

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION JOHANNESBURG

CASE NO: 2022/048748

DOH: 21 AUGUST 2026

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
SIGNATURE	DATE

26/8/2026

In the matter between:

GOMOTSEANG DEPHNIE JOEL

Applicant

AND

CELIA NDLOVU

Respondent

This Judgment was handed down electronically and by circulation to the parties' legal representatives by way of email and shall be uploaded on caselines. The date for hand down is deemed to be on **26 August 2026**.

JUDGMENT

MALI J

Introduction

- [1] This is an application by the applicants for leave to appeal to the Full Bench of this Court, or alternatively to the Supreme Court of Appeal, against the whole of the judgment and order delivered by this Court on 13 May 2026.

Applicable legal principles

- [2] The application is governed by section 17 of the Superior Courts Act 10 of 2013 ("the Act"), which provides that leave to appeal may only be granted where the court is 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;
- (b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and
- (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.

- [3] It is well established that the test for leave to appeal under the Act is more stringent than that which applied under the repealed Supreme Court Act 59 of 1959. In *the Mont Chevaux Trust (IT2012/28) v Tina Goosen and Others*¹, the court observed that the use of the word "would" in section 17(1)(a)(i) signals a measure of certainty that another court will reach a different conclusion, in contrast to the earlier test which required only a reasonable possibility of a different outcome (see *Van Heerden v Cronwright and Others*²).

- [4] This interpretation has been consistently affirmed in subsequent decisions, including *Magashule v Ramaphosa and Others*,³ *Nedbank Ltd v Steyn*

¹ (LCC 14R/2014, 3 November 2014, at para 6)

² 1985 (2) SA 342 (T) at 343H)

³ (2021/23795) [2021] ZAGPJHC 405 (13 September 2021)

NO⁴; and *MEC Health, Eastern Cape v Mkhita*⁵. In *Valley of the Kings Thaba Motswere*⁶ Smith J acknowledged the elevated standard but noted that a judge considering an application for leave must still assess, objectively and dispassionately, whether there are reasonable prospects that another court may find merit in the losing party's arguments.

- [5] Accordingly, an applicant for leave to appeal bears the onus of demonstrating that the appeal would not might have reasonable prospects of success on the facts or the law. In addition, Rule 49(1)(b) of the Uniform Rules of Court requires that the grounds of appeal be set out clearly and succinctly (*Songono v Minister of Law and Order*⁷; *Public Protector of South Africa v The Speaker of the National Assembly and Others* (8500/2022), *Western Cape Division*, 3 November 2022).

Grounds of appeal

- [6] The applicant's complaint on appeal is that the respondent ought to have filed a separate application for leave to file a supplementary affidavit. It is argued that, absent such an application, the applicant could not be expected to rely on the averments contained in the supplementary affidavit when filing her answering affidavit.
- [7] In essence, the applicant contends that she was under no procedural obligation either in fact or in law to file an answering affidavit. She relies on *Famous Idea Trading 4 (Pty) Limited v Government Employees Medical Scheme and Others*⁸, wherein the Constitutional Court confirmed (at para 42) that a notice in terms of Rule 6(5)(d)(iii) is a procedural mechanism available to a respondent to raise a preliminary legal objection without engaging the merits. The court noted that this is a potent and cost-effective tool, as it allows for the early disposal of unmeritorious applications.

⁴ 2020 JDR 0754 (GJ)

⁵ (121/15) [2016] ZASCA 176 (25 November 2016)

⁶ (Pty) Ltd [2016] ZAECGHC 137 (10 November 2016),

⁷ 1996 (4) SA 384

⁸ [2022] ZACC 22

Analysis

- [8] The reliance on *Famous Idea* is misplaced. In that matter, the Rule 53 record had not been filed, and the court was consequently unable to consider the merits. The present case is materially distinguishable. Here, the applicant elected not to file an answering affidavit, even though the supplementary affidavit raised averments that went beyond the founding papers. The point in limine under Rule 6(5)(d)(iii) was argued together with the hearing of the merits as being dispositive of the matter.
- [9] Furthermore, the applicant did not timeously enrol the preliminary point for separate determination. She also did not pursue the Rule 30 application she had enrolled. The respondent's failure to apply separately for condonation of the supplementary affidavit did not, in my view, vitiate the proceedings. The court retains a discretion to manage its process, and in this instance, it was appropriate to hear the eviction application on the merits, particularly given that the applicant's conduct did not evince a genuine and unequivocal reliance on the procedural point from the outset.
- [10] A respondent who chooses not to file an answering affidavit does so at his or her own peril. The applicant cannot now seek to avoid the consequences of that strategic choice by arguing that the supplementary affidavit should have been struck out. The court was entitled to have regard to the full record before it, and the applicant has not shown that the procedural irregularity if any resulted in prejudice or a failure of justice.
- [11] I am accordingly not persuaded that the applicant's grounds of appeal disclose any arguable error in the reasoning or outcome of the court a quo. The applicant has failed to identify a clear legal or factual basis upon which another court would reasonably arrive at a different conclusion. The mere possibility of a different view is insufficient under the elevated standard of section 17.
- [12] Nor has the applicant established any "other compelling reason" why the appeal should be heard. There is no conflict of judgments on the issues

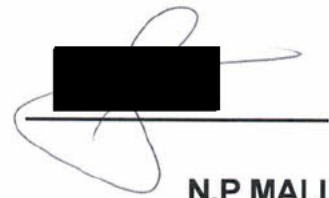
raised, nor is there any matter of public importance or manifest injustice that would warrant the attention of a higher court.

Conclusion

[13] In the result, I am satisfied that the applicant has failed to meet the threshold set out in section 17 of the Superior Courts Act. None of the grounds advanced support the conclusion that there is a reasonable prospect that another court would reach a different conclusion. The application for leave to appeal is therefore devoid of merit.

Order

1. The application for leave to appeal is dismissed with costs on the attorney-and-client scale.



N.P MALI

JUDGE OF THE HIGH COURT

Representatives

For the applicant	: B Shull
Attorneys for applicant	: Stabin Gross and Shull
For the Respondent	: G Holtmann
Attorneys for the Respondent	: Gordon Holtmann Attorneys
Hearing date	: 21 August 2026
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