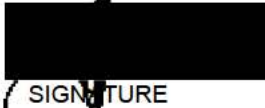


REPUBLIC OF SOUTH AFRICA



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

Case Number: **009838/2023**

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED: YES
DATE	04 November 2025
SIGNATURE	

In the matter between:

THE FINANCIAL SECTOR CONDUCT AUTHORITY

Applicant

and

THE FINANCIAL SERVICES TRIBUNAL

LOUIS HARMS N.O.

JAY PEMA N.O.

MICHELLE LE ROUX N.O.

VICEROY RESEARCH PARTNERSHIP LLC

FRASER JOHN PERRING

AIDEN LAU

GABRIEL BERNARDE

First Respondent

Second Respondent

Third Respondent

Fourth Respondent

Fifth Respondent

Sixth Respondent

Seventh Respondent

Eighth Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J:

[1] The fifth to eight respondents (“the respondents”) apply for leave to appeal against the findings and orders in paragraphs 1, 2 and 3 of the judgment delivered by this court on 9 July 2025. The application is brought in terms of section 17(1)(a)(i) of the Superiors Courts Act, 10 of 2023, i.e that the appeal would have a reasonable prospect of success.

[2] The applicant opposes the application and filed a conditional leave to cross-appeal against paragraph 4 of the judgment.

Grounds for leave to appeal

[3] The respondents’ grounds of appeal may be summarised as follows:

- 3.1 the court erred in developing the common law position in accordance with prayer 3.3 of the applicant’s notice of motion, more particularly in that it is not in the interests of justice nor a permissible development of the common law;
- 3.2 the court erred in conflating procedural law and more particularly service of process with the substantive law of jurisdiction and in not finding that on no basis does the Tribunal have the jurisdiction to impose an administrative penalty in terms of section 167 of the Financial Sector Regulation Act 9 of 2017 (“the Act”) on a *peregrinus*.

[4] At the inception of the hearing I enquired from Mr Subel SC, counsel for the respondents, whether the development of the common law is a compelling reason to grant leave to appeal in terms of section 17(1)(a)(ii). Mr Subel readily agreed and did not address the court any further in respect of the grounds relied upon by the respondents in support of their application for leave to appeal.

Applicant's submissions

[5] Mr Breitenbach SC, counsel for the applicant, did not agree and contended that the respondents are bound by the grounds for leave to appeal contained in their application.

[6] Mr Breitenbach was of the view that the grounds do not have reasonable prospect of success and submitted that in developing the common law in terms of section 173 of the Constitution the court exercised a discretion in “*the strong sense*”. In the result, the court’s finding will only be found to be wrong in certain defined circumstances.

[7] In support of the aforesaid contention Mr Breitenbach relied on the authority of *Mwelase v Director General, Department of Rural Development and Land Reform and Another* 2019 (6) SA 597 (CC) at para [68]:

“[68] A ‘true discretion’ or ‘discretion in the strong sense’ is a power entrusted to a court to consider a wide range of available options, each of which is equally permissible. The court then has a choice as to which option it selects. And its pick can be said to be wrong only if it has failed to exercise that power judicially or has been influenced by wrong principles or a misdirection on the facts, or reached a decision that could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.”

[8] Mr Breitenbach submitted that the respondents failed to point to any of the grounds mentioned in *Mwalase* in support of the ground of appeal in paragraph 3.1 *supra*. Insofar as the ground of appeal in paragraph 3.2 is concerned, the applicant contends that the court adapted and applied the principle in *Bid Holdings Pty Ltd v Strang and Others* 2008 (3) SA 355 (SCA) and in so doing developed the common law to introduce a second requirement for jurisdiction over *peregrinus* for purposes of penalties imposed in terms of section 167(1)(a) of the Act.

Respondents' submissions in reply

[9] In reply, Mr Subel SC, raised several grounds of appeal that were not contained in the application which, according to him, do have a reasonable prospect of success.

[10] Mr Breitenbach objected to the new grounds being introduced during oral argument and contended that it is impermissible to do so. In this regard Mr Breitenbach relied on p 620D in *Fischer and Another v Ramahlele and Others* 2014 (4) SA 614 (SCA):

“[13] Turning then to the nature of civil litigation in our adversarial system, it is for the parties, either in the pleadings or affidavits (which serve the function of both pleadings and evidence), to set out and define the nature of their dispute, and it is for the court to adjudicate upon those issues.”

Discussion

[11] The test for granting leave to appeal in terms of section 17(1)(a)(i) has been succinctly set out by the Supreme Court of Appeal in *MEC for Health, Eastern Cape v Mkhitha and another* [2016] ZASCA 176, to wit:

“[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.”

[12] Having regard to the respondents’ grounds for leave to appeal, I am of the view that, although the grounds might be arguable, the grounds do not meet the threshold set out *Mkhitha*.

[13] In the premises, the application stands to be dismissed, costs to follow the cause.

ORDER

I grant the following order:

1. The application is dismissed.
2. The fifth to eight respondents are ordered to pay the costs, including the costs of two counsel. Counsel’s fees on scale C.



N. JANSE VAN NIEUWENHUIZEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DATE HEARD:

17 September 2025

DATE DELIVERED:

4 November 2025

APPEARANCES

Counsel for the Applicant: Adv Breitenbach SC
Adv Mbikiwa

Instructed by: Chuene Mahlo Inc.

Counsel for the fifth
to eight respondents: Adv Subel SC
Instructed by: Snaid & Morris

