



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

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER
JUDGES: NO
(3) REVISED. ✓

DATE: 27/04/2026

SIGNATURE

Case No: 64258/21

In the matter between:

SIPHO MILA PITYANA

Applicant

And

ABSA GROUP LIMITED

First Respondent

ABSA BANK LIMITED

Second Respondent

PRUDENTIAL AUTHORITY

Third Respondent

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

The judgment and order are published and distributed electronically.

PA VAN NIEKERK, J

INTRODUCTION:

- [1] Applicant applies for leave to appeal in terms of section 16(1)(a)(i) read with section 17(2)(a) of the Superior Courts Act 10 of 2013 (*“the Superior Courts Act”*) against the whole of the judgment and order of this Court dated 9 March 2026 which was delivered on 11 March 2026 and revised on 25 March 2026. The application for leave to appeal is opposed by First- and Second Respondents (*“Absa”*).
- [2] It is now trite law that the Applicant, in an application for leave to appeal, faces a more stringent test under section 17(1)(a) of the Superior Courts Act compared to the Repealed Supreme Court Act 59 of 1959, and that a mere possibility of success, or an arguable case, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal¹ and it was held that the use of the word *“would”* in section 17(1)(a)(i) of the Superior Courts Act imposes a more stringent threshold test.² By virtue of the wording of the provisions of section 17(1) of the Superior Courts Act it follows that this Court is enjoined not to grant leave to appeal unless the Applicant can show that there is a reasonable prospect, based on a sound rational basis, that another Court will uphold an appeal and grant the relief as claimed in the Applicant’s notice of motion in the main application, or that there are other compelling grounds for leave to appeal to be granted.

¹ See: *MEC for Health, Eastern Cape v Mkhitha* 2016 JDR 2214 (SCA) at paras 16 and 17.

² See: *City of Johannesburg Metropolitan Municipality v Spectrum (Pty) Ltd and Others* 2022 JDR 3708 (GJ) at paras 6-7.

- [3] From a perusal of the Applicant's notice in terms of section 16(1)(a)(i) read with section 17(2)(a) of the Superior Courts Act, it transpires that the Applicant does not rely on any alleged incorrect factual finding by this Court, but relies on the contention that this Court applied the legal principles in relation to a special statutory review incorrectly and should have completely reconsidered the impugned decision on review instead of applying the rationality test. Applicant also submitted that this court drew incorrect inferences from the common cause facts and should have arrived at different legal conclusions on those common cause facts. Applicant further submitted that there are compelling reasons for the appeal, based on the contention that the issues in the proceedings are novel and of substantial public importance, with limited jurisprudence on the scope and powers of the Court to review and set aside decisions taken in terms of section 71 of the Companies Act, as result of which the matter calls for determination by the Supreme Court of Appeal ("SCA").
- [4] In the judgment of this court, dismissing Applicant's review under section 71(4) of the Companies Act, this Court made findings which are concisely summarised as follows:
- [4.1] That section 71(4) provides for a special statutory review, which is one of the recognised pathways to review;
- [4.2] That there are distinct differences between a review and an appeal, which should be considered by a Court when any decision in terms of section 71(4) of the Companies Act is subject to review;
- [4.3] That the decision of the Board of Directors of a company, which is a private entity as opposed to a State Organ or public official that exercise public power, is a

decision which provides for a very limited scope of interference by a Court on review because a Court can only interfere with such a decision if the decision does not pass the rationality test.

[5] The findings as summarised above are entrenched principles based on substantial jurisprudence of the SCA and the Constitutional Court. Based on those principles I am of the view that there is no reasonable prospect that another Court will find that the decision of the Respondents to terminate the Applicant's appointment as director was irrational, especially in the context of the common cause facts of this matter as set out in the judgment. This Court found that a breach of trust developed between the Applicant and Respondents and found that a conflict of interest arose between Applicant's personal interests and the interests of Absa as result of which the Absa boards invoked the provisions of section 71(4) of the Companies Act. The facts upon which these findings were made are common cause. These facts were interpreted by the Absa boards to conclude that a conflict of interest developed between Applicant and Absa. In my view this conclusion and the resultant decision is not so irrational as to warrant an interference with that decision and in my view there is no reasonable prospect that another Court will arrive at a different conclusion.

[6] Insofar as Applicant relies on exceptional circumstances as set out in paragraph 15 of the notice of application for leave to appeal, I disagree that the issues are novel to the extent that it requires the attention of the SCA. Section 71(4) of the Companies Act provides the remedy of a special statutory review. There is substantial jurisprudence on the various legal principles which inform review proceedings, which may or may not apply to each individual review in terms of section 71(4), depending on the pertinent issues of each individual case. In my view, because of the scope and nature of a review in terms

of section 71(4) of the Companies Act, and because of the divergent nature of disputes which may result when boards of directors employ the provisions of section 71(3) of the companies act, and considering the divergent nature of companies and their respective spheres of commerce, the SCA will not provide a “one glove fits all” approach to review of these decisions.

- [7] Prior to hearing the application for leave to appeal, this Court requested the parties to submit argument on whether the issues between Applicant and Absa became moot by virtue of the fact that Applicant abandoned the relief claiming reinstatement and reasonable compensation, and only persisted with the relief seeking the decision to be declared unlawful, rendering such relief to be of no practical effect. In this regard the attention of the parties was directed to *Solidariteit Helpende Hand NPC and Others v Minister of Cooperative Governance and Traditional Affairs (104/2022) [2023] ZASCA 35 (31 March 2023)*. It must be noted that the issue whether a matter has become moot may be raised at any stage, and also be raised *mero motu* by the Court.³

- [8] Both parties filed heads of argument on this issue. On behalf of Applicant it was submitted that the *Solidariteit* judgment *supra* can be distinguished from the matter *in casu* and the following was stated:

“7. We submit that this matter is distinguishable. The successful review and setting aside of the first and second respondents’ decision in terms of section 71(3) of

³ See para 30 of the *Akani* judgment referred to *infra*.

the Companies Act 71 of 2008 ('the Companies Act') will have a concrete and significant impact on the Applicant and would be relevant.

8. *As matters currently stand, there is a Court finding that valid grounds existed for the Applicant's removal as a director in terms of section 71(3) of the Companies Act and that the Applicant was validly removed in terms of that section and on such grounds".*

[9] Applicant further referred to the judgment of *Wait v Marais and Others*⁴ where it was held that the removal as a director has potentially far-reaching consequences for the affected director such as an affront to integrity and dignity; reputational harm; impairment of standing and future prospects of acquiring directorships; obvious financial consequences and the like.

[10] On behalf of Absa it was submitted that no adverse factual finding is made against the Applicant in the judgment. It was submitted (in my view correctly so) that the judgment addressed the issue whether the impugned decision of Absa was irrational, considering the objective common cause evidence. Counsel for Applicants submitted that in the *Solidariteit* matter, the SCA appreciated that the impugned regulations may have had an unlawful limitation on the Applicant's constitutionally enshrined rights, under the threat of arrest or criminal penalty, but still declined to entertain the merits of the application on the basis that there was no discrete or justiciable issue between the parties.

⁴ *Wait v Marais and Others (1707/2021) [2022] ZAECQBHC 41 (1 November 2022).*

[11] It was further submitted on behalf of Absa that the Applicant is entitled to pursue various forms of relief against Absa, which does not require that the judgment of this Court be overturned. The Respondents' counsel then concluded to submit that there is no discrete and justiciable issue before the Court and that it would be an exercise in futility and a waste of judiciary resources if leave for appeal is granted, as the SCA will ultimately decline to entertain the merits of the appeal, just as it did in the *Solidariteit* matter referred to *supra*.

[12] In *Akani Retirement Fund Administrators (Pty) Limited and Others v Moropa and Others*⁵ the Supreme Court of Appeal dealt with the issue of mootness of decisions reviewed under the Promotion of Administrative Justice Act (PAJA). In that judgment the Appellant complained that the full Court made adverse findings against it in the course of which it committed various legal and factual errors and which, according to the Appellant, set an incorrect precedent regarding how such factual disputes should be resolved in motion proceedings. The Appellant further submitted that its officers, against whom adverse findings were made, needed to clear their names, and this remained a live issue. In that matter the learned Judge of Appeal held as follows:

"[22] *It is important to emphasise that an appeal does not lie against the reasons for judgment but against the substantive order of the lower Court. Thus, whether or not a Court of Appeal agrees with a lower court's reasoning would be of no consequence and the result would remain the same. In the present appeal, the removal of Akani as CINPF's administrator and its replacement with Momentum*

⁵ *Akani Retirement Fund Administrators (Pty) Limited and Others v Moropa and Others* (1125/2022; 1129/2022) [2025] ZASCA 13 (21 February 2025).

means that the outcome of the appeal will have no practical effect. In addition, two of the impugned trustees have died. The third, Mr Sithole, has been removed as a trustee”.

- [13] In that case it was then held that the appeal became moot. In that matter it was further held⁶ that legal proceedings envisaged in future does not render an issue which has become moot to remain alive as the Court will not provide opinions to parties which may assist in future legal proceedings.
- [14] Considering the aforesaid principles of mootness, applied by the Supreme Court of Appeal in the aforesaid authorities, in my view, *ex post facto* considered, the application should have been dismissed on the basis of becoming moot at the time when the Applicant abandoned his claim for an order to be reinstated and compensation.
- [15] Insofar as Applicant relies on the contention that, even if it is held that the issues have become moot, the legal points raised in the judgment warrants the attention of the Supreme Court of Appeal, in my view, the following *dictum* as contained in paragraph [25] of the Akani judgment is appropriate:

“The only point of law decided by the full Court was that the decision of CINPF to remove NBC and replace it with Akani, constituted an administrative action reviewable under PAJA. The test applicable to whether powers and functions that are exercised are public in nature, and therefore constitute administrative action, is a flexible one. Such cases are routinely decided on a case-by-case basis. Viewed in this light, the full Court’s conclusion

⁶ Akani judgment, para [25] and [26].

that the trustee's decision to remove NBC as a provider of administration services to CINPF amounted to the exercise of public power reviewable under PAJA, does not amount to 'discreet legal issue of public importance' envisaged in Qoboshiyane."

In casu, this is the point made in paragraph 6 supra.

In the premises, the application for leave to appeal is dismissed with costs.


P A VAN NIEKERK
JUDGE OF THE GAUTENG DIVISION,
PRETORIA

APPEARANCES

FOR THE APPLICANT:

A SUBEL SC

N STEIN

INSTRUCTED BY:

HAFFEGEE ROSKAM SAVAGE ATTORNEYS

FOR THE FIRST RESPONDENT:

DA LOXTON SC

A MILOVANOVIC-BITTER

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