

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates:	YES / NO
Circulate to Magistrates:	YES / NO



**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

Case no: 1496/2019

In the matter between:

BASE MAJOR CONSTRUCTION (PTY) LTD

Applicant

and

**THE DEPARTMENT OF ROADS AND PUBLIC
WORKS, NORTHERN CAPE PROVINCE**

First Respondent

**THE MEC, THE DEPARTMENT OF ROADS
AND PUBLIC WORKS, NORTHERN CAPE**

Second Respondent

Coram: MAMOSEBO J

Heard: 11/09/2025 (virtually).

Delivered: 31/10/2025.

Summary: Application for leave to appeal – Reliance on s 17(1)(a)(i) and (ii) of the Superior Courts Act 10 of 2013 – Whether the envisaged appeal

has reasonable prospects of success or there are compelling reasons for the appeal to be heard.

ORDER

1. The application for leave to appeal is dismissed with costs.
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JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

Mamosebo ADJP

- [1] This is an opposed application for leave to appeal to the Full Court of the Northern Cape Division, alternatively to the Supreme Court of Appeal, against the whole of my order and judgment handed down on 25 April 2025. The applicant relies on section 17(1)(a)(i) and (ii) of the Superior Courts Act,¹ that its appeal would have reasonable prospects of success and that there are compelling reasons for the appeal to be heard.
- [2] It is trite that leave to appeal may only be given where the judge or judges concerned are of the opinion that, (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.² Thus, even if the court is not satisfied that there are reasonable prospects of success, it is nonetheless enjoined to enquire whether a

¹ 10 of 2013.

² Section 17(1)(a) of the Superior Courts Act 10 of 2013.

compelling reason exists for the appeal to be entertained. A compelling reason includes an important question of law or a discrete issue of public importance that will have an effect on future disputes.³ The operative word in the former provision is “would” which demands a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.⁴

- [3] It has been held that 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 applicant in this matter needs to convince this Court on proper grounds that it has prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. Thus, a sound rational basis for the conclusion that there are prospects of success must be shown to exist.⁵
- [4] Mr Glendinning, for the applicant, submitted that there exist compelling legal issues within the construction industry with wide implications on the enforcement of penalty clauses relating to reciprocal obligations in the performance of construction contracts. He urged the Court to consider that as a compelling factor justifying the granting of leave to appeal. Counsel further urged that I should not only visit the Google site, but also take judicial notice that public institutions default in the payment of contractors, thereby leading to their bankruptcy. It is trite that each case depends on its

³ *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* 2020 (5) SA 35 (SCA) para 2.

⁴ *Mont Chevaux Trust v Goosen and Others* (LCC 14R/2014) [2014] ZALCC 20 (03 November 2014); 2014 JDR 2325 (LCC) para 6.

⁵ *Ramakatsa and Others v African National Congress and Another* (724/2019) [2021] ZASCA 31 (31 March 2021) para 10.

own merits. It has been held that in applications for leave to appeal, the merits remain vitally important and are often decisive.⁶ The approach I took did not turn on the construction industry as a whole but on this particular contract.

[5] The applicant contends that reasonable prospects for a successful appeal exist in that I erred in both fact and law in:

- 5.1 failing to properly consider that the first respondent was precluded from levying penalties against the applicant for the periods during which it (the first respondent) was in material breach of its obligations under the Joint Building Contracts Committee (JBCC) Agreement, namely, paying the applicant the amounts due and payable to it;
- 5.2 failing to order that the applicant had lawfully terminated the JBCC Agreement (the termination declarator) by accepting the first respondent's repudiation and election to terminate the JBCC Agreement;
- 5.3 failing to order the first respondent to instruct its principal agent to issue a further interim payment certificate in terms of sub-clause 38.5.7 of the JBCC Agreement, reversing all penalty amounts levied against the applicant when the first respondent was in breach of its payment obligations;

⁶ *Minister of Justice and Constitutional Development and Others v Southern Africa Litigation Centre and Others* 2016 (3) SA 317 (SCA) para 24.

5.4 failing to conduct a court's duty of proper consideration as espoused by the Constitutional Court (ConCourt) in *Vodacom (Pty) Ltd v Makate and Another*⁷; and

5.5 impermissibly disregarding two Supreme Court of Appeal (SCA) judgments of *Group Five Building Ltd v Minister of Community Development*⁸ ("Group Five"); and *Du Preez v Tornel Props (Pty) Ltd*⁹ ("Du Preez") in respect of the reciprocity principle.

[6] The applicant's reliance and contention that I impermissibly ignored precedent set by the SCA judgments of *Group Five* and *Du Preez* is misplaced. The contracts are different, and the parties' conduct in implementing the terms of those contracts is crucial in the adjudication of the matters. In *Group Five*, it is captured in this fashion:

'The contract was thus not for a lump sum but was based on a priced schedule of quantities. The ultimate contract amount would only be ascertainable once all the executed work had been finally measured and valued at the prices and rates in the schedule of quantities. The contract was thus of a kind that has been described as a "rate and measurement contract".'¹⁰

Of more significance is what the SCA pronounced pertaining to the extension of time; a consideration the applicant *in casu* completely ignored:

⁷ (CCT 51/24) [2025] ZACC 13; 2025 (10) BCLR 1174 (CC) (31 July 2025).

⁸ [1993] 4 All SA 678 (AD).

⁹ [2016] JOL 34123 (SCA) (29 September 2015).

¹⁰ *Supra* fn 8 at 678.

‘It was held by the trial Court and confirmed on appeal that the employer’s default excused the contractor’s delay and that the contractor could not be faulted for failing to apply for an extension of time within which to complete the contract.’¹¹

[7] In *casu*, the duration of the contract was 14 months. The applicant was 200% behind schedule. An Addendum was concluded putting the applicant on terms. When parties agree that a contract is to be implemented by a fixed date, conduct by the employer which is authorised by the contract, in this instance, the Addendum, must be afforded due weight to promote the completion of the contract. The submission by Mr Glendinning that both parties were in breach of the contract is unconvincing. The terms of the Addendum are unambiguous. The applicant’s reliance on the late payment or non-payment of one issued certificate as justification for its failure to complete the contract timeously is devoid of merit.

[8] In *Du Preez*, the SCA reiterated that repudiation is objective and not subjectively determined. The test as to whether conduct amounts to repudiation of a contract is whether, fairly interpreted, it exhibits a deliberate and unequivocal intention to no longer be bound by the terms of the contract.¹²

[9] Building works in *Du Preez* continued despite the non-payments, it was argued that the house was at 70% completion by the time the contractor ceased building works. The Court there held that:

‘Simply put the failure to comply with the terms and conditions of the contract by the defendant in not making progress payments as agreed, entitled the

¹¹ *Ibid* at 685.

¹² *Supra* fn 9 para 17.

plaintiff to withhold its reciprocal obligation to continue building the house. The defendant's objectively unjustifiable conduct in treating this as a repudiation of the agreement and purporting to cancel the agreement, objectively assessed amounted to a repudiation which the plaintiff accepted and justifiably cancelled the agreement.'¹³

In *casu*, the facts are distinguishable. Had the applicant been of the strong view that the alleged non-payment or late payment precluded it from completing the construction, it could have cancelled the contract and claimed damages due to the breach. However, unlike in *Du Preez*, the applicant did not cancel the contract and claim damages, it acquiesced in the concluded Addendum and its terms. The applicant's reliance on *Du Preez* is misplaced.

- [10] As far as the grounds set out in paras 4.1 – 4.3 are concerned, the aspects raised are fully covered in my judgment in paragraphs 9, 11 – 15, 18 – 21, and 24 – 27. The contention raised by the applicant is therefore without substance.
- [11] Mr Snellenburg SC, for the respondents, submitted that the applicant had moved from an incorrect premise when it alleged that it had progressed with the works in terms of the agreement. The contract was never performed in its agreed terms. That gave rise to concluding the Addendum, which not only put the applicant on terms in terms of performance milestones, but also allowed the respondent to cancel the agreement should the milestones not be reached. These remarks by the SCA in *Group Five* are apposite:

¹³ *Ibid* para 18.

‘The plaintiff chose not to apply for an extension of time on those grounds. It now seeks to justify that omission by contending that it could not have done so since the defendant committed various breaches of contract which prevented the plaintiff from completing the contract by the agreed date.’¹⁴

The applicant opted for motion proceedings and cannot, at this stage, blame the Court if the facts in the matter and contentious issues were not fully ventilated.

- [12] The applicant also claims that the Court failed to conduct its duty of proper consideration as espoused by the ConCourt in *Vodacom (Pty) Ltd v Makate and Another*. In that regard, I wish to refer to the following instructive remarks¹⁵:

‘Justice and, indeed, the court process are not about perfection; courts are not to be held “to some abstract standard of perfection”.’

...

‘Of critical importance is that “there is no duty on a judge in giving . . . reasons to deal with every argument presented by counsel in support of [their] case”. I say of “critical importance” because some litigants may find this statement of the law attractive for nitpickingly arguing that a court’s judgment failed to deal with this or that point and that, therefore, there was a breach of the right to a fair hearing. Let them be warned that they will not succeed. That is not what this statement of the law is about. It is about the substance of a judgment viewed holistically. So viewed, does the judgment tell a reasonable, if not discerning, reader that there was compliance with the duty of proper consideration? In that regard, it is enough if the judgment identifies the issues that were vital to the determination of the matter and then shows how they were determined. One or two issues may not necessarily be critical for that holistic look at the substance of the judgment.’

¹⁴ *Supra* fn 8 at 687.

¹⁵ 2025 (10) BCLR 1174 (CC) para 43 and 57.

[13] That said, I have carefully considered the Notice of Application for leave to appeal and the grounds listed therein where the applicant contends that another court would find the existence of prospects of success and compelling reasons for the appeal to be heard. I have also considered both the written and oral submissions by counsel. I am unpersuaded by the applicant's submissions. There are, in my view, no cognisable prospects of success on appeal nor any compelling reason(s) why the appeal should be heard or warrant the attention of the Full Court of this Division or the Supreme Court of Appeal. In the result, the application for leave to appeal must fail. There is no reason why costs should not follow the result.

ORDER:

1. The application for leave to appeal is dismissed with costs.



MAMOSEBO J
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

Appearances

For the applicant:
Instructed by:

Adv A Glendinning
E Taylor Attorneys
c/o Haarhoffs Inc

For the respondents:
Instructed by:

Adv N Snellenburg SC
Peyper Attorneys
Duncan & Rothman Attorneys