

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED: **YES**

11 May 2026
DATE


SIGNATURE

CASE NO: 21392 / 2020

In the matter between:

SANNAH SANKIE MOREBUDI

FIRST APPLICANT

JOSEPH MABUSENA MOREBUDI

SECOND APPLICANT

NEO-THANDO HOLDINGS (PTY) LTD

THIRD APPLICANT

and

BRAD BARKER

FIRST RESPONDENT

CHARLES LUYCKX

SECOND RESPONDENT

ELLIOTT MOBILITY (PTY) LTD

THIRD RESPONDENT

NEO THANDO ELLIOTT MOBILITY (PTY) LTD

FOURTH RESPONDENT

ORDER

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1. Leave to appeal to the Full Court of this division is granted against the cost order.
 2. The costs of this application will be costs in the appeal.
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JUDGMENT

TOLMAY J:

[1] The first and third respondents (“the respondents”) seek leave to appeal the cost order granted on 16 April 2020 by Sardiwalla J in respect of Part A of the application that was brought by the applicants. The judgment was, however, only delivered on 22 July 2022.

[2] The respondents applied for leave to appeal but ultimately did not follow through with it as Sardiwalla J retired and as they assumed the applicants would refrain from enforcing the order given the lapse of time and lack of action. However, on 26 January 2026, the applicants froze the bank accounts of the respondents. This led to the urgent application that came before me. An order was granted pending the outcome of the application for leave to appeal, which I undertook to hear due to the fact that Sardiwalla J had retired.

[3] The background and circumstances of the granting of the order is significant. The matter was decided on the papers without hearing oral argument. The judgment shows that some misdirection occurred. In the judgment the court stated that the respondents had not filed an answering affidavit or heads of argument. However, this assertion was inaccurate as the respondents submitted an answering affidavit, heads of argument, and supplementary heads of argument. Apparently, the judge did not take the respondent's account into consideration. Additionally, he issued a punitive cost order without offering any justification for it.

[4] The respondents accept that by virtue of Part A of the applicants' application having been given effect to – the 16 April 2020 order was complied with – and Part B of the applicants' application having ultimately succeeded – as Neo Thando Elliot

Mobility (Pty) Ltd ("NTEM") was placed under final winding-up on appeal on 17 March 2025, an appeal in respect of the merits of Part A will not have any practical effect. They insist however that considering the facts in this application leave to appeal against the cost order should be granted.

[5] Section 17(1)(a)(i) and (ii) of the Superior Courts Act¹ provides that leave to appeal may be granted if there is a reasonable prospect of success on appeal, or if there exists another compelling reason for granting leave to appeal. The misdirection by the Judge constitutes a rational basis for the conclusion that there are reasonable prospects of success on appeal.

[6] As far as leave to appeal against a cost order is concerned, this will in terms of s16(2)(a)(ii) of the Superior Courts Act only be granted if exceptional circumstances exist. In *Van Staden NO v Pro-Wiz Group (Pty) Ltd*,² the SCA confirmed that "a failure to exercise a judicial discretion would (at least, usually) constitute an exceptional circumstance." Exceptional circumstances and the absence of the judicial exercise of the court's discretion is further apparent where the court *a quo* in granting a costs order did not give any consideration to the version of the party against whom the costs order was granted and no reasons are given for the costs order. In *Vodacom (Pty) Ltd v Makate and Another*³ the Constitutional Court dealt extensively with the duty of a court to give proper consideration to the issues before the court and to give adequate reasons.

[7] In this matter the court's misdirection was not only that it did not give reasons for the cost order, but also that it did not consider the answering affidavit or the heads of argument. This must constitute exceptional circumstances as envisaged by s16(2)(ii).

[8] The applicants argument was however that the respondents failed to object to the taxation of costs despite launching an appeal and delayed for approximately six

¹ Act 10 of 2013.

² *Van Staden NO v Pro-Wiz Group (Pty) Ltd* 2019 (4) SA 532 (SCA) at para 8. See also *Logistic Technologies (Pty) Ltd v Coetzee and others* 1998 (3) SA 1071 (W).

³ *Vodacom (Pty) Ltd v Makate and Another* 2025 (6) SA 352 (CC) at paras 61-62.

years to prosecute the appeal. The applicants invoke the doctrine of peremption, arguing that the respondents waived their right to appeal the cost order. The respondents emphasised that their actions, including seeking leave to appeal and serving amended applications, indicate an intention to challenge the original orders, contrary to the applicants' assertions. They assert that the applicants' delay in executing the taxed bill of costs (from June 2021 to January 2026) is viewed as inconsistent with a waiver, suggesting instead that respondents retained their right to appeal. The argument in relation to peremption should be properly ventilated on appeal. I am of the view that in the specific circumstances of this case exceptional circumstances do exist and that leave to appeal should be granted.

[9] The following order is made:

1. Leave to appeal to the Full Court of this division is granted against the cost order.
2. The costs of this application will be costs in the appeal.


R TOLMAY
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

This judgment was prepared and authored by the judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 11 May 2026.

APPEARANCES:

For the Applicants	:	Adv T Ndaba
Instructed by	:	Motaung MS Attorneys Inc
For the 1 st and 3 rd Respondent	:	Adv L Hollander
Instructed by	:	Nochumsohn Pretorius Inc.
Matter heard on	:	24 April 2026
Judgment date	:	11 May 2026