

REPUBLIC OF SOUTH AFRICA



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

Case No: 18093/21

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

6/8/2025
DATE

SIGNATURE

In the matter between:

LEKOLOTA ABRAM MAKUA

Applicant

AND

**FIRSTRAND BANK LIMITED (FIRST NATIONAL BANK
OF SOUTHERN AFRICA LIMITED)**

Respondent

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 6 August 2025.

REASONS ON LEAVE TO APPEAL

PHOOKO AJ

INTRODUCTION

- [1] This is an application for leave to appeal against certain parts of the judgment and order of the court *a quo* delivered on 02 May 2022 especially the refusal by that Court to grant the application for postponement, and the cost order against him.
- [2] The respondent opposed the application for leave to appeal.

THE ISSUES

- [3] The issue to be determined is whether there are reasonable prospects that, if leave to appeal is granted, the appeal would succeed or there is a compelling reason for the appeal to be heard.

APPLICABLE LEGAL PRINCIPLES

- [4] The threshold for the granting of leave to appeal has been raised in that leave to appeal may only be granted if the appeal would have a reasonable prospect of success.¹
- [5] In *Mont Chevaux Trust v Tina Goosen & 18 Others* it was held that “*the use of the word “would” in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against*”.² Consequently, 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*”.³
- [6] Section 17(1)(a)(ii) of the Superior Courts Act also provides for the granting of leave to appeal where there is a compelling reason to do so. This was affirmed in *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* where the court held that:

“...[L]eave to appeal may be granted, notwithstanding the Court’s view of the prospects of success, where there are

¹ Section 17(1)(a)(i) of the Superior Courts Act, 10 of 2013 (“the Superior Courts Act”).

² Ibid.

³ *S v Smith* 2011 (1) SACR 567 (SCA) at para 7. See also *MEC for Health, Eastern Cape v Mkhitha and Another* [2016] ZASCA 176 at para 17.

nonetheless compelling reasons why an appeal should be heard...”

- [7] In light of the above, I now proceed to evaluate the submissions of the parties to ascertain whether the evidence and/or submissions before this Court warrant the granting of leave to appeal on the basis that there is a reasonable prospect that the appeal would succeed, or that there are compelling reasons why an appeal should be heard.

APPLICANT’S SUBMISSIONS

- [8] The applicant’s grounds for leave to appeal include that the court *a quo* erred when it refused an application for postponement. According to the applicant, the court erred in not finding that it was in the interest of justice to grant the applicant a postponement to supplement his application.
- [9] In addition, the applicant contended that the court *a quo* erred in not granting the postponement because his dispute with the respondent was still before the Ombudsman for Banking Services.
- [10] In the alternative, the applicant averred that there is a compelling reason that the appeal should be heard because the refusal of the application for postponement and the costs order against him denies him an opportunity to address the court about all the facts of the matter amongst others.
- [11] Additionally, the applicant submitted that it was not in the interest of justice to award a cost order against him thereby denying his right to resolve his complaint as per section 129 of the National Credit Act 34 of 2005.
- [12] The applicant further contended that the denial of the application for postponement was in breach of sections 1 (c), 26 and 34 of the Constitution.

RESPONDENTS’ SUBMISSIONS

- [13] The respondent inter alia argued that the applicant failed to specifically challenge

the reasons of the court *a quo* and demonstrate why they are erroneous in law. According to the respondent, this fails to meet the threshold for an application for leave to appeal as the applicant was *inter alia* re-arguing his case.

[14] The respondent argued that the issues raised by the applicant, ranging from the application for postponement and a dispute pending before the Ombudsman for Banking Services, were adequately addressed by the court *a quo*.

[15] Considering the above, the respondent submitted that there was no reasonable prospect of success on appeal, if leave to appeal is granted, and that there were no compelling reasons as to why the appeal should be heard.

EVALUATION OF EVIDENCE AND SUBMISSIONS

[16] This Court does not intend to rewrite and/or repeat every aspect of the judgment of the court *a quo* because most of the issues raised by the applicant have been comprehensively dealt with in the decision of the court *a quo*. In my view, the applicant has overlooked certain aspects of the judgment or has been selective in his reading of the judgment of the court *a quo*.

[17] In *Persadh v General Motors South Africa (Pty) Ltd*⁴ Plasket J formulated the following principles applicable when a party seeks a postponement of an application:

“First, as that party seeks an indulgence he or she must show good cause for the interference with his or her opponent’s procedural right to proceed and with the general interest of justice in having the matter finalized; secondly, the court is entrusted with a discretion as to whether to grant or refuse the indulgence; thirdly, a court should be slow to refuse a postponement where the reasons for the applicant’s inability to proceed as (sic) been fully explained; where it is not a delaying tactic and where justice demands that a party should have further time for presenting his or her case; fourthly, the prejudice that the parties may or may not suffer must be considered; and fifthly, the usual rule is that the party who is responsible for the postponement must pay the wasted costs.”

[18] The reasons that were advanced by the applicant for the postponement in the

⁴ 2006 (1) SA 455 (SE).

court *a quo* were made up of multiple and different versions that never formed part of his pleadings. These were not conventionally supported by an affidavit clearly setting out the basis for the postponement request. His case changed from one to another. The court *a quo* was placed in a difficult position as to which reason to believe. In my view, the applicant failed to show good cause for the postponement and was far from assisting the court to help him.

[19] The changing nature of the applicant's case did not end in the court of first instance but also occurred in this Court. I say so because during oral argument, a new argument that sought to interpret the content of the decision of the Ombudsman for Banking Services emerged. This was never part of the issues that were fully ventilated in the court *a quo*. This aspect also does not feature in the notice of application for leave to appeal and the heads of argument. This also applies to arguments related to the violation of sections 1 (c), 26 and 34 of the Constitution which do not appear in the notice of application for leave to appeal but somehow found their way into the applicant's heads of arguments. While this Court sympathizes with the applicant, it is placed in a hard position because of a constantly changing case or arguments. This alone does not assist the applicant's case. This Court is aware of the exception to the general rule which allows the introduction of new legal arguments on appeal.⁵ However, for the reasons stated above, this is not applicable in this case because of the changing nature of the applicant's case. It cannot be said that the interests of justice give a litigant a licence to keep shifting his case.

[20] Furthermore, the applicant has, in my view, not shown how the court *a quo* erred in fact and/or law or that the judgment of the court *a quo* or its order would have been different if the court had applied the correct law or facts. Instead, the applicant has gone on a fishing expedition and raised several purported errors without identifying "the facts clearly and succinctly (with reference to the record) and legal principles ... underpinning these contentions".⁶ In other words, the

⁵ *Moroka v Premier of the Free State Province and Others* (295/20) [2022] ZASCA 34 (31 March 2022) para 36. See also *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 39.

⁶ *Celliers and Others v Kleinfontein Aandeleblok (Edms) BPK and Another (Leave to Appeal)* (4755/2022) [2024] ZAGPPHC 1103 para 19.

grounds for leave to appeal are widely expressed and give the applicant room to argue every finding made by the court *a quo* and place the respondent in a difficult position to respond to the case that they are called upon to answer. For ease of reference, the applicant's grounds of appeal are reproduced as follows:

- “1. The learned judge erred in not finding that it was in the interests of justice to grant the applicant postponement to supplement his application.
- 2 The learned judge erred in not finding that it was in the interests of justice to postpone the respondent's exception sine die to allow the applicant an opportunity to exhaust his dispute pending before the Banking Ombudsman and other processes in terms of the National Credit Act 34 of 2005 and the Consumer Protection Act 68 of 2008.
3. The learned judge erred in not finding that the excipient's exception was premature and inconsistent with the applicant's referral of his complaint to the Banking Ombudsman in terms of section 129 of the National Credit Act 34 of 2005.
4. The learned judge ought to have found that there was no factual dispute on any of the main issues relevant to the applicant's relief, for the following reasons:
5. One: The applicant's evidence is that the applicant was aware that there was a pending dispute on the same facts, same parties before the Banking Ombudsman referred by the applicant as required in terms of section 129 of the National Credit Act 34 of 2005 ("the NCA").
- 6- Two: The applicant's evidence is that the excipient was served with applicant's referral to the Consumer Commission and thereafter to the Banking Ombudsman. The respondent have not (and cannot) meaningfully deny this fact. There is thus no dispute on this issue.
7. Three: The applicant has proved that the respondent labored under the same mistake:
8. 1 . The evidence showed that the respondent at all relevant stages and during the argument on the 14 March 2022 that once a referral is made to the Banking Ombudsman in terms of the NCA, should ignore such process and proceed with litigation in the High Court on the same issues pending before the Banking Ombudsman.
9. The learned judge erred in not finding that the applicant had satisfied the requirements of section 129 of the NCA in electing to refer his complaint to the Banking Ombudsman for resolution.

10. The appeal would have a reasonable prospect of success in terms of section 17(1)(a)(i) of the Superior Courts Act 10 of 2013 based on the above grounds.
14. Additionally or alternatively to the above: there is a compelling reason why the appeal should be heard (section 17(1)(a)(ii) of the Superior Courts Act 10 of 2013 in that the orders/judgment dismissing application to supplement applicant's papers/application for postponement/ upholding of respondent's exception and costs against the applicant have the consequences that the Court all facts of the parties' dispute. It was not in the interests of justice to order costs against the applicant and deny him opportunity to continue exercising his rights to resolve his complaint as required by the NCA."

[21] To merely list what is said to be errors without pinpointing and substantiating why they are said to be errors in the judgement is not helpful. In light of the above exposition, I am persuaded by Vorster AJ in *Celliers and Others v Kleinfontein Aandeleblok (Edms) BPK and Another*⁷ where he said:

"The peremptory requirement that an application for leave to appeal must set out the grounds upon which leave is sought is not met when incorrect findings are merely listed. Since an appeal will not lie against the reasons for the Court's judgment but against the substantive order, whether a Court of Appeal will agree with the reasoning of this Court would be of no consequence if it cannot be shown that the result would have been different (references omitted).

What compounds the criticism of the notice is that it does not specify whether the grounds are based on incorrect findings of fact or law, or whether the attack is against the Court's failure to act judicially. Even if the grounds can be deduced from the notice, the defect is not cured because it is not for the Court or the respondents to have to analyze the notice to establish what grounds the applicants intended to rely upon but did not clearly set out. The rambling notice of appeal falls woefully short of the requirement that the notice must set out the grounds upon which leave to appeal is sought."

[22] I have carefully considered the written and oral submissions of the parties, the judgment of the court *a quo*, all the evidence that was presented before it, and the bar for leave to appeal. I am persuaded by counsel for the respondent that the applicant has failed to meet the requisite threshold for leave to appeal to be granted because the appeal would not have a reasonable prospect of success in the substantive application. There is also no compelling reason why the appeal

⁷ Ibid at paras 20-21.

should be heard.

[23] In my view, the applicant's case does not meet the requirements of any of the categories mentioned under section 17 of the Superior Courts Act, one of them being there being no reasonable prospects of success.

ORDER

[24] I, therefore, make the following order:

- (a) The application for leave to appeal to the full bench is dismissed with costs, costs to be on party-party scale.



PHOOKO AJ

**ACTING JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, PRETORIA**

APPEARANCES:

Counsel for the applicant:

Adv R Ratshidile

Instructed by:

Mmowane Attorneys

Counsel for the respondent:

Adv T.E Mabayakhulu

Instructed by:

Hack Stupel & Ross Attorneys

Date of Hearing:

24 June 2025

Date of Judgment:

6 August 2025