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

Case No:2025-168949

In the matter between:

MARY JANE WALSH	**First Applicant**
MATTHEW PIUS WALSH	**Second Applicant**
MAINLINE CIVIL ENGINEERING CONTRACTORS (PTY) LTD	**Third applicant**

And

KUMESHIN SINAYAN	**First Respondent**
TRENCHLESS TECHNOLOGIES (PTY) LTD	**Second Respondent**
KS CIVIL ENGINEERING (PTY) LTD	**Third Respondent**

Corum: LEKHULENI J
Heard: 04 February 2026
Delivered: Electronically on 02 March 2026

JUDGMENT – LEAVE TO APPEAL

LEKHULENI J:

Introduction

[1] This is an application for leave to appeal to the full Court of the Western Cape High Court in terms of s 17(1)(a) of the Superior Courts Act 10 of 2013 *('the Superior Courts Act'),* against the whole judgment and order of this Court *('the main Judgment')* handed down on 10 November 2025. In that judgment, this Court dismissed the applicants' application for the Court to interdict the first respondent from being employed by or being otherwise associated with the second respondent until 22 May 2026. The court also dismissed the applicants' application to declare the first respondent in breach of the buy-back agreement concluded between the first and second applicants and the first respondent on 22 May 2024, which was attached to the applicants' founding affidavit as JS2. The applicants seek leave to appeal that judgment. The first respondent opposed the application. The second respondent did not oppose the application; instead, it filed a notice to abide by the decision of this court.

Brief background facts

[2] The first respondent *('Kumeshin')* was employed by the third applicant *('Mainline')* as a junior site manager in May 2015. Kumeshin also held 15 per cent of Mainline's shares. In terms of clause 14 of his employment contract, Kumeshin agreed that he would not during the currency of his employment with Mainline, or at any time after the termination thereof, directly or indirectly use or disclose to any person, firm or company any information or secrets relating to processes used or developed by Mainline, which he acquired in the course of his employment with Mainline. The employment relationship between Kumeshin and Mainline broke down irretrievably. In October 2023, Mainline and Kumeshin entered into a termination agreement under which his employment was terminated, and he was paid compensation accordingly.

[3] The parties thereafter negotiated the buy-back agreement of Kumeshin's shares in Mainline. An agreement regarding the buy-back of Kumeshin's shares in Mainline by the first and second applicants was ultimately concluded on 2 May 2024. In terms of the buy-back agreement reached by the parties, the first and second applicants

purchased Kumeshin's 15 per cent shares in Mainline for R6 260 132,00. In addition, in terms of the agreement, R534 070, 00 of the purchase price would be held by Mainline's auditors as a retention to be held in trust and paid with interest to Kumeshin if Mainline did not within two years deliver a written notice to the auditors attaching a copy of a court order recording Kumeshin's breach of any of the provisions of the confidentiality and/or restraint provisions in the agreement. The buy-back agreement incorporated both a confidentiality clause and a restraint of trade clause.

[4] The applicants asserted that Kumeshin decided to breach the confidentiality and restraint provision of the buy-back agreement by taking employment with the second respondent *('Trenchless').* The applicants also asserted that Kumeshin breached the restraint clause when he established his company, KS Civil Engineering (Pty) Ltd, which entered into a service-provider agreement with Trenchless. Pursuant thereto, the applicants sought an order interdicting Kumeshin from being employed by or being otherwise associated with Trenchless until 22 May 2026, being the expiry date of the restraint period. The applicants also sought an order declaring Kumeshin to be in breach of the buy-back agreement.

[5] After considering the matter, the Court found that the restraint clause is excessively broad, contravenes public policy and is consequently unenforceable. The Court dismissed the applicants' application and found that there was no evidence suggesting that Kumeshin breached the restraint agreement nor that Trenchless employed him. The applicants now seek leave to appeal that order.

Grounds of Appeal

[6] The applicants raised two grounds of appeal. On the *first* ground, the applicants assert that this court conflated the question of breach with that of the enforceability of the restraint agreement in the main judgment. The applicants contended that whether the respondent breached a restraint clause is separate from the question of whether the restraint clause should be enforced. *Secondly*, the applicants averred that the court erred in finding that the restraint clause was unenforceable. However, at the hearing of this application, the applicants abandoned the second ground of

appeal and persisted only on the first ground. In other words, the applicants do not impugn this court's finding that the restraint clause that it alleged Kumeshin breached is excessively broad, contravenes public policy, and is, consequently, unenforceable. Instead, the applicants persisted that Kumeshin breached the restraint clause and sought leave to appeal the court's finding dismissing its application on this aspect.

The applicable legal principles

[7] The applicants' application for leave to appeal is based on section 17(1)(a) of the Superior Courts Act. Section 17 of the Superior Courts Act regulates applications for leave to appeal from a decision of a High Court. It provides as follows:

> '(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that—
> (*a*) (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;
> (*b*) the decision sought on appeal does not fall within the ambit of section 16(2)(*a*); and
> (*c*) Where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.'

[8] The prospects of success required in terms of section 17(1)(a)(i) of the Superior Courts Act are to be decided without reference to the parties' wishes.[1] The court may grant leave to appeal if the appeal has a reasonable prospect of success. 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 reach a conclusion different from that of the trial court. To succeed, an applicant must convince the court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. There must be a

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[1] *Rail Commuter Action Group v Transnet Limited Trading as Metrorail (Number 2)* 2003 (5) SA 593 (C)

sound, rational basis for the conclusion that there are prospects of success.[2] The requirement for a successful leave to appeal is more than a mere possibility that another court might come to a different conclusion. The test is whether there is a reasonable prospect of success that another court would come to a different conclusion.[3]

[9] In *MEC for Health, Eastern Cape v Mkhita* 2016 JDR 2214 (SCA), the Supreme Court of Appeal *('SCA')* emphasised the applicable test for leave to appeal and stated:

> '[16] 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.
>
> [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.'

[10] Leave to appeal is further granted not in respect of the reasons for the judgment but in respect of the order itself. Therefore, the success of the application for leave to appeal must be related to the outcome of the case and not an argument that fails to dispose of the case in the appellant's favour. In *Tecmed Africa v Minister of Health,*[4] the SCA stated as follows:

> 'First, appeals do not lie against the reasons for judgment but against the substantive order of a lower court. Thus, whether or not a Court of Appeal agrees with the lower court's reasoning would be of no consequence if the

[2] *S v Smith* 2012 (1) SACR 567 at 570 para 7.
[3] *Dineam Trade Pty Ltd v Sumali Investment 101 (Pty) Ltd* 2025 JDR 0666 (GJ at 21.
[4] [2012] 4 All SA 149 (SCA).

result would remain the same *(Western Johannesburg Rent Board v Ursula Mansions (Pty) Ltd* 1948 (3) SA 353 (A) at 354).'

[11] From the foregoing, what is required of this Court is to consider, objectively and dispassionately, whether there are reasonable prospects that another court will find merit in the arguments advanced by the losing party. (*Valley of the Kings Thaba Motswere (Pty) Ltd and Another v Al Maya International* [2016] 137 (ZAECGHC) 137 (10 November 2016) para 4).

Discussion

[12] The applicants' main ground of appeal is that the court conflated the breach question with the enforceability question. The applicants contend that whether a respondent breached a restraint is separate from the question of whether the restraint should be enforced. I must mention that agreements in restraint of trade are valid and enforceable in our law unless, *inter alia*, they impose an unreasonable restriction on a person's freedom to trade, in which case they will probably be held to be against public policy and therefore illegal and unenforceable. At common law, a contract is illegal and unenforceable if it is against good morals *(contra bonos mores)* or against public policy.

[13] In the present matter, I must stress from the outset that I am not persuaded at all that there are any reasonable prospects that the applicants' argument or ground of appeal would or, for that matter, might be upheld by another court for the following reasons: In the main judgment, the court dealt with breach and enforceability under one heading as the two concepts are inextricably intertwined. As Mr Beguley, counsel for the applicants, correctly notes in his heads of argument, the court held in paragraph 61 of the main judgment that the restraint clause is excessively broad, contravenes public policy and is consequently unenforceable.

[14] In paragraph 80 of the main judgment, the court found that on the objective facts, there is no evidence to suggest that the first respondent breached the restraint agreement. In considering the alleged breach of the restrained clause, the Court emphasised in paragraph 80 of the main judgment that Kumeshin is associated with Trenchless under a service agreement that does not infringe the applicants'

protectable interests. The court emphasised that the applicants' case is clearly based on suspicion and speculation that Kumeshin is divulging its confidential information to Trenchless and that there is nothing of substance to negate the respondents' version.

[15] More pertinently, at paragraph 83 of the main judgment, the court held that, in operating KS Civil Engineering to hire out equipment, Kumeshin is not breaching his restraint of trade agreement. The Court concluded that the only effect of the restraint sought would be to inhibit or prevent Kumeshin from using his 'stock of general knowledge, skill and experience' to earn a living. These preceding paragraphs clearly addressed the breach alleged by the applicants.

[16] What compounds the difficulty in the applicants' application is that this Court has found the restraint clause to be overly broad, legally incompetent, and unenforceable. In addition, the Court found that this restraint clause is excessively broad, contravenes public policy, and is, consequently, invalid. The applicant does not challenge this finding. Notwithstanding, the applicants seek a finding before the appeal court that Kumeshin breached a restraint clause that, on the face of it, is unreasonable, against public policy, illegal and unlawful. In my view, if a restraint of trade clause is found to be illegal or against public policy, there can be no breach of such an agreement. As discussed in the main judgment, the restraint clause is contrary to public policy and unenforceable. To this end, I agree with the views expressed by Mr Loubser, counsel for Kumeshin that a court of appeal, when contemplating this as well as the purpose of clause 4.2.2 of the buy-back agreement, will not grant an order that still permits this clause to be enforced despite it flowing from a restraint clause that has been held to be against public policy and unlawful.

[17] In *Bafana Finance Mabopane v Makwakwa and Another*,[5] the SCA held that the principle that a court may not enforce an agreement because the objective it seeks to achieve is contrary to public policy is firmly part of our law.[6] The court noted that in this determination, 'public policy' is anchored in the founding constitutional values which include human dignity, the achievement of equality and the advancement of

[5] 2006 4 SA 581 (SCA) 585H.
[6] *Napier v Barkhuizen* 2006 (4) SA 1 (SCA) at para 7.

human rights and freedoms. In *Sasfin (Pty) Ltd v Beukes,*[7] the court had to consider the question of public policy vis-à-vis a contract of cession. The court held that a deed of cession executed by the respondent (a doctor) in favour of, *inter alia*, the appellant (a finance company) was contrary to public policy and therefore unenforceable. The cession, which was a cession *in securitatem debiti*, contained provisions the effect of which was, on a proper interpretation thereof, to put the appellant, from the time the deed of cession was executed, and at all times thereafter, in immediate and effective control of all respondent's earnings as a doctor, to entitle the appellant, on notice of cession to the respondent's debtors, to recover all his book debts and to retain all amounts so recovered, irrespective of whether the respondent was indebted to it in a lesser amount.

[18] The court observed that the deed of cession was invalid and unenforceable because certain material, non-severable terms thereof were contrary to public policy, and therefore illegal. Notably, the court stressed the well-recognised principle of our law that a contract which contains illegal terms (as opposed to terms which are void for vagueness or incompleteness) is devoid of legal effect unless the offending terms are severable. The court noted further that as a matter of principle, when dealing with an agreement which is invalid because it contains material terms contrary to public policy, and the illegal terms are not severable, the Courts should not be astute to find grounds for upholding the agreement. They should not permit provisions contrary to public policy inserted in an agreement for the benefit of one party (which are non-severable) simply to be disregarded with impunity by that party when, on discovering where the shoe pinches, it suits it to do so.

[19] In the present matter, this Court has found that the restraint clause is unreasonable and against public policy, and thus illegal. In my view, the applicants cannot rely on an illegal provision of the buy-back agreement to establish a breach of the restraint clause. Simply put, that clause is against public policy and therefore illegal. The applicants have not challenged that finding. Furthermore, the enforceability of the restraint, in my view, is intertwined with the alleged breach.

[7] 1989 (1) SA 1 (A) at p.19C.

[20] The alleged conflation by the court of the enforceability and breach of the restraint clause postulated by the applicants is unavailing. In *Basson v Chilwan*,[8] Botha JA in a separate judgment observed that the incidence of the *onus* in a case concerning the enforceability of a contractual provision in restraint of trade does not appear to in principle to entail any greater or more significant consequences than in any other civil case in general. The court noted that the effect of it in practical terms is this: the covenantee seeking to enforce the restraint need do no more than to invoke the provisions of the <u>contract and prove the breach.</u> The covenantor seeking to avert enforcement is required to prove on a preponderance of probability that in all the circumstances of the particular case it will be unreasonable to enforce the restraint.

[21] As foreshadowed above, the court found that the applicants established no breach at all. In addition, the court found that the restraint clause was unreasonable, excessively broad and against public policy.

[22] In the circumstances, an application for leave to appeal to the full court of this division will, in my view, be a waste of judicial resources. I am not persuaded at all that there are any reasonable prospects that the applicants' assertions would (or, for that matter, might) be upheld by another court. On a conspectus of all the facts placed before this Court, there are no prospects of success in granting leave to appeal.

Order

[23] In the result, the following order is granted:

23.1 The applicants' application for leave to appeal is hereby dismissed.

23.2 The applicants are ordered to pay the first respondent's costs on a party and party scale, including the costs of the first respondent's counsel on scale B.

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[8] 1993 3 SA 742 (A).

LEKHULENI JD

JUDGE OF THE HIGH COURT

<u>Appearances:</u>

For the Applicants: Adv Baguley

Instructed by: Slabbert Venter Yanoutsos Inc

For the First Respondent: Adv Loubser

Instructed by: Allie and Naidoo Attorneys Inc