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**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:

NO

CASE NO.: 4542/2023

In the application between:

JOHANNES JACOBUS WOLHUTER N.O.

First Applicant¹

FANTI BEKKER HATTINGH N.O.

Second Applicant

STEPHEN FOUCHÉ N.O.

Third Applicant

[In their capacities as joint trustees of the QWAHA TRUST.
Master's reference number: IT1339/2005]

and

MTETWA INVESTMENTS (PTY) LTD
[Registration number: 2014/253458/07]

Respondent²

CASE NO.: 4543/2023

In the application between:

JOHANNES JACOBUS WOLHUTER N.O.

First Applicant

¹ The 'applicants'. Represented by Advocate Meintjies.

² 'The company'. Represented by Advocate S Reinders.

FANTI BEKKER HATTINGH N.O.

Second Applicant

STEPHEN FOUCHÉ N.O.

Third Applicant

[In their capacities as joint trustees of the QWAHA TRUST.
Master's reference number: IT1339/2005]

and

ALFRED ZAKADE MTETWA

First Respondent³

[Identity number: 5[...]]

ZINVONOX (PTY) LTD

Second Respondent⁴

[Registration number: 2018/329246/07]

JOHANNES STEPHANUS OLIVIER

Third Respondent

[Identity number: 8[...]]

Coram: M Opperman J

Heard: 2 August 2024

Delivered: 15 November 2024. This order was handed down electronically by circulation to the parties' legal representatives *via* email and release to SAFLII on 15 November 2024. The date and time of hand-down is deemed to be 15h00 on 15 November 2024

Reasons: 22 November 2024

Summary: Application for leave to appeal – condonation for late filing – new case in reply.

ORDER

- Both applicants' applications for leave to appeal are granted in the following terms:

³ Referred to as 'Mr. Mtetwa'. Represented by Advocate S Reinders.

⁴ Second and third respondents represented by Ms. A Smith. Referred to as 'Zinvonox' and 'Mr. Olivier'.

- a. The applicants' applications for leave to appeal are granted under case numbers 4542/2023 and 4543/2023 in respect of the first order made on 4 April 2024 and such leave is granted to the Full Court of the Free State Division (Bloemfontein);
 - b. the costs of both applications for leave to appeal are costs in the appeals.
2. Reasons for judgment may be uplifted from the Registrar of this Court on Friday 22 November 2024.

REASONS FOR JUDGEMENT

Opperman J

[1] The atmosphere of this case reminded of the words of the Constitutional Court in *Shinga v The State and another (Society of Advocates (Pietermaritzburg Bar) intervening as Amicus Curiae); S v O'Connell and Others*⁵ that defined the judicial character of the task conferred upon a presiding officer in determining whether to grant leave to appeal. Although having heard the evidence and having made a ruling, the judge is called upon to consider whether another Court may reach a different conclusion. This requires a careful analysis of both the facts and the law that have supported the judgement a quo and a consideration of the possibility that another Court may differ either in relation to the facts or the law, or both. This is a task that has been carried out by High Court judges for many years and it is a judicial task of some delicacy and expertise. It should be approached on the footing of intellectual humility and integrity, neither over-zealously endorsing the ineluctable correctness of the decision that has been reached, nor over-anxiously referring decisions that are indubitably correct to an appellate court.

⁵ *Shinga v The State and another (Society of Advocates (Pietermaritzburg Bar) intervening as Amicus Curiae); S v O'Connell and Others* [2007] ZACC 3; 2007 (2) SACR 28 (CC).

[2] The right to appeal is, among others, managed by the application for leave to appeal. It may not be abused, but the hurdle of an application for leave to appeal may never become an obstacle to justice in the post-constitutional era. Section 17 of the Superior Courts Act 10 of 2013 is the law and provides:

‘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.’

[3] The interpretation of the Rules and the law has evolved in case law since 2013.

1. In numerous cases, the view is held that the threshold for the granting of leave to appeal was raised with the induction of the 2013 legislation. The former assessment that authorization for appeal should be granted if ‘there is a reasonable prospect that another Court might come to a different conclusion’ is no longer applicable.

2. The words in s 17(1) that: ‘Leave to appeal may only be given . . .’ and s 17(1)(a)(i) that: ‘The appeal would have a reasonable prospect of success’ are peremptory. ‘If there is a reasonable prospect of success’ is now that: ‘May only be given if there would be a reasonable prospect of success.’ A possibility and discretion were therefore, in the words of the legislation and consciously so, amended to a mandatory obligatory requirement that leave may not be granted if there is not a reasonable prospect that the appeal will succeed.

3. It must be a reasonable prospect of success; not that another court may hold another view. The court a quo may not allow for one party to be unnecessarily put through the trauma, costs and delay of an appeal. In *Four Wheel Drive v Rattan N.O.*⁶ the following was ruled by Schippers JA:

‘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”. In the light of its findings that the plaintiff failed to prove *locus standi* or the conclusion of the agreement, I do not think that there was a reasonable prospect of an appeal to this court succeeding, or that there was a compelling reason to hear an appeal. In the result, the parties were put through the inconvenience and expense of an appeal without any merit.’⁷

[4] It is trite that the views of courts may differ but that there will not be, automatically, interference with the judgment of the court a quo. The vital way of thinking of the courts of appeal is that the trial court experienced the hearing, the conduct of the parties and their counsel and the evidence in all its forms; and that interference will not be a given just for a difference in opinion by the court sitting on appeal. The Supreme Court of Appeal reiterated this stance in its judgment on 31 July

⁶ *Four Wheel Drive v Rattan N.O.* [2018] ZASCA 124; 2019 (3) SA 451 (SCA).

⁷ Ibid para 34. Lewis JA, Zondi JA, Molemela JA and Mokgohloa AJA concurred in this judgment.

2020 in *AM and another v MEC Health, Western Cape*:⁸ 'Such findings are only overturned if there is a clear misdirection or the trial Court's findings are clearly erroneous.'⁹

[5] The final word was spoken in the Supreme Court of Appeal in *Ramakatsa and Others v African National Congress and Another*¹⁰ in March 2021:

'[10] 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 s 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 oppose 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

⁸ *AM and another v MEC Health, Western Cape* [2020] ZASCA 89.

⁹ *Ibid* para 8.

¹⁰ *Ramakatsa and Others v African National Congress and Another* [2021] ZASCA 31.

conclusion that there are prospects of success must be shown to exist.'
(Accentuation added.)

[6] Counsel for the applicant in the application for leave to appeal filed heads of argument the day before the hearing of the matter consisting of 104 pages. The matter was postponed giving the respondents the opportunity to file heads of argument. They opposed the application. On 15 November 2024 I ordered that:

'1. Both applicants' applications for leave to appeal are granted in the following terms:

a. The applicants' applications for leave to appeal are granted under case numbers 4542/2023 and 4543/2023 in respect of the first order made on 4 April 2024 and such leave is granted to the Full Court of the Free State Division (Bloemfontein);

b. the costs of both applications for leave to appeal are costs in the appeals.

2. Reasons for judgment may be uplifted from the Registrar of this Court on Friday 22 November 2024.'

[7] On the arguments of the applicants as per paras 38 to 68 of their heads of argument and after extensive oral arguments, I concluded that 'a sound, rational basis for the conclusion that there are prospects of success on appeal' exists. I will not reiterate the grounds as it had been comprehensively dealt with by counsel for the applicants. Since it revolves around the late filing of papers, I deemed it apt that the matter be heard by a full court of this division.

M OPPERMAN J

Appearances

For applicants (J.J Wolhuter N.O. and others): L Meintjes
Instructed by: Noordmans Attorneys Inc.
Bloemfontein
Cases no.: 4542/2023 & 4543/2023

For first respondents
(Mtetwa Investments (Pty) Ltd & Alfred Zakade Mtetwa): S.J. Reinders
Instructed by: Lovius Block Attorneys
Bloemfontein
Cases no.: 4542/2023 & 4543/2023

For second and third respondents
(Zinvonox (Pty) Ltd & Johannes Stephanus Olivier): A Smith
Instructed by: Shardelow Smith Attorneys Inc.
Bloemfontein
Case no.: 4543/2023