



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

CASE NO: 2024-075293

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
<u>23/07/2025</u> DATE	
 SIGNATURE	

In the matter between

NALEDI COAL & LOGISTICS PROPRIETARY LIMITED

Applicant

And

**LI COAL CLEAN COAL GASIFICATION
PROPRIETARY LIMITED**

Respondent

JUDGMENT IN APPLICATION FOR LEAVE TO APPEAL

PEARSE AJ:

1. This is an application for leave to appeal against the whole of my judgment and order of 07 May 2025. The applicant in this application is the respondent in the main application. The applicant in the main application opposes this application. I refer to the parties as they were in the main application. The reader of this judgment is taken to be familiar with the facts and issues traversed in my main judgment.
2. Although the application for leave to appeal is dated 29 May 2025, it does not appear to have been uploaded on CaseLines and was only drawn to my attention on 08 July 2025. By agreement between the parties and arrangement with the registrar's office, the application was argued before me on the morning of 21 July 2025.
3. The application for leave to appeal lists nine grounds of appeal. I address each of them briefly in paragraphs 7 to 30 below.
4. For reasons that follow, I conclude that this application does not satisfy the test for the grant of leave to appeal and should be dismissed with costs.

5. Leave to appeal may only be granted if the court is of the view that the appeal would have a reasonable prospect of success or that there is some other compelling reason why an appeal should be heard.¹
6. *Smith* explains that “*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.*”² This test, set out in section 17(1)(a)(i) of the Act, requires more than the possibility of success; it demands a demonstrable prospect of a different outcome. See too the articulation of the test in *Mkitha*.³
7. The first ground of appeal is that I “*erred in failing and/or refusing to exercise the court’s inherent jurisdiction and powers to mero motu raise and decide on the issue of the breach of contract by the [applicant], in that the [applicant] on 8 May 2024, failed to deliver coal in compliance with the specifications set out in the supply agreement on a Free On Truck (‘FOT’) basis.*”
8. This ground of appeal highlights a failure on the part of the respondent to differentiate between the supply agreement and the transport arrangement. The terms of the former agreement were common cause on the papers before court,

¹ Section 17(1)(a)(i) and (ii) of the Superior Courts Act 10 of 2013

² *Smith v S* 2012 (1) SACR 567 (SCA) [7]

³ *MEC for Health, Eastern Cape v Mkitha and another* [2016] ZASCA 176 (25 November 2016) [16]-[18]

including that the respondent would be responsible for transporting the coal from point A to point B. Indeed, they were recorded in a document that both parties identified as recording their consensus in respect of the supply of a consignment of coal. The latter arrangement pertained to an ancillary request by the respondent that the applicant assist in facilitating the transportation of the coal. The terms of that arrangement were not recorded in writing but formed the subject matter of a discussion between executives of the parties. Even on the respondent's own version, payment by it of the costs of a third-party contractor was not contingent on the quality of the coal, an issue that was, instead, expressly regulated in the supply agreement.⁴ This stands to reason, in my view, because the contractor's costs would be incurred regardless of the quality of the coal transported by it. In any event, the fact that not even the respondent sought to link payment to quality means that any suggestion that a breach of the supply agreement would excuse payment under the transport arrangement is without force and most unlikely to find favour with an appellate court.

9. Ms Lifero, who appeared for the respondent at the hearing of this application, sought to develop this ground of appeal by submitting that the applicant does not show that the "*correct*" coal was delivered by Sekunjalo.
10. But nowhere in the answering affidavit is it contended that liability for the costs of transporting the coal was contingent on its identity or quality. When I put this

⁴ See paragraphs 49 and 50 of the main judgment.

difficulty to Ms Lifero, she acknowledged that the proper facts had not been placed before court.

11. To address this deficiency in the papers, Ms Lifero suggested that there might have been an implied or tacit term of the transport arrangement or related trade usage to the effect that liability for the costs of transporting the coal would be contingent on its identity or quality, i.e. that the applicant would only be entitled to payment if the correct coal was delivered by Sekunjalo.
12. Even if such an unspoken term or trade usage were capable of being invoked by the respondent in the circumstances of this case, it was not contended for in the answering affidavit. And Ms Ashton for the applicant fairly observed that it is prejudicial for a new point not canvassed on the papers before the court *a quo* to be relied on as the basis for seeking leave to appeal.⁵
13. A second ground of appeal contends for a similarly-worded error on my part in relation to *"the breach of the sale agreement in that payment was made by the [respondent] on the basis that the correct product would be sold in compliance therewith"*. Issue is taken with my finding that the papers disclosed no pertinent denial by the respondent of the assertion that, at the time of the sale, it had satisfied itself in respect of all of the terms of the sale.

⁵ *Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA) [30]

14. There is little to differentiate this ground of appeal from its predecessor. First, the respondent identifies no such denial. Second, the respondent considers that I overlooked or undervalued its contention that the coal was paid for on the understanding that its quality would be as specified in the supply agreement. But, if that is so, the respondent has its remedies in law for breach of that agreement. It does not follow that the respondent is excused from making payment for services rendered by a third party under the transport arrangement. As recorded in paragraphs 51 and 67 of the main judgment, it was disclosed to me at the hearing of the main application that an arbitration is underway between the parties in which the respondent seeks relief against the applicant arising out of the alleged breach of the supply agreement, and not the transport arrangement, relating to the alleged contamination of the coal. To my mind, that disclosure underscores the conclusion that the breach-related defence to the main application was without merit and provides no basis for this application.
15. As a third ground of appeal, the respondent contends for a misdirection on my part in finding that its complaint of coal contamination was irrelevant to the proper adjudication of the main application in which the transport arrangement was the focus of the dispute.
16. I do not understand this ground of appeal to take the matter further. As Ms Ashton observed, the respondent does not contest the finding in paragraph 64 of the main judgment that, *“besides Mr Phillip’s assertions of contamination, there is no evidence in the record supportive of a defence that the coal loaded and/or*

delivered was in fact contaminated." Any contamination of the coal is irrelevant to the costs of its transportation and I do not understand it to be disputed on the papers that they were incurred and paid by the applicant to the contractor at the instance and on behalf of the respondent. The legal principles of agency and mandate traversed in paragraphs 31 to 36 of the main judgment – which are not challenged in this application – entitle the applicant to reimbursement as claimed in the main application. The fact that this application takes no issue with the main judgment's identification and application of such principles further underscores the conclusion that an appellate court would be most unlikely to reach a different conclusion in respect of the applicant's claim.

17. A fourth ground of appeal submits that I misdirected myself by admitting evidence by Mr Ramadje in spite of my finding that nothing would turn on its admission or exclusion "*since, even if I were to disregard the evidence of Mr Ramadje, I would still be minded to grant the relief ordered in paragraph 70 below.*" As I understand this ground, it is to the effect that such evidence was relevant to the defence raised by the respondent inasmuch as it was undermining of that defence.
18. There is no suggestion that the respondent sought either to strike out or to respond to the evidence of Mr Ramadje. Nor does the respondent engage with the view expressed in my main judgment that the issue of any coal contamination could have been addressed in detail by it in answer to paragraph 17 of the founding

affidavit.⁶ Instead, the respondent put up little more than a bare denial, which the applicant rebutted by means of Mr Ramadje's evidence. If the respondent considered that affidavit to offend the rules of motion proceedings, it should, in my view, have challenged its admission at the time. To cater for the possibility of a different view on the matter, I considered whether – and decided that – the relief claimed by the applicant should properly be granted even in the absence of the evidence of Mr Ramadje. There is no engagement by the respondent with that finding.

19. A fifth ground of appeal is that I erred in failing and/or refusing *"to find in favour of the [respondent] after court has meru moto raised the Arbitration clause that is peremptory if regard is had to its wording."*
20. Insofar as I understand this ground of appeal, it seems to me that it is misdirected. The arbitration clause is to be found in the supply agreement and regulates disputes arising out of that agreement. It is presumably for that reason that there are ongoing arbitration proceedings between the parties in respect of the alleged contamination of the coal. The arbitration clause finds no application in respect of the dispute underpinning the main application since that dispute pertains to the transport arrangement and was correctly ventilated in judicial proceedings. Even if I am wrong in this regard, it is notable that the answering affidavit did not take issue with the applicant's initiation of an application as opposed to an arbitration. In other

⁶ See paragraphs 24 and 64 of the main judgment.

words, the respondent condoned any breach by the applicant of the arbitration agreement.

21. As its sixth ground of appeal, the respondent contends that I erred in failing to have due and/or proper regard to the prejudice suffered by it *“as they paid for a product that was not in compliance with the specifications in the supply agreement”*. Issue is taken with my observation in regard to the email dated 04 June 2024 that *“[t]he reference to a cash flow problem is indicative not of an objection to paying for Sekunjalo’s services per se but of an inability to pay for its services before the respondent is paid by its client for the coal.”*

22. There appear to be two parts to this ground of appeal:

22.1. In the first instance, the respondent reiterates its primary grievance that it has suffered prejudice in paying for coal that did not fall within the agreed quality specifications. As I observe in both judgments, that is a fight for another forum.

22.2. Second, the respondent takes issue with my reading of the email of 04 June 2024. Besides the fact that that reading is not central to my determination of the main application, I remain of the view that, had the transport arrangement included an agreement or even an understanding on the part of the respondent that it would not be liable for the costs of transporting its coal, either in any circumstances or in circumstances

where it turned out to be contaminated, its representative would have said something to that effect in the email. Instead, the representative alluded to a cash flow difficulty suggestive of its inability to pay the transport costs rather than that it was not liable to do so. Nor did the respondent reply to subsequent emails from, or a demand on behalf of, the applicant for payment of Sekunjalo's costs of transporting the coal from the mine to the port. I did not understand counsel for the respondent to suggest otherwise at the hearing of the main application or this application.

23. A seventh ground of appeal takes aim at my recordals (a) that I discerned no factual or legal basis for the suggestion by the respondent that the applicant had contracted with Sekunjalo in its own right such that it – as opposed to the respondent – was liable for Sekunjalo's costs and (b) that the applicant had derived no benefit from the transport arrangement. The thrust of the complaint appears to be that I failed adequately to appreciate that *"the [applicant] was paid at the time of the conclusion of the supply agreement despite its subsequent failure to fulfil its obligations in respect to delivering the ordered coal"*.

24. To my mind, there is no merit to this ground of appeal.

- 24.1. No case was made out in the answering affidavit to the effect that the applicant would bear the costs of transporting the respondent's coal from the mine to the port. Nor was any such factual or legal basis for liability on the part of the applicant suggested to me by counsel for the respondent.

- 24.2. And it is incorrect to submit that the respondent derived no benefit from the transport arrangement. It is not in dispute that the coal it purchased from the applicant was transported by Sekunjalo from the mine to the port from where it was to be exported at the respondent's instance. The transportation service that was procured was rendered. If the applicant breached its obligations under the supply agreement, the respondent may expect to secure relief in the arbitration proceedings.
25. In its eighth ground of appeal the respondent challenges my application of the *Plascon-Evans* rule inasmuch as I held that its defence amounted to a bare denial in circumstances where, in my assessment, *"Mr Phillip initiated and participated in the key engagement with Mr Mphuthi and could and should have told the court what was or was not discussed and agreed between the parties."* According to this ground, a defence in the form of a breach of the supply agreement had indeed been advanced by the respondent.
26. This ground of appeal appears to misconstrue the relevant part of the main judgment.
- 26.1. In paragraphs 53 and 56 of that judgment I observed that, despite the deponent's having represented the respondent in the discussion that culminated in the transport arrangement, the answering affidavit does not say either that the respondent would not be liable for the costs of transporting its coal or that such liability would fall away in the event that

the coal was contaminated or otherwise of poor quality. Insofar as contamination is raised as an alleged breach of contract, the assertion relates not to the transport arrangement but to the supply agreement. The latter agreement is neither the basis for the applicant's claim nor relied on as a defence to that claim.

- 26.2. This ground of appeal perpetuates the respondent's blurring of lines between the supply agreement and the transport arrangement. As noted, the terms of the former agreement were common cause on the papers before court. As regards the latter arrangement, I did and do not understand there to be any factual dispute in regard to the applicant's primary assertion that it facilitated transportation services at the instance and on behalf of the respondent such that the resultant costs were for the account of the respondent. If that was not the arrangement discussed and agreed between the parties, it was for Mr Phillip to say as much in the answering affidavit. He did not do so and I am satisfied that I did not err in finding there to be no material dispute of fact precluding final relief on motion. I do not consider there to be any reasonable prospect that an appellate court would come to a different conclusion on the score.
27. Finally, the respondent submits that I erred in granting the relief sought by the applicant in the form of an order for payment of the costs of the transportation of the coal.

28. This ground of appeal does not appear to take the matter further. In particular, it does not explain why another court would be likely to differ with the central findings in paragraph 2 (read with paragraph 52) of the main judgment that:

"I consider that the applicant acted within the scope of authority conferred on it by the respondent and is entitled to be reimbursed for the transport costs of the third party, which are not said to have been unnecessary, unreasonable and/or incurred in bad faith. Nor do I consider any contamination-related term of the transport arrangement to be demonstrated on the papers."

29. Ms Lifero argued that the applicant had failed to disclose Sekunjalo's invoice or to demonstrate what transportation costs had allegedly been incurred by it on behalf of the respondent.
30. The difficulty with this argument is again that it was not raised in the answering affidavit, which takes no issue with the necessity for or reasonableness of such costs. In that context, I am satisfied that the founding affidavit suffices on this score.
31. In the result, I do not consider there to be a reasonable prospect that another court would come to a different view on the papers before court on any material issue determined in the main judgment. The central deficiencies in the opposing papers presented in the main application would, in my view, continue to stymie the prospects of success of any appeal. No other compelling reason for an appeal was identified by the respondent; nor do I perceive there to be such a reason.

32. In the circumstances, this application for leave to appeal is dismissed with costs.


PEARSE AJ

This judgment is handed down by uploading it to CaseLines and emailing it to the parties or their legal representatives. The date of delivery of the judgment is 23 July 2025.

Counsel for Applicant:	Alex Ashton
Instructed By:	Darryl Ackerman Attorneys
Counsel for Respondent:	Ashanti Lifero
Instructed By:	NRT Attorneys
Date of Hearing:	21 July 2025
Date of Judgment:	23 July 2025