IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1)	**NOT** REPORTABLE
(2)	**NOT** OF INTEREST TO OTHER JUDGES

CASE NO: 2024-063165

DATE: 25 March 2026

In the matter between:

SIBANYE GOLD (PTY) LIMITED	First Applicant
SIBANYE SOLAR PV (PTY) LIMITED	Second Applicant
SIBANYE STILLWATER LIMITED	Third Applicant

and

ESKOM HOLDINGS SOC LTD	First Respondent
THE NATIONAL ENERGY REGULATOR OF SOUTH AFRICA ('NERSA')	Second Respondent
FAR WEST RAND DOLOMITIC WATER ASSOCIATION	Third Respondent

Neutral Citation: *Sibanye Gold and Others v Eskom Holdings SOC and Others (2024-063165)* **[2026] ZAGPJHC ---** (25 March 2026)

Coram: Adams J

Heard: 25 March 2026

Delivered: 25 Marcg 2026 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 12:30 on 25 March 2026.

Summary: Application for leave to appeal – s 17(1)(a)(i) of the Superior Courts Act 10 of 2013 – an applicant now faces a higher and a more stringent threshold –

Another compelling reason for leave to appeal to be granted (s 17(1)(a)(ii)) – the decision sought to be appealed against involves an important question of law –

Leave to appeal refused.

ORDER

---

(1) The first respondent's application for leave to appeal is dismissed with costs.

(2) The first respondent shall pay the applicants' costs of this opposed application for leave to appeal, such costs to include the costs consequent upon the utilisation of two Counsel, one being Senior Counsel (where so employed), on scale 'C' of the tariff referred to in Uniform Rule of Court 67A(3), read with rule 69.

JUDGMENT [APPLICATIONS FOR LEAVE TO APPEAL]

Adams J:

[1]. I shall refer to the parties as referred to in the original opposed application by the first, second and third applicants ('Sibanye') for an order reviewing and setting aside the first respondent's (Eskom's) decision to refuse the applicants' wayleave application and for related ancillary relief. On 18 February 2026, written judgment was handed down in the said application. The applicants' application was granted and I declared the said decision to be unlawful and constitutionally invalid. The impugned decision was reviewed and set aside and substituted with an order in terms of which applicants' wayleave application with reference WS171/2023 was granted. I also granted costs in favour of the applicants against the first respondent.

[2]. The first respondent applies for leave to appeal against the whole of the aforementioned judgment and order, including the order for costs. The first respondent contends that I erred in granting the aforesaid order and that I should instead have dismissed the applicants' application with costs. In a

nutshell the first respondent’s case in this application for leave to appeal is that I erred in a number of factual and legal findings.

[3]. Firstly, I erred, so Eskom contends, and committed an error of law when I failed to consider the legal consequences and implications of Sibanye's project as a ‘Strategic Integrated Project’ (‘SIP’) in terms of the Infrastructure Development Act 23 of 2014 (IDA). The true legal effect of my aforementioned recognition, so Eskom contends, is that the provisions of the IDA are applicable to Sibanye, as are the dispute resolution mechanisms referred to therein. This, in turn means, so Eskom’s argument on this point is concluded, that instead of litigation in this Court, Sibanye ought to have first exhausted the dispute resolution mechanism provided for in the Intergovernmental Relations Framework Act 13 of 2005 (IRFA).

[4]. Eskom therefore contends that I committed an error of law in that I ought to have found that Sibanye was duty bound to first exhaust the dispute resolution processes prescribed in IRFA whilst holding steadfast to their status as an SIP. It matters not, so it is argued by Eskom, that this point was not raised in the main application or at any stage prior to the application for leave to appeal.

[5]. Secondly, Eskom contends that I committed an error of law in finding that the crossing of Eskom's lines was ubiquitous, that Eskom did not raise a query on inspection, that it belatedly decided that underground lines would be permitted and that the decision to refuse the application for a wayleave was not a genuine concern. I erred in law, so the contention goes, when I disregarded Eskom's safety concerns which are statutory obligations and arose from operational risk or safety of crossing of lines.

[6]. Thirdly, Eskom contends that I erred when I found that the wayleave policy of Eskom stipulates that the process for the wayleave application was to be concluded within a 14-day period, for which I criticised Eskom for the delay of 12 months. However, I contradicted myself in later finding that Eskom's policy

is not legislation and cannot be applied rigidly. The court ought to have found that Eskom's engagements with Sibanye demonstrated its pragmatism in applying its policy.

[7]. Eskom also argues that my approach to the issue of Eskom's revenue was erroneous in fact because Sibanye was allowed to advance its revenue consideration points that the Project would increase its profits and the returns to shareholders through higher dividends yields and energy costs being a growth inhibitor, yet Eskom's argument in the same vein was rejected as demonstrating its ulterior motive. Furthermore, the court erred in law when it found that Eskom's decision was irrational, unreasonable and irrelevant because Eskom could not historically meet the energy needs of Sibanye and as a result it suffered significant energy deficits through operational disruptions, production losses and increased risks.

[8]. Finally, it was contended on behalf of Eskom that the court *a quo* erred in granting the substitution order and contracting for Eskom and on terms favourable only to Sibanye. The effect of the order, so the contention goes, is that it breaches the separation of powers because it trespasses upon the administrative terrain of another branch of government.

[9]. As regards the first ground on which this application for leave to appeal is based, that being in relation to IRFA, Sibanye argued that this new defence was never pleaded let alone raised in argument before this Court *a quo*. It would be impermissible to raise it on appeal.

[10]. I agree. Moreover, the argument has no merit. The Sibanye entities, as private companies, not organs of state as defined under section 239 of the Constitution, could never be subject to the intergovernmental dispute resolution requirements of section 41 of the Constitution, which are given effect through the IRFA, which apply exclusively to organs of state in the national, provincial or local spheres of government. There is also nothing in the IDA that purports to

transform private entities into organs of state merely because they are owners or beneficiaries of projects declared to be strategic integrated projects.

[11]. There are further grounds on which the application for leave to appeal is based. They are related to and overlap with the grounds alluded to *supra*. All the same, nothing new has been raised by Eskom in its application for leave to appeal. In my original judgment of 18 February 2026, I have dealt with most, if not all of the issues raised by Eskom in its application for leave to appeal and it is not necessary for me to repeat those in full. Suffice to restate what I said in my original judgment that, if regard is had to the context in which this matter is played out and the official policy adopted by the South African government, Eskom's approach to Sibanye's wayleave application is to say the least surprising.

[12]. The traditional test in deciding whether leave to appeal should be granted was whether there is a reasonable prospect that another court may come to a different conclusion to that reached by me in my judgment. This approach has now been codified in s 17(1)(a)(i) of the Superior Courts Act 10 of 2013, which came into operation on the 23rd of August 2013, and which provides that leave to appeal may only be given where the judges concerned are of the opinion that 'the appeal *would* have a reasonable prospect of success'.

[13]. In *Ramakatsa and Others v African National Congress and Another*[1], the SCA 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 'would' reasonably arrive at a conclusion different to that of the trial court. These prospects of success must not be remote, but there must exist a reasonable chance of succeeding. An applicant who applies for leave to appeal must show that there is a sound and rational basis for the conclusion that there are prospects of success.

---

1 *Ramakatsa and Others v African National Congress and Another* (724/2019) [2021] ZASCA 31 (31 March 2021);

[14]. The ratio in *Ramakatsa* simply followed *S v Smith* 2012 (1) SACR 567 (SCA), [2011] ZASCA 15, in which Plasket AJA (Cloete JA and Maya JA concurring), held as follows at para 7:

‘What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that the Court of Appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this 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. More is required to be established than that there is a mere possibility of success. That the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.’

[15]. In *Mont Chevaux Trust v Tina Goosen*[2], the Land Claims Court held (in an *obiter dictum*) that the wording of this subsection raised the bar of the test that now has to be applied to the merits of the proposed appeal before leave should be granted. I agree with that view, which has also now been endorsed by the SCA in a judgment in *Notshokovu v S*[3]. In that matter the SCA remarked that an appellant now faces a higher and a more stringent threshold, in terms of the Superior Courts Act 10 of 2013 compared to that under the provisions of the repealed Supreme Court Act 59 of 1959. The applicable legal principle as enunciated in *Mont Chevaux* has also now been endorsed by the Full Court of the Gauteng Division of the High Court in Pretoria in *Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others*[4].

[16]. I am not persuaded that the issues raised by Eskom in its application for leave to appeal, are issues in respect of which another court is likely to reach conclusions different to those reached by me. I therefore conclude that there

---

[2] *Mont Chevaux Trust v Tina Goosen,* LCC 14R/2014 (unreported).

[3] *Notshokovu v S* 2016 JDR 1647 (SCA); Case no: 157/2015 [2016] ZASCA 112 (7 September 2016).

[4] *Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others* (19577/09) [2016] ZAGPPHC 489 (24 June 2016).

are no reasonable prospects of another court making factual findings and coming to legal conclusions at variance with my factual findings and legal conclusions. Therefore, in my view, the appeal does not have reasonable prospects of success.

[17]. Moreover, there are no other compelling reasons why the appeal should be heard, as envisaged by s 17(1)(a)(ii) of the Superior Courts Act.

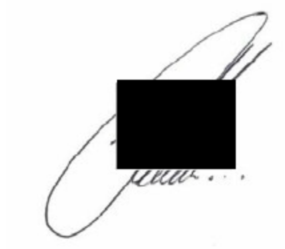
[18]. Leave to appeal should therefore be refused.

Order

[19]. In the circumstances, the following order is made:

(1) The first respondent's application for leave to appeal is dismissed with costs.

(2) The first respondent shall pay the applicants' costs of this opposed application for leave to appeal, such costs to include the costs consequent upon the utilisation of two Counsel, one being Senior Counsel (where so employed), on scale 'C' of the tariff referred to in Uniform Rule of Court 67A(3), read with rule 69.



L R ADAMS
Judge of the High Court
Gauteng Division, Johannesburg

HEARD ON:	25 March 2025
JUDGMENT DATE:	25 March 2026 – Judgment handed down electronically
FOR THE FIRST, SECOND AND THIRD APPLICANTS:	J Babamia SC, with C McConnachie
INSTRUCTED BY:	Norton Rose Fulbright SA Inc, Sandhurst, Sandton
FOR THE FIRST RESPONDENT:	S L Shangisa SC, with L Rakgwale
INSTRUCTED BY:	Tasneem Moosa Incorporated, Houghton Estate, Johannesburg
FOR THE SECOND AND THIRD RESPONDENTS:	No appearance
INSTRUCTED BY:	No appearance