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

Case number: **17916/2022**

(1) REPORTABLE: YES/**NO**

(2) OF INTEREST TO THE JUDGES: YES/**NO**

(3) REVISED: NA

DATE: 19/8/2025

SIGNATURE:

In the matter of:

ANTHONY KILROY BEAMISH

Applicant

and

MS VAN DER MERWE

Respondent

JUDGMENT: LEAVE TO APPEAL

Summary: Application for leave to appeal.

DE BEER AJ

Introduction

1. In a judgment granted on 11 March 2025, the applicant's application was dismissed with costs, based on the reasons detailed in the judgment. The applicant has applied for leave to appeal, which is opposed by the respondent.

The Test For Leave To Appeal

2. The full court held as follows:¹ *"This dictum serves to emphasise a vital point: 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 needs 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"*.
3. An application for leave to appeal the judgment of this court must fulfil and comply with the requirements stipulated in section 17 of the Superior Courts Act, 10 of 2013 (*"The Act"*), which reads as follows:

"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; and

¹ In *Democratic Alliance v President of the Republic of South Africa and Others* 2124/2020 [2020] ZAGPPHC 326 (29 July 2020) at paragraphs [4] – [5].

(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.*" (own underlining)

4. Applications for leave to appeal are governed by rule 49(1) of the Uniform Rules of Court and sections 16 and 17 of the Act. In terms of rule 49(1)(b) *"when leave to appeal is required and it had not been requested at the time of the judgment or order, application for such leave shall be made and the grounds therefor shall be furnished within fifteen days after the date of the order appealed against."*

5. In terms of section 16(1)(a)(i) of the Act, an appeal against any decision of a division as a court of first instance lies, upon leave having been granted if the court consisted of a single judge, either to the SCA or to a full court of that division, depending on the discretion issued in terms of section 17(6). Section 17(6)(a) of the Act provides:

"If leave is granted under subsection (2)(a) or (b) to appeal against a decision of a division as a court of first instance consisting of a single judge, the judge or judges granting leave must direct that the appeal be heard by a full court of that Division, unless they consider-

- (i) That the decision to be appealed involves a question of law of importance, whether because of its general application or otherwise, or in respect of which a decision of the Supreme Court of Appeal is required to resolve differences of opinion; or*
- (ii) That the administration of justice, either generally or in the particular case, requires consideration by the Supreme Court of Appeal of the decision, in which case they must direct that the appeal be heard by the Supreme Court of Appeal."*

6. Section 17 makes provision for leave to appeal to be granted where the presiding judge is of the opinion that either the appeal would have a reasonable prospect of success or there is some other compelling reason

why the appeal should be heard, including whether there are conflicting judgments on the matter under consideration.

7. Considering the statutory and regulatory matrix, three questions for consideration arise in the application for leave to appeal. These questions are not distinct but interrelated. The first question is whether the applicant filed a proper notice of application for leave to appeal, which concisely and succinctly set out the grounds upon which leave to appeal is sought. The second question is whether the appeal would have a reasonable prospect of success or whether there are compelling reasons that exist why the appeal should be heard, such as the interests of justice. The third question is whether the application for leave to appeal sets out expressly why the default position of an appeal to a full court of the Division should not prevail, as well as the questions of law or fact, or other considerations involved that dictate that the matter should be decided by the SCA.
8. Previously, under the common law, the test for leave to appeal was whether a respondent may or might have reasonable prospects of success on appeal.
9. However, subsequent to the promulgation of the Act, the legislator has introduced a jurisdictional requirement to applications for leave to appeal.
10. Leave to appeal may only be given when the appeal would have reasonable prospects of success, or *alternatively*, if there is some other compelling reason why the appeal should be heard.
11. The new statutory test is more stringent than its common law predecessor.
12. Section 17(1)(a)(i) of the Act amended the common law test that has been applicable in approaching the application for leave to appeal. The new test, as provided for in the Act/statute/jurisdictional requirement, replaced the word "might" or "may" in the common law test with the word "*would*". It is

thus clear that the test that is outlined in terms of the Act/statute is more stringent.

13. That an appeal “*would*” have reasonable prospects of success is a more searching inquiry than a mere possibility that another court might come to a different conclusion. It is equally insufficient that an applicant’s case is merely arguable.
14. This accords with the purpose of provisions in the Act dealing with appeals, being a bold step by the legislator to limit unnecessarily protracted litigation and/or frivolous applications for leave to appeal.
15. The Honourable Justice Prinsloo in *E-TV v Minister of Communications*,² stated the following in paragraph 11 of the judgment: “*It has been held that the test to be applied before leave to appeal may be granted, is more stringent than what it was before. The test was codified in Act 10 of 2013 which came into operation on 23 August 2013.*” (own emphasis added)
16. The full bench in *Minister of Justice and Constitutional Development v Southern Africa Litigation Centre*,³ stated the following regarding the previous test applied: “*The traditional approach which our courts have followed in the past when confronted with applications of this nature is to determine whether there is a reasonable prospect that another court may come to a different conclusion.*” (see: *Commissioner of Revenue v Tuck* 1989 (4) SA 888 (T) at 890 B).
17. At paragraph 9 of this judgment, the Court stated that: “*Section 17(1)(a)(i) provides that leave to appeal may only be given where the court concerned is of the opinion that the appeal would have a reasonable prospect of success.*” (own emphasis)

² 2015 JDR 2418 (GP).

³ 2015 JDR 2102 (GP).

18. This criteria, which over many years has been adopted in regard to the question of leave to appeal, has now obtained statutory force. To this must be added the consideration that in this subsection, the word “*would*” is used in determining the conclusion to which the judge/judges must come before leave to appeal can be granted. In *Mont Chaevaux Trust (I[...]) v Tina Goosen*,⁴ the Land Claims Court held (in an *obiter dictum*⁵) that the wording of this subsection raised the bar of the test that now has to be applied to the merits of the proposed appeal before leave should be granted.
19. In *Notshokovu v S*,⁶ it was held⁷ that an appellant (in an application for leave to appeal) faces a higher and stringent threshold, in terms of the Act (i.e., this subsection), compared to the provisions of the Repealed Supreme Court Act, 59 of 1959. The SCA stated that “*This Court has to decide whether or not the Courts below, including the two judges in this Court, or to have found that reasonable prospects of success existed to grant leave or special leave respectively. (see S v Khoasasa [2002] ZASCA 113; 2003 (1) SACR 123 (SCA); S v Matshona [2008] ZASCA 58; 2013 (2) SACR 126 (SCA)).*”
20. The Honourable Justice Bertelsmann in *Mont Chaevaux Trust (I[...]) v Tina Goosen and 18 Others*⁸ 2014 GDR 2325 (LCC) at para 6 found the following: “*It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another Court might come to a different conclusion, see Van Heerden v Cronwright and Others 1985 (2) SA 342 (T) at 343 H. 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.*”

⁴ Unreported, LCC Case No LCC 14R/2014 dated 3 November 2014 cited with approval by the full bench in the Acting National Director of Public Prosecution v Democratic Alliance (unreported, GP Case no: 19577/09 dated 24 June 2016) at para 25.

⁵ In the distinction between *ratio decidendi* and *obiter dicta*, see *Pretoria Council v Levinson* 1949 (3) SA 305 (A) at 316 – 17; *Santam Versekeringsmaatskappy Bpk v Roux* 1978 (SA) 856 (A) at 871 H – 872 B; *True Motives 84 (Pty) Ltd v Mahdi* 2009 (4) SA 153 (SCA) at 168 A – F and 186C – 188D; *Hardenburg v Nedbank Ltd* 2015 (3) SA 470 (WCC) at 477 A – I; *BSB International Link CC v Readam South Africa (Pty) Ltd* 2016 (4) SA 83 (SCA) at 87B – 89B.

⁶ Unreported, SCA Case no: 157/15 dated 7 September 2016.

⁷ At para 2.

⁸ 2014 GDR 2325 (LCC) at para 6.

21. As was stated by the Honourable Justice Plaskett JA, in *S v Smit*,⁹ the test is now more stringent in that: *“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 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.”*
22. An appellant faces a higher and more stringent threshold, in terms of the Act, compared to the provisions of the Repealed Supreme Court Act, 59 of 1959 (see *Van Wyk v S Galela v S* [2014] ZASCA 152; 2015 (1) SACR 584 (SCA) para [14]) guides an application for leave to appeal.
23. The criteria laid down in *Ramakatsa v African National Congress* [2021] JOL 49993 (SCA) at par 10 guides an application for leave to appeal: *“Turning the focus to the relevant provisions of the Superior Courts Act (the SC Act), leave to appeal may only be granted where the judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there are compelling reasons which exist why the appeal should be heard such as the interests of justice. This Court in Caratco, concerning the provisions of section 17(1)(a)(ii) of the SC Act pointed out that if the Court is unpersuaded that there are prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal. Compelling reason would of course include an important question of law or a discreet issue of public importance that will have an effect on future disputes. However, this Court correctly added that “but here too the merits remain vitally important and are often decisive.” 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*

⁹ 2012 (1) SACR 567 (SCA) at para 7.

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 prospect 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.”

24. In *MEC (Health) Eastern Cape v Mkhitha*¹⁰ the SCA stated that “An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.

Grounds Of Appeal

25. The following are the grounds of appeal as per the notice:¹¹

“1. In coming to the conclusion that the legal proceedings brought by the respondent against the applicant were not instituted “without reasonable grounds”, the Court disregarded the involvement of Mr Ronald Bobroff and Mr Paul O’Sullivan in the institution and funding of the proceedings.¹

1.1. This was a material misdirection, as:

1.1.1. their involvement in the proceedings was not meaningfully disputed;

¹⁰ 2016 (ZASCA) 176.

¹¹ CaseLines: 013-3 to 013-7.

- 1.1.2. *they had a clear motive and intention to defame, discredit, humiliate, harass and vilify the applicant (which was also not disputed);*
- 1.1.3. *the proceedings were precipitated by the respondent's admitted offer to assist Mr Bobroff to "sort out" the applicant;*
- 1.1.4. *details of and documents from the proceedings were published on the websites of Mr Bobroff and Mr O'Sullivan, and extensively on social media (which was also not disputed);*
- 1.1.5. *the above facts demonstrated that each of the three legal proceedings was an abuse of process, as (in the words of the Court) "procedures permitted to facilitate the pursuit of the truth are used for purposes extraneous to that object";²*

1.2. *On this basis, an appeal court will hold that, on the papers, and on a balance of probabilities, the legal proceedings were instituted for an ulterior purpose and thus without reasonable grounds.*

2. *In finding that the respondent had not instituted the legal proceedings "without reasonable grounds", the Court relied on a document signed by a prosecutor, in which she remarked that the respondent's "story could be true".³*

2.1. *This was a material misdirection, as:*

- 2.1.1. *the remark by the prosecutor was plainly a passing comment and not a considered finding of fact, and was obviously made for diplomatic rather than forensic reasons;*
- 2.1.2. *no probative value could be placed on it in the absence of confirmation from the prosecutor as to what she meant by it;*
- 2.1.3. *the remark was also made without affording the applicant audi alteram partem principle partem (sic);*

- 2.1.4. *any allegation “could be true” where there are no third party witnesses – the remark by the prosecutor does not take this any further;*
 - 2.1.5. *the prosecutor did not have before her the material (which this Court had), which showed that the criminal complaint was made with an ulterior motive, and that the sexual assault allegation was a concocted afterthought tacked onto an affidavit addressing altogether unrelated issues.*
- 2.2. *On this basis, an appeal court will hold that the Court was incorrect to hold that the proceedings were not instituted without reasonable grounds.*
- 3. *The Court found that the respondent had not instituted legal proceedings against the applicant “persistently”, solely on the bases that: (a) “a substantial period has elapsed from the respondent’s withdrawal of proceedings until the institution of this [present] application”,⁴ and (b) “there are no current legal proceedings or live controversies instituted by the respondent against the applicant”.⁵*
 - 3.1. *This was a material misdirection, as:*
 - 3.1.1. *in fact, only four months had elapsed between the withdrawal of the last of the respondent’s proceedings (the private prosecution) and the institution of the applicant’s application, which is not substantial;*
 - 3.1.2. *in any event, in law, any lapse of time in the institution of an application of this nature is not a relevant factor in the determination of whether the respondent had, before that, instituted proceedings “persistently”;*
 - 3.1.3. *in law, the test is not whether there are “current legal proceedings or live controversies” between the parties, nor can that be a factor in the determination of whether the respondent instituted legal proceedings “persistently”;*
 - 3.1.4. *indeed, the purpose of the relief sought in an application of this nature is precautionary – its function is not, and cannot be, to put an end to “current” or “live” proceedings,*

and thus it cannot be instituted until the legal proceedings in issue have been withdrawn or dismissed;

3.1.5. *the common cause fact that the respondent had initiated three legal proceedings against the applicant, essentially on the same facts, and then withdrawn each of them, was sufficient to show that she had been instituting legal proceedings “persistently”.*

3.2. *On this basis, an appeal court will hold that, on the papers, and on a balance of probabilities, the respondent instituted legal proceedings “persistently”.*

Application Of The Law To The Facts And Grounds

26. The grounds are a regurgitation of arguments advanced during the hearing and have been considered and addressed in the judgment granted on 11 March 2025.
27. The reasons advanced for the judgment have already been addressed in the judgment granted on 11 March 2025. The grounds for leave to appeal do not rise to the test referred to above and duly applied herein.
28. After reconsidering the facts and the arguments advanced during argument in this court and during the main application, the court is not convinced that another court would come to a different outcome in dismissing the application that sought final relief in terms of the Vexatious Proceedings Act, 3 of 1956.
29. There are no arguments or reasons advanced or facts presented that will render this matter to be elevated to an appeal court, nor will it be in the interest of justice to grant leave to appeal. This (the fact that there are no interest of justice elements present to grant leave, i.e., the second statutory ground) was conceded by the applicant’s counsel, correctly so. Elevating this matter to a court of appeal will not be in the interest of justice.

30. There are essentially three grounds advanced seeking leave to appeal. The first and second grounds contradicted each other; the third ground does not pass the judicial authoritative test to grant leave to appeal.
31. Ground one relies on “*motive*” regarding individuals not cited as parties; they also didn’t provide admissible evidence or the opportunity to gainsay the applicant’s version, and the evidentiary value is weak. Be that as it may, the first ground is not based on common cause fact.
32. Ground two is based on the contention that the version of the prosecutor has no probative value, which is ironic, as it contradicts the first ground. However, it is the applicant who brought this report to the fore; therefore, unlike the first ground regarding the unsubstantiated motive inference, as contended, the report by the prosecutor and the existence of the paragraph referred to were common cause facts.
33. Ground three was considered comprehensively in the judgment; it is improbable that an appeal court would come to a different outcome.
34. In this regard, it is apposite to refer to paragraphs 43 to 45 of the judgment dated 11 March 2025.
35. Respondent’s counsel argued that the ostensible grounds of appeal on behalf of the applicant provided no reasons to grant leave to appeal; I agree.
36. No other court would come to a different finding; all the grounds were advanced during the hearing and thereafter considered in the judgment. A different outcome advancing the same arguments on the facts duly considered is improbable.
37. Accordingly, the application for leave to appeal should be dismissed. Counsel for the respondent submitted that the costs to follow should be on the same scale granted in the previous judgment; I agree.

Order

38. In the premises, the court grants the following order:

38.1. The application for leave to appeal is dismissed.

38.2. Costs to be paid by the applicant to the respondent on the scale between party and party, on scale C, including the costs of senior counsel.

DE BEER AJ

Acting Judge of the High Court

Gauteng Division

Date of hearing: 7 August 2025

Judgment delivered: 19 August 2025

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