

REPUBLIC OF SOUTH AFRICA



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

CASE NUMBER: 2023-048927

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

G.W. AMM

7 APRIL 2025

In the application for leave to appeal:

KINGFISHER FUELS CC t/a BP BRAAMFONTEIN

Applicant

and

BP SOUTHERN AFRICA (PTY) LTD

First respondent

ARBITRATOR: WARREN B PYE SC

Second respondent

Summary:— Application for leave to appeal / gatekeeper application – Certain section 17(1)(a)(i) considerations enumerated - Requirements of section 17 not met – No reasonable prospect of success in the appeal – No compelling reason(s) why the appeal should be heard – Interests of justice are also not engaged – Application for leave to appeal dismissed.

JUDGMENT

AMM, AJ

Introduction

- [1] On 29 January 2025, I handed down a judgment dismissing the applicant's application to review and set aside the second respondent's arbitration award.
- [2] In broad terms, the review application was premised on the assertion that the second respondent (as arbitrator) had exceeded his powers by determining a non-pleaded issue (i.e., the termination of the head-lease) in the arbitration proceedings between the applicant and the first respondent. Clause 42 of the parties' sub-lease provided that the sub-lease would terminate if the head-lease terminated.
- [3] In dismissing the review application, I also granted an order striking out certain new material matter in the applicant's replying affidavit.
- [4] The applicant now seeks leave to appeal the review judgment, and the orders granted. The applicant seeks leave to appeal to the Full Court of this Division, alternatively the Supreme Court of Appeal.
- [5] Only the first respondent opposes the application for leave to appeal. The second respondent did not participate in the review proceedings. He similarly does not participate in this application for leave to appeal.
- [6] For purposes of this application for leave to appeal, I have inter alia (re-)read and (re-)considered the record in the review proceedings, my judgment (embarrassed by certain inadvertent and inconsequential, but regrettable, typographical errors), and the orders that I granted. I have also carefully considered the notice of application for leave to appeal. In anticipation of this hearing, the parties' legal representatives filed heads of argument. I have similarly carefully considered, weighed, and measured the parties' respective written arguments in their heads of argument and the subsequent oral submissions. I have done so objectively and dispassionately. I have also considered the relevant authorities.
- [7] At the risk of stating the obvious, my judgment in the review application contains my full reasons for the orders granted. As such, I do not intend to deal herein with each of the grounds on which leave to appeal is sought. Nor do I intend to repeat what is contained

in the review judgment. I also do not repeat or traverse all of the parties' respective leave to appeal arguments. Nevertheless, I have evaluated and interrogated, for purposes of this application and this judgment, each ground on which leave to appeal is sought, and the parties' respective leave to appeal arguments.

[8] In closing this introduction, I must mention that it is ineluctably so that an application for leave to appeal may be an uncomfortable affair; for the applicant for leave to appeal, for the leave to appeal respondent, and for the judge him- or herself. This is because:

- a. an applicant for leave to appeal is called upon to criticise, directly and with fearless candour, the judge's judgment and reasoning, and more importantly the orders granted;
- b. a leave to appeal respondent ordinarily unblushingly proclaims that "the judge got things perfectly right"; and
- c. the relevant judge - in open court - is called upon to scrutinise his or her potential failings and any shortcomings of their judgment, but he or she must do so with objective introspection and humility.

[9] Yet the aforesaid is exactly as it should be. Judges and counsel are not shrinking violets. This is precisely why an application such as this must be argued, considered, and determined candidly and dispassionately.

Applicable principles / considerations in applications for leave to appeal

(i) Introduction

[10] In the main, the applicant seeks leave to appeal under the rubric of section 17(1)(a)(i). In its heads of argument, and subsequent oral arguments, the applicant belatedly pursues leave to appeal, in the alternative, under the rubric of section 17(1)(a)(ii).

[11] Before dealing with the merits of this application for leave to appeal, I first traverse the applicable requirements and tests for an application for leave to appeal.

(ii) The traditional leave to appeal test

- [12] The traditional test applied by our courts in considering applications for leave to appeal is whether there is a reasonable prospect that another court may come to a different conclusion to the one reached by the court of first instance.¹

(iii) Section 17 of Superior Courts Act, 2013

- [13] Section 17 of the Superior Courts Act, No. 10 of 2013 now legislates the circumstances in which leave to appeal is to be sought and granted. Section 17(1) reads (my underlining):

“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) the decision sought on appeal does not fall within the ambit of section 16(2)(a);² 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.”

(iv) Section 17(1)(a)(i): Reasonable prospects of success

- [14] There is a panoply of disparate and contrasting judgments dealing with the applicable “reasonable prospect of success” test under section 17(1)(a)(i); more particularly traversing the much debated “could” versus “would” threshold test.

¹ See inter alia *Commissioner of Inland Revenue v Tuck* 1989 (4) SA 888 (T) at 889

² Section 16(2)(a)(i) provides:

“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.”

- [15] The applicant, for its part, places particular store on the Supreme Court of Appeal decision in *Ramakatsa*;³ more specifically the following extract from paragraph 10 thereof:

“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.”

- [16] The *Ramakatsa* decision, as I read it, endorses the “could” threshold. However, at the same time, the decision proceeds to articulate what I construe to be a “would” threshold.⁴ It is not the purpose of this judgment to add to the “could” versus “would” debate or discourse except to point out – *en passant* – that the Legislature expressly used the adverb “only”, and the modal auxiliary verb “would”, in section 17(1)(a)(i). I regard this language as peremptory.
- [17] That said, I will nevertheless reconcile and apply herein the articulated test in *Ramakatsa* (i.e., the applicant needs to convince this Court on proper grounds that it has prospects of success on appeal, which prospects must not be remote) and other precedential judgments.
- [18] A consideration of *Ramakatsa* and other relevant judicial precedents on this question enumerate, without intending to be exhaustive, the following important section 17(1)(a)(i) considerations:

³ *Ramakatsa and Others v African National Congress and Another* (724/2019) [2021] ZASCA 31 (31 March 2021)

⁴ The court in *Van Zyl v Steyn* (83856/15)[2022] ZAGPPHC 302 (03 May 2022) considered *Ramakatsa* against the background of inter alia *MEC for Health, Eastern Cape* supra paras 16-18], *Notshokuvu v S* (2016) ZASCA 112 para 2, *Van Wyk v S*, *Galela v S* 2015 (1) SACR 548 (SCA) para 14, *Zuma v Office of the Public Prosecutor and Others* (2020) ZASCA 133 (30 October 2020) para 19, and *Nwafor v Minister of Home Affairs and Others* (2021) ZASCA 58 (12 May 2021) para 25] and concluded that *Ramakatsa* decision did not lower the threshold as generally applied – see *Shawn v Shabalala and Another* (56880/2021) [2023] ZAGPPHC 2065 (5 September 2023) para 11

- a. Leave to appeal, especially to the Supreme Court of Appeal, must not be granted unless there is truly a reasonable prospect of success.⁵
- b. A sound rational basis for the conclusion that there are prospects of success on appeal must be shown to exist.⁶
- c. An applicant for leave to appeal must therefore convince the court that, on proper grounds, there is a reasonable prospect or realistic chance of success on appeal.⁷
- d. A mere possibility of success, or an arguable case, or a case that is not hopeless, is insufficient.⁸

[19] In summary, an appellant for leave to appeal must convince the court hearing its application that, on a sound rational basis, its prospects of success on appeal are not remote, but have a reasonable and realistic chance of succeeding. Equally, a mere possibility of success on appeal is not enough.

[20] Additionally, there is authority (traversed below) for the proposition that an inquiry into whether the appeal would not have reasonable prospects of success requires a court to also inquire whether it is in the interests of justice that the appeal should be heard; an issue in respect of which the Court has a discretion.

[21] That said, a consideration of the “interests of justice” ought also to feature under the rubric of section 17(1)(a)(ii)’s “other compelling reason” considerations, to which I now turn.

⁵ *Ramakatsa supra*

⁶ *MEC for Health, Eastern Cape v Mkhitha and Another* [2016] JOL 36940 (SCA) para 17 *Four Wheel Drive Accessory Distributors CC v Rattan NO* 2019 (3) SASA 451 (SCA) at par [34] with reference to *S v Smith* 2012 (1) SACR 567 (SCA) par [7] and see *68 Wolmarans Street Johannesburg (Pty) Ltd and Others v Tufh Limited* 2024 JDR 1552 (SCA) para 32—albeit the judgment also deals with the further requirement that ‘something more by way of special circumstances’ is needed when there is an application for special leave to appeal the judgment of the full court - an additional requirement not necessary for purposes of this *application* for leave to appeal.

⁷ See inter alia *S v Smith* 2012 (1) SACR 567 (SCA) para 7

⁸ *Mkhitha supra*

(v) Section 17(1)(a)(ii): Some other compelling reason

[22] Section 17(1)(a)(ii)'s "some other compelling reason", contemplates the existence of compelling reasons of inter alia the following types (i) a substantial point of law, (ii) conflicting judgments on the questions in issue; (iii) the matter being of great public importance, or (iii) considerations of the interests of justice (e.g. instances where a refusal of leave to appeal would likely result in a manifest denial of justice).

(vi) The interests of justice consideration

[23] As demonstrated below, a liberal approach to granting leave to appeal is to be discouraged. That said, I accept, without demure, that a court must be cautious when refusing leave to appeal, particularly where there is a potential for injustice.⁹

[24] In the aforesaid regard, our courts have laudably adopted an approach that even if the appeal would not have reasonable prospect of success, the court should nevertheless inquire whether it is in the interest of justice that the appeal should be heard.¹⁰

[25] Within this context, an additional factor thus to be considered is that a court hearing an application for leave to appeal ought not allow a party to be unnecessarily put through the trauma, inconvenience, costs, and delay of an appeal that does not meet the required thresholds.¹¹

(vii) Conclusion

[26] In concluding this topic, it is salutary to emphasise that an appeal lies against the decision¹² of the court, and not against the reasons for the decision.¹³

⁹ Notshokovu *supra*

¹⁰ See *Mothule Inc Attorneys v The Law Society of the Northern Cape and Another* (213/16) [2017] ZASCA 17 (22 March 2017). Even though the appeal was granted by the court a quo, the presiding judge had not properly investigated the interests of justice; such that the appeal should have never been granted.

¹¹ *Four Wheel Drive v Rattan N.O.* 2019 (3) SA 451 (SCA) para 34

¹² Section 16 (1) (a) of the Superior Courts Act, 10 of 2013

¹³ *Medox v Commissioner, South African Revenue Service* 2015 (6) SA 310 (SCA) para 10 and *Tecmed Africa (Pty) Ltd v Minister of Health and Another* [2012] All SA 149 (SCA) para 17

The merits of this application for leave to appeal

(i) **Section 17(1)(a)(i): Reasonable prospects of success**

[27] Apropos section 17(1)(a)(i) (i.e. reasonable prospects of success), this application for leave to appeal is pursued on several ultimately imbricated grounds. For the reasons already mentioned, I do not intend to reference or traverse all the grounds of the (proposed) appeal.

[28] That said, the main or central thrust of this application for leave to appeal is duplicated and repeated in several respects in the notice of application for leave to appeal. This main or central thrust is, however, in essence encapsulated in paragraphs 7 and 8 of the notice of application for leave to appeal, being:

“7. The Court erred in relying on the provisions of clause 4.5.6 of the Arbitration Agreement which clothes the Arbitrator with the power to determine whether a valid contract is in place between the parties.

8. Even though such “power” was afforded to the arbitrator in terms of the Arbitration, same could not be exercised *mero muto* and had to fall within the scope of the enquiry as formulated by the pleadings. Only in circumstances where an issue is properly placed in dispute, could the parties to the dispute be required to deal with such dispute by adducing evidence, if necessary.”¹⁴

[29] Simply stated, the applicant contends that there are reasonable prospects that another court will conclude that the arbitrator’s clause 4.5.6 power (i.e., the power to determine if a valid contract was in place between the parties) was in truth a standalone power, which would only be triggered if the issue was expressly pleaded.

[30] Leaving aside for a moment my findings in the review judgment on whether the clause 4.2 issue was “pleaded”, for the various reasons traversed in my judgment in the review application, the applicant’s contentions are irreconcilable with, and do not survive, a unitary interpretation of the arbitration agreement.

[31] In fact, the applicant’s contentions impermissibly and improperly require a reader of the arbitration agreement to:

¹⁴ See also paragraphs 9, 10 15, 16, 18, 19, and 20

- a. Read into clause 4.5.6 a qualification to the effect that such must be pleaded in order for the arbitrator to exercise such power (a qualification that is simply not there and not tacitly imposed by clause 2.1 of the arbitration agreement, as the applicant argues); or
- b. simply disregarded the applicant's section 12B complaints; the circumstances resulting in the reference to arbitration, the subsequent conclusion of the arbitration agreement, and clause 4.5.6's express terms.

[32] The applicant's contentions also ignore the applicant's primary obligation to have established – in the arbitration proceedings – the validity of its sub-lease,¹⁵ and, in turn, the franchise agreement. Unfair or unreasonable contractual practices can only exist within the context of a valid and extant agreement. This is especially so where the applicant withdrew its claim 3 in the arbitration proceedings. The applicant did not seriously, if at all, challenge this reasoning in the application for leave to appeal.

[33] Importantly, the Controller of Petroleum Products only directed the parties, in referring the applicant's complaints to arbitration, to "appoint an arbitrator and agree on the rules that apply during the arbitration process". However, the parties voluntarily and intentionally went much further. They concluded a comprehensive arbitration agreement; traversing additional substantial and material terms (including clause 4.5.6).

[34] As such, ultimately, the questions of whether clause 42 was required to be pleaded, and whether it in fact was pleaded, are irrelevant considerations. This is because they are trumped by a unitary interpretation of the arbitration agreement. The sanctity of contract requires that the applicant, like any other contracting party, be held to the (arbitration) agreement, it voluntarily concluded.¹⁶ I am of the opinion that there is no prospect of an appeal court finding otherwise.

[35] In any event, only to the extent that this is relevant to this application for leave to appeal, the second respondent did not arbitrarily or *mero muto* exercise his clause 4.5.6 stand-alone power. The evidence in the arbitration establishes, on a balance of probabilities,

¹⁵ See *Kriegler v Minitzer* 1949 (4) SA 821

¹⁶ 68 Wolmarans Street Johannesburg *supra* para 18

the fact of the head-lease's termination; an issue also addressed in argument before the arbitrator.

- [36] The applicant also seeks leave to appeal in respect of the striking out orders that I granted in the review application. It is trite that an applicant must make their case in the founding affidavit for that is the case which a contesting respondent is called upon to either affirm or deny.¹⁷ A respondent has thus only one opportunity to deal with the applicant's cause of action, and to present evidence in opposition; and to do so in the answering affidavit.¹⁸ A failure to strike out material new matter in a replying affidavit is axiomatically prejudicial to the respondent (in this instance the first respondent). Moreover, a striking out order of the kind in issue is a discretionary matter. As such, it is trite that an appellate court will not readily interfere in a lower court's exercise of a discretion unless the discretion is exercised improperly, injudiciously, unreasonably or based on a misapplication of the law. The applicant fails to assert, in seeking leave to appeal, a satisfactory case in any of the aforesaid regards.
- [37] Leave to appeal is also sought by the applicant against the costs orders granted. The relevant general principles on costs are that (i) the award of costs is in the discretion of the presiding judicial officer, and (ii) the successful party should have its costs,¹⁹ and (iii) appellate courts are slow to interfere with costs orders.²⁰ That said, as I understand matters, the challenge to the costs orders granted is tied to the merits of this application for leave to appeal. The applicant did not argue that the costs order in issue should not have followed the result. As such, there is nothing more to say on this score.
- [38] All things considered, I am not satisfied that the applicant has made out a compelling enough case that it enjoys reasonable prospects of success on appeal. More specifically, the applicant has failed to convince me, on proper grounds and a sound and rational basis, that there is a reasonable prospect or realistic chance of success on appeal or that

¹⁷ Director of Hospital Services v Mistry (272/77) [1978] ZASCA 126 (9 November 1978).

¹⁸ Gold Fields Limited and Others v Motley Rice LLC, In re: Nkala v Harmony Gold Mining Company Limited and Others (48226/12) [2015] ZAGPJHC 62; 2015 (4) SA 299 (GJ); [2015] 2 All SA 686 (GJ) (19 March 2015), paragraph 122.

¹⁹ Ferreira vs Levin N.O and others; Vryenhoek and others v Powell NO and others 1996 (2) SA 621 CC para 3

²⁰ Tebeila Institute of Leadership, Education, Governance and Training vs Limpopo college of Nursing and Another 2015 (4) BCLR 396 (CC) paras 13 and 14 and Hotz and others vs University of Cape Town 2018 (1) SA 369 CC in paragraphs 25 and 28

any other court will come to a different conclusion, or grant different orders, than I did in the review judgment.

(ii) *The applicant's reliance on section 17(1)(a)(ii): Some other compelling reason*

[39] As foreshadowed above, in its notice of application for leave to appeal, the applicant relies only on section 17(1)(a)(i) (i.e. reasonable prospects of success).

[40] Yet, in its belatedly filed heads of argument in this application for leave to appeal, the applicant endeavours – at the proverbial last minute – to spread its bets by pursuing, as an alternative, reliance upon section 17(1)(a)(ii) (i.e., some other compelling reason).

[41] On this score, paragraph 3.3 of the applicant's heads of argument simply states, without more, the following:

“It is submitted that this matter involves important questions of law on Section 33 of the Arbitration Act and as well as motion court practice (Rule 6).”

[42] As to the claimed first “important question of law” justifying the applicant's alternative reliance on section 17(1)(a)(ii)'s, Mr Venter, for the applicant, - after some pressing on my part to articulate the question of law in issue - opaquely stated it to be: The interaction, as I understood it, between section 12B of the Petroleum Products Act, 1977 and section 33 of the Arbitration Act, 1965.

[43] The unclear articulation of the first “important question of law” aside, the applicant overlooks the fact that the parties concluded the aforesaid comprehensive arbitration agreement (including its clause 4.5.6). The comprehensive arbitration agreement removes any need for an appeal court to consider the interaction between section 12B and section 32 within the context of this matter. There is thus no important question of law requiring determination.

[44] The applicant also baldly claims a second “important question of law” pertaining to uniform rule 6. In response to my enquiry, Mr Venter stated the uniform rule 6 reference is to the striking out order that I granted in respect of the new matter raised in the applicant's replying affidavit. There is however no “public importance”, or important question of law raised, in this regard. The law on this score is well-established and trite. There is no challenge to the manner in which I exercised my discretion.

[45] As such, neither of the aforesaid two (additional) grounds, raised under section 17(1)(a)(ii), are of any public importance, and do not raise any important questions of law. I am accordingly unable to find – within the facts and circumstances of this matter – that any questions of law or any matter of public importance exist which demands the attention of either a Full Court of this Division or the Supreme Court of Appeal. The applicant’s reliance on the dicta in *Sidwell NO v Du Buisson NO*²¹ is thus misplaced.

[46] Before closing this topic, I must refer to the Pretoria High Court decision in *Phiri v Phiri and Others*.²² Therein the following warning in respect of grounds of appeal being pursued outside of those listed in a notice of application for leave to appeal was issued:

“It does not help the Applicant to marshal grounds of appeal over the bar which have not been set out clearly and succinctly in the notice for leave to appeal, no matter how meritorious these might be, which is not the case in my view, otherwise, there is no need for the Rules; *vide Xayimpi v Chairman Judge White Commission (formerly known as Browde Commission* [2006] 2 ALL SA 442 E at 446 i-j.”

[47] All things considered, I am of the opinion that there is no (other) compelling reason(s) existing under the rubric of section 17(1)(a)(ii) why the appeal should be heard.

(iii) The interests of justice consideration

[48] The applicant similarly blandly alleges, in paragraph 3.6 of its heads of argument, under the alternative reliance on section 17(1)(a)(ii):

“It is also submitted that the administration of justice also justifies consideration by the Supreme Court of Appeal.”

[49] Notwithstanding that the applicant does not make any serious claims or arguments on this score in its application for leave to appeal, I find that there is no potential for injustice should leave to appeal be refused. It is moreover not in the interest of justice that the appeal should be heard.

[50] If anything, granting the applicant leave to appeal will unnecessarily delay the interests and administration of justice in bringing this matter to finality. This is particularly so where the applicants initially approached the Controller of Petroleum Products during

²¹ 2016 JDR 2014 FB paras 11 and 12

²² (39223/2011) [2016] ZAGPPHC 341 (14 March 2016)

November 2020. Thereafter, there were full-blown arbitration proceedings before the second respondent followed by the voluminous review application before me.

- [51] Additionally, my aforesaid views on the interests of justice consideration in this application for leave to appeal are entrenched if regard is had to my below-mentioned gatekeeper responsibilities.

This is also a “gatekeeper” application

- [52] An application for leave to appeal must also to be regarded and treated as a gatekeeper application.²³
- [53] This is because an application for leave to appeal – requiring a peremptory formal application to the Court handing down the judgment in issue - is a formal request to allow an appeal against that court's decision; requiring the applicant to demonstrate a reasonable prospect of success or compelling reasons for the appeal to be heard. An application for leave to appeal is thus the crucial first step in an appeal process.
- [54] The "gatekeeper" nomenclature indubitably signifies access control. It refers to the fact that an application for leave to appeal is an important, necessary and unavoidable judicially controlled filter; promoting the interests and administration of justice by preventing disqualifying, vapid or specious appeals from clogging-up an already overburdened and understaffed court systems.
- [55] Otherwise stated, the "gatekeeper" function ensures that scarce judicial resources are not wasted on appeals that are unlikely to succeed. In this regard, the Supreme Court of Appeal in *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and Others*²⁴ emphasised 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”.

²³ See inter alia Moorcraft AJ's statement in *Lee v Minister of Safety and Security and Another (Leave to Appeal)* 2025 JDR 1114 (GJ) para 7

²⁴ 2013 (6) SA 520 (SCA) para 24

- [56] Reid J, in *Venter and another v Steyn and others*,²⁵ in similar terms articulates the nature of the gatekeeper function in an application such as this as follows:

“The workload in the judiciary is ever increasing and a judge who considers any application for leave to appeal, and specifically an appeal to the Supreme Court of Appeal has a judicial duty to ensure that unmerited appeals do not become part of the workload of the Supreme Court of Appeal. Appeals without merits should simply not be granted leave to appeal.”

- [57] Shongwe JA similarly emphasised this gatekeeper-function in the following pithy terms in *Mothule Inc Attorneys v The Law Society of the Northern Provinces*:²⁶

“It is important to mention my dissatisfaction with the court a quo’s granting of leave to appeal to this court. The test is simply whether there are any reasonably prospects of success in an appeal. It is not whether a litigant has an arguable case or mere possibility of success.”

- [58] In considering and determining this application for leave to appeal, I am thus mindful of the gatekeeper-function that a High Court must play in, and when, determining an application for leave to appeal.

Additional considerations

- [59] In addition to that stated elsewhere herein regarding the dicta in *Phiri v Phiri*, for purposes of this application for leave to appeal, I must record two important “concessions” (I use the noun loosely) made by Mr Venter, for the applicant, during his oral argument in the application for leave to appeal.

- [60] First, Mr Venter confirmed the applicant’s abandonment of its reliance on section 32 of the Petroleum Products Act for purposes of the review application. Second, Mr Venter conceded, in response to my enquiry – within the context of a unitary interpretation of the arbitration agreement – that regard was to be had to the applicant’s section 12B request to the Controller of Petroleum Products.

- [61] The concession listed in the above paragraph thus stands directly at odds with the applicant’s assertion in paragraph 22 of the application for leave to appeal; namely that

²⁵ 2024 JDR 0190 (NWM)

²⁶ *Mothule Inc Attorneys supra*

I had incorrectly placed some reliance on the applicant's section 12B request to the Controller of Petroleum Products.

- [62] I must also mention my disquiet regarding paragraph 14 of the applicant's notice of application for leave to appeal. Therein it is contended that because the applicant was not a party to the head-lease, it "did not have any reason to investigate the validity of the head lease ... for purpose of investigating whether clause 42 of its lease agreement might have been triggered".
- [63] As traversed in my judgment in the review application, the applicant repeatedly references, directly and indirectly, the applicant's concerns regarding the fate of the head-lease and the first respondent's conduct respect thereof, in its correspondence, with the Controller.
- [64] In my view, the assertions in paragraph 14 of the applicant's notice of application for leave to appeal thus lacks candour. The assertions are materially contradicted by the correspondence traversed in the review judgment; so too by the fact and content of the claimant's claim 3 in its statement of claim in the arbitration proceedings dealing directly with the fate of the head-lease (irrespective of the claims' subsequent withdrawal).

Conclusion

- [65] A careful consideration of this application for leave to appeal, even with a generous evaluation of its merits and also having regard to the applicant's belated reliance on section 17(1)(a)(ii), reveals that there is no satisfactory basis made out for leave to appeal to be granted.²⁷
- [66] The aforesaid is because I am of the opinion that neither of section 17(1)(a)'s jurisdictional requirements for the granting of leave to appeal are met. I am unpersuaded that the (proposed) appeal has a reasonable or realistic chance of succeeding. Furthermore, no issues of law, or public importance, are implicated. No other compelling reason why the appeal must be heard exists. The interests of justice also do not warrant an appeal. As such, there is no basis for me to grant leave to appeal.

²⁷ See *Fusion Properties 233 CC v Stellenbosch Municipality* [2021] JOL 49443 (SCA) para 18

[67] On the issue of costs, the general rule is that, subject to a court's discretion, costs follow the result. There is no reason for the fate of the costs of this application for leave to appeal not to follow the result. Mr Venter did not suggest otherwise. Counsel for both parties agreed that scale C should apply if the application for leave to appeal should fail.

Orders

[68] For the reasons set out above, I grant the following orders:

The application for leave to appeal is dismissed with costs (scale C to apply).



AMM AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Electronically submitted:

Delivered: This judgment was prepared and authored by the Acting Judge whose name is reflected above. This judgement is handed down electronically by circulation to the Parties / their legal representatives by email and/or by uploading it to the electronic file of this matter on CaseLines.

COUNSEL FOR THE APPLICANT:	Adv. JA Venter
INSTRUCTED BY:	Des Naidoo & Associates
COUNSEL FOR THE FIRST RESPONDENTS:	Adv. T Marolen
INSTRUCTED BY:	Lawtons Inc.
DATE OF ARGUMENT:	18 March 2025
DATE OF JUDGMENT:	07 April 2025

