



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

CASE NO: 16469/2023

In the application of:

NETCARE HOSPITALS (PTY) LTD

Applicant

and

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED



COMPENSATION FUND

First Respondent

FAKIR N.O., FARZANA

Second Respondent

RUITERS N.O., MILDRED

Third Respondent

THANDO N.O., JOHN-ROSS

Fourth Respondent

MABUDUSHA N.O, VUYISWA

Fifth Respondent

LAMATI N.O., THOBILE

Sixth Respondent

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

NGALWANA AJ

[1] It is axiomatic that the applicable standard in applications for leave to appeal has in the past been whether there is a reasonable possibility that another Court may or could come to a different conclusion than that reached by the Court of first instance.

[2] Equally axiomatic, by now, is that the position is now governed by the Superior Courts Act 10 of 2013 which says leave to appeal may be granted where:

- 2.1. the appeal would have a reasonable prospect of success¹ or there is some compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;²
- 2.2. the decision sought will have a practical effect or result;³ and
- 2.3. the appeal would lead to a just and prompt resolution of the real issues between the parties even where the decision sought to be appealed does not dispose of all the issues in the case⁴.

[3] For Acting Judges – such as I – who run relatively busy practices and so can scarcely find time away from their demanding briefs to focus properly on an application for leave to appeal against their judgments, the temptation often lurks to simply grant leave, thereby shifting their problem to the appeal court, and wander off back into the warm embrace of – by comparison – handsomely rewarding briefs. Not only is this approach hardly helpful; it is also a dereliction of duty not only as an officer of the court but also as a judicial functionary. It also detracts from the court's dignity and effectiveness of the court system.

¹ Section 17(1)(a)(i)

² Section 17(1)(a)(ii)

³ The effect of section 17(1)(b) read together with section 16(2)(a)(i) is that where the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.

⁴ Section 17(1)(c)

[4] On the other side of this spectrum – and this in my experience applies in equal measure both to Acting Judges and Permanent Judges – lies the temptation to defend one’s judgment come Hell or High Water, often driven less by objective application of law to the facts but more by a sometimes-unacknowledged sense of one’s own teleological rectitude. It is an insidious judicial temptation that probably causes more harm to the rule of law than does a lazy passing-of-the buck to the appeal court that I describe in paragraph 3 above.

[5] Between the two extremes lies a more sensible approach adumbrated by Retired Deputy Chief Justice Moseneke. In his judicial memoir, *All Rise: A Judicial Memoir*, Justice Moseneke provides sound advice on how to approach an application that seeks to set aside a judgment of a lower court. He says

“[T]he best route to the kernel of an appeal [is] to read the judgment appealed against first, followed by the grounds of appeal or grievances against the order. Only thereafter [should one] venture into the evidence. An astute judge learns quickly which evidence is core to the decision to be made and which is merely ancillary... .”⁵

[6] Although I am not sitting as a court of appeal, this is the guidance I have sought to follow in dealing with this application for leave to appeal. Having done so, I have concluded – on a careful consideration of the judgment sought to be set aside, the grounds of appeal, the heads of arguments filed at my request, and oral submissions made by Counsel – that it would be unpardonable *louche* of this court to grant leave.

[7] Both in its notice of application for leave to appeal and in the written submissions filed on its behalf, the applicant advances ten grounds of review. All of them seek to demonstrate – unsuccessfully – that it has reasonable prospects of success on appeal [(s 17(1)(a)(i)]. It then recycles much of the same argument advanced in the main application and which this court has already determined and provided reasons for

⁵ *All Rise: A Judicial Memoir* (Picador Africa), © 2020, Ch 15: “Tenure and intellectual bonding”, p 127. As an Acting judge, one is not confronted with “*eleven to fifteen cases on the roll per term*”. Still, the learning of this reading skill and technique is vital if one is to navigate without much anxiety the not-so-placid waters that come with voluminous special motions and experienced Counsel on both sides determined that their respective causes are right.

dismissing. Regrettably, none of the argument and grounds of appeal relates to the aspect of the compelling reason why the appeal should be heard [s 17(1)(a)(ii)]. This aspect emerged for the first time in oral argument when the court asked Counsel to state expressly what the argument is based on compelling reason. From the transcript of proceedings, the following exchange appears:

“COURT: Alright. Just so that I can understand exactly your case on the compelling reason, just summarise it for me in a paragraph, what exactly is your case on compelling reasons?

MR STOCKWELL: The compelling reasons has got two components, M'Lord. The position firstly where Netcare finds it and it has got to make a decision, do we continue trading, treating workmen, injured persons if we are not getting paid, and that on the one hand and on the other hand section 27 and that everyone has the right to healthcare, and bringing the two together we say it would be a travesty and there will be constitutional issues if my client is forced to take that decision, which he does not want to take, M'Lord, but if it comes to the end of the road and there is no solution, then it has, then certain hard decisions may have to be taken, M'Lord, and that is what we say there are compelling reasons, M'Lord.”

[8] In my view this hardly constitutes a compelling reason for the appeal to be heard. It seems to me rather a threat that if Netcare does not get its way in the game, it will take its toys and run away with them. From that it says workmen will be denied a right to healthcare. This is nothing short of a constitutional issue forcibly manufactured or shoe-horned into a crisis that Netcare threatens to create. A court should not bow to what seems to be an inappropriate threat. There is no compelling reason for the appeal to be heard. Netcare has itself admitted that the CompEasy System has built into it a system of *“outgoing notifications for acknowledgement of invoices and payment remittance advice”*. Yet this is the very basis on which it founds its case for the proposition that the CompEasy System is dysfunctional.

[9] The applicant advances a plethora of grounds of appeal. They range from a criticism of the main judgment as failing to recognise the ineptitude and inability of the Fund's officials in the implementation of the CompEasy system, including their failure to fulfil their statutory functions;⁶ to the judgment failing to order that the system fulfil the basic functions for which it was designed;⁷ to the judgment failing to give consideration to the appointment of an expert to assess the functionality of the system;⁸ to the judgment failing to follow the approach on disputes of fact as laid down in *Wightman*.⁹

[10] These grounds have already been addressed in the main judgment. The argument advanced in support of them does not do much to move the needle.

[11] The applicant's own admission that the Fund "*has in place built-in the System outgoing notifications for acknowledgement of invoices and payment remittance advice*" is in my view a complete answer to its *Wightman* point. To this averment by the Fund,¹⁰ the applicant's reply was to admit that the functionality it seeks in prayers 2.3 and 3 of its notice of motion (pars 2 & 3 of its draft order) "*is already in place*".¹¹

⁶ Pars 2, 3, 4, 7, 8, 9 of the notice

⁷ Par 6 of the notice

⁸ Par 5 of the notice

⁹ Par 1 of the notice; *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another* [2008] 2 All SA 512 (SCA); 2008 (3) SA 371 (SCA), par 13:

"A real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter."

¹⁰ CL 02-242/96

¹¹ CL 02-317/45

If the very functionality of which it complains in the system is “*already in place*”, it is hard to justify an order that the system is dysfunctional.

[12] Many of the issues raised by the applicant in relation to what it says is the dysfunctionality of the system, relate more to the officials’ inability or failure or ineptitude in fulfilling their statutory functions. That, as conveyed in the main judgment, cannot reasonably and validly found a reason for declaring the system itself dysfunctional.

[13] As regards the criticism that the judgment fails to order that the system fulfil the basic functions for which it was designed, a court does not have the power to impose obligations or functions or duties on an organ of state that the legislature has seen fit not to impose. Nowhere in COIDA, the empowering legislation, or in the regulations and rules promulgated pursuant to it, is there an obligation on the Fund or any of the Respondents to perform the functions listed by the applicant in prayers 2 and 3 of its draft order that was handed up during argument.

[14] As regards criticism of the judgment as failing to give consideration to the appointment of an expert to assess the functionality of the system, this presupposes that there is something amiss in the system which requires inspection and assessment by an expert. But in light of the applicant’s admission that the functionality of which it complains “*is already in place*”, the appointment of an expert to confirm or disprove that which the applicant admits in its papers would seem rather otiose.

[15] On a conspectus of all the facts as alleged by the applicant, taken together with the facts as alleged by the first respondent which the applicant has not denied, one cannot reasonably conclude that the CompEasy system is dysfunctional. If the system is, on the undisputed facts not dysfunctional, there can be no warrant for a declaratory order to that effect and the appointment of an expert to confirm or disprove what seems common ground between the parties in the papers. In the result, I do not believe another court would reach a different conclusion.

ORDER

In the result, I make the following order:

1. The application for leave to appeal is dismissed with costs on the ordinary scale.

A handwritten signature in black ink, appearing to read 'V NGALWANA', is written over a solid black rectangular redaction box.

V NGALWANA

**ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA**

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 05 December 2025.

Date of hearing: 09 September 2025

Date of judgment: 08 November 2025 and revised on 05 December 2025

Appearances:

Attorneys for the Applicant: Whaley & Van Der Lith Inc

Counsel for the Applicant: R Stockwell SC

Attorneys for Respondents: State Attorney, Pretoria

Counsel for First Respondent: M D Mohlamonyane SC

P Managa