



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

CASE NUMBER: 2023-117206

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

D. MLAMBO

09 APRIL 2025

In the matter between:

DISCOVERY HEALTH (PTY) LTD

Applicant

and

ROAD ACCIDENT FUND

First Respondent

**CHIEF EXECUTIVE OFFICER OF THE ROAD
ACCIDENT FUND: COLLINS PHUTJANE
LETSOALO**

Second Respondent

Coram: Mlambo JP, Opperman J and Bam J

Delivered: This Judgment was handed down electronically by circulation to the parties' legal representatives by email and by uploading to Caselines and release to SAFLII. The date and time for hand down is deemed to be 10:00 am on 09 April 2025.

ORDER

1. Leave to appeal to the Supreme Court of Appeal is granted.
2. Costs are to be costs in the appeal.

**JUDGMENT
[LEAVE TO APPEAL]**

MLAMBO JP (OPPERMAN J and BAM J concurring):

Introduction

- [1] The applicant, (Discovery) seeks leave to appeal to the Supreme Court of Appeal (SCA) against the majority Judgment and orders, handed down by this Court on 17 December 2024. No formal hearing was held, during which oral submissions would be made, The parties were directed to file written submissions which we have had reference to, in considering the application.

Brief background

- [2] On 27th October 2022 this Court per Mbongwe J, handed down judgment in which a directive (August 2022 Directive), that had been issued by the first respondent (RAF), was reviewed, declared unlawful and set aside. In terms of that directive, RAF employees were instructed to reject past medical claims that had been paid by a medical scheme (the disputed medical expenses)¹. The directive's instruction, in essence, was: –

“All Regional Managers must ensure that their teams implement the attached process to assess claims for past medical expenses. All RAF offices are required to assess claims for past medical expenses and reject the medical expenses claimed if the Medical Aid has already paid for the medical expenses.”

- [3] The RAF applied unsuccessfully to obtain leave to appeal from Mbongwe J and further failed to obtain such leave from the Supreme Court of Appeal and Constitutional Court. Whilst the application for leave to appeal process was unfolding the RAF issued two further directives, on 13 April 2023 and 2 November 2023, (the subsequent directives). In terms of the April 2023

¹ The directive's instruction, in essence, was “All Regional Managers must ensure that their teams implement the attached process to assess claims for past medical expenses. All RAF offices are required to assess claims for past medical expenses and reject the medical expenses claimed if the Medical Aid has already paid for the medical expenses.”

directive, the RAF's employees were required to first ascertain whether a claim fell within prescribed minimum benefits (PMB's) or emergency medical conditions (EMC's), and only where it was neither, would a claim be processed and honoured.

- [4] On the other hand, Discovery brought an application, before Khumalo J, in terms of section 18 of the Superior Courts act², for the enforcement of the order granted by Mbongwe J. Mbongwe J had refused to entertain that application after he dismissed the RAF's application for leave to appeal, hence the matter came before Khumalo J and she dismissed it. The reasoning of the Judge in dismissing Discovery's Section 18 application was, based on amongst other considerations, that Discovery was a medical schemes administrator, not the medical scheme itself, and as such had no interest whatsoever in the matter at hand. Khumalo J refused Discovery's application for leave to appeal that order.
- [5] On 2 November 2023 the RAF issued a further directive, the third directive, which is based on section 19(d) (i). The essence of this directive was that RAF employees were instructed to ascertain if the claimant had entered into any agreement with any person or party, and if that person or party was not the one contemplated in section 19 (c) (i) or (ii) then the claim was to be rejected.
- [6] After all appeal processes had been finalized the RAF continued to refuse to pay past medical expenses (the disputed medical expenses), based on the subsequent directives it had issued. That led to the application that came before this Court. In those proceedings, Discovery had initially sought an order that the RAF and the second respondent, (the CEO), were in contempt of the Mbongwe J order. As set out in the judgment of the majority, the relief that discovery eventually sought before us was a declarator, amongst others, that the RAF was in breach of the Mbongwe J order. Discovery's objective in the litigation or in the application was to force the RAF to comply with that order.

² Act 10 of 2013, as amended.

- [7] Discovery's case was mainly that in line with the principle of *res judicata*, the RAF could not and was not entitled to rely on the subsequent directives it had issued. Discovery's submission was that the ratio in the Mbongwe J judgment covered the subsequent directives hence its insistence that the RAF comply with that order. This proved to be the point on which the majority and the minority judgments diverged. The majority held that the Mbongwe J judgement didn't go that far whilst the minority judgment held that the ambit of the Mbongwe J order covered the subsequent directives and that they were hit by *res judicata*.
- [8] In the current application for leave, and distilled to its bare essentials, the crux of Discovery's case, is that the judgement and order of the majority will be overturned by an appellate Court. Furthermore, in its view, there are reasonable prospects that an appeal Court will reach a different conclusion on the main findings of the majority. Discovery further asserts that there are compelling reasons that leave be granted.

The test for leave to appeal

- [9] As recognized by all the parties, the point of departure is section 17(1) which provides as follows:
- "(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."

[10] The test for leave to appeal, in line with section 17 (1) is now well established. That test is whether (i) there are reasonable prospects of success on appeal or (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments regarding the issues under consideration. The Supreme Court of Appeal, summed this up succinctly in *Fusion Properties 233 CC v Stellenbosch Municipality*³ as follows:

“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”. See also *MEC for Health, Eastern Cape v Mkhitha and Another*.⁴

What constitutes reasonable prospects of success in section 17(1)(a)(i)

[11] The Supreme Court of Appeal in *Smith v S* had occasion to consider what constituted reasonable prospects of success in section 17(1)(a)(i) and held:

"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 the conclusion that there are prospects of success on appeal."

[12] Similarly, in *Democratic Alliance v President of the Republic of South Africa and Others*⁵ the court held:

³ [2021] ZASCA 10 (29 January 2021) at para [18].

⁴ [2016] ZASCA 176 at para 16.

⁵ [2020] ZAGPPHC 326 (29 July 2020) at para 5.

"Leave to appeal is not simply for the taking. A balance between the rights of the party which was successful before the court a quo and the rights of the losing party seeking leave to appeal need to be established so that the absence of a realistic chance of succeeding on appeal dictates that the balance must be struck in favour of the party which was initially successful."

What constitute "compelling reason" in section 17(1)(a)(ii)

[13] In the context of section 17(1)(a)(ii) of the Superior Courts Act, a "compelling reason" for an appeal to be heard, includes conflicting judgments on the matter under consideration, or other similar compelling circumstances that warrant a higher Court's review.

[14] In *Van Zyl N.O and Another v Cometa Trading (Pty) Ltd*⁶, the court held that:

"... . Compelling reasons include, among others, the involvement of substantial public interest, an important question of law, differing judicial interpretations, or a discrete issue of statutory interpretation with implications for future cases." See also *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others*⁷ where it was stated:

"After expressing its conclusion on prospects of success the High Court also said that it had no discretion once it reached that conclusion to grant leave to appeal. But it failed to consider the provisions of s 17(1)(a)(ii) of the Superior Courts Act which provide that leave to appeal may be granted, notwithstanding the Court's view of the prospects of success, where there are nonetheless compelling reasons why an appeal should be heard. This is linked to the question of mootness. In that regard there is established jurisprudence in this Court that holds that even where an appeal has become moot the Court has a discretion to hear and dispose of it on its merits. The usual ground for exercising that discretion in favour of dealing with it on the merits is that the case raises a discrete issue of public importance that will have an effect on

⁶ [2025] ZAWCHC 112 (17 March 2025) at para 15. See also *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* 2020 (5) SA 35 (SCA) (25 March 2020) at para 2.

⁷ 2016 (3) SA 317 (SCA) (15 March 2016).

future matters. That jurisprudence should have been considered as a guide to whether, notwithstanding the High Court's view of an appeal's prospects of success, leave to appeal should have been granted. In my view it clearly pointed in favour of leave to appeal being granted".

Res judicata

- [15] Discovery's case based on there being reasonable prospects of success on appeal is rooted in the findings in the majority judgment, that the subsequent directives issued by the RAF were beyond the reach of the Mbongwe J judgement. Discovery's argument was that the order granted by Mbongwe J also covered the subsequent directives. Its argument was that based on the principle of *res judicata*, the issues dealt with in the subsequent directives were based on the same policy encapsulated in the first directive that was before Mbongwe J and as such suffered from the same fate as ruled by Mbongwe.
- [16] Discovery also relies predominantly on the reasoning and conclusion of the minority judgment, which essentially found that the policy stance of the RAF, embedded in the first directive, of refusing to pay for past medical expenses that had been paid by medical aid schemes, was replicated in the second and third directives. For this reason, Discovery argued that, as that policy was set aside by Mbongwe J, it follows that the subsequent directives were covered by the Mbongwe J Judgement and as such were hit by *res judicata*.
- [17] The fact that there is a point of difference between the judgment of the majority and that of the minority is an important consideration. It is important to note that the majority based its reasoning on the fact that the subsequent directives were premised on distinct and different bases and were never before Mbongwe J as they had not yet been issued at the time. The majority found that the distinct nature of the aspects covered by these directives could not simply be brushed aside on the basis that an earlier directive had been set aside and therefore all subsequent directives were unlawful and should not be followed.
- [18] This on its own is sufficient to dispose of this application. This is for the simple reason that it was the main basis for the relief sought by Discovery. It is also

the basis on which the minority judgement differed from the majority. The other issues dealt with hereunder, based on whether there are compelling reasons to grant leave, arose as a result of the majority finding that *res judicata* was not implicated and as such we were obliged to consider whether Discovery had made out a case to interdict the operation of the subsequent directives. This was the context on which the aspects discussed below arose.

Res inter alios acta

[19] Discovery argued that there are a number of other judgements handed down by other Courts whose conclusions are at variance with the conclusion of the majority. This is indeed correct. In addition, Discovery reiterates its argument that based on the SCA judgment in *Bane vs D'Ambrosi*⁸, a medical aid scheme is entitled to recover the medical expenses it had paid, from the RAF. The majority reasoned that Discovery had not made out a case based on policy considerations of equity, reasonableness and fairness, that medical aid schemes should be allowed to regain what they had paid in discharge of their contractual and statutory obligations to their members, based on the principle of *res inter alios acta*.

[20] The view of the majority is based on *Santam Versekeringsmaatskappy vs Beyleveld*.⁹ In that case, the SCA concluded that for a party to succeed in a claim reliant on the *res inter alios acta* principle, that party must make out a case based on policy considerations of equity, reasonableness and fairness. The majority found that Discovery had not made out such a case.

Subrogation

[21] In the majority judgment the case law underpinning this principle was set out expansively and it is unnecessary to go through the same exercise here. Discovery had argued that this principle applied in the circumstances of this case, ie entitling a medical aid scheme to be reimbursed for the expenses it had paid on behalf of its member, from the payout of its member's claim by the

⁸ [2009] ZASCZ 98; 2010 (2) SA 539 (SCA); [2010] 1 All SA 101 (SCA).

⁹ 1973 (2) SA 146 A.

RAF. The majority felt strongly that the subrogation principle does not apply to medical aid schemes and the RAF, in the same way as that principle applied in insurance law. The majority was clear that both the RAF and Discovery were not insurers, meaning that the principle of subrogation finds no application in this matter. The discreet issue here is that it was not the medical aid scheme that asserted this entitlement but Discovery, the administrator.

[22] It has been pointed out already, that the minority judgement did not discuss nor express a view regarding the sustainability of the *res inter alios acta* and subrogation principles but confined the adjudication of the breach of the Mbongwe J order to the *res judicata* principle only. The superior Courts have not authoritatively decided the sustainability of these principles in the context of third party claims involving the RAF and medical aid schemes and it is thus prudent that leave to appeal be granted.

[23] An additional aspect is the standing of Discovery, a medical schemes administrator, to institute such litigation and not the medical scheme itself. These are important issues that call for clarification by the superior Courts. The majority was clear that Discovery has no such standing. The majority found that the principle of subrogation, which has its location and application in indemnity insurance law, finds no application in delictual claims against the RAF, which is a social benefit scheme, funded by public funds and not an insurer. The majority further found that medical schemes have no claim against the RAF after discharging their contractual and statutory duty towards their member. Discovery asserts that the majority erred. The application of these principles requires the attention of the SCA, and it is our view that there are compelling reasons that suggest that leave should be granted. We agree simply because these are important principles of our law and it is in the interests of justice that leave be granted to enable the superior Courts to provide a definitive view and necessary guidance to lower Courts.

Order

[24] In the final analysis, leave must be granted and the following order is issued:

1. Leave to appeal to the Supreme Court of Appeal is granted.
2. Costs are to be costs in the appeal.



D MLAMBO
Judge President of the High Court
Gauteng Division

Appearances

For Applicant:	W Trengove SC (with N Ferreira, M Salukazana, and D Sive) <i>instructed by</i> Edward Nathan Sonnenbergs Inc
For First Respondent:	C Puckrin SC (with A Ngidi) <i>instructed by</i> Malatji & Co Attorneys
For Second Respondent:	JG Cilliers SC (with MT Shepherd) <i>instructed by</i> Mpoyana Ledwaba Attorneys
Date of hearing:	[Matter dealt with on the papers]
Date of Judgment:	09 April 2025