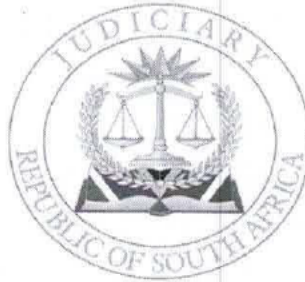


Reportable:	YES
Circulate to Judges:	YES
Circulate to Magistrates:	NO
Circulate to Regional Magistrates	NO



30 April 2026

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

CASE NUMBER: 2025/145669

In the application for leave to appeal between:-

R DU PLESSIS

Applicant

and

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

1st Respondent

CONRAD PRETORIUS

2nd Respondent

AFRIFORUM NPC

3rd Respondent

**DIRECTOR OF PUBLIC PROSECUTIONS,
NORTH GAUTENG**

4th Respondent

This judgment is handed down electronically by circulation to the parties email addresses. The date of the judgment is deemed to be 30 April 2026.

JUDGMENT: LEAVE TO APPEAL

Reid J

Introduction

- [1] The applicant seeks leave to appeal to the full court of this Division or to the Supreme Court of Appeal, after a *rule nisi* order dated 25 August 2025 under case number 2025-145669 was discharged by this Court on 9 February 2026.
- [2] The applicant (R du Plessis) was initially not prosecuted criminally after an incident of road rage. Instead, the second respondent (Conrad Pretorius) was prosecuted on two charges. After representations by AfriForum on behalf of Mr. Pretorius, the National Director of Public Prosecutions (NDPP) reviewed and set aside the earlier decision not to prosecute the applicant and decided to prosecute the applicant for attempted murder.
- [3] The applicant obtained an interim *rule nisi* on an *ex parte* basis on 25 August 2025 suspending that decision (to prosecute) pending a review application against the decision to prosecute the applicant.
- [4] On the return date, this Court discharged the interim order. The applicant now seeks leave to appeal that discharge.

Grounds of appeal

[5] In essence, the applicant claims that this Court erred in treating this as an ordinary challenge to a prosecution decision, thereby applying the wrong legal framework and incorrectly refusing interim relief that was necessary to prevent irreparable harm from a *prima facie* illegal prosecution.

[6] The applicant argues that the NDPP's decision to prosecute him is illegal on the basis that:

6.1. The NDPP failed to comply with constitutional preconditions for reviewing a decision not to prosecute in that it:

6.1.1. Failed to take proper representations from the applicant (not disclosing adverse information) after receiving new information after the decision to not prosecute the applicant was made.

6.1.2. Failed to consult the relevant Director of Public Prosecutions (DPP) as required by section 179(5)(d) of the Constitution and section 22(2)(c) of the National Prosecuting Authority Act 32 of 1998 (NPA Act).

[7] The applicant further argues that the decision to prosecute him,

is irrational and biased (e.g., applying double standards, ignoring exculpatory evidence, and essentially trying to appease AfriForum).

[8] The applicant contends that this Court erred in refusing to confirm the interim relief, on the basis that:

8.1. A *prima facie* illegal prosecution causes irreparable harm to liberty, dignity, and privacy (citing *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC)).

8.2. The balance of convenience favours suspending the prosecution pending review.

8.3. There is no adequate alternative remedy (the criminal trial itself is the harm, not a remedy).

[9] The applicant contends that this Court erred as follows:

9.1. In not distinguishing between an ordinary decision to prosecute and a review decision under section 179(5)(d) of the Constitution (where prior non-prosecution exists and specific preconditions apply).

9.2. In holding that the applicant failed to establish a *prima facie* case of illegality, when in fact the NDPP failed to provide the applicant

with the AfriForum representations or even the “gist” of adverse considerations, violating the right to meaningful representations. The NDPP failed to properly consult the Gauteng DPP (in that there was no reciprocal exchange of ideas).

- 9.3. In finding that the harm to the applicant is “speculative” and that arrest/adverse publicity does not amount to irreparable prejudice.
- 9.4. In holding that the criminal trial is a suitable alternative remedy, whereas appearing as an accused itself causes irreparable harm.
- 9.5. In concluding that the “floodgates” argument applies here, when this is a rare case of a review of a decision not to prosecute – not an ordinary challenge to a prosecution decision.
- 9.6. In applying *In Mapisa-Nqakula v National Director of Public Prosecutions and others* 2024 JDR 1749 (GP) which concerned an original decision to prosecute to this matter, which concerns a different constitutional provision (section 179(5)(d)).
- 9.7. In failing to find that the NDPP’s decision was irrational and biased, e.g.:
 - 9.7.1. Ignoring the unexplained adaptation of Mrs Pretorius’s

version.

9.7.2. Applying double standards to the applicant as opposed to Mr Pretorius.

9.7.3. Incorrectly rejecting the applicant's self-defence argument.

9.8. In requiring irreparable trial prejudice or *mala fides* as a prerequisite for interim relief, whereas *prima facie* illegality alone should suffice to prevent irreparable harm to fundamental rights.

[10] In holding that the balance of convenience favours the NPA, when the only alleged harm to the NPA (loss of public confidence) is speculative.

[11] In concluding that the applicant had an alternative remedy, when none exists that can prevent the irreparable harm before the review is heard.

Leave to appeal

[12] The test to be applied in an application for leave to appeal is set out in section 17(1)(a) of the **Superior Courts Act** 10 of 2013 which provides that:

*"(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;*

(own emphasis)

- [13] In *Erasmus Superior Court Practice* CD Rom & Intranet: ISSN 1561-7476 Internet: ISSN 1561-7475, DE van Loggerenberg, © Jutastat e-publications Part A, Volume 3 under the heading "Introduction, Superior Court System and Access to Superior Courts" the author discusses the right of a party to appeal to a higher court, and compares section 20(4) of the *Supreme Court Act* 59 of 1959 (repealed with effect from 23 August 2013) with section 17 of the *Superior Courts Act* 10 of 2013. The author writes as follows:

*"**Leave to appeal.** Both Acts limit the right to appeal to a higher court against a judgment or order, either by the court appealed from or the court appealed to. This limitation was contained in section 20(4) of the **Supreme Court Act** 59 of 1959, and was re-enacted in section 17 of the **Superior Courts Act** 10 of 2013. In **Besserglik v Minister of Trade, Industry and Tourism (Minister of Justice Intervening)** 1996 (4) SA 331 (CC), dealing with the repealed Act, the Constitutional Court pronounced that the screening of unmeritorious appeals to prevent the flooding of the courts of appeal with hopeless cases did not constitute an infringement of the fundamental right of access to courts. The same principle applies to the new Act, save that the wording of section 17 indicates that, in the test whether a potential appeal could succeed, **the bar has been raised: except in extraordinary cases, leave may be granted only if***

*another court ‘would’ come to the conclusion that the appeal had merit. (See: **Magashule v Ramaphosa** [2021] 3 All SA 887 (GJ) at para [6]; and also cited with approval in, amongst others, **South African Breweries (Pty) Ltd v Commissioner of the South African Revenue Services** (unreported, GP case no 3234/15 dated 28 March 2017) at para [5]; **Pretoria Society of Advocates v Nthai** 2020 (1) SA 267 (LP) at para [5], overruled, but not on this point, in **Johannesburg Society of Advocates v Nthai** 2021 (2) SA 343 (SCA)) Given the case load of all courts, the new section does meet the constitutional threshold of compliance.”*

(some footnotes omitted; own emphasis)

- [14] The Supreme Court of Appeal specifically found in **MEC for Health, Eastern Cape v Mkhita** 2016 JDR 2214 (SCA) that the application for the test for leave to appeal has to be applied purposefully for appeals where there is no prospect of success and appeals which have no merit, should not be granted leave to appeal. This is to alleviate the ever-increasing workload on the judicial system.

- [15] The Supreme Court of Appeal aptly described the test to grant leave to appeal in **Cook v Morrisson and Another** 2019 (5) SA 51 (SCA) as follows:

“[8] The existence of reasonable prospects of success is a necessary but insufficient precondition for the granting of special leave. Something more, by way of special circumstances, is needed. These may include that the appeal raises a substantial

point of law; or that the prospects of success are so strong that a refusal of leave would result in a manifest denial of justice; or that the matter is of very great importance to the parties or to the public. This is not a closed list (Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd 1986 (2) SA 555 (A) at 564H – 565E; Director of Public Prosecutions, Gauteng Division, Pretoria v Moabi 2017 (2) SACR 384 (SCA) ([2017] ZASCA 85) para 21)."

- [16] These sentiments are echoed in **MEC for Health, Eastern Cape v Mkhita** 2016 JDR 2214 (SCA) the Supreme Court of Appeal emphasised the application for the test for leave to appeal and found as follows in paragraphs [16] to [18]:

*"[16] Once again it is necessary to say that **leave to appeal**, especially to this court, **must not be granted unless there truly is a reasonable prospect of success**. 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.***

*[18] In this case the requirements of 17(1)(a) of the Superior Courts Act were simply not met. The uncontradicted evidence is that the medical staff at BOH were negligent and caused the plaintiff to suffer harm. The special plea was plainly unmeritorious. **Leave to appeal should have been refused. In the result, scarce public resources were expended: a hopeless appeal was***

prosecuted at the expense of the Eastern Cape Department of Health and ultimately, taxpayers; and valuable court time and resources were taken up in the hearing of the appeal. Moreover, the issue for decision did not warrant the costs of two counsel.
 (own emphasis)

- [17] The above illustrates that the legislation and the Supreme Court of Appeal require more than a mere possibility than that another judge might come to a different conclusion. The test is whether another judge would come to a different conclusion.

Analysis

- [18] In my view, the *crux* of the application for leave to appeal relates to the correct interpretation of sections 179(5)(d) of the Constitution and section 22(2)(c) of the NPA Act.
- [19] These sections deal specifically with the process to be followed when the NDPP executes a decision made on whether to prosecute an individual or not.
- [20] The fundamental question in this application for leave to appeal, in my analysis, is whether the NDPP failed to take proper representations from the applicant by not disclosing adverse information and giving the applicant an opportunity to respond to the adverse information, before the decision to not prosecute is changed to a decision to prosecute.

[21] Having considered the grounds of the application for leave to appeal, I hold the view that another court may have come to a different conclusion, being presented with the same facts. I hold this view on the basis that the outcome of the application was based on the interpretations of sections 179(5)(d) of the Constitution and section 22(2)(c) of the NPA Act, which may have been interpreted differently.

[22] In as far as my research has been concerned, and both parties' legal representatives submissions, this is a novel point in law and have not been considered in our courts before.

[23] As such, I conclude that leave to appeal to the Supreme Court of Appeal should be granted.

Cost

[24] The general principle in appeals, is that the costs of the application for leave to appeal forms part of the costs of the appeal, save where the applicant does not pursue the appeal in which case the applicant is to pay the application for leave to appeal.

[25] I find no reason to deviate from this principle.

Order:

[26] In the premise, I make the following order:

- i) Leave to appeal to the Supreme Court of Appeal is granted.
- ii) The costs of the application for leave to appeal forms part of the costs of the appeal, save where the applicant does not pursue the appeal in which case the applicant is to pay the application for leave to appeal.



FMM REID
JUDGE OF THE HIGH COURT
NORTH WEST DIVISION
SEATED IN GAUTENG DIVISION
PRETORIA

DATE OF ARGUMENT: 24 APRIL 2026

DATE OF JUDGMENT: 30 APRIL 2026

APPEARANCES:

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ADV DC DU PLESSIS

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