



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

Case No: 1934/2019

In the matter between:

**NICOLAAS VAN DEN BERGH**

Plaintiff

and

**THE GOVERNMENT OF THE FRENCH REPUBLIC**

Defendant

**Reportable / Not reportable**

**Coram:** Anderssen AJ

**Heard:** 20 May 2026

**Delivered:** Electronically on 25 May 2026

**Summary:** Application for leave to appeal – no reasonable prospects of success  
– no other compelling reason – application refused

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**ORDER**

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1. The application for leave to appeal is refused.
2. The plaintiff is ordered to pay the defendant's costs, such costs to include the costs of two counsel on scales C and B respectively.

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## JUDGMENT

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Anderssen AJ:

### Introduction

[1] The plaintiff seeks leave to appeal the judgment handed down on 17 March 2026, which granted absolution from the instance, upheld the defendant's special plea of immunity and ordered the plaintiff to pay the defendant's costs.

[2] In terms of section 17(1) of the Superior Courts Act<sup>1</sup> I must consider whether the appeal would have a reasonable prospect of success or whether there is some other compelling reason why the appeal should be heard, such as conflicting judgments on the matter under consideration. This court, in *MSH v JSH*,<sup>2</sup> in addressing the debate as to whether the section introduced a higher threshold to that which applied prior to the promulgation of the Act, found that:

*[4] Prior to the Act coming into force, the test in an application for leave to appeal was whether there were reasonable prospects that another court may come to a different conclusion. Much debate has ensued as to whether s 17(1) imposes a more stringent and onerous test before leave to appeal can be granted. I am of the view that it is now authoritatively established that the position remains that if there is a reasonable prospect of success, leave to appeal should be granted. The different views and findings in this regard, in my view, essentially are now moot in light of the finding in Ramakatsa and Others v African National Congress and Another.<sup>3</sup>*

[5] *In Ramakatsa, in interpreting the section, the SCA held that:*

*'If a reasonable prospect of success is established, leave to appeal should*

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<sup>1</sup> 10 of 2013.

<sup>2</sup> *M.S.H v J.S.H* - Application for Leave to Appeal (8470/2021) [2023] ZAWCHC 345 (14 September 2023) at para [4] and [5].

<sup>3</sup> Footnote: reference [2021] JOL 49993 (SCA) March 2021.

*be granted. Similarly, if there are some other compelling reasons why the appeal should be heard, leave to appeal should be granted. 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 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.'*

[3] I agree with the above finding. I must thus grant the plaintiff leave to appeal if a reasonable prospect of success is established or if there are some other compelling reasons why the appeal should be heard.

[4] I turn to the grounds on which the plaintiff relies in his application. Before dealing with each of the four grounds raised I find myself compelled to record that the ten-page Notice of Application for Leave to Appeal is unduly prolix, and does not succinctly set out the grounds of appeal. It does not confine itself to where the court erred or misdirected itself but also incorporates argument. Notices of this sort must be clear, concise, and unambiguous, indicating exactly where the trial court erred in fact or in law. They should not incorporate a rehash of trial arguments.

#### **The first ground**

[5] The plaintiff avers that this court materially misdirected itself by finding that the plaintiff bore the onus of proving an exception to immunity and that the defendant bore no onus in respect of its special plea. The argument is, firstly, that the special plea asserts positively that the transaction is a sovereign act of a governmental character falling outside the exceptions in section 4(1) of the the Foreign States Immunities Act ("*the Act*"). As such, because the defendant set up a positive special defence, it bore the onus. Secondly, the argument is that *The Akademik Fyodorov* case sets up a contrary authority.

[6] The defendant's special plea in abatement reads as follows:

3. *The defendant denies that this Honourable Court is capable of adjudicating this dispute because:*

3.1 *the defendant is the Government of the French Republic;*

3.2 *the French Republic is a foreign state;*

3.3 *the defendant, as the French Republic's Government, is a 'foreign state' in terms of section 1(2) of the Foreign States Immunities Act 87 of 1981 ("the Act") and is immune from the jurisdiction of the courts of the Republic of South Africa as a result of the provisions of section 2(1) of the Act;*

3.4 *the contract for the supply of goods (which contract is denied) is not a contract as envisaged by either section 4(1)(a) or (b) of the Act; and*

3.5 *the defendant is therefore immune from the jurisdiction of this court, in accordance with section 2(1) of the Act.*

[7] The structure of the plea makes it clear that it is not a positive assertion – it is a denial and the assertions in the subparagraphs follow the Act. It is common cause that the defendant is a foreign state. In terms of section 2(1) of the Act a foreign state shall be immune from the jurisdiction of the courts of the Republic except as provided in this Act or in any proclamation issued thereunder. Paragraphs 3.1 to 3.3 of the special plea therefore simply asserted the statutory position and the defendant, by doing so, cannot draw an onus.

[8] Section 2(1) of the Act confers general immunity on a foreign state, subject to the limited exceptions listed in the Act. Section 2(2) imposes an obligation on this court to give effect to the immunity conferred by subsection (1) even though the foreign state does not appear in the proceedings in question. It is the plaintiff who avers that the defendant does not have immunity from the jurisdiction of this court. The amended particulars of claim include the following positive claims:

*Defendant does not have immunity from the jurisdiction of the above Honourable Court in these proceedings by virtue of the transaction between Plaintiff and Defendant:*

52.1 *being a contract for the supply of goods and as such it is a commercial transaction entered by Defendant as envisaged by section 4(1)(a) as read with subsection 4(3)(a) of The Foreign States Immunities Act, 87 of 1981; and*

52.2 *imposing on the Defendant an obligation to perform the annual audits at Plaintiff's manufacturing plant in Cape Town was an obligation on the Defendant, which by virtue of the contract fell to be performed partly in the Republic and accordingly he contract is a contract envisaged by section 4(1)(b).*

[9] Based on ***Pillay v Khrishna***,<sup>4</sup> there can be no doubt that the plaintiff bore the burden of proving to this court that the contract he relies on is a commercial transaction, and that an obligation was imposed on the defendant in terms of section 4(1)(b). If proven, this would mean that the defendant does not enjoy immunity. After all, 'he who asserts, must prove'. The onus can never be on the defendant, who enjoys automatic protection under the Act. Paragraph 3.4 of the special plea in abatement also contains a denial – and not a positive assertion – as the defendant denied that the contract for the supply of goods as pleaded by the plaintiff is a contract as envisaged by either section 4(1)(a) or (b) of the Act.

[10] The special plea of abatement filed by the defendant merely reasserts the defendant's immunity – i.e. pleads the default statutory position – and denies that the contract, as pleaded by the plaintiff, is a contract in terms of either section 4(1)(a) or (b) of the Act. The defendant is not asserting a positive case. It is a denial of an averment in the particulars of claim.

[11] ***The Akademik Fyodorov***-case<sup>5</sup> is not authority for the proposition that the

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<sup>4</sup> ***Pillay v Krishna and Another*** 1946 AD 946.

<sup>5</sup> ***The Akademik Fyodorov: Government of the Russian Federation and Another v Marine Expeditions Inc*** 1996 (4) SA 422 (C).

onus is on a foreign state to prove that it must be afforded immunity. I was once again referred to the passage at 443A/B:

*It is clear from the provisions of s 2(1) read with s 3-s 12, which set out the exceptions to the general immunity of foreign States from the jurisdiction of South African courts, that a foreign State does not enjoy such immunity if any one of the statutory exceptions applies to it or to the proceedings in which the question of immunity arises. The foreign State must, so to speak, run the gamut of the statutory exceptions under s 3-s to 12 and only if it emerges unscathed must it be afforded immunity from the adjudicative jurisdiction of the courts.*

[12] I am compelled, again, to point out that any remark on onus would have been *obiter* as the Russian government launched an application seeking the release of its ship. As such, it was deemed to have waived its immunity in terms of section 3(3)(a) by instituting the proceedings. Furthermore, the above passage, and the underlined portion, does not in any manner or form determine that the onus rests on a foreign state. If anything, it suggests that the onus is on he who asserts – the phrase ‘run the gamut’ means to include, encompass, or experience an entire range of something. A person who runs the gamut is thus on the receiving end. The passages at 447J to 448I in this judgment confirm that the court treated the exceptions at sections 3 to 12 as placing an evidential burden on the foreign state – not an onus.

[13] I am satisfied that the plaintiff has no reasonable prospect of success on this ground and that there is no other compelling reason why the appeal should be heard.

### **The second ground**

[14] The plaintiff also complains that this court misdirected itself by ‘*finding that the Plaintiff contracted with a Foreign State to exercise its sovereign*

*authority and to pass Decree 284 so that the Applicant could benefit from the sovereign act personally*'. This is a misstatement of what was held at paragraph [35] of the judgment. No finding was made in this paragraph that the plaintiff contracted with the defendant. Furthermore, Francis J in his judgment on the exception already warned the plaintiff that the transaction – as pleaded by him – is substantially, and predominantly, political or governmental in character. It is not a 'commercial transaction' even though it may incorporate, or possibly incorporate, some elements of commercial activity.<sup>6</sup> I recorded my agreement with the views expressed by Francis J.

[15] The reasoning employed in the judgment does not depart from the principle set out in *The Akademik Fyodorov*-case.<sup>7</sup> This court held that the definition of 'commercial transaction' is an objective criterion based on the nature or character of the transaction without reference to the purpose for which it was concluded. The contract pleaded by the plaintiff including terms that the defendant contracted with one man to enact legislation. This court held that this is not a commercial transaction.

[16] Firstly, the plaintiff expressly pleaded that the defendant represented (at all material times prior to the enactment of Decree 180) that it would fully implement and strictly enforce Decree 284. He also expressly pleaded that

[16.1] the defendant had requested the production of chemical breathalysers for use in France from persons capable of producing them.

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<sup>6</sup> *Van Der Bergh v Government of the French Republic* [2024] ZAWCHC 414 (9 December 2024); 2025 (4) SA 307 (WCC) at para [16].

<sup>7</sup> At 447F-H.

[16.2] it was a term of the contract between the plaintiff and the defendant that “*the defendant undertook to ensure the proper legal implementation of Decree 2012-284 ...*”

[16.3] the defendant “*failed in its duty and legal responsibility to implement decree 2012-284*” and that the defendant repudiated the contract it had agreed with the plaintiff.

[16.4] the damages he suffered was as a result thereof that the demand for breathalysers in France collapsed overnight after Decree 180 was enacted.

[17] It was also notable that the plaintiff’s oral evidence was that Le Duc came to South Africa for two reasons: to enter into a commercial transaction with the plaintiff “*to enable the drivers in France to comply with decree 2012-284*” and to conduct an audit for the NF mark. When pressed, in cross-examination, he testified that the “*terms of the contract were we ... through the conduit, the factory would manufacture the product. It would have an NF. I undertook to deliver, at that time 55 million breathalysers ... I managed to do 40 million. The contract was ongoing. The prices were set, market-related prices, and the French government undertook to implement the Sarkozy decree of 2012-284 was their responsibility...*”

[18] The plaintiff has no reasonable prospect of success on this ground. Despite the averment to the contrary, the regulatory context that created the demand is most certainly decisive of its characterisation.

[19] Secondly, the plaintiff’s complaint also ignores the fact that his evidence clearly showed that he had not personally contracted with the defendant –

it was Redline that had entered into contracts with other entities (not the defendant). To qualify as a commercial transaction, the plaintiff personally had to conclude the agreement. He did not even get past this hurdle.

### **The third and fourth grounds**

[20] The third complaint, as I understand it, is closely linked to the fourth ground. It is that the findings were only made in respect of section 4(1)(a) and section 3 of the Act and that the exception under section 4(1)(b) was not treated as an independent exception. The problem for the plaintiff is that he did not plead the two exceptions separately. This is also why – apart from the express denial that “*the contract for the supply of goods (which contract is denied) is not a contract as envisaged by either section 4(1)(a) or (b) of the Act*” – I cannot agree with the argument that the special plea contained a ‘deemed’ admission. The inspections that were to be conducted in the Republic were pleaded as a further term of the same contract that the plaintiff averred was a commercial transaction.

[21] In addition, the inspections were pleaded as a ‘right’ to inspect – the obligation fell on the plaintiff according to the particulars of claim. Yet section 4(1)(b) reads that “*a foreign state shall not be immune ... in proceedings relating to an obligation of the foreign state which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the Republic.*”

[22] Furthermore, even if the right to inspect constituted a separate agreement, it is only that obligation in respect of which there would be no immunity – it would not extend to the other obligations. And the right to inspect related

to the Redline facilities. It did not relate to the plaintiff personally.

[23] I am again satisfied that there is no reasonable prospect of success and that on these grounds also I must refuse the plaintiff leave to appeal.

[24] The ordinary rule is that the successful party is entitled to its costs. The matter is of sufficient complexity to warrant the employment of two counsel and for taxation of counsel's fees on Scales C and B respectively.

[25] The order is recorded above.

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**ANDERSEN J S**  
**Acting Judge of the High Court**

**Appearances:**

For the applicant: Adv G R Papier with Adv Carla Hing  
Instructed by: Tobin Attorneys Inc

For the defendant: Adv B J Manca SC with Adv Adam Brink  
Instructed by: Bisset Boehmke McBlain