



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

JUDGMENT

Not Reportable

Case no: 19438/2024

21657/2024

7107/2023

In the matter between:

ILSE JOUBERT

APPLICANT

and

JOHANNES STEPHANUS SPAMER

FIRST RESPONDENT

CARINA MYBURG (née SPAMER)

SECOND RESPONDENT

**MAGARETHA SWANEPOEL (née
SPAMER)**

THIRD RESPONDENT

ELITHA VAN DYK (née SPAMER)

FOURTH RESPONDENT

JOHANNES STEPHANUS SPAMER N.O.

FIFTH RESPONDENT

(in his capacity as trustee for the time being in
THE SPAMER FAMILY TRUST)

CARINA MYBURG (née SPAMER) N.O.

SIXTH RESPONDENT

(in her capacity as trustee for the time being in
THE SPAMER FAMILY TRUST)

**MAGARETHA SWANEPOEL (née
SPAMER) N.O.**

SEVENTH RESPONDENT

(in her capacity as trustee for the time being in
THE SPAMER FAMILY TRUST)

ELITHA VAN DYK (née SPAMER) N.O.

EIGHTH RESPONDENT

(in her capacity as trustee for the time being in
THE SPAMER FAMILY TRUST)

LINDISTAR (PTY) LTD

NINTH RESPONDENT

**THE COMMISSIONER OF THE
COMPANIES AND INTELLECTUAL
PROPERTY COMMISSION**

TENTH RESPONDENT

**INT COMPANY AND SECRETERIAL
SERVICES (PTY) LTD**

ELEVENTH RESPONDENT

KIM-LIZA GIBBS

TWELFTH RESPONDENT

Neutral citation: *Joubert v Spamer and Others* (Case no 19438/2024,
21657/2024 and 7107/2023) [2025] ZAWCHC (21 October
2025)

Coram: NUKU J

Heard: 30 September 2025

Delivered: 21 October 2025

Summary: Practice – Application for leave to appeal on the basis that the Court erred in failing to consider causes of action that it was not required to consider – the Court did not err in determining only the issues submitted to it for determination – the appeal would not have reasonable prospects of success – no

compelling reason why the appeal should be heard – application for leave to appeal refused with costs.

ORDER

The application for leave to appeal is refused, and the applicant is directed to pay the party and party costs, including costs of two counsel, where so employed, and such costs shall be on scale B.

JUDGMENT

Nuku J:

[1] This is an application for leave to appeal the judgment and orders issued by this Court on 19 August 2025, which dismissed the three applications filed by the applicant under case numbers 7107/2023, 19438/2024, and 21653/2024. The applicant also seeks leave to appeal the adverse cost orders made under case numbers 7107/2024 and 19438/2024. The application is opposed by the first to ninth respondents as well as the twelfth respondent (respondents).

[2] The judgment the applicant seeks to appeal did not address the merits of each party's case as outlined in the affidavits filed. This was at the applicant's request, whose counsel urged the Court to disregard the pleadings and decide the matter based on settlement offers exchanged between the applicant and the first respondent.

[3] The first respondent made an offer to settle by proposing to buy the applicant's shares in the ninth respondent on certain terms. However, these terms were not acceptable to the applicant. The applicant then made a settlement offer to buy the first respondent's shares in the ninth respondent, but those terms were also not acceptable to the first respondent.

[4] Based on the exchanges between the parties mentioned above, counsel for the applicant argued that the only issue the court needed to resolve was the terms on which the applicant would buy the first respondent's shares in the ninth respondent. He submitted that the court has the power to determine the terms of the buy-out based on principles established in *Robson v Theron*¹ (Robson).

[5] The court then proceeded to decide the matter based on the applicant's argument. Her main difficulty, however, was that she had not provided any evidence to establish the terms of the buy-out. The inevitable result was that the application could not succeed, and it was dismissed accordingly.

[6] In what can only be described as a complete reversal, the applicant now seeks to appeal the judgment because the Court erred by failing to consider the merits of her case as outlined in the affidavits filed. Relying on authorities concerning the Court's power to decide legal issues apparent on the papers on its own accord², counsel for the applicant argued that nothing prevents the applicant from reviving the case she had abandoned.

¹ 1978 (1) SA 841 (A).

² Nedbank v Mendelow NO 2013 (6) SA 130 (SCA) at paras [17] and [18] and CUSA v Tao Ying Metal Industries and Others 2009 (2) SA 204 (CC) at para [68].

[7] Counsel for the applicant, relying on the decision of the Constitutional Court in *Alexkor*³, argued that a litigant who had abandoned a legal contention in a lower court is entitled to revive that contention on appeal.

[8] Finally, relying on authorities dealing with a new point or cause of action on appeal⁴, counsel for the applicant argued that it is permissible for a party to raise a new point of law on appeal for the first time, provided that it does not result in unfairness to the other party, does not introduce new factual issues, and does not cause prejudice.

[9] It was argued on behalf of the respondents that the duty of an appellate tribunal is to determine whether the lower court came to a correct conclusion “...on the facts submitted to it...”⁵. The applicant, having abandoned reliance on her pleaded case, cannot now contend that the court erred in disregarding the case she had requested the court to disregard.

[10] It was further argued that the applicant’s approach, if permitted, would create an unacceptable situation where litigants could ‘bank’ or secure an appeal by deliberately abandoning causes of action before a lower court, and then claiming that those causes of action have reasonable prospects of success on appeal.

[11] It was further argued that the test on leave to appeal cannot be applied to causes of action that were not brought before the court for adjudication. This is

³ *Alexkor Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC) at paras [42]-[44].

⁴ *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at paras [39] and [40], *Moroka v Premier of the Free State Province and Others* (295/20) [2022] ZASCA 34 (31 March 2022) at para [36] and *Ndebele & Another v Industrial Development Corporation of South Africa and Others* (21687/2021) [2023] ZAGPJHC 822 (unreported).

⁵ *Cole v Government of the Union of South Africa* 1910 AD 263 at 272 as referenced in *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) at 23C-D.

because no error can result from a lower court failing to decide issues that it is not required to resolve.

[12] Counsel for the respondents argued that the applicant's reliance on authorities regarding the court's power to determine issues on its own initiative is completely misplaced for several reasons. First, it conflates points of law and causes of action. Second, *Nedbank v Mendelow NO*⁶ is premised upon the fundamental principle that the point of law must be raised and can only be applied '... where the facts to which those principles apply are squarely raised in the papers before the Court (and that were before the High Court) ...'. Thirdly, the same principle was applied in *Cuninghame and Another v First Ready Development 249*⁷ and *CUSA v Tao Ying Metal Industries*⁸ with the former decision referencing the latter where it was stated that: 'Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact obliged, mero motu, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law. That would infringe the principle of legality.'⁹ It was submitted that these decisions are distinguishable from the applicant's case as the latter does not involve a wrong perception of the law, but rather the abandonment of the very foundation of the applicant's pleaded case.

[13] Counsel for the respondents also distinguished *Alexkor* by asserting that the Constitutional Court's ruling states that an abandoned legal contention can only be revived on appeal if it is included in the pleadings and evidence, and its

⁶ 2013 (6) SA 130 (SCA).

⁷ 2010 (5) SA 325 (SCA) at para [30].

⁸ 2009 (2) SA 204 (CC).

⁹ At para [67].

reconsideration does not cause unfairness to the other party. In other words, the legal contention must not introduce new factual issues. In the present case, the applicant not only abandoned a legal contention but also the entire cause of action.

[14] Finally, it was argued that *Barkhuizen v Napier*¹⁰ and *Paddock Motors*¹¹ are also distinguishable because they involved situations where the parties presented the Court with a stated case, and all that the Court was required to do was to decide a point of law based on the agreed facts. In the present case, it was submitted that the facts are highly disputed, and this is beside the point that the applicant requested the Court to disregard the facts.

[15] The authorities relied on by the applicant are indeed distinguishable based on the argument advanced by the respondents. This is because, as the respondents argue, appellate tribunals are required to assess the correctness of lower court decisions based on the cases submitted to those courts for determination.

[16] To allow a party to abandon its entire cause of action only to permit it to advance the court's acquiescence to such abandonment as a ground of appeal does not accord with the provisions of section 17(1)(a) of the Superior Courts Act 10 of 2013 (Superior Courts Act) which provides that

‘Leave to appeal may only be granted where the judge or judges concerned are of the opinion that (a)(i) the appeal would have a reasonable prospect of success; or (b) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.’

¹⁰ 2007 (5) SA 323 (CC).

¹¹ 1976 (3) SA 16 (A)

[17] The other problem with the applicant's approach is that it would require the appellate court to evaluate the merits of the applicant's claim based on the affidavits filed, acting like a court of first instance. This is not the purpose of an appellate court, and adopting such an approach would undermine the entire judicial hierarchy. It is easy to imagine a situation where the applicant, if granted leave to appeal on this basis, chooses not to present all her causes of action to the appellate court and then later uses this as grounds for further appeals. In my opinion, such a situation is untenable.

[18] Having considered all of the above, my conclusion is that the applicant has not satisfied the requirements for granting leave to appeal as outlined in s 17(1)(a) and (b) of the Superior Courts Act. This is because, in my opinion, the appeal would not have a reasonable prospect of success, nor are there any compelling reasons that justify hearing the appeal. Leave to appeal will accordingly be refused, and costs are to follow the result.

Order

[19] As a result, the following order shall issue:

The application for leave to appeal is refused, and the applicant is directed to pay the party and party costs, including costs of two counsel, where so employed, and such costs shall be on scale B.

LG NUKU
JUDGE OF THE HIGH COURT

Appearances

For applicant: RS Van Der Reit, SC and HN De Wet
Instructed by: Berhard van der Hoven Attorneys, Pretoria
Care of: Bisset Boehmke McBlain Attorneys, Cape Town

For respondent: G Walters SC and A Brouwer
Instructed by: Spamer Triebel Inc, Bellville
C/O: Norman, Wink Stephens, Cape Town.