

REPUBLIC OF SOUTH AFRICA



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

Case Number: **2022-21063**

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

In the matter between:

GOLD LEAF TOBACCO CORPORATION (PTY) LTD

Applicant

and

SASFIN BANK LTD

Respondent

JUDGMENT – LEAVE TO APPEAL

ESTERHUIZEN, AJ

Introduction

[1] The applicant applies for leave to appeal to a full court of the Gauteng Division of the High Court of South Africa, alternatively, the Supreme Court against my judgment delivered on 5 November 2024 (*“the main judgment”*), which contained

the reasons for my findings. The Respondent opposes the application for leave to appeal.

[2] The facts of the matter are set out in the main judgment and will not be repeated herein.

[3] The grounds of appeal are set out in detail in the notice of appeal and I have taken note of the points raised and carefully considered each.

Test to be applied

[4] It is relevant to firstly deal with the requirements for leave to appeal to be granted. Section 17(1) of the Superior Courts Act 10 of 2013 provides as follows:

“17(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) ...”

[5] Therefore in terms of section 17(1)(a)(i), leave to appeal may only be given where the court is of the opinion that *'the appeal would have a reasonable prospect of success'*, or in terms of section 17(1)(a)(ii), if there is *'some other compelling reason why the appeal should be heard'*.¹

[6] In considering the test the court in *S v Smith* 2012 (1) SACR 567 stated:

“[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 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**

¹ In *Mont Chevaux Trust v Tina Goosen* 2014 JDR 2325 (LCC), it was held that the threshold for granting leave to appeal is now higher under the Superior Courts Act than it was under the previous regime. A mere possibility of success is not sufficient; a reasonable prospect must exist that another court would come to a different conclusion.

the conclusion that there are prospects of success on appeal.² (Emphases added)

[7] The test is summarised by the Supreme Court of Appeal in *Fusion Properties 233 CC v Stellenbosch Municipality* [2021] ZASCA 10 (29 January 2021) as follows –

“[18] Since the coming into operation of the Superior Courts Act, there have been a number of decisions of our courts which dealt with the requirements that an application for leave to appeal in terms of ss17(1)(a)(i) and 17 (1)(a)(ii) must satisfy in order for leave to be granted. **The applicable principles have over time crystallised and are now well established. Section 17(1) provides, in material part, that leave to appeal may only be granted ‘Where the judge or judges concerned are of the opinion that-**

(a) (i) the appeal would **have a reasonable prospect of success**; or

² *The National Credit Regulator v Lewis Stores (Pty) Ltd* (937/18) [2019] ZASCA 190 the court held:

“[40] Under ss 17(1) and (2) of the SC Act, the judge or judges who heard the case at first instance may grant leave to appeal, if they are of the opinion that the appeal would have reasonable prospects of success, or that there is some other compelling reason why the appeal should be heard.”

(ii) *there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration..’)*

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

Turning now to the applicant’s grounds for appeal.

First Ground - Reasonable Prospect of a Different Conclusion

[8] The Applicant’s contention on the first ground of appeal is that the main judgment deals with an abstract enquiry as to whether the procedural requirements of section 53 of PAIA had been met. This enquiry, the applicant argues, was both unnecessary and impermissible.

[9] The applicant with reference to *Fortuin v Cobra* 2010 (5) SA 288 (ECP) , referred to in the main judgement, argues that this is authority that the requirement in section 53, to communicate the right sought to be protected to the party from whom the information is requested, is not a formalistic requirement but a means

to an end, i.e. to permit for the request to be properly evaluated. Because, so the applicant argues, the respondent knew why the applicant sought the information that it did, the requirement was met and it was thus incorrect to determine whether the applicant had complied with the requirements.

[10] In *Fortuin supra* it is explained that the requirements of section 53 are peremptory and must be complied with. I do not agree that considering whether the requirements of section 53 had been met was unnecessary or not permitted. It is only if the peremptory requirements have been met that a court can be in a position to determine whether the applicant reasonably requires the information in order to protect the specific right(s) that the applicant seeks to enforce.

[11] Section 50(1)(a) requires the applicant to demonstrate that the record sought is required for the exercise or protection of its rights. Section 53(1)(d) in turn explains how the requirement is to be met. To do so the requester of the information must first identify the right it is seeking to protect or enforce and secondly, the applicant must provide an explanation of why the information is required for the protection of that right³. The applicant complied with neither of these jurisdictional requirements.

[12] This conclusion is by itself fatal to the application for leave to appeal. It is also for this reason that I am of the view that the applicant has little or no prospect of

³ The applicable authorities are discussed in main judgment and not repeated herein.

overcoming the hurdle that faces it, which is to convince another court that its application complied with the peremptory requirements of PAIA.

The second ground: The supposed probability of harm

[13] In its second ground of appeal the applicant argues that my finding, that the respondent's version that harm may be done to the respondent, if it is released to the applicant, is not "*so far-fetched that it should be rejected*" is incorrect. The applicant argues that it is "*likely that another court may find that the respondent's version is entirely far-fetched*". As is evident from the authorities referred to above to be granted leave the applicant must establish that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success is not enough. The arguments now raised should have been raised by the applicant in its replying affidavit. The applicant should have presented a version as to why the respondent's version is so far-fetched that it can be rejected in the pleadings when it had the opportunity to do so. It elected not to do so.

[14] Since the proceedings before the Court were motion proceedings, the Court was obliged to apply the *Plascon Evans rule* and in doing so no grounds to deviate from its trite principles were established by the applicant.⁴ I am thus not convinced that there is any rational basis for the conclusion that the applicant has any prospects of success on appeal on this ground either.

⁴ See *MEDIA 24 Books (Pty) Ltd v Oxford University Press Southern Africa (Pty) Ltd 2017(2) SA 1 (SCA)* at p17 para 36, where the Supreme Court of Appeal restated the trite principles

Conclusion

[15] I have considered all the grounds in the application for leave to appeal. Most of the reasons are contained in the main judgment and have not been repeated herein. There is no reasonable prospect that a court of appeal could arrive at a different conclusion.

[16] There is also no other compelling reason why leave should be granted.

I therefore make the following order

Order

1. The applicant's application for leave to appeal is dismissed.
2. The applicant is to pay the costs of this application which costs shall include costs of Senior Counsel and to be taxed on scale "C".



**JUDGE OF THE HIGH COURT
JOHANNESBURG**

For the Applicant:

Adv Rudolf Mastenbroek

Instructed by
Saint Attorneys

For the Respondent:

Adv Werner Lüderitz SC

Instructed by
Werksmans Attorneys

Date of submissions:

Applicant 14 January 2025

Respondent 20 January 2025

Date of judgment: 24 January 2025