule 31(2)(a) must be *“excluded”* and that the court erred in not dealing with Rule 46 and the definition of a *“judgment debtor”* which essentially means that where a judgment has already been issued, default judgment cannot be granted in terms of Rule 31, or so the argument was presented.

28. In general, the demeanour and conduct of Mr Modingwana can be characterised as being ignorant of the law and not observing proper decorum and protocol. In this regard:

28.1. The court was constantly interrupted and Mr Modingwana on several occasions made sarcastic remarks such as “lovely”.

28.2. He accused the Office of the Registrar of perpetrating irregularities in respect of the communicating the set down of this hearing. The Office of the Registrar indicated that a hearing in open court should be scheduled, rather than a hearing on Microsoft Teams, due to the fact that it was communicated that Mr Modingwana does not have electronic facilities. To this Mr Modingwana insisted that what the Registrar stated is incorrect, and that the requisite information or link for the electronic hearing previously scheduled for 26 July 2024 was only sent to him 24 hours before the hearing. This is standard protocol for a link hearing to be sent, the accusation regarding an irregularity is baseless and unwarranted.

28.3. These baseless attacks and accusations did not stop there. I was accused of violating the Judicial Code of Conduct which reads as follows:

“Article 12: Association

(1) A judge must not-

(a) belong to any political party or secret organization;

(b) unless it is necessary for the discharge of judicial office, become involved in any political controversy or activity;

(c) take part in any activities that practice discrimination inconsistent with the Constitution; and

(d) use or lend the prestige of the judicial office to advance the private interests of the judge or others.

(2) A judge must, upon permanent appointment, immediately sever all professional links and recover speedily all fees and other amounts outstanding and organise his or her personal business affairs to minimise the potential for conflicts of interest.

(3) A judge previously in practice must not sit in any case in which he or she, or his or her former firm, is or was involved before the judge's appointment, and a judge must not sit in any case in which the former firm is involved until all indebtedness between the judge and the firm has been settled.

(4) An acting judge who is a practising attorney does not sit in any case in which the acting judge's firm is or was involved as attorney of record or in any other capacity."

28.4. I previously explained that I am a member of the PSA and PABASA, I am not a practising attorney and I am not associated with the respondent's attorney of record. The fact that I practise at Club

Chambers under the auspices of the Pretoria Society of Advocates does not violate Article 12 of the Code of Judicial Conduct and it is therefore not applicable. In accusing me of not complying therewith, Mr Modingwana evinced his ignorance of the law, his ignorance of the legal profession regarding the different roles of legal practitioners practising as attorneys and advocates that are involved or practises at the bar or sidebar.

28.5. Adv RG Wells previously appeared to postpone the matter and for the filing of an answering affidavit, and thereafter to remove the matter from the unopposed roll to be enrolled in the opposed motion court.¹³ The previous involvement of Adv Wells in this matter during 2022 and 2023 is irrelevant for the hearing of the opposed rescission application in 2024. It does not create reasonable perceived conflict of interest and does not rise to a reasonable suspicion of bias upon objective or any facts.

29. I have dealt with the application for recusal in the judgment granted on 3 June 2024. As indicated, the application for recusal was not persisted with. However, I am again confronted with scathing accusations of unethical conduct and that I do not comply with the Code. However, Article 13 is applicable regarding a recusal application, which indicates that a Judge should recuse himself if there is a conflict of interest or suspicion of bias, if not, a Judge *“shall not recuse him- of herself on insubstantial grounds.”*¹⁴ I reiterate that there are substantial grounds advanced for my recusal. The accusations

¹³ See court orders granted by the Honourable Justice Phooko and the Honourable Justice Baqwa on 31 January 2023 – CaseLines: K3 – K6.

¹⁴ Article 13 – Judicial Code of Conduct.

against myself and the notion that I should recuse myself do not rise to the test enunciated in the Supreme Court of Appeal.¹⁵

30. Conversely, the conduct of Mr Modingwana was disruptive and obstructive. There is a difference between advancing an argument in a dignified manner, observing proper decorum and being argumentative, and repeatedly attempting to draw the court into arguments. His disruptive and disrespectful conduct would have been frowned upon, or at the very least, investigated for unprofessional conduct by associations such as the Legal Practice Council or Bar Councils, which consequences Mr Modingwana will seemingly escape due to not being a member of the professional body. He is not, as far as the court is aware, a practising or admitted legal practitioner, professional or representative. His conduct displayed in even accusing the Office of the Registrar of this court of irregularities and that the respondent's attorneys manipulated the CourtOnline system is without substance, is inappropriate, unbecoming, unfortunate and regrettable. His conduct in general constitutes an unmeritorious attack on the dignity of this Court, the Office of the Registrar and the legal practitioners involved.

Application Of The Law To The Facts

31. The serious and defamatory allegations levied from the bar and in the heads of argument submitted by Mr Modingwana are made without cogent reasons or proper foundation, seemingly in an attempt that any alleged impropriety will cause the court to deviate its attention from the purpose of its role as an

¹⁵ SAP SE v Systems Applications Consultants (Pty) Ltd t/a Securinfo and Another (Case no 376/2002) [2024] ZASCA 26 (20 March 2024).

adjudicator of admissible facts in respect of a rescission application, and the application for leave to appeal.

32. The reasons advanced and the ostensible grounds of appeal have already been addressed in the previous judgement. They do not rise to the test referred to above and duly applied herein. Another court will not come to a different outcome in respect of the rescission application duly dismissed. There are no reasons advanced or facts presented that it will be in the interest of justice to grant leave to appeal. To elevate this matter to a court of appeal will waste precious judicial resources and costs.
33. Respondent's counsel argued that the ostensible grounds of appeal on behalf of the applicant provided no cogent reasons, I agree. The heads of argument filed on behalf of the respondent¹⁶ provide more detail in this regard. Counsel for the respondent further argued that there was no mistake in the evidence admitted, considered and adjudicated upon. He submitted that there was no collusion between the court and counsel for the respondent. He further submitted that there was no mistake perpetrated by the Court in terms of Rule 42, that Rule 42 was not applicable and no irregularities were perpetrated when the default judgment was granted in 2020. I agree.
34. Accordingly the application for leave to appeal should be dismissed. Counsel for the respondent submitted that the costs to follow should be on a party and party scale, on Scale B. Counsel for the respondent did not insist on punitive costs, which would have been warranted in the circumstances. Be that as it

¹⁶ CaseLines: W1 – W9.

may, costs should follow the event. The costs sought by the respondent will consequently be granted.

35. The grounds are a regurgitation of arguments advanced during the hearing and have been considered and addressed in the judgment granted on 3 June 2024.
36. The grounds do not rise to the test referred to above and duly applied herein. Another court will not come to a different outcome, there are no reasons advanced or facts presented that it will be in the interest of justice to grant leave to appeal. Costs should follow the event.

Rule 7 Notice

37. Prior to the hearing of the application for leave to appeal, the respondent delivered a Rule 7¹⁷ notice requiring a power of attorney from the applicant regarding the appearance of Mr Modingwana. A response thereto was uploaded.¹⁸ At the commencement of the hearing on 6 August 2024, respondent's counsel indicated that the Rule 7 notice would not be persisted with. The court urged the respondent not to continue therewith, as it turned on nothing and as explained in the judgment, Mr Modingwana advanced argument on behalf of the applicant, his sister. Mr Modingwana immediately interjected and indicated that he intended to hold the respondent "*liable to pay for the R34,436.36 in legal fees*".¹⁹ I indicated that the Taxing Master deals with issues of costs. However, Mr Modingwana is not an admitted practising attorney. Attorneys may not practise or act as practitioners for their own

¹⁷ CaseLines: V1 – V2 (there are different sections "V" created on CaseLines).

¹⁸ CaseLines: V5 – V7.

¹⁹ CaseLines: V7.

account or charge professional fees if they are not in possession of a Fidelity Fund certificate. The right to practise as an attorney or advocate depends on being admitted as such, either as an advocate or an attorney under the Legal Practice Act.²⁰ In the event of Mr Modingwana charging the applicant for fees, the same will be illegal. Be that as it may, the court grants no order as to costs in respect of the Rule 7 notice, which was not persisted with, or the response thereto.

Order

38. In the premises, the court grants the following order:

38.1. The application for leave to appeal is dismissed.

38.2. Costs to be paid by the applicant to the respondent on the scale between party and party, on scale B.



DE BEER AJ

Acting Judge of the High Court
Gauteng Division

Date of hearing: 6 August 2024

Judgment delivered: 11 September 2024

For the applicant: Mr ST Modingwana

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²⁰ Section 24 read with section 115 of Act 28 of 2014.

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