

REPUBLIC OF SOUTH AFRICA



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

CASE NO.: 8657/2023

(1)	REPORTABLE: NO.
(2)	OF INTEREST TO OTHER JUDGES: NO.
(3)	REVISED: NO.
<u>13 August 2025</u>	 _____ SIGNATURE
DATE	

In the application for leave to appeal of:

JOHN GERALD KULLMANN

APPLICANT

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand-down is deemed to be 14:00 on 13 August 2025.

JUDGMENT

MEIRING, AJ:

Introduction

- [1] This is an application by which the *ex parte* applicant seeks leave to appeal against the order that this court handed down on 2 May 2024 refusing his prayer to be placed in voluntary surrender. He seeks leave to the full bench of this division.

[2] The application was heard virtually at 9:30 on the morning of Thursday, 25 July 2024. The creditors that had entered the fray in the court below, represented by Ms Indhira Naik, were not present in court.

[3] Out of an abundance of caution, as the hearing was about to start, Ms Dineo Sereko, who ably fulfilled the role of registrar at this hearing, telephoned the attorney that had represented the creditors. She was told that, owing to a dearth of money, they would not be represented at the hearing.

[4] The hearing proceeded in their absence.

The facts

[5] On 2 May 2024, this court handed down an order refusing on various grounds Mr Kullmann's prayer that his estate be voluntarily surrendered.

The law

[6] The test whether leave to appeal is to be granted is framed in section 17(1) of the Superior Court Act, 2013:

"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."*

[emphasis added]

[7] The applicant does not say whether he brings this application under section 17(1)(a)(i) or (ii). However, the complaints that he raises indicate that he relies only on section 17(1)(a)(i). Thus, he asks this court for leave on the basis that "*the appeal would have a reasonable prospect of success*".

- [8] If an applicant shows that the appeal would have a reasonable prospect of success (and the requirements in section 17(1)(b) and (c) are also met), the court must grant leave to appeal. The exercise of the power to grant leave is not then in the discretion of the court.¹
- [9] The wording of section 17(1)(a)(i) does not set the threshold for leave to appeal any higher than it was at common law before the promulgation of the Superior Courts Act, 2013.
- [10] In its unreported decision in *Ramakatsa v African National Congress*,² the Supreme Court of Appeal explained the test for leave to appeal:³

“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.”

[emphasis added]

Analysis of the case for leave

- [11] In large measure, the applicant’s case for leave was a repetition of the arguments advanced at first instance.
- [12] The grounds of appeal are marshalled under two heads. First, the applicant criticises what he characterises as various factual findings. Then, he attacks various findings of law, as he calls them.

¹ Erasmus *Superior Court Practice*, vol 1, A2-54.

² (724/2019) [2021] ZASCA 31 (31 March 2021).

³ At para 10.

- [13] Under the rubric of factual findings, the applicant first criticises the court's finding that it was not in the interests of justice to admit the applicant's late delivery of a sworn valuation in the absence of an application for condonation.
- [14] That is, of course, no factual finding properly so called. Rather, it is a ruling that, without an application for condonation, the court would not exercise the discretion granted to it by rule 27 to allow the belatedly submitted sworn valuation. It would not be in the interests of justice to do so.
- [15] The judgment makes it plain that the court was uncomfortable with the manner of the production of the sworn statement. Not only was condonation not sought – which is no mere formality, but requires the litigant in question to go on oath carefully and in detail – but the court was wholly in the dark over *“the process that led to its production at beyond the eleventh hour”*.
- [16] In his notice of appeal, the applicant tries to make a virtue out of the fact that the sworn valuation *“did not differ materially from the value set out in the estate agent's valuation attached to the founding affidavit in any event”*. He says that *“therefore the figures set out in the founding affidavit can still be relied upon”*. Yet, nearly two years passed between the two dates. It is hard to accept the soundness of the earlier valuation without more: while there might be an explanation for the fact that there was no change, that explanation is not advanced. The court found the business of the valuation of the immoveable property to be unsatisfactory. It was obviously unsatisfactory.
- [17] What is more, the applicant seeks to minimise the court's finding that it is important that there be compliance with the rules governing applications of this type so that all creditors might from the outset have a full and accurate picture of the applicant's financial state.
- [18] The simple fact is that there ought to be compliance with the rules. While the court might indeed grant condonation in the absence of an application for it, that should be only in truly exceptional circumstances. There are no such circumstances present here.

- [19] What the applicant does not, however, attack is the further finding of the court that, even if the sworn valuation had been received, the outcome of the application would have been no different.
- [20] In my considered view, a court of appeal could not on this ground reasonably arrive at a conclusion different to that of the trial court.
- [21] The second factual finding of the court that the applicant attacks is its criticism that the founding affidavit did not set out his assets with sufficient particularity. There was no sworn valuation of the applicant's furniture. The applicant did not disclose how his legal fees were being paid.
- [22] The applicant conceded that, while his furniture was not accompanied by a sworn valuation, it is clear that his primary asset, which comprised almost his entire estate, was the immoveable property and that the benefit to creditors could still be calculated based on the figures provided for that. The applicant contended that he still satisfied the requirements of section 6(1) of the Insolvency Act.
- [23] Yet, in the light of the view that I take above over the late delivery of the sworn valuation of the applicant's immoveable property, this argument ill assists him.
- [24] In sum, upon a careful consideration of the founding affidavit, it was not marked by the level of candour that allowed the court to appraise the financial position of the application with much confidence.
- [25] In my considered view, a court of appeal could not on this ground reasonably arrive at a conclusion different to that of the trial court.
- [26] The third factual finding of the court that the applicant criticises is the finding that the applicant could not truthfully have advanced the argument that his brother was also, jointly and severally, liable to pay his litigation costs and that creditors might, therefore, also attach and sell his immoveable property. This, the court found, was less than candid since the applicant's brother in question was, at the

time of the making of the founding affidavit, himself seeking voluntarily to surrender his estate.

[27] The applicant argues that there is nothing “*inherently false*” about that statement and that “*the body of creditors between both the applicant and his brother is almost identical, especially when considering the unsecured creditors*”. Yet, what this contention leaves entirely out of account is that, in circumstances where the applicant’s brother was seeking to surrender his own estate, it was his own creditors’ demands that would through that process be met. The fact that there was a similarity in the body of creditors does not undo the fact that, were the applicant’s brother’s estate to have been surrendered, nothing from his estate would logically have remained to satisfy his joint and several liability with the applicant.

[28] In the circumstances, it was directly relevant to the applicant’s application for voluntary surrender that his brother had set a parallel process of voluntary surrender in train. Accordingly, there is no basis upon which to criticise the court’s finding in this regard.

[29] In my considered view, a court of appeal could not on this ground reasonably arrive at a conclusion different to that of the trial court.

[30] The fourth factual finding that the applicant criticises is the finding that he had failed to demonstrate on a balance of probabilities that his estate was insolvent or that it would be to the advantage of creditors that his estate be sequestrated.

[31] For the reasons set out in the judgment, some of which are adumbrated above, the court did not have sufficient confidence that the full picture concerning the applicant’s estate had been fairly presented to it. Accordingly, it was justified in finding that the applicant had not on a balance of probabilities demonstrated those two requirements.

[32] In my considered view, a court of appeal could not on this ground reasonably arrive at a conclusion different to that of the trial court.

[33] Lastly, under the heading “*Findings of law*”, the applicant says the court erred by finding that the applicant had failed to meet the standard of *uberrimae fides*.

[34] It admits of no argument that the Latin tag *uberrimae fides*, which translates as the utmost good faith, requires a very high standard of good faith and frankness.

[35] The application that served before me, marked by *inter alia* the deficiencies discussed above, was rather far from that standard. Were it otherwise, the standard of *uberrimae fides* would have very little meaning indeed.

Costs

[36] Despite the applicant’s contentions to the contrary, the costs order granted against him was entirely warranted.

Order

1. The application for leave to appeal is dismissed.



J J MEIRING
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

Date of hearing:	25 July 2024
Date of judgment:	13 August 2025

APPEARANCES

For the first applicant:	Advocate Tyrone Lautré
Instructed by:	Kaveer Guinness Inc.