

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2022/6731

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

H. LOUW 7 October 2024

In the matter between:

JAVED MALIK

Applicant

And

**SOUTH AFRICA CHAPTER OF THE BRICKS
BUSINESS COUNCIL**

First Respondent

**MINISTER OF TRADE, INDUSTRY AND
COMPETITION**

Second Respondent

BUSISIWE MABUZA

Third Respondent

AYANDA NTSALUBA

Fourth Respondent

BRIDGETTE RADEBE

Fifth Respondent

ELIAS MONAGE

Sixth Respondent

STAVROS NICOLAOU

Seventh Respondent

This judgment was handed down electronically by circulation to the parties' and/or the parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on 7 October 2024

JUDGMENT - Leave to Appeal application

LOUW H AJ:

- [1] In this matter, the Applicant applied for leave to appeal against the whole of the Judgment and Order in which this Court dismissed his application with costs.
- [2] The Applicant sought an order that the First Respondent's Decision of 12 March 2022, purportedly removing the Applicant as a member of its Aviation Working Group, be declared unlawful and inconsistent with the First Respondent's Constitution be set aside, alternatively that the Decision to be reviewed in terms of section 6 (1) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), alternatively the common law and be rescinded and set aside.
- [3] The grounds of appeal are set out in the application for leave to appeal.¹ The application for leave to appeal is opposed.

Principles when adjudicating an application for leave to appeal

- [4] Regarding applications for leave to appeal, the test to be applied is set out in Section 17(1)(a) of the Superior Courts' Act 10 of 2013, which provides:
- “(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*

¹ caselines 034-1

(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 emphasis)

[5] Section 16 - Appeals generally provides in (2)(a)

“(2)(a) (i) When at the hearing of an appeal the issues are of such a nature that the Decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.

(ii) Save under exceptional circumstances, the question whether the Decision would have no practical effect or result is to be determined without reference to any consideration of costs.”

[6] The threshold for granting leave to appeal was raised with the introduction of the 2013 legislation. The former assessment that authorisation for appeal should be granted if *“there is a reasonable prospect that another Court might come to a different conclusion”* is no longer applicable. The words in section 17(1) that: *“Leave to appeal may only be given*” and section 17(1)(a)(i) that: *“The appeal would have a reasonable prospect of success”* (my emphasis) are peremptory. Thus, leave to appeal *may only* be given if there *would be* a reasonable prospect of success. Therefore, a possibility and discretion were, in the words of the legislation and consciously so, amended to a mandatory obligatory requirement that leave may not be granted if there is no reasonable prospect that the appeal will succeed.²

² *Bester NO and others v CTS Trailers (Pty) Ltd and another (Leave To Appeal)* 2021 (4) SA 180 (WCC), *Cloete Murray NO and others v Ntombela and others; In re: Ntombela and another v Cloete Murray NO and others* [2022] 3 All SA 689 (FB)

[7] In *South African Breweries (Pty) Ltd v The Commissioner of the South African Revenue Services*,³ the Court cited with approval the following passage from *Mont Chevaux Trust v Goosen*⁴ concerning the apparent rigid section 17(1) threshold to grant a party leave to appeal, it to be granted in the circumstances set out and deduced from the word “only” used in the section.: *“It is clear that the threshold for granting leave to appeal against a judgment of the High Court has been raised in the new Act. The former test whether leave to appeal should be granted was reasonable prospect that another court might come to a different conclusion. See Van Heerden v Cornwright and Others 1985 (2) SA 342 (T) at 343H. The use of the word “would” in the new statutes indicates a measure of certainty that another court will differ from the Court whose judgment is sought to be appealed against.”*

[8] In *Four Wheel Drive v Rattan NO*⁵ Schippers JA stated the following: “[34] *There is a further principle that the Court a quo seems to have overlooked – leave to appeal should be granted only when there is ‘a sound, rational basis for the conclusion that there are prospects of success on appeal’.*” This followed and confirmed the principle and test of reasonable prospects of success in an application for leave to appeal in *S v Smith*,⁶ at [7]: *“What the test of reasonable prospects of success postulates is 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 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*

³ [2017] ZAGPPHC 340 (28 March 2017) para 5

⁴ 2014 JDR 2325 (LCC) para 6

⁵ 2019 (3) SA 451 (SCA) by Schippers JA (Lewis JA, Zondi JA, Molemela JA and Mokgohloa AJA concurring)

⁶ *S v Smith* 2012 (1) SACR 567 (SCA) para 7 by Plasket AJA (Cloete JA and Maya JA concurring), *Pretoria Society of Advocates and others v Nthai* 2020 (1) SA 267 (LP)

realistic chance of succeeding. More is required to be established than 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.”

[9] In *MEC Health, Eastern Cape v Mkhitha*⁷ the Supreme Court of Appeal emphasised the application for the test for leave to appeal and found:

“[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.

[18] In this case the requirements of 17(1)(a) of the Superior Courts Act were simply not met. Leave to appeal should have been refused. In the result, scarce public resources were expended: a hopeless appeal was prosecuted at the expense of the Eastern Cape Department of Health and ultimately, taxpayers; and valuable court time and resources were taken up in the hearing of the appeal. Moreover, the issue for Decision did not warrant the costs of two counsel.”

[10] Although the views of the Courts may differ, it will not automatically result in interference with the Judgment of the Court appealed against, given a difference in opinion by the Court sitting on appeal.⁸ More is required, in *Ramakatsa and others v African National*

⁷ (1221/15) [2016] ZASCA 176 (25 November 2016)

⁸ *AM and another v MEC Health, Western Cape* (1258/2018) [2020] ZASCA 89, [2020] JOL 48031 (SCA)

*Congress and another*⁹ it was held at [10] “Turning the focus to the relevant provisions of the Superior Courts Act The, 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. 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.”

[11] The procedural and substantive importance of applying for leave to appeal cannot be overstated. The Supreme Court of Appeal held in *Dexgroup (Pty) Ltd v Trustco Group*¹⁰ that: - “The need to obtain leave to appeal is a valuable tool in ensuring that scarce judicial resources are not spent on appeals that lack merit. It should, in this case, have been deployed by refusing leave to appeal.”

[12] Consequently, it is against this legal backdrop that I consider the application for leave to appeal.

⁹ [2021] JOL 49993 (SCA), *S v Notshokovu and Another* [2016] ZASCA 112 (7 September 2016) para 2

¹⁰ 2013 (6) SA 520 (SCA) paragraph [24], see also *The Public Protector of South Africa v The Chairperson of the Section 194(1) Committee and Others* (627/2023) [2024] ZASCA 131 (1 October 2024)

Submissions on the Grounds of Appeal

[13] The grounds of appeal are set out in the application for leave to appeal and summarised herein.¹¹

First Ground – Decision *ultra vires* and invalid

[14] The first ground of appeal has reference to the alleged *ultra vires* and invalid Decision of 12 March 2022 (“Decision”) of the South African BRICS Business Council (“SABBC” / First Respondent used interchangeably), the Decision offending against the First Respondent’s Constitution / Terms of Reference (“Terms of Reference”), being inconsistent with clause 4.3 regarding clauses 4.3.1, 4.3.2 and 4.3.7 read with clause 11, the three provisions or grounds for termination advances by the First Respondent.

[15] The Applicant, on an interpretation of the Judgment of this Court, formulated the view that the circumstances under which termination can occur are not infinite and are narrowly circumscribed by the circumstances listed in clause 4.3 itself, with a finding by the Court that termination could not occur because of clauses 4.3.1 and 4.3.2, the Applicant expressing the view that it was unassailable in that; i) clause 4.3.1 references ineligibility or disqualification in terms of the Companies Act or the King IV Code limited to section 69 of the Companies Act with a contravention thereof allowing for automatic termination without supervision and ii) clause 4.3.2 required majority consensus for removal subject to having obtained the written consent of the Minister.

¹¹ caselines 034-1

[16] The first ground of appeal is premised on the Court upholding the termination on the basis of clause 4.3.7 read in conjunction with clause 11, the Court incorrectly interpreting it as a blanket or all-encompassing power upon the First Respondent to remove a member by unanimous consent with reference to other provisions contained in the Terms of Reference. In addition, the Court further erred by reasoning that because the Terms of Reference contained no provisions for investigations, inquiries or a disciplinary process, the Applicant was not entitled to any better/more contractual rights.

[17] By way of the use of clause 4.3.7, read with clause 11 as a basis for termination, the Court failed to identify provisions permitting termination, and the Court imputed a tacit term, or implied term; the power to terminate a member appointment based on unanimous consent, following a breach of any term of the Terms of Reference.

[18] As such, the Applicant is of the view that an expanded interpretation of clause 4.3.7 providing for a unanimous decision would offend against clause 4.3.2 and defeat the need for including clause 4.3.2 in the Terms of Reference, neither the text nor content of clause 4.3 providing support for permitting a unanimous termination beyond clause 4.3.2, the Applicant arguing that it has established a reasonable prospect that another Court would come to a different conclusion on the declaratory orders sought.

[19] By way of the Terms of Reference, the First Respondent was entitled to appoint members of the working groups, the working groups functioning subject to the First

Respondent, and the First Respondent was entitled to terminate membership in the working groups.

[20] The circumstances that could lead to the cessation of office from the working groups are set out in clause 4.3 with a broad interpretation to be afforded to it, considering its wording, contrary to the limitations which the Applicant wishes to afford to it, clause 4.3.1 being wide in its scope with reference to ineligibility or disqualification for an event of violating corporate governance, generally, in terms of the principles of the Companies Act and/or the King Code (my emphasis), there being no limitation to section 69 of the Companies Act; *“Ineligibility and disqualification of persons to be director or prescribed officer”* as argued by the Applicant, with the First Respondent also referring to section 76 *“Standards of directors conduct”* with the King IV Code directed at good corporate governance, these enforced through the Code of Conduct and clause 4.3. Likewise, clause 4.3.7 is also broad in its ambit, providing for removal in accordance with any provisions of the Terms of Reference, including clause 11, the *“Code of Conduct of the SABBC and its Working Groups”*.

[21] The conduct complained of was investigated by a sub-committee created for that purpose, to which the Applicant responded¹² and participated, resulting in the termination of his participation in the SABBC Structures by way of a unanimous decision by the SABBC¹³ taken on 12 March 2020 with the Applicant being informed thereof on the same day with the reasons, or Report on termination being provided. The process followed, the findings and recommendation by the sub-committee and the

¹² Annexure FA4 caselines 001-40

¹³ Annexure FA5 caselines 001-55

unanimous Decision by the SABBC to terminate the Applicant's membership appear in accordance with the Terms of Reference, specifically clauses 4.3, 4.3.1, 4.3.7 and clause 11, the exact clause relied on in the unanimous Decision not mattering regarding the declaratory relief sought.

[22] The use of the terminology "*unanimously concluded*"¹⁴ or "*unanimous consent*" or "*unanimous decision*" reference to the Decision conveys a factual scenario of the members being unanimous, they all being in agreement and all being supportive of the Decision. This has no relevance to the provisions of clause 4.3.2 with reference to "*majority consensus*"¹⁵ requiring at least the majority of Council members to be in agreement, consensus differing from unanimity. Only clause 4.3.2 required a "*majority consensus*" of the Council on a decision on what was done, an action threatening or which brought the SABBC into disrepute. The remainder of the clause 4.3 provisions, also decisions with reference to clause 11 do not require decisions to be "*unanimously concluded*" or by way of "*unanimous consent*" or "*unanimous decision*" and it not being imputed as a term.

[23] I have again considered all of the issues raised by the Applicant as manifesting and alleged *ultra vires* and invalid Decision offending against the First Respondent's Terms of Reference, being inconsistent with clause 4.3 read with clause 11 and the provisions thereof, with the ground of imputing unanimous consent. For the reasons set out in the main judgment, I remain of the view that the Decision is not *ultra vires* and invalid, unlawful and inconsistent with the First Respondent's Terms of Reference.

¹⁴ Annexure FA5 caselines 001-55

¹⁵ Annexure FA1 caselines 001-31

[24] I, therefore, find that there is no reasonable prospect that another Court would come to a different decision based on the first ground raised by the Applicant.

Second Ground – PAJA Review

Whether Decision Involved an Administrative Action and Whether the First Respondent Performed a Public Function / Whether PAJA Applies or Ought the Application be Categorised as a Common Law Review in Terms of Section 33 of the Constitution

[25] By way of the Second Ground of Appeal, the PAJA review the Applicant argued that the Court erred in finding that the Decision was not an administrative decision and erred in failing to find that the First Respondent performed a public function, not considering *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*¹⁶ and the approach adopted in *AAA Investments (Proprietary) Limited v Micro Finance Regulatory Council and Another*.¹⁷

[26] In addition, the Applicant stated that the Court erred in failing to add sufficient weight to the First Respondent's own description of its functions and duties as described in the Founding Affidavit,¹⁸ not being specifically referred to the Grounds of Appeal but for a footnote, the self-description bolstering the fact that the First Respondent's function and purpose operates on a public sphere, summarised in general; i) the focus of goals of SABBC and the Department of Trade, Industry and Competition ("the Department") are aligned with close ties expressed in various ways, ii) BRICS is a multilateral platform of then five emerging economies launched by BRICS heads of state with the BRICS

¹⁶ 2001 (2) SA 1 (CC)

¹⁷ 2007 (1) SA 343 (CC)

¹⁸ caselines 008-30 paragraphs 5.6 to 5.9

Business Council being a workstream of this formation, iii) apex business bodies seek the approval or endorsement of the proposed Council members to be appointed, by the relevant Minister in the Department which authority to appoint or endorse is not assigned by way of legislation or Declaration, the Terms of Reference recording the existing convention, and iv) the SABBC works closely with the Department of International Relations and Cooperation due to the impact of the Council's work on business and economic relations between the various BRICS countries with Council members being accorded the privilege of interacting Heads of State at annual events.

[27] This self-description and the SABBC must further be considered with its creation and Terms of Reference. SABBC was not constituted in terms of legislation and it does not have a statutory framework, it being an unincorporated voluntary association of business people with its own governance structure, the Terms of Reference, working to promote and strengthen trade, business and investment ties between South Africa and other BRICS nations, and advising the South African government on policies and regulations falling under the Department, it itself neither regulating nor being a regulatory body, it also not having a membership beholdent to it. Within this environment neither of the members of the SABBC nor the members of the Working Groups are remunerated.

[28] PAJA and the principles of natural justice are intended to ensure fair treatment where the public or a concerned individual stands to lose due to a decision made by a person/s in a position of authority. In determining whether or not a decision falls within the ambit of PAJA it must firstly be determined whether the Decision constitutes an

“*administrative action*”.¹⁹ The test for determining whether conduct constitutes “*administrative action*” is not the question whether the action concerned is performed by a member of the executive arm of government, but rather a consideration of the the function, the relevant question then being whether the task itself is administrative or not, the focus of the enquiry being on the nature of the power being exercised.

[29] In the *Minister of Defence and Military Veterans v Motau and others*²⁰ the Constitutional Court identified seven elements of the definition of administrative action as set out in section 1(i) of PAJA: “*there must be: (a) a decision of an administrative nature; (b) by an organ of state or a natural or juristic person; (c) exercising a public power or performing a public function; (d) in terms of any legislation or an empowering provision; (e) that adversely affects the rights; (f) that has a direct, external legal effect; and (g) that it does not fall under any of the listed exclusions*”.

[30] Considering the aforementioned, what is relevant is whether or not the Decision was an exercise of public power, or private power in circumstances where the Decision was taken in a contractual setting within the sphere of an unincorporated voluntary association governed by, and operating in accordance with its Terms of Reference where decisions to expel and terminate membership are not administrative decisions, having no impact on the public nor any regulatory environment and not falling within the exercise of public power.

¹⁹ *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2001 at [141]

²⁰ 2014 (5) SA 69 (CC) at [33], section 1 (i) of PAJA: “*there must be: (a) a decision of an administrative nature; (b) by an organ of state or a natural or juristic person; (c) exercising a public power or performing a public function; (d) in terms of any legislation or an empowering provision; (e) that adversely affects the rights; (f) that has a direct, external legal effect; and (g) that it does not fall under any of the listed exclusions*”.

[31] Within this definitional environment the Applicant also did not make any factual submissions as to whether or not the termination of his membership from the Aviation Working Group affected his rights and he did not take issue with the Decision of the Court in this regard, nor was any direct, external legal effect shown, or addressed. Consequently, the Decision did not satisfy each one of the seven elements of the definition of administrative action, the Decision not being an administrative action.

[32] I have again considered all of the issues raised by the Applicant as manifesting the Decision and the nature of the power being exercised of an administrative nature, it falling short of an administrative action and its definitional requirements. For the reasons set out in the main judgment, I remain of the view that the Decision does not fall within the ambit of administrative action and is not administrative in nature.

[33] I, therefore, find that there is no reasonable prospect that another Court would come to a different decision based on the second ground raised by the Applicant, PAJA Review.

Third Ground – PAJA Delay

[34] By way of the Third Ground the Applicant formulated the view that the Court erred in concluding that there was an unreasonable delay in the launch of the application proceedings and the Court erred in failing to appreciate that if the Decision was invalid from inception, the aspect of delay requiring no consideration. The Court further erred in failing to place due weight on the relevant chronology and the reasons for the delay advanced by the Applicant from the taking of the Decision on 12 March 2020 until the commencement of the application and review proceedings on 2 March 2022, some 23

months after the Decision and 181 days after reasons were provided on 2 September 2021, the First Respondent claiming the delay causing prejudice.

[35] The undue delay rule required a two stage enquiry. First, whether there was an unreasonable delay and, second, if so, whether the delay should in all the circumstances be condoned,²¹ with section 7(1) of PAJA requiring the same two stage approach with the legislature's determination of a delay exceeding 180 days as *per se* unreasonable. Consequently, the Court is only empowered to entertain the review application if the interest of justice dictates an extension in terms of section 9 of PAJA and in the absence of such extension the Court has no authority to entertain the review application at all.

[36] The two year delay was not fully explained by the Applicant but for reference to the commencement of Covid and financial constraints suffered during some period in time in circumstances where the Decision was taken on 12 March 2020 with the Applicant being informed thereof on the same day, the Applicant seeking reasons on 20 March 2020 (some 8 days later), the application then being invited on 23 March 2020 to launch application proceedings with the Applicant then threatening legal action in the event of reasons not being received on or about 27 March 2020 (some 15 days later).

[37] On 16 July 2021, some 16 months after the Decision and being advised to proceed with legal action, the reasons were requested and provided on 2 September 2021, some 18 months later with the issue of the application on 18 February 2022 and the service thereof on 2 March 2022 on the First Respondent, some 23 months after the Decision and 181 days after reasons were provided.

[38] In *Opposition to Urban Tolling Alliance v South African National Roads Agency Limited*²² Brand JA stated that the "*delay exceeding 180 days is determined to be per se unreasonable, but a delay of less than 180 days may also be unreasonable and*

²¹ *Associated Institutions Pension Fund and others v Van Zyl and others* 2005 (2) SA 302 (SCA) para 47; *Opposition to Urban Tolling Alliance v South African National Roads Agency Limited* [2013] 4 All SA 639 (SCA) at para 26

²² [2013] 4 All SA 639 (SCA) at para 26

require condonation” and in the “circumstances, and given the obvious widespread prejudice that would be caused by any delay, [4 Africa’s] institution of the review application [after the lapse of time] was plainly unreasonable and is not in the interests of justice.”

[39] The Applicant did not provide an explanation as to why he did not commence with review proceedings after 23 March 2020 when he was requested to do so, nor why he did not do so after he threatened to institute legal proceedings on 27 March 2020, in circumstances where the Terms of Reference on which he relies also did not create a procedure with reference to the obtaining of reasons for review.

[40] The application, launched 181 days after the reasons were provided placed the matter within the legislature’s determination of a delay exceeding 180 days *per se* being unreasonable with the Court not empowered to entertain the review application in the absence of any interest of justice dictating an extension, there being no request for either condonation nor an extension, the Court then having no authority to entertain the review application in the event of the Decision falling within the ambit of PAJA.

[41] I have again considered all of the issues raised by the Applicant with reference to delay and for the reasons set out in the main judgment, I remain of the view that the delay was unreasonable also falling with the legislature’s determination of a delay exceeding 180 days *per se* being unreasonable with consequences flowing from that.

[42] I, therefore, find that there is no reasonable prospect that another Court would come to a different decision based on the third ground raised by the Applicant, delay.

[43] For the reasons set out above, I make the following order:

A. The application for leave to appeal is dismissed.

B. The Applicant is to pay the costs of the application for leave to appeal, with counsel's fees to be taxed on scale C.



H. LOUW

Acting Judge of the High Court
Gauteng Division, Johannesburg

Judgment: 7 October 2024

Appearances

For Applicant: JC Viljoen
Instructed by: Stupel & Berman Inc

For Respondent: HR Fourie SC
Instructed by: Friedland Hart Solomon & Nicolson