



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

CASE Number: 2024 – 008803

- (1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES:
~~YES~~/NO
(3) REVISED: ~~YES~~/NO

7 November 2025



In the matter between:-

JOAO MBALA

Applicant

and

**THE CHAIRPERSON STANDING COMMITTEE
FOR REFUGEE AFFAIRS**

First Respondent

THE MINISTER OF HOME AFFAIRS

Second Respondent

DIRECTOR-GENERAL OF HOME AFFAIRS

Third Respondent

JUDGMENT: LEAVE TO APPEAL

SNYMAN, AJ

Introduction

- [1] This judgment concerns an application for leave to appeal brought by the applicant on 16 September 2025. The matter had originally come before me for argument on the merits on 30 July 2025, and on 4 September 2025, I handed down judgment against the applicant, in terms of which the applicant's application was dismissed with costs. The application for leave to appeal was opposed by the respondents, and both parties filed written submissions.
- [2] The leave to appeal was set down for virtual hearing on 29 October 2025. Only the applicant appeared at the hearing. At the conclusion of the hearing, I reserved judgment. I now hand down written judgment in the application for leave to appeal.

Leave to Appeal

- [3] Leave to appeal is not there for the asking.¹ This is evident from section 17(1)(a) of the Superior Courts Act², which provides that:

‘(a) 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 a matter under consideration.’

- [4] As to the meaning of ‘*reasonable prospects of success*’, the Court in *Member of the Executive Council for Health, Eastern Cape v Mkhitha and Another*³ said the following:

¹ See *J & L Lining (Pty) Ltd v National Union of Metalworkers of SA and Others (2)* (2019) 40 ILJ 1303 (LC) at para 5.

² Act 10 of 2013.

³ [2016] JOL 36940 (SCA) at paras 16 – 17. See also *Ramakatsa and Others v African National Congress and another* [2021] JOL 49993 (SCA) at para 10, where it was held: ‘*The test of reasonable prospects of success*

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

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.’

- [5] Next, and as to what would constitute a compelling reason for another Court to entertain the appeal, the *Court in Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd*⁴ had the following to say:

‘... A compelling reason includes an important question of law or a discrete issue of public importance that will have an effect on future disputes. But here too, the merits remain vitally important and are often decisive. ...’

Analysis

- [6] The applicant has raised four individual grounds for seeking leave to appeal, which are as follows. First, the applicant contends that I erred in making a costs award against him, as he seeking to assert a constitutional right. Second, he submits that I erred by failing to *mero motu* enquire into the lawfulness and regularity of the UNHCR Report of 15 January 2012 and the notice published by the SCRA revoking the refugee status of employees from Angola on 14

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 ...’.

⁴ 2020 (5) SA 35 (SCA) at para 2. See also *Qoboshiyane NO and Others v Avusa Publishing Eastern Cape (Pty) Ltd and Others* 2013 (3) SA 315 (SCA) at para 5; *Minister of Justice and Constitutional Development and Others v Southern Africa Litigation Centre and Others* 2016 (3) SA 317 (SCA) at para 23; *Tshwane City and Others v Nambiti Technologies (Pty) Ltd* 2016 (2) SA 494 (SCA) at para 6.

August 2013. Third, the applicant argues that I failed to give effect to the 'qualitative assessment' prescribed by the earlier judgment in Wright J in this same matter on 27 July 2022. And finally, the applicant contends that I erred by failing to grant the applicant condonation for the late filing of his review application under PAJA, as I negated pertinent considerations. For the reasons to follow, it is my view that none of these grounds have any substance, and the applicant simply has no prospects of success on appeal in respect of the same.

[7] I will first deal with the issue that I needed to *mero motu* enquire into the validity / lawfulness of the UNHCR Report of 2012 and the SCRA Notice of 2013, and then invite the parties to make submissions on the same. This contention by the applicant is simply patently wrong, and without any basis in law. It is not for a Court to *mero motu* enquire into the validity, legality or lawfulness of administrative actions. This can only be done pursuant to specific application being made by a litigant under PAJA in which the administrative action is actually challenged, and in which the grounds for seeking such review is specifically pleaded and a case for doing so is properly made out. As correctly pointed out by the respondents, the two administrative actions referred to by the applicant, if one can call it that, involves different parties and different circumstances, never brought into this matter by the applicant. For me to *mero motu* decide that UNHCR Report of 2012 and the SCRA Notice of 2013 is unlawful, in the absence of any actual challenge, is an untenable proposition.

[8] It must be remembered that the UNHCR Report of 2012 and the SCRA Notice of 2103 applied to all refugees from Angola, and not just the applicant. The applicant, insofar as it concerns his own refugee status specifically, received his own notice of intention to revoke his refugee status on 17 July 2013, which led to the process that only ultimately culminated in his own status as refugee being withdrawn many years later. If the applicant wanted to challenge the lawfulness / legality of his own notice of 17 July 2013 on the basis that the founding instruments for it, for the want of a better description, , was somehow unlawful or irregular or invalid, he needed to bring a specific review application to do so. That he never did, and as such, these administrative actions must

stand. In *Department of Transport and Others v Tasima (Pty) Limited*⁵ and the Court held:

‘... No constitutional principle allows an unlawful administrative decision to “morph into a valid act”. However, for the reasons developed through a long string of this Court’s judgments, that declaration must be made by a court. It is not open to any other party, public or private, to annex this function. Our Constitution confers on the courts the role of arbiter of legality. Therefore, until a court is appropriately approached and an allegedly unlawful exercise of public power is adjudicated upon, it has binding effect merely because of its factual existence ...’

- [9] The simple fact is that administrative actions remain valid and binding, and any action taken pursuant to the same would be lawful. In *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*⁶ the Court said:

‘Thus the proper enquiry in each case – at least at first – is not whether the initial act was valid but rather whether its substantive validity was a necessary precondition for the validity of consequent acts. If the validity of consequent acts is dependent on no more than the factual existence of the initial act then the consequent act will have legal effect for so long as the initial act is not set aside by a competent court.

The Court in *Oudekraal supra* also held that a collateral challenge to the validity of an administrative act is only available:⁷

‘... ‘if the right remedy is sought by the right person in the right proceedings’. Whether or not it is the right remedy in any particular proceedings will be determined by the proper construction of the relevant statutory instrument in the context of principles of the rule of law.’

- [10] This *ratio* in *Oudekraal* has been consistently applied over the last decade. The Constitutional Court considered the *Oudekraal* principle in *MEC for Health,*

⁵ 2017 (2) SA 622 (CC) at para 147.

⁶ 2004 (6) SA 222 (SCA) at para 31

⁷ *Id* at para 35.

Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye and Lazer Institute.⁸ The majority of the Court, by way of Cameron J, held as follows:⁹

‘The fundamental notion — that official conduct that is vulnerable to challenge may have legal consequences and may not be ignored until properly set aside — springs deeply from the rule of law. The courts alone, and not public officials, are the arbiters of legality... For a public official to ignore irregular administrative action on the basis that it is a nullity amounts to self-help. And it invites a vortex of uncertainty, unpredictability and irrationality. The clarity and certainty of governmental conduct, on which we all rely in organising our lives, would be imperilled if irregular or invalid administrative acts could be ignored because officials consider them invalid.’

- [11] What the applicant is in essence propagating is a collateral challenge, under circumstances where the applicant made out no case for it. As such, the administrative actions will remain valid and binding. Mero motu intervention by a Court is not permitted. This was made clear by the Constitutional Court in *Merafong City Local Municipality v AngloGold Ashanti Limited*¹⁰, as follows:

‘This is because, unless challenged by the right challenger in the right proceedings, an unlawful act is not void or non-existent, but exists as a fact and may provide the basis for lawful acts pursuant to it. This leads to a logical corollary, which this Court recognised in *Giant Concerts*, that an own-interest litigant may be denied standing “even though the result could be that an unlawful decision stands” ...’

- [12] And lastly on this issue, when the matter was originally brought and then argued before me, the applicant made no attempt to contradict these two administrative actions. Or differently put, he never challenged their validity or lawfulness even in argument. It is entirely impermissible to now raise a new case in this regard when seeking leave to appeal. This was made clear in *J & L Lining (Pty) Ltd v National Union of Metalworkers of SA and Others (2)*¹¹, where the Court said:

⁸ 2014 (3) SA 481 (CC).

⁹ Id at para 103.

¹⁰ 2017 (2) SA 211 (CC) at para 36. See also *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC) at para 64 – 66.

¹¹ (2019) 40 ILJ 1303 (LC) at para 9.

*'It is impermissible for the applicant to raise a new case or argument on appeal that was never before the court a quo when the matter was decided ...'. And in Universal Service and Access Agency v MT Creations Trading Enterprise Pty (Ltd) and Others (Leave to Appeal)*¹² it was similarly held that 'A litigant is not allowed to make a new case in an application for leave to appeal ...'.

[13] This brings me the next ground, being that I failed to give proper effect to the earlier judgment of Wright J in this matter given in 2022. Despite what the applicant baldly says in the application for leave to appeal, nothing can be further from the truth. I specifically dealt with the effect of the judgment of Wright J in my original judgment, and the applicant has simply advanced nothing in the application for leave to appeal to contradict what I have already found. I do not intend to repeat everything that I have already said in my original judgment, save for a referring to a few pertinent issues. Wright J in effect found that the applicant was not given a proper opportunity to state his case before the earlier decision to revoke his refugee status, and the learned Judge order the SCRA to comply with a fair procedure. It was as a result of this judgment that the applicant was then afforded a comprehensive opportunity to state this case by the SCRA, which actually went far beyond what was required for the ultimate decision to revoke his refugee status to be considered procedurally fair. There is simply absolutely no merit in what the applicant is now contending.

[14] In simple terms, and on the facts, the SCRA complied with the judgment of Wright J by affording the applicant a comprehensive opportunity to be heard. I am compelled to reiterate that at the end of the process, the applicant himself made it clear that the SCRA now had all the information it would get, and needed to proceed to make a decision based on what it now had. The applicant did not even deal, in the application for leave to appeal, with the actual facts in this regard. This ground for seeking leave to appeal simply has no substance at all, and there is zero prospect that another Court would come to a different conclusion.

¹² 2025 JDR 1793 (GP) at para 13. See also *Abn-Amro Bank NV v Hyundai Corporation* 2005 JDR 1071 (SCA) at para 21; *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* 2008 (5) SA 339 (SCA) at paras 28 – 2; *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau NO & others* (2009) 30 ILJ 269 (LAC) at para 30.

- [15] Where it comes to the ground relating to condonation for the late filing of the applicant's review application, it is a ground that is completely still born. The insurmountable problem the applicant has, which I highlighted in my original judgment and which the applicant has not even dealt with in the application for leave to appeal, is that he did not apply for condonation in the first place. In simple terms, one cannot get condonation if you do not ask for it. The applicant did not ask for it. That must be the end of it.
- [16] The applicant seeks to rely on the judgment in *Ntame v MEG for Social Development*¹³, where the Court, according to the applicant, dealt with similar circumstances to the case in casu, and then granted condonation in order to vindicate a constitutional right, taking note of that applicant's lack of formal education, indigence, and her corresponding lack of means to pay for the services of an attorney. The applicant's reliance on this judgment is misplaced, again for the simple reason what the applicant never applied for condonation, nor did he seek to even offer the kind of explanation found in the judgment of *Ntame*. In the absence of an actual application for condonation in order to show good cause as to why the time limit of 180 days under PAJA should be extended, a jurisdictional fact is absent, and yet again, it can only be said that it must be the end of the matter. The applicant has no prospects of success on appeal in this respect.
- [17] This leaves only the ground of seeking leave to appeal relating to the costs award. According to the applicant, the costs award I made against him is a misdirection because of the general rule in constitutional litigation that an unsuccessful litigant ought not to be ordered to pay costs. In this regard, the applicant relies on the judgments in *Affordable Medicines Trust v Minister of Health*¹⁴ and *Biowatch Trust v Registrar, Genetic Resources*¹⁵ where it was held that in matters between the government and a private party seeking to assert a constitutional right, if the government loses, it should pay the costs of the other side, and if the government wins, each party should bear its own costs.

¹³ 2005 (6) SA 248 (E) at para 25.

¹⁴ 2006 (3) SA 247 (CC) at para 139.

¹⁵ 2009 (6) SA 232 (CC) at para 22.

The rationale for this rule is that an award of costs in such circumstances might have a chilling effect on the litigants who might wish to vindicate their constitutional rights, and may deter them from asserting their rights against the State due to the fear of incurring an adverse costs order.

- [18] But the fact that the applicant attaches the label of asserting a constitutional right to this matter does not make it so. In fact, I am confident in saying that this matter has nothing to do with asserting constitutional rights. The right which the applicant sought to assert dealt with the withdrawal of a refugee status and there is nothing constitutional about this controversy. In *Ferreira v Levin NO and Others; Vryenhoek and others v Powell NO and Others*¹⁶ the Court affirmed the long-standing practice that costs are in the discretion of the Court and, in general, the unsuccessful party must pay, holding:

'The Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer, and the second that the successful party should, as a general rule, have his or her costs. Even this second principle is subject to the first. The second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs. Without attempting either comprehensiveness or complete analytical accuracy, depriving successful parties of their costs can depend on circumstances such as, for example, the conduct of parties, the conduct of their legal representatives, whether a party achieves technical success only, the nature of the litigants and the nature of the proceedings.'

- [19] It is of course true that the so-called *Biowatch* principle, on which the applicant attempts to rely, does constitute a departure from the ordinary position where it comes to awarding costs. This was more recently described in *eTV (Pty) Ltd v Minister of Communications and Digital Technologies and Others*¹⁷ as follows:

'The scope and content of the *Biowatch* principle have become trite; albeit, for purposes of this case, it bears repeating. Essentially, the general rule is that in constitutional litigation involving private parties and the government, 'if the

¹⁶ 1996 (2) SA 621 (CC) at para 3.

¹⁷ 2023 (3) SA 1 (CC) at para 105.

government loses, it should pay the costs of the other side, and if the government wins, each party should bear its own costs'.^[82] This court has confirmed that when considering whether the *Biowatch* principle applies, the crucial consideration is not the character of the parties, but the nature of the litigation at issue.'

[20] It is in this context that applicant's ground for seeking to leave to appeal based on the purported application of the *Biowatch* principle must fail. The nature of the litigation at stake is not constitutional litigation. The applicant is not asserting a constitutional right. The applicant did not launch a challenge based on a constitutional right. The applicant never put forward a case that any of the provisions of the Refugees Act was unconstitutional. Although it can perhaps be said that review challenges under PAJA on the basis of legality can be said to contain a constitutional element, for the want of a better description, that does not make *Biowatch* applicable. As held in *Lawyers for Human Rights v Minister in the Presidency and Others*¹⁸:

'Despite the constitutional dimensions of the application itself, the High Court considered the way the proceedings had been managed manifestly inappropriate — largely on the ground of their extreme belatedness, and the fact that they targeted an operation that was long gone and done. Indeed, the High Court indicated that while it would never suggest that LHR would launch a frivolous or vexatious application, 'its action in having the matter placed on the urgent roll was uncalled for and inappropriate'. This was the basis for awarding costs adversely to LHR. The court made an order it deemed appropriate to protect its process and exercised its discretion in doing so. Unless it exercised that discretion unjudicially or on a wrong principle, this court has no basis to interfere.

Despite LHR's best efforts, it has advanced no acceptable basis on which this court may conclude that the High Court exercised its discretion unjudicially. Nor is the costs order here likely to have a 'chilling effect' on future litigation. The

¹⁸ 2017 (1) SA 645 (CC) at paras 23 and 24. See also *Mkhatshwa and Others v Mkhatshwa and Others* 2021 (5) SA 447 (CC) at para 18, where it was held: '*Although the interpretation of s 13 of the Act may invoke constitutional issues, the genesis of this application is a dispute about the validity of an Anton Piller order. And I am thus inclined to agree with the respondents' submission that this 'constitutes an attempt to bring the matter under a broad blanket of constitutional rights, so as to enable the applicants to then rely on the Biowatch principle ...'*

reason is that the High Court's ire about the urgency and the extreme exaction LHR laid upon the respondents cannot by any stretch be regarded as unwarranted. The *Biowatch* principles should not be abused to avoid ordinary court process.'

- [21] I am convinced that the applicant's belated reliance on *Biowatch* is nothing but contrived to escape a costs award. I do not believe that *Biowatch* applies in this instance. In any event and considering that none of the other grounds for seeking leave to appeal have any substance, seeking leave to appeal on the only based on a costs award is misdirected. Once again, it must be reiterated that deciding on the issue of costs constitutes the exercise of a discretion, which can only be interfered with on appeal on limited grounds. As said in *J K Vorlauffer & Sons (Pty) Ltd v Hodge*¹⁹:

'It is trite that a trial Judge has a wide discretion in awarding costs. The discretion should be exercised judicially upon consideration of all facts, and as between the parties, it is in essence a matter of fairness to both sides.

In appeals against costs the question is whether there was an improper exercise of judicial discretion, that is, whether the award is, vitiated by irregularity or misdirection or is disquietingly inappropriate. The court will not interfere merely because it might have taken a different view.'

- [22] In addition, seeking leave to appeal only respect of costs order requires the applicant to make out exceptional circumstances, which the applicant did not do. This was made clear in *Mukanda v South African Legal Practice Council*²⁰, as follows:

'In light of ss 16(2)(a)(ii), 17(1)(a) and 17(1)(b) of the Act and the case law referred to hereinbefore, it can thus be stated that a court will not grant an application for leave to appeal against a costs order only, unless the applicant can satisfy the court that an appeal court would reasonably find that exceptional circumstances exist that warrant such leave. In the absence of exceptional

¹⁹ 2020 JDR 1708 (GP) at paras 8 – 9.

²⁰ 2021 (4) SA 292 (GP) at para 9. See also *MEC for Local Government, Housing and Traditional Affairs, KwaZulu-Natal v Yengwa and Others* 2010 (5) SA 494 (SCA) at para 1.

circumstances, the appeal would not have any reasonable prospect of success, and the application for leave to appeal will consequently have to be dismissed. ...'

- [23] As a result, the applicant has simply failed to make out a proper case for leave to appeal in respect of the costs order I have made, and this ground for seeking leave to appeal must equally fail.

Conclusion

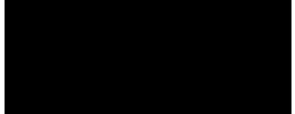
- [24] All the above considered, I thus conclude that the applicant has failed to show that there exists a reasonable prospect that another Court would come to a different conclusion, and in my view the applicant has negligible prospects of success on appeal. There is not even, in my view, an arguable case on appeal. The application for leave to appeal falls to be dismissed.

- [25] This only leaves the issue of costs. It is true that the application for leave to appeal failed. However, the respondents failed to make an appearance when the matter was argued. I have a wide discretion where it comes to the issue of costs, and I believe that in the circumstances, it is fair and equitable that no costs order be made.

- [26] In all the circumstances as set out above, I make the following order:

Order

1. The applicant's application for leave to appeal is dismissed.
2. There is no order as to costs.

S SNYMAN

Acting Judge of the High Court of South Africa

Gauteng Division, Johannesburg

Appearances:

Heard on: 29 October 2025

For the Applicant: Advocate George SP Modisa and Advocate
Asher Huhlwane

Instructed by: Umennaka Attorneys

For the Respondents: No appearance

Judgment: 7 November 2025