



**IN THE HIGH COURT OF SOUTH AFRICA, MPUMALANGA DIVISION,
(MBOMBELA MAIN SEAT)**

Case No. 1957/2024

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED YES/NO
<u>26 September 2025</u> DATE	 [REDACTED] SIGNATURE

MOUNTAINLANDS ESTATE OWNERS

ASSOCIATION

First Applicant

SAPPI SOUTHERN AFRICA LIMITED

Second Applicant

SIMPLY SEE (PTY) LIMITED

Third Applicant

BARBERTON CHAMBER OF BUSINESS

Fourth Applicant

and

MPUMALANGA TOURISM AND PARKS

AGENCY

First Respondent

SIPHELELE GENERAL TRADING 15 (PTY) LIMITED

Second Respondent

THE MEC OF THE MPUMALANGA DEPARTMENT:

JUDGMENT
APPLICATION FOR LEAVE TO APPEAL AND CROSS APPEAL

MONTSHO-MOLOISANE AJ

- [1.] This is an application for leave to appeal to the Supreme Court of Appeal *alternatively* to the Full Court of this Division, lodged by the Applicants against the whole of the judgment and order granted by this Court on 26 June 2025, in terms of which their application for a final interdict was dismissed, with no order made on costs.
- [2.] The First Respondent (hereinafter referred to as “the **MTPA**”), opposes the application, and lodged an application for leave to cross-appeal against the order of not making a costs order in its favour, on 31 July 2025.
- [3.] On 18 August 2025, the Applicant then filed a Notice in terms of Rule 7(1) of the Uniform Rules of Court, disputing the First Respondent’s attorney’s authority to act on its behalf, and required Adams and Adams Attorneys, its mentioned attorneys of record, to furnish its Power of Attorney to act on its behalf in the application. The Notice was filed more than 10(ten) days after the First Respondent had filed its application for leave to cross-appeal the judgment.
- [4.] On 05 September 2025 Mr Richard Spoor, the Applicants’ attorney of record, filed an affidavit of good cause in terms of Rule 7(1) wherein he sought

condonation for the late filing of the Rule 7(1) Notice. He further requested that this Court to order that the First Respondent's attorneys may not be permitted to act on its behalf unless they satisfy the Court that they are properly authorised to do so. In the said affidavit, Mr Spoor relied on the extracts from the Investigation report titled: *"MPUMALANGA TOURISM AND PARKS AGENCY (MTPA) FORENSIC INVESTIGATION INTO ALLEGATIONS RELATING TO THE BARBERTON MAKHONJWA MOUNTAINS WORLD HERITAGE SITE-14 MAY 2025"*.

- [5.] He argued and relied on the fact that an investigation into the affairs of the MTPA had found that the appointment of the Second Respondent was irregular as defined in the Public Finance Management Act, 1 of 1999, and as such, the authority of the First Respondent's attorneys of record had to be confirmed.
- [6.] The First Respondent then filed a Notice in terms of Rule 30(A) of the Uniform Rules based on the Applicants' non-compliance with the timeframes prescribed by Rule 6(5)(d), and the Practice Directive of this Division regarding the failure to refer the matter for case management.
- [7.] This was an interlocutory application which had to be adjudicated before the hearing of the main application, and submissions were made in that regard.
- [8.] Having considered submissions made on behalf of both parties, I made a ruling condoning the Applicants' late filing of the Rule 7(1) Notice, and further ruled that the First Respondent's attorneys of record and Counsel were not permitted to act on its behalf, unless proof of authority to act was furnished by

way of a Power of Attorney, alternatively documentary proof of such a mandate.

[9.] It is however regrettable that after a lengthy period of deliberations, Mr Seape furnished correspondence from the First Respondent which his instructing attorneys had before the date of hearing of this matter that satisfied the Court that they were duly authorised and had the necessary mandate to act on its behalf.

[10.] The costs of the interlocutory application are costs in the course of the applications before this Court. I now turn to deal with the applications for leave to appeal and cross-appeal.

APPLICABLE LAW

[11.] The Applicants' and First Respondent's applications are brought in terms of Section 17(1)(a) of the Superior Courts Act, 10 of 2013 ("the Superior Courts Act").

[12.] It is now trite that the Superior Courts Act, is the applicable legislation in such applications. It provides for leave to appeal to be granted only in two circumstances. The first envisaged circumstance is where the judge concerned is of the opinion that an appeal would have a reasonable prospect of success. The second circumstance is where there are some compelling reasons why the appeal should be granted¹.

[13.] Section 17(1)(a) of the Superior Courts Act provides that-

¹ Section 17 of the Superior Court Act

“(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”.

[14.] Prior to the coming into force of the Superior Courts Act, the test in an application for leave to appeal was whether there were reasonable prospects that another Court may come to a different conclusion. It appears from the wording of Section 17(1)(a) quoted *supra*, that there is more stringent and onerous test before leave to appeal can be granted.

[15.] It is now authoritatively established that the position remains that, if there is a reasonable prospect of success, leave to appeal should be granted.

[16.] When considering the judicial precedence, the Supreme Court of Appeal (“the SCA”) postulated the test for granting leave to appeal in the case of *MEC for Health, Eastern Cape v Mkhitha and Another*² as follows:

“[16] Once again it is necessary to say that leave to appeal, especially to this Court, must not be granted unless there truly is a reasonable prospect of success. Section 17(1)(a)(i) of the Superior Courts Act 10 of 2013 makes it clear that leave to appeal may only be given where the judge concerned is of the

² MEC for Health, Eastern Cape v Mkhitha and Another (1221/15) [2016] ZASCA 176 at para 17

opinion that the appeal would have a reasonable prospect of success; or there is some other compelling reason why it should be heard.

[17] *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”.*

[17.] In a latter of *Ramakatsa and Others v African National Congress and Another*³ to which I was referred to by both Mr Spoor, appearing for the Applicants and Mr Seape for the MTPA, it was held that:

“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”.

³ *Ramakatsa and Others v African National Congress and Another* (724/2019) [2021] ZASCA (31 March 2021) at para 10

[18.] The SCA, in the case of *Chithi and Others: In re: Luhlweni Mchunu Community v Hanock and Others*⁴, held that:

“[10] *The threshold for an application for leave to appeal is set out in Section 17(1) of the Superior Courts Act which provides that leave to appeal may only be given if the judge or judges are of the opinion that the appeal would have a reasonable prospect of success*”.

[19.] In the case of *MEC for Health Eastern Cape v Mkhitha supra*, the Court emphasised that leave to appeal should not be granted if the Applicant makes out a case of a “*mere possibility of success, an arguable case or one that is not hopeless*”⁵.

[20.] The essence of the judgments quoted *supra* is that leave will be granted only where there are sound and rational basis to conclude that there is a reasonable prospect of success on appeal, based on the facts and the law.

[21.] I, accordingly, consider the Applicants’ application and the cross-application of the MTPA, on the basis that leave should be granted if a reasonable prospect of success is established in respect of each application, or if there are some other compelling reasons why the appeal should be heard.

[22.] The Applicants’ grounds of appeal are set out in their application for leave to appeal and, in summation, are that this Court erred in dismissing their application for a final interdict on the ground of mootness and, alternatively,

⁴ *Chithi and Others: In re: Luhlweni Mchunu Community v Hanock and Others* (423/2020) [2021] ZASCA 123 (23 September 2021)

⁵ At para 17

on the ground that they failed to demonstrate the absence of an alternative remedy.

COMMON CAUSE FACTS

[23.] In order to properly consider the grounds of appeal relied on by the Applicants, it is important to outline the facts which are common cause, as set out in the judgment which is the subject of the two applications, which are that:

- 23.1. The First to Third Applicants are the registered owners of the properties on which 9(nine) of the 13(thirteen) Geosites, located along the Barberton Makhonjwa Mountains ("BBM"), which were declared World Heritage Sites ("WHS") by the United Nations Educational, Scientific and Cultural Organization (UNESCO) in July 2018;
- 23.2. Each of the 13 Geosites infrastructure and facilities constructed thereon at the time of the UNESCO declaration, is located partly within and partly out of the road reserve over which the P77-1 provincial road, traverses. The land comprising the road reserve has not been expropriated.
- 23.3. The South African Government assumed the obligations and responsibilities for the management and protection of the declared WHS, which was assigned to the provincial department, which in turn appointed the First Respondent, the MTPA, as the entity responsible for it.

- 23.4. On 09 May 2022, the South African Heritage Resources Agency (“SAHRA”), a statutory organisation established under the National Heritage Resources Act, 25 of 1999 (“NHRA”), and that is responsible for the management, protection and promotion of heritage resources in South Africa, entered into a Memorandum of Agreement with the First Respondent, the MTPA, in terms of which the latter assumed the responsibility to take all reasonable measures to protect all parts of the Geosites from abuse, damage, obstruction, unauthorised removal, unauthorised excavation, and to comply with the conditions of title of the site and the applicable laws;
- 23.5. On 29 September 2023, the MTPA awarded a tender to the Second Respondent (“the Contractor”), to refurbish and upgrade the 13 Geosites.
- 23.6. The Contractor accessed and commenced with construction activities on the 13 Geosites, without prior engagement with, or obtaining the consent of the landowners, as stipulated in Section 27(21) of the NHRA, which requires the responsible heritage resources authority to agree with the owner of a heritage site prior to engaging in any construction activities thereon;
- 23.7. The First, Second and Third Applicants did not consent to the construction activities on their properties;
- 23.8. The construction activities on the 13 Geosites were also carried out in contravention of Section 27(18) of the NHRA, which stipulates that “*no person may destroy, damage, deface, excavate, alter, remove from*

its original position, subdivide or change the planning status of any heritage site without a permit issued by the heritage resources authority responsible for the protection of such site”.

- 23.9. Upon becoming aware of the construction activities taking place on their properties without their consent, the Applicants’ representatives approached the workers on site, and subsequent thereto, had a number of engagements with the MTPA, pursuant to which on 17 January 2024, the latter agreed to stay the proposed BMM Geotrail upgrade pending the outcome of a consultative process and agreement with the land owners;
- 23.10. On 30 April 2024, the Applicants’ attorney of record Mr Richard Spoor, sent a Letter of demand to the MTPA and the Contractor, wherein he demanded the cessation of all construction activities on the BMM Geotrail, following the failure to stop as agreed at the meeting held on 17 January 2024;
- 23.11. On 24 July 2024 the SAHRA wrote a letter to the MTPA titled “*Order for immediate cessation of all works or actions*” (“Cessation Order”) in respect of all works conducted on the BMM-WHS Geosites; and
- 23.12. The Contractor ceased all construction activities on the 13 Geosites pursuant to the issue of the Cessation Order.
- 23.13. The application, which was opposed by the MTPA, was opposed on the basis that the application was moot, and that the Applicants had an alternative remedy of claiming damages from the Respondents for

any damage that may have been caused by the construction activities carried out on their properties by the MTPA or the Contractor.

23.14. This Court dismissed the application on the ground of mootness of the issues, and the Applicants' failure to satisfy the third requirement for the granting of a final interdict, which is the absence of an alternative remedy, or other alternative remedy which could offer similar protection. Furthermore, relying on the Biowatch principle⁶, this Court made no order as to costs.

THE APPLICANTS' GROUNDS OF APPEAL

[24.] The Applicants contend that this Court erred in finding that:

- 24.1. the application became moot when the SAHRA issued the Cessation order on 24 July 2024, as a result of which all the construction activities on the Geosites were stopped by the MTPA and the Contractor. Mr Spoor contended that while the construction activities have stopped, "*the dispute has not been resolved*";
- 24.2. that there remains a concrete, live controversy over "*the Respondents' right to re-enter and build on private land without the landowners' consent, and a real risk of repetition absent a final interdict*";⁷ and that
- 24.3. the Applicants had no other alternative remedy than to approach this Court for the final interdict to be granted.

⁶ Biowatch Trust v Registrar, Genetic Resources 2009 (6) SA 232 (CC)

⁷ At para 3, Applicants' Heads of argument

[25.] On the issue of costs, Mr Spoor contended that neither of the parties believe that the Biowatch principle is applicable, and he further submitted that “*having regard to the lawless and reckless conduct of the MTPA*”, the Applicants are entitled to an award of costs against the MTPA on an attorney and own client scale.

[26.] On the above stated grounds, Mr Spoor contended that the appeal has reasonable prospects of success.

GROUND OF OPPOSITION OF THE MTPA

[27.] It was contended by Mr Seape, on behalf of the MTPA, that leave to appeal should be refused in that:

27.1. although the Applicants did not rely on the contravention of the provisions of the NHRA in their Founding affidavit to establish a clear right, but relied on the principle of accession as they alleged that they acquired ownership of the 9 Geosites through accession, and that the protections afforded by the NHRA to National Heritage sites are not rights afforded to, or exercisable by them in their capacity as owners;

27.2. that the Court of appeal would identify ownership of all the Geosites as the right that the Applicants sought to assert; and

27.3. accordingly, the Court of appeal would find that the Applicants failed to establish the existence of a clear right as they are the owners of only nine of the thirteen Geosites.

- [28.] A further point that would be dispositive of the application, as submitted by Mr Seape, is that if accession is the basis of ownership as contended by the Applicants, it follows that they can only assert ownership over the Geosites that are situated on land owned by the First to Third Applicant, and not on land owned by Third parties.
- [29.] On the second requirement of the Injury committed, Mr Seape contended that a Court of appeal would find that the Applicants failed to establish that they were injured by the activities of the MTPA as they failed to establish that they acquired ownership of the Geosites infrastructure.
- [30.] On the third requirement of the absence of an alternative remedy, Mr Seape submitted that although this Court found that the Applicants had an alternative remedy by way of laying criminal charges and securing a criminal prosecution⁸, and that the Cessation Order had provided the Applicants with an adequate remedy, this Court failed to explore the fact that the Applicants can still obtain adequate redress by an award of damages.
- [31.] On the above stated grounds, he contended that the leave sought should be refused.
- [32.] In reply to contentions made, Mr Spoor contended that the laying of criminal charges against the contractor by the Second Applicant yielded no results as the perpetrators were never arrested.

⁸ Vide para 45,54 and 59 of the judgment

LEAVE TO CROSS-APPEAL

[33.] The MTPA applies for leave to cross-appeal against the Costs order granted by this Court, in that neither the Applicants nor the MTPA asked for the application of the Biowatch principle as a consideration regarding costs.

[34.] Mr Seape contended that the Biowatch principle finds no application in the circumstances of the case in that the Applicants, though having the constitutionally guaranteed right to access the Court, they are not seeking to assert a constitutional right, and that based on the dismissal of the application, the MTPA should be awarded costs, which should include the costs of two Counsel at Scale C in terms of Rule 67A of the Uniform Rules of Court.

[35.] Mr Spoor for the Applicants, did not make any submissions regarding the Biowatch principle, but in his Heads of argument, contends that neither of the parties believe that the Biowatch principle is of application⁹.

CONSIDERATION OF GROUNDS OF APPEAL

[36.] It is common cause that both Messrs Spoor and Seape are *ad idem* that the Applicants relied on the principle of accession to establish a clear right, and not on the violation of the provisions of Section 27(21) of the NHRA, which require the MTPA to engage with the relevant landowners prior to commencement of any construction activities, as this Court found¹⁰. I am therefore of the view that the submissions of Messrs Spoor and Seape regarding the principle of accession, require adjudication by the Court of

⁹ Vide para 40 of the Heads of argument.

¹⁰ At para 50 to 51 of judgment

appeal to establish whether the Applicants satisfied the requirement of the clear right.

[37.] Regarding the third requirement of the absence of an alternative remedy, which this Court found, was negated by the Cessation Order, Mr Spoor did not place any reliance thereon, as his contention is that the issue is still alive, and as such, the Applicants have no alternative remedy. Although I am not persuaded by this submission, there is a reasonable prospect of success that a Court of appeal may find in the Applicants' favour on the interpretation of the provisions of the NAHRA and the Cessation Order, and more importantly, whether the dispute is still alive, as contended by Mr Spoor.

[38.] I am therefore of the view that the issue of mootness and the clear right require adjudication by the Court of appeal.

[39.] As regards costs, I stand by my comments in the main judgment regarding the conduct of the MTPA before the Cessation Order was issued by the SAHRA on 24 July 2024, and that of the Applicants after the said Order was issued, in persisting with litigation in light of the cessation of construction activities.

[40.] This Court cannot, however be oblivious of the fact that the determination of the issues by the Court on appeal may have a bearing on costs.

[41.] I am therefore constrained to grant the MTPA leave to cross-appeal this Court's judgment on costs in so far as I relied on the Biowatch principle for not making an order on costs.

[42.] I am of the opinion that both the Applicants and the First Respondent, in their respective applications, have met the threshold referred to in Section 17(1)(a)(i) as fully ventilated in the judgments referred to *supra*.

ORDER

[43.] In the result, the following order is granted:

- 43.1. The Applicants are granted leave to appeal to the Full Court of this Division;
- 43.2. The First Respondent is granted leave to cross-appeal the order of costs;
- 43.3. Costs are to be costs in the appeal and cross-appeal.



L.M. MONTSHO-MOLOISANE
ACTING JUDGE OF THE HIGH COURT
MPUMALANGA DIVISION, MBOMBELA

Date heard : 23 September 2025

Judgment electronically delivered

by circulation to all parties : 26 September 2025

Appearances

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