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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1)	NOT REPORTABLE
(2)	NOT OF INTEREST TO OTHER JUDGES

CASE NO: 2023-023796

DATE: 4 September 2026

In the matter between:

JOHANNES ZACHARIAS HUMAN MULLER N O

First Applicant

LIEZEL VENTER N O

Second Applicant

*[In their capacities as the duly appointed
joint liquidators of
Allied Mobile Communications (Pty) Ltd (in liquidation)]*

ALLIED MOBILE COMMUNICATIONS (PTY) LTD

[In Liquidation]

Third Applicant

and

FRANCOIS STEPHANUS VAN EYSEN

First Respondent

ALLIED MOBILE AFRICA (PTY)LIMITED

Second Respondent

Neutral Citation: *Muller NO and Others v Van Eysen and Another (2023-023796) [2026] ZAGPJHC ---* (4 September 2026)

Coram: Adams J

Heard: 15 January 2026

Delivered: 4 September 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 and time for hand-down is deemed to be 10:30 on 4 September 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 –

Another compelling reason for leave to appeal to be granted (s 17(1)(a)(ii)) – the decision sought to be appealed against involves an important question of law –

Leave to appeal granted to the Full Court of the Gauteng Division of the High Court, Johannesburg.

ORDER

- (1) The first respondent is granted leave to appeal to the Full Court of this Division.
 - (2) The cost of this application for leave to appeal shall be costs in the appeal.
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JUDGMENT [APPLICATION FOR LEAVE TO APPEAL]

Adams J:

[1]. I shall refer to the parties as referred to in the original opposed application by the first, second and third applicants against the first and the second respondents for an order declaring the disposal and transfer of two motor vehicles by the third applicant (the company in liquidation) to the first respondent, as void in terms of s 341(2) of the Companies Act 61 of 1973 (Companies Act). The first respondent is the applicant in this application for leave to appeal and the first, second and third applicants are the respondents herein

[2]. On 11 December 2025 this Court (per Bothma AJ) handed down a written judgment and an order in the following terms: -

‘22.1 The disposal and transfer of the following assets by the third applicant to the first respondent are declared void in terms of section 341 (2) of the Companies Act 61 of 1973:

- 22.1.1 The Ford Everest 3.2 LTD 4x4 80 with registration number W[...], license number F[...] and VIN number M[...] with an accepted retail value of R434 100; and
- 22.1.2 a Hyundai H1 2.5 VGT 9-s DSI Bus 80 with registration number W[...], licence number F[...] and VIN number K[...] with an accepted retail value of R317 400.

- 22.2 The first respondent is to pay the applicants R751 500;
- 22.3 The first respondent is to pay interest on R 751 500 at the rate of 7.75% per annum from 29 November 2019 date of payment.
- 22.4 Costs of the application on scale C.'

[3]. The first respondent applied for leave to appeal against the whole of the aforementioned judgment and the order, including the order for costs. The application for leave to appeal was based on the provisions of sub-section (i), as well as sub-section (ii), of section 17(1)(a) of the Superior Courts Act 10 of 2013 (Superior Courts Act), which reads as follows: -

'17 Leave to appeal

- (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;'

[4]. The application for leave to appeal was mainly against the factual findings made and the legal conclusions reached by Bothma AJ that, on the papers before him and based upon the documentary evidence, it had been clearly established that the liquidated company (third applicant) was not the first respondent's employer and therefore, that the first respondent was not a creditor of the Company entitled to its assets. The learned Acting Judge, so the first respondent contended, further erred in finding that the documentary evidence unequivocally supports this conclusion.

[5]. The application for leave to appeal was heard by Bothma AJ on 15 January 2026. However, shortly after hearing the said application, the learned Acting Judge sadly passed away before the judgment relating to the application for leave to appeal could be handed down by him. This application for leave to appeal accordingly came before me for judgment in terms of s 17(2)(a) of the Superior Courts Act 10 of 2013, which provides as follows: -

‘(2) (a) Leave to appeal may be granted by the judge or judges against whose decision an appeal is to be made or, if not readily available, by any other judge or judges of the same court or Division.’

[6]. In his application for leave to appeal, the first respondent submits that the court *a quo* should have found that, based upon the documentary evidence and the allegations in his answering affidavit, that it was established that the Company was his employer and that the documentary evidence supports this conclusion. Alternatively, so the contention continues, in as far as there was a factual dispute in this regard, the applicants were not entitled to the relief sought as the first respondent had discharged such onus as there may have been on him, on a balance of probabilities. The court *a quo* erred in failing to have considered that when the shared services department of the company was moved to the second respondent it was for logistical reasons and for purposes only of accommodating the shared services department of the Group of Companies. The second respondent had no income of its own nor did it engage in business dealings to generate income – it merely performed a management function in respect of the companies in the Group operating in Africa.

[7]. In the circumstances of the matter and having regard to all of the salient facts, so the argument on this point is concluded on behalf of the first respondent, the court *a quo* should have found that the first respondent was indeed an employee of the third applicant. It erred and misdirected itself by failing to do so. Importantly, so the first respondent contends, the court *a quo* should have had regard to the fact that the retrenchment agreement, although formally concluded between him and the second respondent, was signed on behalf of the Company, which affixed its company stamp to the retrenchment agreement. This, so the first respondent argues, indicates that *de facto* the retrenchment was done by the Company.

[8]. A further ground of appeal raised on behalf of the first respondent is that the court *a quo* erred in rejecting the first respondent’s contentions that the dispositions were made in the ordinary course of business. The error by the

court *a quo*, so the first respondent's contention goes, lies in the finding that the transfer of the vehicles, during a period of impending liquidation, did not meet the criteria for transactions made in the ordinary course of business, where the value of the vehicles was set-off against the monetary amount that the first respondent was entitled to have received. The court *a quo* should not have seen the first respondent as an ordinary creditor of the Company but as an employee and that it would be in the ordinary course of business of any company facing a possible closure of its business, to prudently retrench its employees. The contention in a nutshell is that the court *a quo* ought to have adopted the same approach adopted by the court in *Gainsford NO v Joubert*¹. And it should have found that the dispositions had been in the ordinary course of a company in distress and were not made with the intent to prefer any creditor.

[9]. The first respondent contends that leave to appeal should also be granted in terms of s 17(1)(a)(ii) of the Superior Courts Act on the basis that there are compelling reasons why the appeal should be heard. Those compelling reasons, so the first respondent avers, include the fact that the original application raises an issue of public importance, namely whether retrenchment packages paid by a company in distress is done in the ordinary course of business for purposes of section 341(2) of the Companies Act. Moreover, there are conflicting judgments on the matter in question. In that regard, the first respondent makes reference to *Gainsford NO v Joubert*², in which the court held that employees should not be seen as ordinary creditors, but as employees and that it would be in the ordinary course of business of any company in distress, facing a possible closure of its business, to prudently retrench its employees.

[10]. Nothing new has been raised by the first respondent in his application for leave to appeal. In the court *a quo*'s original judgment of 11 December 2025, it

¹ *Gainsford NO v Joubert* 2009 JDR 0832 (GNP).

² Fn 1.

has dealt with most, if not all of the issues raised by the first respondent in his application for leave to appeal and it is not necessary for me to repeat those in full. Suffice to restate the conclusion reached by the court *a quo*, that being that the transfer of the vehicles, during a period of impending liquidation, did not meet the criteria for transactions made in the ordinary course of business. The Company operated within the telecommunications industry and, so the court held, 'it could hardly be in the ordinary course of business to dispose of vehicles to employees'.

[11]. The traditional test in deciding whether leave to appeal should be granted was whether there is a reasonable prospect that another court may come to a different conclusion to that reached by the court *a quo* in its judgment. This approach has now been codified in s 17(1)(a)(i) of the Superior Courts Act 10 of 2013, which came into operation on the 23rd of August 2013, and which provides that leave to appeal may only be given where the judge concerned are of the opinion that 'the appeal *would* have a reasonable prospect of success'.

[12]. In *Ramakatsa and Others v African National Congress and Another*³, 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 'would' 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* 2012 (1) SACR 567 (SCA), [2011] ZASCA 15, in which Plasket AJA (Cloete JA and Maya JA concurring), held as follows at para 7:

³ *Ramakatsa and Others v African National Congress and Another* (724/2019) [2021] ZASCA 31 (31 March 2021);

‘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 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 a more stringent 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 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]. I am persuaded that the issues raised by the first respondent in his application for leave to appeal, are issues in respect of which another court is likely to reach conclusions different to those reached by the court *a quo*. I conclude that there are reasonable prospects of another court making factual findings and coming to legal conclusions at variance with the factual findings

⁴ *Mont Chevaux Trust v Tina Goosen*, LCC 14R/2014 (unreported).

⁵ *Notshokovu v S*, case no: 157/2015 [2016] ZASCA 112 (7 September 2016).

⁶ *Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others* (19577/09) [2016] ZAGPPHC 489 (24 June 2016).

and legal conclusions of the court *a quo*. Therefore, the appeal does, in my view, have a reasonable prospect of success.

[16]. Moreover, I am of the view that there is another compelling reason why the appeal should be heard, as envisaged by s 17(1)(a)(ii) of the Superior Courts Act, and that relates to the fact that the issues implicated in this matter are novel insofar as they relate to whether or not paying retrenchment packages to employees of a company in financial distress can and should be regarded as being expenses in the ordinary course of the business of such a company. Moreover, there are conflicting decisions on that point and in that regard, the first respondent made reference to *Gainsford N O*⁷, in which the court held that those expenses are indeed to be regarded as having been incurred in the ordinary course of a business in distress. That judgment is to be contrasted with the court *a quo*'s judgment.

[17]. Leave to appeal should therefore be granted.

Order

[18]. In the circumstances, the following order is made:

- (1) The first respondent is granted leave to appeal to the Full Court of this Division.
- (2) The cost of this application for leave to appeal shall be costs in the appeal.

L R ADAMS
Judge of the High Court
Gauteng Division, Johannesburg

⁷ Fn 1 supra.

HEARD ON:	15 January 2026 – before Bothma AJ
JUDGMENT DATE:	4 September 2026 – Judgment handed down electronically
FOR THE FIRST, SECOND and THIRD APPLICANTS:	A Vorster
INSTRUCTED BY:	Cox Yeats Attorneys, Sandton
FOR THE FIRST RESPONDENT:	I M Lindeque
INSTRUCTED BY:	Van Gaalen Attorneys, Northcliff, Johannesburg
FOR THE SECOND RESPONDENTS:	No appearance
INSTRUCTED BY:	No appearance