

REPUBLIC OF SOUTH AFRICA



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

CASE NO.: 35882/2022

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

DATE: 26 September 2024

SIGNATURE

In the application for leave to appeal between:

SMARTPURSE SOLUTIONS (PTY) LTD

Applicant for leave

and

FIRSTRAND BANK LTD

Respondent

In re:

FIRSTRAND BANK LTD

Applicant

and

SMARTPURSE SOLUTIONS (PTY) LTD

Respondent

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand-down is deemed to be 10:00 on 26 September 2024.

JUDGMENT

MEIRING, AJ:

INTRODUCTION

- [1] This is an application by which the applicant for leave – the respondent in the court below – seeks leave to appeal against the order that this court handed down on 26 April 2024 by which it, Smartpurse Solutions (Pty) Ltd, was finally wound up.
- [2] The application for leave was heard virtually on the morning of Friday, 26 July 2024. Both the applicant for leave and the respondent in this application were represented by their legal representatives. The applicant for leave had delivered a detailed notice of application for leave, and the respondent had submitted ample heads of argument. I had regard to both documents, and obviously to the argument made orally before me.
- [3] Before applying the legal test for leave to appeal to the facts of this case, one must know what that test is. In the respondent's heads of argument and in the argument generally, there were traces of the notion that the promulgation of the Superior Courts Act, 2013, in the language of the respondent's heads, "*significantly raised the threshold for the granting of ... leave to appeal*". On the plainest reading, it seems as if the authors of the canonical commentary known as *Erasmus* also subscribe to this notion. At any rate, they do not consider critically the perhaps half-hearted debate that has arisen over it. Thus, the idea lingers that the threshold has indeed been raised.
- [4] This creates confusion. Obviously, this is an important matter and, in my view, deserves the enquiry that follows.

THE LAW

The substantive test for leave to appeal

- [5] In section 17(1) of the Superior Courts Act, 2013, the legislature states the substantive test to be applied in determining whether leave to appeal ought to be granted:

“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(2)(a); 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.”*

[emphasis added]

- [6] This was the first time the legislature enacted a substantive test for leave to appeal. The test that had been applied up until then had developed and subsisted at common law.
- [7] Thus, the legislature has provided two alternative bases upon or circumstances in which (see the use of the disjunctive conjunction “or”) leave might be granted. They are where the judge (or judges) in question form the view either that “*the appeal would have a reasonable prospect of success*” or that “*there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration*”. The conjunction “or” indicates that both grounds do not have to be present for leave to be granted. One will suffice. Yet, logically, nothing precludes an applicant for leave from contending that in a given case both apply. A knotty question that does not arise here is the interplay between sections 17(1)(a)(i) and (ii).
- [8] This test in section 17(1)(a)(i) applies whether leave is sought from the court that handed down the judgment or where it is sought from the Supreme Court of Appeal where the court below had refused leave (in other words, leave under both sections 17(2)(a) and 17(2)(b)). A different regime applies, and it appears a higher threshold (“*exceptional circumstances*”), in the peculiar circumstances of section 17(2)(f).

- [9] While this applicant is not explicit about whether it pigeonholes this application for leave in section 17(1)(a)(i) or (ii) (or indeed in both), the list of complaints that it marshals suggests strongly that it has only section 17(1)(a)(i) in mind.
- [10] Accordingly, the applicant for leave must be taken to ask this court to grant it leave to appeal because “*the appeal would have a reasonable prospect of success*”. [emphasis added]
- [11] If the applicant demonstrates that the appeal would have a reasonable prospect of success (and the requirements in section 17(1)(b) and (c) are also met), the court must grant the leave that is sought. The exercise of the power to grant leave is then not in the court’s discretion.¹
- [12] As I observe above, a debate has arisen over whether the words in section 17(1)(a)(i) raise the threshold for the applicant for leave to above what it was previously at common law, namely before the promulgation of the 2013 Act. I repeat that the substance of the test arose at common law. Before the legislature codified the test in section 17(1), it was contained in no statutory provision.
- [13] Yet, the suggestion that section 17(1)(a)(i) raises the bar seems to me to be a red herring. Yet, it is not without importance. If section 17(1)(a)(i) does indeed push up the bar – if it has rewritten the law – the authorities that were decided before the promulgation of the Superior Courts Act would have to be disregarded (or treated with profound circumspection). What is more, if the threshold has been raised, one wonders: from what has it been raised and to what precisely? A judge hearing an application for leave to appeal must surely know what yardstick to apply.
- [14] To put this question to bed, one must start one’s enquiry with the South Africa Act, promulgated in 1909, by which the Union of South Africa was brought into being.

¹ Erasmus *Superior Court Practice*, vol 1, A2-54.

The South Africa Act, 1909

[15] The notion of “*special leave*” appeared in two sections of the South Africa Act, 1909, namely sections 103 and 105.

[16] Jointly, those sections governed the regime by which leave was granted for appeal, in matters that originated in the superior courts and in the magistrates’ courts, respectively. The adjective “*special*” was of no great moment. It simply denoted a case where there was no automatic right of appeal.

[17] Section 103 read:

“In every civil case in which, according to the law in force at the establishment of the Union, an appeal might have been made to the Supreme Court of any of the Colonies from a Superior Court in any of the Colonies, or from the High Court of Southern Rhodesia, the appeal shall be made only to the Appellate Division, except in cases of orders or judgments given by a single judge, upon applications by way of motion or petition or on summons for provisional sentence or judgments as to costs only, which by law are left to the discretion of the court. The appeal from any such orders or judgments, as well as any appeal in criminal cases from any such Superior Court, or the special reference by any such court of any point of law in a criminal case, shall be made to the provincial division corresponding to the court which before the establishment of the Union would have had jurisdiction in the matter. There shall be no further appeal against any judgment given on appeal by such provincial division except to the Appellate Division, and then only if the Appellate Division shall have given special leave to appeal.”

[emphasis added]

[18] Section 105 provided:

“In every case, civil or criminal, in which at the establishment of the Union an appeal might have been made from a court of resident magistrate or other inferior court to a superior court in any of the Colonies, the appeal shall be made to the corresponding division of the Supreme Court of South Africa; but there shall be no further appeal against any judgment given on appeal by such division except to the Appellate Division, and then only if the Appellate Division shall have given special leave to appeal.”

[emphasis added]

- [19] These two sections were an attempt to create uniform rules governing appeals for the nascent Union on the basis of the practices that had obtained in the four colonies out of which the Union came to be merged.²
- [20] Under both sections 103 and 105, it was the Appellate Division that was enjoined, where there was no automatic right of appeal,³ to determine whether special leave to appeal was to be given to an aspiring appellant. Importantly, the application for special leave was not directed to the judge that had handed down the judgment. As we see below in discussions in the later cases, it is a rather different exercise for puisne judges to sit in judgment, as it were, over their own judgment, deciding whether there is a reasonable prospect of success on appeal against their own judgment, than for a higher court, like the erstwhile Appellate Division, to make that determination.
- [21] The following two decisions, both heard in 1933 – a week apart – give a flavour of how the Appellate Division then grappled with such applications.
- [22] In *Haine v Podlashuc & Nicolson*,⁴ the Appellate Division was composed of three judges. This was an application for special leave against a decision of the Transvaal Provincial Division upholding a judgment of the magistrate of Johannesburg. Accordingly, this application for leave was brought under section 105 of the South Africa Act.
- [23] The majority (*per* Beyers *et* De Villiers JJA) refused leave since the amount claimed was so small as to be insubstantial. The minority (*per* Curlewis JA) disagreed, setting out at some length the principles governing the grant of special leave. In large part, Curlewis JA drew upon the exposition in the now-famous book by Beck, namely *The Jurisdiction, Practice and Procedure of the Appellate*

² Interestingly, after union, until 1955, as section 103 indicates, some appeals lay from the high court of Southern Rhodesia (later Rhodesia) to the Appellate Division. From 1918, until the independence of Namibia, they also lay to the Appellate Division from the high court of South-West Africa. The Appellate Division became the final court of appeal, other than for the narrow and little-granted right of appeal to the Judicial Committee of the Privy Council, in London.

³ See the discussion over an automatic right of appeal versus the need to obtain special leave in *Stalker v Natal Law Society* 1933 AD 113.

⁴ 1933 AD 104.

Division of the Supreme Court of South Africa, which had been published first in 1920, and which presented a bird's-eye view of the case law.

[24] On section 105, Beck had *inter alia* this to say:⁵

“The effect of this section is to make the Appellate Division the final though not the direct Court of Appeal from the inferior courts ...; and its obvious intention was to put an end to litigation as soon as possible and to discourage frivolous appeals. Unless, therefore, there is a prima facie ground for believing that an appeal may be successful, leave will be refused. Such applications for special leave are not matters of course, and leave will only be granted in cases which, upon due consideration, appear proper for appeal; where therefore an appeal would in the opinion of the Court be clearly hopeless the Court must give effect to that opinion even though it may be a capital case. The matter must present an arguable case of some nicety or be one of real substance, for the Court will not undertake enquiries into small legal conundrums unrelated to a substantial dispute or one of public or professional interest.”

[25] Curlewis JA went on to cite a *dictum* of the Appellate Division to which Beck also referred,⁶ in *African Films Trust Ltd v Popper*,⁷ where Innes CJ had observed:⁸

“It is impossible to lay down a wholly exhaustive rule as to the conditions under which leave to appeal will be granted, and it would be undesirable to attempt to do so. As a rule in applications for leave to appeal the amount involved is small. Therefore the Court has looked at other considerations, such as whether a law affecting the general public or a point of practice of interest to the profession would be involved.”

[26] A theme that emerges in the above *dictum* and which recurs, namely that in appeals the amount in dispute is often small, makes sense in the jurisprudence on section 105, which, as I say above, governed appeals that originated in the magistrates' courts. This aspect of the early discussions on leave to appeal ought, therefore, to be treated with caution.

⁵ This quotation from p 48 of *Beck* is at pp 108–109 of the judgment.

⁶ At p 113 of his book.

⁷ 1916 AD 486

⁸ At p 488.

[27] Curlewis JA also quoted this passage from Beck:⁹

“There are two elements which the Court especially regards in all these matters, namely (1) whether there is prima facie reason for believing that the appeal might succeed, or (2) whether the matter is one of importance, whether of general public importance or of importance to a particular class of persons making their living in a particular way. Consequently, the Court invariably refuses applications or leave when the appeal would be hopeless, as, for instance, when the decision below was clearly right; and in illustration of the second essential, leave will be refused if the petition does not raise a point of some nicety or an arguable one of some importance ...”

[emphasis added]

[28] Noticeably, the “two elements” that Beck mentions as underpinning the authorities are strikingly similar to the bifurcation in sections 17(1)(a)(i) and (ii) of the Superior Courts Act (quoted above).

[29] Curlewis JA concluded this part of his analysis thus:¹⁰

“It seems to me, therefore, that we should not look only at the amount at issue between the parties and be more ready to grant leave where the amount is substantial and not where it is small. As a rule the amounts involved in applications for leave to appeal are small, and as was said by Innes CJ, in the case above quoted, we should then look to other considerations apart from the amount involved in deciding on an application for special leave to appeal, and amongst such considerations might, I think, well be concluded (as has been done in the past) the consideration whether a matter raises an arguable question of law or practice of some importance, not a merely trivial technical point or one of purely academic interest; but one not only of importance to the parties as settling the dispute between them and the costs attached thereto, but also of general importance to the public or the profession ... While we should not do anything to encourage unnecessary litigation but rather discourage it, and should guard against litigation becoming vexatious or oppressive and keep before us the maxim interest rei publicae ut sit finis litium, we should not on the other hand exercise our discretion under sec. 105 of the South Africa Act in such a manner as unduly to restrict the privilege of obtaining leave to appeal.”

⁹ At p 109, citing *Beck*, at p 113.

¹⁰ At 110–111.

[30] Yet, as if abiding by the admonition of Innes CJ against an exhaustive definition, only a week later, in *Stalker v Natal Law Society*,¹¹ the language of the Appellate Division (again *per* Curlewis JA, for the unanimous court) had a different tone. Mr CA Beck KC, the very author of the above-mentioned tome, appeared for the applicant before five judges of the Appellate Division in an application in which the attorney Mr Stalker sought special leave against a decision of the Natal Provincial Division directing that he be struck off the roll of attorneys. Mr RC Streeten, for the Natal Law Society, was not called upon. His client prevailed. Special leave was refused since “*there was no hope of success on appeal*”.¹² The majority (*per* Curlewis JA) observed:¹³

“So far as leave to appeal is concerned if we thought that there was any hope of success we should have been disposed to grant leave to appeal because this is a matter of such importance to the applicant and the whole of his professional career depends on the case.”

[31] These two decisions provide a snapshot of the reasoning of the courts in the period before the passage of the General Law Amendment Act, in 1935. Where the overriding caution was against formulating an exhaustive rule, there are obvious tensions, both internally in the reasoning in *Haine*, and between it and *Stalker*. At first blush, the latter appears to posit a lower standard, that of simply not being a hopeless case. Yet, it seems that the specific facts of *Stalker* informed that formulation that the Appellate Division used.

[32] Yet, what perhaps stands out most is that the first of the “*two elements*” that Beck raised in his practitioners’ guide is a measure very like the one that came to be applied in the following decades: “*whether there is prima facie reason for believing that the appeal might succeed*” is at least broadly speaking synonymous with “*a reasonable prospect of success on appeal*”.

¹¹ 1933 AD 113.

¹² At p 115.

¹³ At 115.

The General Law Amendment Act, 1935

[33] In 1935, section 104 of the General Law Amendment Act amended section 103 of the South Africa Act, and section 105 of the former statute amended section 105 of the latter.

[34] Section 104 of the 1935 Act read:

- “104 Section one hundred and three of the South Africa Act 1909, is hereby amended –
- (a) *by the deletion of the words ‘as well as any appeal in criminal cases from any such superior court or the special reference by any such court of any point of law in a criminal case’; and*
 - (b) *by the substitution of the words ‘such provincial division’ for the words ‘the Appellate Division’ where these words occur for the last time in the said section; and*
 - (c) *by the insertion of the following proviso at the end of the said section: ‘Provided that if such provincial division shall have refused special leave to appeal, the Appellate Division may, on application being made thereto, grant such special leave and may vary any order as to costs made by such provincial division in refusing such special leave’; and*
 - (d) *by the addition thereto of the following new subsection (2) (the existing section as hereby amended becoming sub-section (1):-*
 - ‘(2) If any court grants special leave to appeal under the provisions of sub-section (1) the court may order the appellant to find security for the costs of appeal in such an amount as may be fixed by such court and may fix the time within which such security shall be found.’”*

[emphasis added]

[35] Section 105 of the 1935 Act read:

- (a) *by the substitution of the words ‘such corresponding division’ for the words ‘the Appellate Division’ where those words occur for the last time in the said section; and*
- (b) *by the insertion of the following proviso at the end of the said section: ‘Provided that if such corresponding division shall have refused special leave to appeal, the Appellate Division may on application being made thereto grant such*

special leave and may vary any order as to costs made by such corresponding division in refusing such special leave'; and

- (c) *by the addition thereto of the following new sub-section (2) the existing section as hereby amended becoming sub-section (1):-*

(2) *If any court grants special leave to appeal under the provisions of sub-section (1) the court may order the appellant to find security for the costs of appeal in such an amount as may be fixed by such court and may fix the time within which such security shall be found."*

[emphasis added]

[36] Thus, a new procedure was introduced in both appeal streams. The litigant seeking leave would no longer first approach the Appellate Division but would approach the puisne judge that had decided the matter ("*such provincial division*"; "*such corresponding division*"). Were they not to obtain leave from that judge, it would be open to the litigant to seek "*special leave to appeal*" from the Appellate Division. Under the Superior Courts Act, this logic persists.

[37] Yet, like the South Africa Act, the General Law Amendment Act had nothing to say about the substantive test that was to be applied to determine whether leave should be granted. It remained a matter for the courts.

[38] In 1935, in *Beatley & Co. v Pandor's Trustee*,¹⁴ an application under section 105 of the South Africa Act, as amended by the 1935 Act, the full bench of the Transvaal Provincial Division (*per* Tindall AJP) observed:¹⁵

"This Court is of the opinion that it is not advisable to lay down a general rule. The Appellate Division itself has on various occasions said that it is not advisable to formulate a general rule, but we might mention some of the considerations which have weighed with the Appellate Division, and which I think should also weigh with this Court, in deciding whether or not leave should be granted to appeal in applications of this kind.

One factor is whether the point raised is arguable, using the word 'arguable' in the sense that there is substance in the

¹⁴ 1935 TPD 365.

¹⁵ At p 366.

argument advanced on behalf of the applicant. Another factor is whether the amount at stake between the parties is substantial.”
[emphasis added]

[39] In 1946, in *R v Ngubane*,¹⁶ five judges in the Appellate Division (*per* Davis AJA) again examined the test for leave:¹⁷

“It was for the applicants to satisfy the Court that there was a reasonable prospect of success on appeal if leave were granted. When in Rex v Nxumalo (1939 AD at p 588), the present Chief Justice¹⁸ stated that there was ‘no probability of the applicant succeeding’, that did not mean, of course, that he had merely failed to show that there was a balance of probabilities in his favour. That test would obviously place too heavy a burden upon the applicant. Equally clearly, when Lord De Villiers, C.J., in Rex v Gannon (1911 AD at p 270), spoke of the appeal as ‘hopeless’, or Innes, C.J., in Rex v Mahomed (1924 AD at p 238), referred to ‘the possibility of success’, they did not mean that leave will only be refused where the appeal is hopeless or where the Court is certain beyond all reasonable doubt that the appeal would fail. In all the cases, no matter what form of words was used, the same thing was, in my opinion, intended to be conveyed, namely, that it is for the applicant for special leave to satisfy the Court that, if that leave be granted, he has a reasonable prospect of success on appeal. That was the test applied, for instance, in Bezuidenhout v Dippenaar (1943 AD at p 195), and it is, in my view, the correct one.”¹⁹

[emphasis added]

[40] Thus, among other things, the Appellate Division placed a corrective gloss on the notion of a “hopeless” appeal or case, which had surfaced in *Stalker* above.

[41] Three years later, in 1949, in *Afrikaanse Pers Beperk v Olivier*,²⁰ the Orange Free State Provincial Division, too, considered the test for leave to appeal. Leave was

¹⁶ 1945 AD 185.

¹⁷ At p 186-7.

¹⁸ This is a reference to Watermeyer CJ, who was one of the five judges sitting in *Ngubane*.

¹⁹ In *Bezuidenhout v Dippenaar* 1943 AD 190, at 195, the Appellate Division (*per* Centlivres JA; the panel including Watermeyer JA, as he then was) applied the test, without any reasoned exposition of the law: “I come to the conclusion, therefore, that there is no reasonable prospect of success in the appeal, and it follows that the application must be refused with costs.”

²⁰ 1949 (2) SA 890 (O).

also sought under section 105, as amended. The court said this [my translation; the Afrikaans original in footnote]:²¹

“The question is, therefore, whether the applicant has a reasonable prospect of success on appeal. It is no enviable task for a Judge to judge the correctness of a judgment with which he agreed – he will, as Judge of Appeal Centlivres observes in Baloi’s case, have a natural hesitation to say that his judgment is so unquestionably correct that the Court of Appeal will not differ from him. Be that as it may, the legislation in terms of the provisions of Sec. 105 the obligation to decide whether or not leave to appeal should be granted is placed on the Court. However, the granting of leave to go on appeal is no mere formality. The Court must be satisfied that there is a reasonable prospect that the appeal will succeed. It is unfair to a party in whose favour a judgment has been given by a high court to submit to all the disadvantages of an appeal, if his opponent has no reasonable chance of success.”

[emphasis added]

[42] In 1949, too, in *R v Kuzwayo*,²² the Appellate Division considered the question again, in the light *inter alia* of its earlier decision in *R v Baloi*,²³ and held:

“In Baloi’s case this Court appreciated the need that when an application is made for leave to appeal although it is easier for a Judge who was not the trial Judge to apply the test laid down in that and other decisions of this Court, it is the duty of the trial Judge to apply the same test. That test must, to the best of the ability of the trial Judge be applied objectively. By that is meant that he must disabuse his mind of the fact that he himself has no reasonable doubt as to the guilt of the accused. He must ask himself whether there is a reasonable prospect that the Judges of Appeal will take a different view.”

[emphasis added]

²¹ At p 894. “Die vraag is dus of aansoekdoener ‘n redelike vooruitsig op sukses op appèl het. Dit is geen benydenswaardige taak vir ‘n Regter om oor die juistheid van ‘n uitspraak waarmee hy saamgestem het te oordeel nie – hy sal soos Appèlregter Centlivres in Baloi se saak opmerk, ‘n natuurlike huiwering hê om te sê dat sy uitspraak so onbetwyfelbaar juis is dat die Appèlhof nie van hom sal verskil nie. Hoe dit ook al sy, het die wetgewing ingevolge die bepalings van Art. 105 die verpligting om te beslis of verlof om in hoër beroep te gaan toegestaan behoort te word al dan nie op die Hof geplaas. Die vergunning van verlof om in hoër beroep te gaan is egter geen blote formaliteit nie. Die Hof moet sig tevrede stel dat daar ‘n redelike vooruitsig is dat die appèl sal slaag. Dit is onbillik teenoor ‘n party in wie se guns ‘n uitspraak gegee is deur ‘n hoër hof om hom te onderwerp aan al die nadele van ‘n appèl, indien sy teenparty geen redelike kans op sukses het nie.”

²² 1949 (3) SA 761, at 764 (AD).

²³ 1949 (1) SA 523 (AD).

[43] In 1952, in *R v Boya*,²⁴ the Cape Provincial Division (per De Villiers JP) considered the earlier cases dealing with the meaning of “reasonable prospects” in applications for leave to appeal, commenting thus on the above *dictum* from *R v Kuzwayo*:²⁵

“[P]erhaps the learned Judge when he said ‘will’ meant ‘may’. In Baloi’s case ... he said that leave should not be granted unless the applicant will have a reasonable prospect of success on appeal. In neither of these cases, however, is there any definition of what is meant by a reasonable prospect of success.”

[44] There is here an early inkling of the confusing debate over “might” (or “may”) and “would” (or “will”), which underpins the debate currently being considered. On the definition of “reasonable prospects of success”, De Villiers JP concluded:²⁶

*“In Baloi’s case ... the learned Chief Justice had held that the fact that an appeal was fairly arguable was not sufficient. It has also been pointed out that the possibility of success is not sufficient, nor, on the other hand, has applicant to show a reasonable probability of success. (Butterworth v. Butterworth, 1943 W.L.D. 127 at p. 130, per Schreiner, J.) It may well be that the exact definition of the ambit of the phrase in *Turkstra v Turkstra*, 1946 CPD 774 at p. 780, per Ogilvie Thompson, J., is not possible. Curiously enough, on consulting Stroud’s Legal Dictionary (2nd ed.), the word ‘reasonable’ is dealt with in the first sentence as follows: ‘It would be unreasonable to expect an exact definition of the word ‘reasonable’.’ It seems to me that a reasonable prospect of success means that the Judge who has to deal with an application for leave to appeal must be satisfied that on the findings of fact or conclusions of law involved the Court of Appeal may well take a different view from that arrived at by a jury or by himself and arrive at a different conclusion.”*

[emphasis added]

[45] Considering these decisions, there is a clear line back to the first of the “two elements” of Beck. The court determining an application for leave has to decide whether there is a reasonable prospect of success in the appellate forum. It must be satisfied that, on the findings of fact or conclusions of law, the court hearing

²⁴ 1952 (3) SA 574 (C).

²⁵ At 576.

²⁶ At 577.

the appeal that is being sought might take a different view from that at which the court being appealed arrived.

[46] By this juncture, it would seem as if the legal test for leave to appeal had hardened into a relatively clear and manageable one.

The Supreme Court Act, 1959

[47] In 1959, the Supreme Court Act was promulgated. Sections 21(1) and (2) of that Act, which came then to govern leave to appeal, read:

“21 Appeals to appellate division

- (1) *In addition to any jurisdiction conferred upon it by this Act or any other law, the appellate division shall, subject to the provisions of this section and other law, have jurisdiction to hear and determine an appeal from any decision of the court of a provincial or local division.*
- (2) (a) *There shall be no appeal to the appellate division against any judgment or order referred to in paragraph (a) of subsection (1) of section 20 given or made by a judge of the South-West Africa division, or on any decision given by any division on appeal to it, except with the leave of the court against whose decision the appeal is to be made: Provided that where such leave has been refused, the appellate division may, on application made to it, grant such leave, and may vary any order as to costs made by the court concerned in refusing leave.*
- (b) *Any leave required under paragraph (a) may be given subject to such conditions, including a condition that the applicant shall pay the costs of the appeal, as may be determined by the court from which the appeal is to be made or by the appellate division, according to whether leave is given by such court or by the said division.”*

[48] Yet, as before, the question of the substantive test for granting leave to appeal was left to the common law.

[49] In 1961, in *Odendaal v Loggerenberg*,²⁷ the Orange Free State Provincial Division considered an application for leave against a decision of the full bench of that division. Smit AJP opined [my translation; the Afrikaans original in footnote]:²⁸

“This Act does not determine the principles on which such an application must be considered. Therefore, in the absence of any indication in the Act in this regard, I am of the opinion that the same motivations that were applied to applications for leave to appeal, made pursuant to sec. 105 of the South Africa Act and sec. 1 of Act 1 of 1911, also applies here. According to the decisions made on applications under these articles, it is clear that it is not sufficient that the case is arguable for the applicant. Applicant must go further and satisfy the Court that, if leave is granted, he has reasonable prospects of success on appeal, and that the matter is of material interest to him alone, or to both him and the respondent.”

[emphasis added]

[50] In 1973, in *S v Ackerman*,²⁹ Rabie JA took up the intermittent debate over the modal verbs “*might*” and “*will*” (and their cognates), by concluding [my translation; the Afrikaans original in footnote]:³⁰

²⁷ 1961 (1) SA 724 (O).

²⁸ 727A–C. “Hierdie Wet bepaal nie die beginsels waarop so ‘n aansoek oorweeg moet word nie. In die afwesigheid dus van enige aanduiding in die Wet in hierdie verband, is ek van mening dat dieselfde beweegredes wat toegepas was op aansoeke om verlof om te appelleer, gedoen luidens art. 105 van die Suid-Afrika Wet en art. 1 van Wet 1 van 1911, ook hier van toepassing is. Volgens die beslissings op aansoeke onder hierdie artikels gedoen, is dit duidelik dat dit nie voldoende is dat die saak vir die aansoekdoener beredeneerbaar is nie. Aansoekdoener moet verder gaan en die Hof tevrede stel dat indien verlof toegestaan word, hy redelike vooruitsigte op sukses op appèl het, en dat die saak van wesenlike belang vir hom alleen, of sowel vir hom en die respondent, is.”

This passage was referred to in *Attorney-General, Transvaal v Nokwe* 1962 (3), at 807A:

“In civil cases the test is two-fold: firstly, whether or not there is a reasonable prospect of the further appeal to the Appellate Division succeeding; and secondly, whether or not the case is of substantial importance to the applicant, or to him and the respondent. Both requirements must be satisfied before leave will be granted.”

²⁹ 1973 (1) SA 765 (A).

³⁰ At p 767H–768A. “Die woord ‘will’, in die verband waarin dit gebruik word, dra nie die betekenis van ‘sal’ in die sin waarin dit in Kara se saak gebruik word nie. Die voorskrif van ‘redelike vooruitsig’ op sukses kan nouliks gerym word met ‘n vereiste – soos in Kara se saak gestel – dat daar bewys moet word dat ‘n aansoek ‘sal’ slaag, en die bedoeling moes gewees het dat ‘will’ in die sin van ‘may’ verstaan moet word. Dat met ‘will’ niks meer as ‘may’ bedoel is nie, blyk trouens ook uit Muller se saak wanneer daar gesê word dat die Verhoorregter moet beslis –

‘whether a judgment which he has himself given may be considered by a higher Court to be wrong...’.

Die gebruik van die woord ‘may’ in hierdie passasie, word in Kara se saak gesê (bl. 117E), toon dat die ‘teenstelling’ van ‘sal’ en ‘mag’ nie ‘konsekwent gehandhaaf’ word nie. Dit het in Muller se saak egter nie om enige onderskeiding tussen ‘will’ en ‘may’ gegaan nie, en die feit dat hulle feitlik langs mekaar gebruik word toon dat ‘will’ nie in ‘n ander sin as ‘may’ opgevat is nie.”

“The word ‘will’, in the context in which it is used, does not bear the meaning of ‘will’ in the sense in which it is used in Kara’s case. The requirement of a ‘reasonable prospect’ of success can hardly be reconciled with a requirement – as in Kara’s case – that it must be proved that an application ‘will’ succeed, and the intention must have been that ‘will’ in the sense of ‘may’ should be understood. That by ‘will’ nothing more than ‘may’ is meant, in fact also appears from Muller’s case when there said that the Trial Judge must decide –

‘whether a judgment which he has himself given may be considered by a higher Court to be wrong...’

The use of the word ‘may’ in this passage, it is said in Kara’s case (p. 117E), shows that the ‘opposite’ of ‘shall’ and ‘may’ is not ‘consistently maintained’. In Muller’s case, however, no distinction was made between ‘will’ and ‘may’, and the fact that they are used practically side by side shows that ‘will’ is not taken in a different sense than ‘may’.”

[emphasis added]

[51] While the words “will” and “may” obviously have different meanings, it is indeed so that, in the present context, the opposition between them has become a diversion, based upon a disregard for their context. I return to this below.

[52] In spite of the consensus that had thus been achieved on the test for leave to appeal, in 1984, in *Magnum National Life Assurance Co Ltd v South African Bank of Athens*,³¹ the Witwatersrand Local Division (per Coetzee J) adopted a contrary view:³²

“It seems to me that, where the right of appeal has been cut down in this fashion, the Court a quo that sits on the application for leave to appeal should be very careful not to refuse leave unless it is satisfied it is what one might call a hopeless case.

Possibly I put this test not high enough and it may very well be that theoretically it is no lower than a reasonable prospect of success. But, speaking for myself, I would be inclined to grant leave to appeal in virtually every such case, unless I was satisfied in my own mind that it is what could be called a hopeless case on appeal.”

[emphasis added]

³¹ 1985 (4) SA 365 (W).

³² At 366E–G.

[53] This statement is at odds with the authorities cited above, including *R v Ngubane*. Indeed, when, in *Van Heerden v Cronwright*,³³ the Transvaal Provincial Division (*per* Eloff J) was urged to follow the course charted in *Magnum National Life Assurance Co Ltd* (which on the day that argument was heard in *Van Heerden* was still an unreported decision “*delivered in June 1984*”),³⁴ it declined to do so:

“Over many years one of the requirements for leave to appeal has been held to be a reasonable prospect of success (cf R v Baloi 1949 (1) SA 523 (A) at 524; R v Nxumalo 1939 AD 580 at 581; R v Ngubane and Others 1945 AD 185 at 187; Capital Building Society v De Jager and Others; De Jager and Another v Capital Building Society 1964 (1) SA 247 (A); Afrikaanse Pers Bpk v Olivier 1949 (2) SA 890 (O) at 892–893 and S v Sikosana 1980 (4) SA 559 (A) at 562).

That was also the approach in regard to the subsection repealed by ss (4) of s 20 (see The Practice of the Superior Courts in South Africa 3rd ed at 714). The effect of the replacement of the old subsection was simply to extend the requirement of leave to appeal to all cases. I think that when the Legislature created ss (4) of s 20 it intended that the criteria which over many years had been adopted in regard to such provisions, including its predecessor, should be maintained. I also think that, since the Legislature clearly intended to limit the number of cases which might be taken on appeal, it would have achieved very little in that direction if in all but hopeless cases leave to appeal is to be granted. I conclude that the judgment of Coetzee J is clearly wrong and should not be followed. In my view the criterion that should be adopted is, apart from other considerations, whether there is a reasonable prospect of success on appeal.”

[emphasis added]

[54] In sum, then, however much later courts on occasion returned to the mantra of Innes CJ, that framing an exhaustive test was neither salutary, nor possible, the test that emerged in the decades after 1909 has in essence always been whether there is a reasonable prospect of success on appeal.

[55] In 2013, the Supreme Court Act was repealed and replaced by the Superior Courts Act. As I say above, leave to appeal is now governed by the substantive test in section 17(1)(a)(i): “Leave to appeal may only be given where the judge

³³ 1985 (2) SA 342 (T), at 343C.

³⁴ At 365.

or judges concerned are of the opinion that ... the appeal would have a reasonable prospect of success”.

- [56] While the authors of *Erasmus* correctly observe that the criterion of yore thus “obtained statutory force”,³⁵ they do not go on to criticize those judgments that appeared to say the contrary. Thus, as I say above, in the wake of the promulgation of the Superior Courts Act, a debate of sorts arose over whether the test had been ratcheted up from what it had been before. In *Mont Chevaux Trust v Goosen*,³⁶ the Land Claims Court (*per* Bertelsmann J) said this:³⁷

“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 & 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.”

- [57] With respect, in my view, this analysis is premised on a misunderstanding of the respective semantic and syntactic roles of “*might*” and “*would*”. What the applicant for leave must show is that there *is* or *would be* a reasonable prospect of success on appeal. This might well colloquially be couched as the standard that the appeal *might* reasonably succeed. Yet, the rather different notion that there *might* be a prospect of success is an inscrutable one. To the extent that it has any meaning, it posits a standard so low that it could never be the measure for leave. It certainly was not the standard before the promulgation of the Superior Courts Act.
- [58] Put differently, “*a likelihood that another tribunal will*” is broadly synonymous with “*that another tribunal might*”. It is in this sense that the Appellate Division’s view in *S v Ackerman*, quoted above, is to be construed, namely that in this context, properly construed, these words are interchangeable.

³⁵ Erasmus Superior Court Practice, vol 1, A2-55.

³⁶ 2014 JDR 2325 (LCC).

³⁷ At para 6.

[59] Nevertheless, in 2016, in its decision in *Notshokovu v S*,³⁸ without providing any further analysis, the Supreme Court of Appeal observed:³⁹

“An appellant [sc. applicant for leave], 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.”

[60] With respect, this is an unsubstantiated *obiter dictum*. Two months later, in *MEC for Health, Eastern Cape v Mkhita*,⁴⁰ the Supreme Court of Appeal held as follows:⁴¹

“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.

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.”

[emphasis added]

[61] This *dictum* is a statement of the very test or criterion that had applied, in broadly these terms, since 1909. Some years later, in 2021, in *Ramakatsa v African National Congress*,⁴² the Supreme Court of Appeal echoed it:⁴³

“Turning the focus to the relevant provisions of the Superior Courts Act (the SC Act), leave to appeal may only be granted

³⁸ This is an unreported decision of the SCA, case number 157/2015, dated 7 September 2016. Accessible on *Juta*: 2016 JDR 1647 (SCA). For this statement, the SCA referred to *See Van Wyk v S, Galela v S* [2014] ZASCA 152; 2015 (1) SACR 584 (SCA), para 14:

“As pointed out by this court in S v Matshona 2013 (2) SACR 126 (SCA) para 4, the issue to be determined is not whether the appeal against conviction and sentence should succeed, but whether the high court should have granted leave, which in turn depends upon whether the appellant could be said to have reasonable prospects of success on appeal.”

³⁹ At para 2.

⁴⁰ 2016 JDR 2214 (SCA).

⁴¹ See paras 16–17.

⁴² (724/2019) [2021] ZASCA 31 (31 March 2021).

⁴³ At para 10.

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 s17(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 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.”

[emphasis added]

[62] The authors of *Erasmus* criticise this judgment for the fact that the Supreme Court of Appeal did not refer to *Notshokovu v S*,⁴⁴ where, in *Ramakatsa*, it made the observations underlined in the above quotation. What it ought to have made of the throwaway comment about a higher standard in *Notshokovu* is unclear.

[63] Again, in 2023, in *Gaone Jack Siamisang Montshiwa*,⁴⁵ the majority of the Supreme Court of Appeal refused leave to appeal since it was “*not persuaded that another court would reach a different decision from that of the high court*”.⁴⁶

Conclusions on the test for leave to appeal

[64] From the above examination of the historical development of the decisions on leave to appeal, it would appear that, from the early period under the South Africa

⁴⁴ (unreported, SCA case no 1221/2015 dated 25 November 2016), 2016 JDR 2214 (SCA).

⁴⁵ (*Ex Parte* Application) (unreported, SCA case no 672/2021, dated 3 March 2023), 2023 JDR 0647.

⁴⁶ At para 33.

Act, 1909, to the present, the test for leave to appeal has gone unchanged. The debate over the heightening of the threshold in the wake of the promulgation of the Superior Courts Act rests upon a misunderstanding of the context of the use, in the cases and latterly in that statute, of the modal verbs “*might*” and “*would*”.

[65] Indeed, without undertaking a survey of the *travaux préparatoire* of the 2013 Act, it seems inescapable that the legislature sought simply to enact the very test that already applied at common law. In sum, the test is – and appears always to have been – whether there *is* or *will be* a reasonable prospect of success on appeal, or, in other words, that another court *might* reasonably find differently.

[66] The Superior Courts Act did not bring with it a new test for leave to appeal.

[67] What the applicant must demonstrate is that there is a “*reasonable prospect of success*”. The notion of success is qualified by the words “*reasonable prospects of*”. Something has “*reasonable prospects*” where, as the Supreme Court of Appeal has held, “[a] *sound rational basis for the conclusion that there are prospects of success ... exist*”.⁴⁷

[68] Considered in the round, to establish a “*reasonable prospect of success*” on appeal, the applicant must demonstrate that there exists some sound, cognisable reason why an appeal court would find differently to the court of first instance. In other words, there must be a reasonable possibility, not a certainty, of success on appeal. This possibility must exist (it must not be hopeless) and must be reasonable (based on logic).

[69] For example, the applicant must show that there is some aspect of the reasoning in the judgment that has the potential to lead a different court to a different conclusion. There must be some factual finding or issue of law that the applicant can demonstrate might, as a matter of law, lead to a different conclusion or in other words, success on appeal.

⁴⁷ *Ramakatsa v African National Congress*, fn 40, para 10.

ANALYSIS

- [70] In the light of the applicable test, set out above, the question is whether the applicant for leave has demonstrated that it has a reasonable prospect of success.
- [71] In large part, the applicant for leave marshals grounds of appeal that mirror the arguments it advanced in the hearing of the application itself, without taking account of why in the judgment they were found lacking.
- [72] So, it contends that the court erred “*in failing to consider [and finding] that Clause 14.2.7.1*” in appendix 1 to the loan agreement required that it be afforded a period of not less than thirty days from the date of written notice of breach to remedy that breach, and that no such notice was given. Yet, it fails to address the court’s finding, in paragraph 71 of the judgment, that “*the breaches of which [FirstRand] had complained do not fall within the purview of the financial covenants in clause 10, nor indeed are they financial covenants properly or commonly so called*” such that clause 14.2.7.1 does not apply. Without attacking that finding, there is simply no way another court would countenance this complaint, which presupposes its applicability.
- [73] The applicant also repackages its complaint over the TPPP certificate in vague and inscrutable terms, attempting to reargue the point without addressing the findings in paragraphs 73–81 of the judgment. An applicant for leave cannot accuse the court of “*fail[ing] to consider*” its proffered characterization of the conduct of FirstRand by closing its eyes to the court’s appraisal of that argument already in the judgment. The proper course would be to demonstrate how the court erred in its reasoning such that another court might take another view. To do so, the applicant must at least take account of the specific premises that led the court to its conclusion.
- [74] The applicant proceeds to complain that the court applied the wrong legal test, and what it had in mind was an application for a provisional winding-up. What the court should have done, following *Paarwater v South Sahara Investments*,⁴⁸ it

⁴⁸ [2005] 4 All SA 185 (SCA).

contends, was to ensure that it was satisfied on a balance of probabilities and not just on a *prima facie* basis. Strangely, the applicant thus ignores the detailed reasoning in the judgment that led to this conclusion, in paragraph 86: “*The applicant has established the case for the relief it seeks on a balance of probabilities.*”

[75] Over and above a terse and unintelligible argument that the applicant for leave was commercially solvent – it does not address the finding in paragraph 84 of the judgment that “*it is common cause that the respondent is indeed unable to pay what it owes the applicant, as and when those liabilities fall due*” – the applicant’s main complaint is that the court did not exercise judicially its discretion under section 344(f) of the Companies Act, 1973. It does so by reference to what it calls its “*coherent defences to the application*”, yet without addressing the various grounds upon which the court found that they were each far from coherent, or indeed applicable.

[76] Having considered carefully the grounds upon which the applicant seeks leave to appeal, I find that, were leave to be granted, there is no basis whatsoever that such appeal would have a reasonable prospect of success.

COSTS

[77] The costs are to follow the result, including the costs of counsel, taxed on the “B” scale.

ORDER

1. This application for leave to appeal is dismissed.
2. The applicant for leave will pay the respondent’s costs, which may be taxed on the “B” scale.



J J MEIRING
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

Date of hearing: 26 July 2024

Date of judgment: 26 September 2024

APPEARANCES

For the appellant: Mr S M Ndobe

Instructed by: Ndobe Inc.

For the respondent: Adv K Mashishi

Instructed by: Edward Nathan Sonnenberg Inc