

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 2025-016115

- 1. REPORTABLE: NO
- 2. OF INTEREST TO OTHER JUDGES: NO
- 3. REVISED: NO

19 June 2026

Date

Signature

In the matter between:

ELAKANYANI PHUNDULU

Applicant

and

LERALLA PHARMACY

First Respondent

MOWANA PROPERTIES

Second Respondent

VHONANI PATRICK MUDAU

Third Respondent

Neutral Citation: *Elekanyani Phundulu v Leralla Pharmacy & Mowana Properties & Vhonani Patrick Mudau (016115/2025)* [2026] ZAGPJHC ---- (19 June 2026)

Coram: Khaba AJ

Heard: 18 May 2026

Delivered: 19 June 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 for hand-down is deemed to be on 19 June 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 – Leave to appeal refused.

JUDGMENT
[APPLICATION FOR LEAVE TO APPEAL]

KHABA, AJ:

- [1]. This is an application for leave to appeal against the order granted on 25 February 2026. That order dismissed the applicant's condonation application brought under Uniform Rule 27 and directed that the applicant's attorney of record pay the costs of that application on an attorney-and-client scale. The applicant also sought leave to appeal against the written reasons delivered on 09 March 2026, which were provided pursuant to his request of 05 March 2026 in terms of Rule 49(1)(c).

- [2]. The applicant applies for leave to appeal whole of the aforementioned judgment and order, including the order for costs, to the Supreme Court of Appeal, alternatively to the Full Bench of this Court. The second respondent opposes the application. The first and third respondents have taken no part in these proceedings.
- [3]. The central legal question is whether the applicant has satisfied the threshold prescribed by section 17(1)(a)(i) of the Superior Courts Act 10 of 2013. The provision permits leave to appeal only where this court is persuaded that the appeal would enjoy reasonable prospects of success, or that some other compelling reason exists why the appeal should be heard. It is against that standard that the applicant's grounds of appeal must be measured.
- [4]. The applicant advances five grounds of appeal.
- a. The applicant contends that I erred in dismissing the condonation application, and there are reasonable prospects that another court will find that it is in the interests of justice that condonation be granted.
 - b. The applicant contends that I misdirected myself by applying the test for joinder and determining that the applicant failed to demonstrate that the second respondent has a direct and substantial interest in the litigation. The applicant contends that the issue of joinder was not an issue for determination at the condonation stage and that the court's evaluation of the applicant's version contained a factual inaccuracy.
 - c. The applicant contends that I erred in opining on the contents of the replication and the attached evidence and using such opinion to determine prospects of success. The applicant contends that subjecting evidentiary material to trial-level scrutiny at the condonation stage amounts to a material misdirection.

- d. The applicant contends that I erred in determining that the second respondent is prejudiced by defending proceedings to which it is not properly a party. The applicant contends that the issue of joinder is for the trial court and should not have been a factor in the determination of prejudice.
- e. That the award of costs on the scale as between attorney and client scale against the applicant's attorney without inviting him to make submissions, which the applicant contends violates *the audi alteram partem* principle.

- [5]. The test for leave to appeal is no longer whether another court might reasonably come to a different view. It is whether there are reasonable prospects of success on appeal, that is, a sound, rational basis for the conclusion that there is a realistic chance of this court's decision being overturned on appeal. A mere arguability or the possibility of an alternative finding does not suffice. The respondent must demonstrate that the appeal would have a tangible, not speculative, prospect of success.
- [6]. Having carefully considered the five grounds advanced by the applicant, I find that none, singly or cumulatively, discloses a reasonable prospect of success. The grounds are, in substance, a repetition of arguments already fully ventilated and correctly rejected in the main judgment; they identify no misdirection of law or fact reasonably capable of yielding a different outcome on appeal. In truth, they seek impermissibly to re-litigate the same issues without pointing to any palpable error or novel point of substance
- [7]. The applicant has not identified any principle of law that this court misplaced, nor any fact that was misunderstood. In my original written reasons of 09 March 2026, I have dealt with most, if not all of the issues raised by the applicant in its application for leave to appeal and it is not necessary to repeat those in full. Suffice to restate what I said in my original written reasons. The application amounts to a disagreement with the outcome.

- [8]. The traditional tests in deciding whether leave to appeal should be granted was whether there is a reasonable prospect that another court can come to a different conclusion to that reached by me in my written reasons. This approach has now been codified in s 17(1)(a)(i) of the Superior Court Act 10 of 2013, which came into operation on the 23rd of August 2013, which provides that leave to appeal may only be given where a judge concerned is of the opinion that “the appeal would have reasonable prospects of success”.
- [9]. As explained in *Notyawa v Makana Municipality and Others*¹, reaffirmed that limited circumstances in which an appellate court may interfere with the lower court’s discretionary decision. In the context of a condonation ruling, the appellate court will not lightly interfere. The Constitutional Court held as follows in paragraph 41:
- “The test is whether the court whose decision is challenged on appeal has exercised its discretion judicially. The exercise of the discretion will not be judicially if it is based on incorrect facts or wrong principles of law. If none of these two grounds is established, it cannot be said that the exercise of discretion was not judicial. In those circumstances the claim for interference on appeal must fail”
- [10]. These principles apply with equal force to the present application. The applicant must demonstrate that the discretion exercised by this court was not exercised judicially, or that it was based on incorrect facts or wrong principles of law. A mere preference of different outcome is insufficient.
- [11]. It is trite that if a court is unpersuaded of the prospects of success, it must still enquire into whether there is compelling reason to entertain the appeal. However, the merits remain vitally important and are often decisive. In considering the existence of compelling reasons as envisaged by s 17(1)(a)(ii) of the Superior Courts Act. I am also not persuaded that such reasons exist in this matter, when considering in the context of prospects of success on the merits.

¹[2020] 41 ILJ 1069 (CC); 2020 (2) BCLR 136 (CC) [2019] ZACC 43.

[12]. In *Ramakatsa and Others v African National Congress and Another*², 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 'could' 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.

[13]. The ratio in *Ramakatsa* simply followed *S v Smith*³, in which Plasket AJA (Cloete JA and Maya JA concurring), held as follows at paragraph 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."

[14]. In *Mont Chevaux Trust (IT2012/28) v Tina Goosen*⁴, 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 an unreported judgment in *Notshokovu v S*⁵. In that matter the SCA remarked that an appellant now faces a higher and more stringed 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

² *Ramakatsa and Others v African National Congress and Another* [2021] ZASCA 31 (31 March 2021)

³ 2012 (1) SACR 567 (SCA) at para 7.

⁴ (LCC14R/2014) at para 6

⁵ [2016] ZASCA 112 (7 September 2016) at para 2.

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*⁶.

- [15]. In *MEC for Health, Eastern Cape v Mkhitha and Another*⁷, Schippers AJA provided the following guidance on the test:

“[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 Supreme Courts Act 10 of 2013 makes it 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.”

- [16]. I am not persuaded that the issues raised by the applicant in this 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 am therefore of the view that there are no reasonable prospects of another court making factual findings and coming to legal conclusions at variance with my factual findings and legal conclusions. The applicant has failed to demonstrate that another court would reach a different decision and that the first respondent should be granted leave to appeal. In light of the all the circumstances alluded above, it is my view that the applicant has not presented and facts demonstrating that it has any prospects of success; therefore, it would not serve any interest of justice to grant leave to appeal to the first respondent.

⁶ [2016] ZAGPPHC 489 at para 25.

⁷ [2016] ZASCA 176 at paras 16 - 17.

- [17]. Having considered the papers filed on record and the submissions made by the parties, it follows that the application for leave to appeal, must therefore fail. There is no reason to deviate from the normal principle that costs follow the result.

Costs:

- [18]. The second respondent seeks an order that the application for leave to appeal be dismissed with costs, on scale C. The application has been opposed and has failed. There is no reason to depart from the ordinary principle that costs follow the result. Indeed, there is every reason to affirm that principle. The costs sought are on scale C. This is justified considering the all the foregoing circumstances, the applicant has not made out a case which justifies an opinion that would have reasonable prospects of success, or that there any compelling reasons why an appeal should be heard in this matter.

Order:

- [19]. Accordingly, the following order is made:

- 1) The application for leave to appeal is dismissed.
- 2) The applicant is ordered to pay the second respondent's costs in this application to be taxed on scale C.



KHABA AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Appearances:

For the Applicant:

Adv. Z Nako with Adv. N Nematikula

Instructed by:

Lukhalimana Attorneys

For the Second Respondent

Adv. F Sangoni

Instructed by:

Mcedisi Ndlovu & Sedumedi Attorneys

Date of Hearing:

18 May 2026

Date of Judgment:

19 June 2026