



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 13451/2017

In the application between:

THOMAS JAMES FITZPATRICK

First Applicant

WINNIFRED ANN FITZPATRICK

Second Applicant

And

SEAN ADRIAAN LATSKY N.O.

First Respondent

ROBERT WILLIAM SOUTHERN N.O.

Second Respondent

ZADOCK PROPERTIES CC

Third Respondent

Heard on: 28 August 2026

Delivered on: 07 September 2026

Summary:

Leave to appeal – s 17 of the Superior Courts Act 10 of 2013 – Judgment granting absolution from the instance – Whether another court would reasonably arrive at a different conclusion – Notice of application for leave to appeal containing forty-three prolix and repetitive grounds – Uniform Rule 49(1)(b).

Fraudulent non-disclosure – Voetstoots sale – Prima facie proof of knowledge and fraudulent concealment not established – Plaintiffs' own evidence inconsistent with allegation of fraud.

Actio quanti minoris / actio empti – Quantification not established on measure advanced at trial – Reliance on *actio empti* at leave stage amounting to reformulation of case.

Consumer Protection Act – Seller not supplier acting in ordinary course of business – Section 113 derivative in nature – Independently dispositive findings remaining unanswered.

No reasonable prospects of success and no compelling reason for appeal – Leave refused.

ORDER

1. The application for leave to appeal is dismissed.
2. The applicants are directed, jointly and severally, the one paying the other to be absolved, to pay the costs of the application for leave to appeal on Scale B.

JUDGMENT

ANDREWS, AJ:

Introduction

[1] This is an application for leave to appeal against the whole of the judgment and orders handed down on 25 February 2026, in terms whereof absolution from the instance was granted in favour of the First, Second and Third Defendants in respect of all claims advanced by the Plaintiffs, together with certain ancillary costs orders.

[2] The Plaintiffs seek leave to appeal either to the Supreme Court of Appeal (the SCA) or, alternatively, to a Full Court of this Division. Their application is founded upon the contention that the appeal would have a reasonable prospect of success as contemplated in section 17(1)(a)(i) of the Superior Courts Act 10 of 2013 (the SC Act) and, additionally, that there exist compelling reasons why the appeal should be heard in terms of section 17(1)(a)(ii).

[3] The application is opposed by all three Defendants.

[4] For the sake of convenience, and to avoid confusion, the parties will be referred to as they were cited in the main action proceedings.

[5] The Defendants contend that the Plaintiffs have failed to satisfy the requirements of section 17 of the SC Act. In addition, the Second Defendant raises a preliminary objection concerning the form and content of the notice of application for leave to appeal. It was submitted that the notice, which contains forty-three grounds of appeal, fails properly to identify the issues sought to be pursued on appeal and does not comply with the requirements of Uniform rule 49(1)(b).

[6] Before considering the substantive grounds advanced by the Plaintiffs, it is necessary to consider the preliminary issue raised by the Second Defendant and thereafter determine whether the Plaintiffs have demonstrated either reasonable prospects of success or some other compelling reason warranting the grant of leave to appeal.

[7] Properly analysed, the issues raised in the application fall into three broad categories. The first concerns the preliminary challenge directed at the adequacy of the notice of application for leave to appeal. The second concerns the findings relating to the claims advanced against the First and Third Defendants. The third concerns the findings relating to the Second Defendant. It is convenient to deal with the issues on that basis.

Legal framework

[8] Section 17(1) of the SC Act provides that leave to appeal may only be granted where the court is of the opinion that—

- (a) the appeal would have a reasonable prospect of success; or
- (b) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.

[9] It is now well established that the threshold for the grant of leave to appeal under the SC Act is more exacting than that which prevailed under the former dispensation. An applicant must demonstrate more than a mere possibility that another court may come to a different conclusion. There must exist a sound and rational basis for concluding that there is a reasonable prospect that another court would arrive at a different result.

[10] In *MEC for Health, Eastern Cape v Mkhitha and Another*,¹ the SCA emphasised that 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 and that a mere possibility of success, an arguable case, or one that is not hopeless, is insufficient. There must be a sound and rational basis for concluding that there is a reasonable prospect of success on appeal.

[11] In *Ramakatsa and Others v African National Congress and Another*,² the SCA explained that the test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law and whether a court of appeal could reasonably arrive at a conclusion different to that of the trial court.

¹ *MEC for Health, Eastern Cape v Mkhitha and Another* (1221/2015) [2016] ZASCA 176 (25 November 2016) para 17.

² *Ramakatsa and Others v African National Congress and Another* (724/2019) [2021] ZASCA 31 (31 March 2021) para 10.

[12] It is equally well established that where reliance is placed on the existence of a compelling reason as contemplated in section 17(1)(a)(ii), the merits remain central to the enquiry and are often decisive. In *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd*,³ the SCA held that whilst a compelling reason may include an important question of law or a discrete issue of public importance, the merits remain vitally important and are often decisive.

[13] The judgment sought to be appealed concerned an application for absolution from the instance at the close of the Plaintiffs' case. Consequently, the issue before this Court is not whether the Plaintiffs' claims were ultimately established on a balance of probabilities, but whether the Plaintiffs have demonstrated reasonable prospects that another court would conclude that this Court erred in finding that they had failed to establish a prima facie case on the causes of action advanced against the Defendants.

[14] Put differently, the Plaintiffs therefore bear the burden, at the leave stage, of demonstrating reasonable prospects that another court would conclude that this Court erred in finding that there was no evidence upon which a court, applying its mind reasonably, could or might find for the Plaintiffs on the pleaded causes of action.

Point in limine

[15] The Second Defendant raised a preliminary objection concerning the adequacy of the notice of application for leave to appeal. It was submitted that the notice, which comprises forty-three grounds of appeal, fails properly to identify the issues sought to be pursued on appeal and does not comply with the requirements of Uniform rule 49(1)(b).

³ *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* [2020] ZASCA 17; 2020 (5) SA 35 (SCA) para 2.

[16] Uniform rule 49(1)(b) requires an applicant seeking leave to appeal to state the grounds upon which leave is sought. The purpose of the rule is self-evident. It serves to identify the issues which are sought to be pursued on appeal, to enable both the court and the opposing party properly to appreciate the case sought to be advanced, and to permit a meaningful assessment of whether the requirements of section 17 of the SC Act have been satisfied.

[17] The importance of properly formulated grounds of appeal has repeatedly been emphasised by our courts. In *Hing and Others v Road Accident Fund*,⁴ the Full Court observed that a number of grounds of appeal were ‘so vaguely formulated as to be of little or no assistance in meaningfully defining the bases of the intended appeals’. The Court further remarked upon the ‘manifestly indiscriminate formulation’ of the grounds upon which leave to appeal had been sought.⁵

[18] Similar concerns were expressed in *MSH v JSH*,⁶ where Maher AJ described the notice before him as being ‘unduly prolix’, lacking clarity and failing succinctly to set out the grounds of appeal. The learned Acting Judge further deprecated what was described as a ‘shotgun approach’ to applications for leave to appeal and emphasised that Uniform rule 49(1)(b) requires grounds of appeal to be stated clearly and unambiguously.⁷

[19] More recently, in *Van der Westhuizen and Others v Life Healthcare Holdings Group (Pty) Ltd and Others*,⁸ Wille J reiterated that applications for leave to appeal must be pleaded with sufficient specificity to enable the court properly to apply the test in section 17 of the SC Act and remarked that quality, rather than quantity, is required in the formulation of grounds of appeal.⁹

⁴ *Hing and Others v Road Accident Fund* [2014] ZAWCHC 15; 2014 (3) SA 350 (WCC) para 4.

⁵ *Ibid* para 4.

⁶ *MSH v JSH* (8470/2021) [2023] ZAWCHC 263 (14 September 2023).

⁷ *Ibid* paras 8–10, and 28–30.

⁸ *Van der Westhuizen and Others v Life Healthcare Holdings Group (Pty) Ltd and Others* (18544/2023) [2026] ZAWCHC 143 (27 March 2026).

⁹ *Ibid* paras 3, 12 and 13.

[20] To my mind, there is force in the criticism advanced by the Second Defendant. A significant number of the grounds raised by the Plaintiffs are framed in broad and generalised terms. Many are repetitive. Others amount, in substance, to assertions that this Court failed to take account of particular evidence, attached insufficient weight to certain facts, or ought to have drawn different inferences from the evidence presented.

[21] Properly analysed, many of the forty-three grounds do not raise discrete questions of law or identify particular misdirections. Instead, they amount to a broad challenge to the factual conclusions reached by this Court and the inferences drawn from the evidence.

[22] That said, I do not consider that the application ought to be dismissed on this basis alone. The Plaintiffs seek leave to appeal against the whole of the judgment and the issues intended to be pursued have been further developed in the Plaintiffs' written note on argument and in oral submissions before this Court. In those circumstances, and notwithstanding the force of the criticism directed at the notice, I consider it appropriate to deal with the application on its merits.

[23] The deficiencies in the formulation of the grounds nevertheless remain relevant to the enquiry under section 17 of the SC Act and will be considered where appropriate in assessing whether the Plaintiffs have demonstrated reasonable prospects of success or any compelling reason why an appeal should be heard.

Grounds advanced against the first and third defendants

[24] A substantial portion of the Plaintiffs' application is directed at the findings made in relation to the First and Third Defendants. Properly analysed, these grounds concern the representations allegedly made by Mr. Latsky regarding the condition of the property, the duties resting upon him as an estate agent, the application of the Estate Agency Affairs Act and its Code of Conduct, the applicability of the Consumer

Protection Act (the CPA) and the conclusions reached concerning negligence, causation and misrepresentation.¹⁰

[25] The Plaintiffs contend that this Court failed properly to appreciate the significance of Mr. Latsky's representations that the property was in a "stunning", "beautiful" or "good" condition and that the Plaintiffs would not be required to do anything to the property. It was further submitted that these representations ought not to have been characterised as mere puffery and that another court may reasonably conclude that they constituted actionable representations concerning the condition of the property.¹¹

[26] These issues were fully considered in the judgment. The court analysed the context in which the statements were made, the evidence of the Plaintiffs and Mr. Latsky, the nature of the alleged representations and the duties resting upon an estate agent in the circumstances of the matter.

[27] In my view, the complaint advanced by the Plaintiffs is directed primarily at the conclusions reached from the evidence rather than the application of an incorrect legal principle or demonstrable misdirection in law. The fact that another court may potentially attach different significance to a particular statement does not, without more, establish reasonable prospects that the result would be different.

[28] A number of the grounds further contend that the court erred in its treatment of the Estate Agency Affairs Act and the Code of Conduct and in concluding that the Plaintiffs failed to establish negligence on the part of Mr. Latsky. It was submitted that Mr. Latsky's experience as a local estate agent, his knowledge of timber decks in Marina da Gama and his awareness of maintenance issues imposed upon him a greater duty of enquiry than that recognised by the court.¹²

¹⁰ Grounds 1–32 of the Notice of Application for Leave to Appeal.

¹¹ Grounds 4, 9, 12, 22, 23, 26 and 32 of the Notice of Application for Leave to Appeal; Plaintiffs' Note on Argument paras 88–108.

¹² Grounds 7, 8, 21, 22 and 23 of the Notice of Application for Leave to Appeal; Plaintiffs' Note on Argument paras 109–139.

[29] Once again, these submissions were fully canvassed during the trial and addressed in the judgment. The complaint ultimately amounts to a contention that the court ought to have drawn different inferences from the evidence concerning Mr. Latsky's experience, local knowledge and conduct. Properly analysed, the challenge is directed at the court's evaluation of the evidence rather than at any identifiable error of legal principle. The fact that another inference may be contended for on the same evidential material does not, without more, establish a reasonable prospect that another court would reach a different conclusion.

[30] The Plaintiffs further rely upon Mr. Latsky's admitted familiarity with properties in Marina da Gama, his knowledge of the maintenance requirements associated with timber decks and his experience as a local estate agent. These considerations were fully canvassed during the trial and formed part of the matrix considered by the court in assessing negligence, foreseeability and causation. The complaint advanced on appeal is not that these factors were ignored, but that insufficient weight was attached to them. In my view, that does not establish a reasonable prospect that another court would arrive at a different conclusion.

[31] In my view, the existence of a competing inference does not, without more, demonstrate a reasonable prospect that another court would interfere with the conclusion reached. The application for leave to appeal does not identify any material misdirection in the approach adopted by the court. Rather, it advances an alternative interpretation of the same evidential material and invites a different evaluative conclusion in relation to questions already considered in the judgment.

[32] The Plaintiffs also rely heavily upon the provisions of the CPA and submit that another court may conclude that the court adopted an unduly restrictive approach to the obligations imposed by that statute.¹³

¹³ Plaintiffs' Note on Argument paras 140–278.

[33] While the CPA issues raised in the matter are not without interest, the claims advanced against the First and Third Defendants did not turn solely upon questions of statutory interpretation. The Plaintiffs were still required to establish the factual and legal elements underpinning the causes of action relied upon. The court concluded that, on the evidence presented, those requirements had not been established on a prima facie basis.

[34] It is apparent from both the notice of application for leave to appeal and the Plaintiffs' written submissions that many of the complaints directed at the First and Third Defendants rest upon the proposition that a different court may attach greater significance to the evidence concerning the condition of the property, the decks, and the representations allegedly made by Mr. Latsky. To my mind, that does not establish a reasonable prospect that another court would conclude that the court misapplied the absolution test.

[35] Having regard to the totality of the evidence, the reasoning contained in the judgment and the grounds advanced in the application for leave to appeal, I am not persuaded that the Plaintiffs have demonstrated a reasonable prospect that another court would conclude that this Court erred in granting absolution from the instance in respect of the claims advanced against the First and Third Defendants.

[36] This conclusion is reinforced by the fact that many of the grounds advanced seek, in substance, to revisit factual findings and evidential inferences which were extensively analysed in the judgment. An application for leave to appeal is not an opportunity to reargue the merits of the case in the hope that another court may attach different weight to the same evidential material.

Grounds advanced against the second defendant

[37] The grounds directed against the Second Defendant are principally contained in grounds 5, 6, 14, 15, 18, 19, 24, 27 and 33 to 41 of the notice of application for

leave to appeal.¹⁴ Properly analysed, these grounds are directed at the court's findings concerning the alleged fraudulent non-disclosure by the Second Defendant, the significance of the repairs identified by the expert witnesses, the so-called "quick-fix" repairs, the evidence relating to the Mica sticker, and the conclusion that the Plaintiffs failed to establish a prima facie case of fraudulent concealment.

[38] The central complaint advanced by the Plaintiffs is that this Court ought to have concluded that the Second Defendant must have known of the latent defects in the decks and that the evidence concerning the repairs constituted a sufficient basis upon which a court could infer knowledge and deliberate concealment.¹⁵

[39] In advancing this contention, considerable reliance was placed on the evidence of Mr. Carelse and Mr. Hattingh. The Plaintiffs submitted both in their notice of application for leave to appeal and in their written note on argument that the evidence established that structural repairs were undertaken during the period of the Second Defendant's ownership and that the only reasonable inference was that the Second Defendant therefore knew of the defects.¹⁶

[40] The difficulty with this submission is that it forms only part of the evidential picture considered by the court.

[41] The judgment did not reject the Plaintiffs' case simply because the court was unpersuaded by the significance of the repairs. The court considered the repairs evidence together with the entire body of evidence led by the Plaintiffs, including the evidence of the Plaintiffs themselves, the evidence of Mr. Latsky, the documentary evidence and the expert testimony.

[42] Importantly, the Plaintiffs' own evidence presented considerable difficulties for the case which they sought to advance against the Second Defendant.

¹⁴ Notice of Application for Leave to Appeal, grounds 5, 6, 14, 15, 18, 19, 24, 27 and 33–41.

¹⁵ Notice of Application for Leave to Appeal, grounds 33–41.

¹⁶ Plaintiffs' Note on Argument, paras 17–41 and 48–69.

[43] As appears from the judgment, the First Plaintiff testified that he was “perfectly certain” that Mr. Southern did not know of the latent defects. The Second Plaintiff conceded that she did not know whether the Southernns were aware of the defects. The Plaintiffs further described the Southernns as honest and decent people and repeatedly distinguished their conduct from that of the estate agent.¹⁷

[44] The Plaintiffs contend that the court attached undue significance to these aspects of the evidence. I am unable to agree.

[45] These findings did not concern peripheral issues. They were directed at the very question of knowledge, which formed an essential element of the Plaintiffs’ claim founded upon fraudulent non-disclosure. In circumstances where the Plaintiffs were required to establish a prima facie case of actual knowledge and deliberate concealment, the evidence referred to above constituted a relevant and material consideration.

[46] The Plaintiffs face a further difficulty. As appears from the evidence recorded in the judgment, the First Plaintiff accepted that, had he been aware of the issues affecting the decks, he would probably still have purchased the property, subject to some arrangement being reached regarding them.¹⁸ The significance of that evidence is that it bears directly upon the issue of inducement, which formed part of the Plaintiffs’ fraudulent non-disclosure claim.

[47] The application for leave to appeal does not meaningfully engage with that aspect of the evidence or demonstrate reasonable prospects that another court would reach a different conclusion thereon.

[48] To my mind, the Plaintiffs’ submissions on leave effectively require the court to move from evidence suggestive of repairs to an inference of actual knowledge, and from actual knowledge to an inference of deliberate concealment. Even

¹⁷ Judgment paras 107–120; Second Defendant’s Heads of Argument paras 37–39.

¹⁸ See judgment para 134.

assuming in favour of the Plaintiffs that the repairs occurred during the Second Defendant's ownership, a substantial evidential gap remains between proof of repairs and proof of fraudulent concealment.

[49] In this regard, many of the grounds advanced amount to no more than an invitation to prefer the inferences contended for by the Plaintiffs to those drawn by the court. The existence of a competing inference does not by itself establish reasonable prospects that another court would interfere with the conclusion reached.

[50] I am therefore not persuaded that the Plaintiffs have demonstrated a reasonable prospect that another court would conclude that the essential elements underpinning Claim E were established on a prima facie basis.

The evidence of Mr. Latsky

[51] A further consideration which, in my view, materially distinguishes this matter from the ordinary application for absolution from the instance, concerns the evidence of Mr. Latsky.

[52] The Plaintiffs elected to call Mr. Latsky as a witness during the presentation of their own case. In doing so, the Plaintiffs placed before the court the evidence of the very individual who featured centrally in the allegations advanced against the First and Third Defendants.¹⁹

[53] The significance of this feature of the case should not be overlooked. Ordinarily, when absolution is sought at the close of a plaintiff's case, a court may be reluctant to grant absolution where there exists a realistic possibility that evidence led during the defendant's case may materially affect the evidential landscape. The circumstances of the present matter were, however, unusual.

¹⁹ Judgment paras 222–223.

[54] The circumstances confronting the court were therefore materially different from those ordinarily encountered where absolution is sought before all potentially relevant evidence has been led. The Plaintiffs had already elected to place Mr. Latsky's evidence before the court, while the Second Defendant was deceased and Mrs. Southern was not available to testify. These circumstances were specifically considered in the judgment and formed part of the matrix against which the court determined whether a prima facie case had been established.

[55] The Plaintiffs contend that this Court ought nevertheless to have concluded that sufficient evidence existed to permit the matter to proceed further. To my mind, that submission does not adequately engage with the factual reality confronting the court at the close of the Plaintiffs' case.

[56] The court was not confronted with a situation in which a potentially decisive witness remained to testify. Nor was the court required to speculate as to whether future evidence might emerge curing deficiencies identified in the Plaintiffs' case. The evidence of Mr. Latsky had already been placed before the court by the Plaintiffs themselves and was available for consideration in determining whether a prima facie case had been established.

[57] To the extent that the Plaintiffs now contend that different conclusions ought to have been drawn from that evidence, the complaint is directed at the evaluation of the evidence itself rather than the application of the absolution test.

[58] In my view, the fact that the Plaintiffs elected to call Mr. Latsky as a witness, coupled with the circumstances relating to the deceased Mr. Southern, constituted a relevant consideration in the determination of the absolution application and does not provide a basis upon which it can reasonably be concluded that another court would arrive at a different result.

Independent difficulties confronting the appeal

[59] There are further difficulties confronting the application for leave to appeal which, in my view, have not been satisfactorily addressed by the Plaintiffs.

[60] These difficulties arise from findings made in relation to Claims F, G and H. The significance of those findings is that they are capable of sustaining the result independently of the complaints directed at other portions of the judgment.

Claim F

[61] In seeking leave to appeal, the Plaintiffs contend that the pleadings were sufficiently wide to accommodate not only a claim based on the *actio quanti minoris*, but also a claim founded upon the *actio empti*. It was further submitted that an appellate court is not bound by a mistake of law and would therefore be entitled to consider the matter on that basis notwithstanding the manner in which the case was approached before this Court.²⁰

[62] Even accepting, in favour of the Plaintiffs, that the pleadings may be capable of sustaining reliance upon the *actio empti* and that another court would not necessarily be precluded from considering the legal consequences thereof, that submission does not answer the finding actually made in the judgment.

[63] The issue before this Court was not whether some alternative juridical route might theoretically have been available to the Plaintiffs. The issue was whether the evidence adduced by the Plaintiffs established a prima facie case on the basis upon which the claim was advanced and quantified. This Court concluded that it did not. In particular, the court found that the Plaintiffs relied upon replacement costs, reconstruction costs and associated expenditure rather than establishing prima facie quantification on the legally applicable measure.²¹

²⁰ Plaintiffs' Note on Argument paras 255–259.

²¹ Judgment para 141; Second Defendant's Heads of Argument paras 57–60.

[64] To my mind, the Plaintiffs' reliance on the *actio empti* does not constitute a direct challenge to that finding. Rather, it seeks to avoid its consequences by advancing an alternative legal route. There is, however, an important distinction between identifying a possible alternative cause of action and demonstrating that the dispositive finding actually made by the court was wrong.

[65] The enquiry at the leave stage remains whether another court would reasonably conclude that this Court erred in finding that prima facie quantification had not been established on the evidentiary basis presented. The Plaintiffs have not persuaded me that such prospects exist. In my view, the argument founded upon the *actio empti* amounts, at least in substantial part, to a reformulation of the claim advanced on leave rather than a demonstration that the dispositive finding made in the judgment was incorrect.

[66] Significantly, the finding concerning quantification is capable of sustaining the result independently of a number of the other complaints advanced by the Plaintiffs. For that reason, I am not persuaded that the Plaintiffs have demonstrated reasonable prospects of success in relation to Claim F.

[67] This is particularly so where the alternative route now relied upon was not the basis upon which the court was invited to determine the absolution application. The issue before the court was whether the evidence actually presented established a prima facie case. The application for leave to appeal cannot succeed merely because another legal formulation may subsequently be suggested.

Claims G and H

[68] The court found that the Second Defendant was a once-off private seller who was not acting in the ordinary course of business and therefore did not fall within the category of a supplier contemplated by the CPA.²²

²² Judgment paras 207–209.

[69] The court further concluded that section 113 of the CPA is derivative in nature and presupposes an underlying contravention to which liability may attach.²³

[70] Even assuming, in favour of the Plaintiffs, that another court may reach a different conclusion concerning certain aspects of the CPA claims advanced against the First and Third Defendants, that does not without more address the findings made in relation to the Second Defendant.

[71] The difficulty confronting the Plaintiffs is that the judgment contains separate findings which are capable of sustaining the result independently. The court found that the Second Defendant was not a supplier acting in the ordinary course of business for purposes of the CPA. The court further concluded that section 113 is derivative in nature and presupposes an underlying contravention to which liability may attach.

[72] To my mind, the Plaintiffs have not demonstrated reasonable prospects that another court would overturn those findings. Nor have they shown that success in relation to the claims advanced against the First and Third Defendants would necessarily alter the result reached in relation to the Second Defendant. These considerations weigh heavily against a conclusion that the requirements of section 17(1)(a)(i) have been satisfied.

Compelling reasons

[73] The Plaintiffs further contend that there exist compelling reasons why an appeal should be heard as contemplated in section 17(1)(a)(ii) of the SC Act.

[74] The principal basis upon which this contention was advanced is that the matter raises important questions concerning the application of the CPA to estate

²³ Judgment paras 193–196.

agents and their principals and that appellate consideration of those issues would be in the interests of justice.²⁴

[75] There can be little doubt that the issues raised concerning the extent of an estate agent's duties, the interaction between those duties and the CPA, and the remedies potentially available to consumers are important. However, the existence of an interesting legal issue does not, without more, constitute a compelling reason for granting leave to appeal.

[76] As was observed by the SCA in *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd*, whilst a compelling reason may include an important question of law or a discrete issue of public importance, the merits remain vitally important and are often decisive.²⁵

[77] To my mind, the present matter remains overwhelmingly fact-driven. The outcome of the judgment did not turn upon the determination of a novel legal principle. Rather, it turned on the court's assessment of whether the Plaintiffs had established a prima facie case on the causes of action advanced, having regard to the totality of the evidence presented.

[78] In relation to the claims against the Second Defendant, the difficulties identified by the court arose principally from the evidential record, including the Plaintiffs' own evidence regarding Mr. Southern, the absence of prima facie proof of fraudulent concealment, the findings concerning quantification, and the obstacles confronting the CPA claims.

[79] Similarly, in relation to the claims against the First and Third Defendants, the dispute concerns the application of established legal principles to a particular factual matrix rather than the existence of uncertainty in the law itself.

²⁴ Plaintiffs' Notice of Application for Leave to Appeal, para 43; Plaintiffs' Note on Argument, paras 276–278.

²⁵ *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* [2020] ZASCA 17; 2020 (5) SA 35 (SCA) para 2.

[80] I am therefore not persuaded that the Plaintiffs have demonstrated the existence of a compelling reason, separate and distinct from the question of prospects of success, which would justify the grant of leave to appeal.

[81] Insofar as leave is sought directly to the SCA, I am in any event not persuaded that the matter raises a question of law, issue of novelty, conflicting authority, or consideration relating to the administration of justice which would justify bypassing the ordinary appellate structure contemplated by the SC Act.²⁶

Conclusion

[82] I have reconsidered the matter from the dispassionate and objective perspective required at the leave stage, mindful that the enquiry is not whether the judgment is correct, but whether the Plaintiffs have satisfied the requirements of section 17 of the SC Act.

[83] The preliminary objection raised by the Second Defendant concerning the form and content of the notice of application for leave to appeal is not without merit. However, for the reasons already stated, I do not consider it necessary to dispose of the application on that basis alone.

[84] Having considered the notice of application for leave to appeal, the Plaintiffs' written note on argument, the oral submissions advanced on their behalf, the submissions of the Defendants and the authorities relied upon by the parties, I am not persuaded that the Plaintiffs have demonstrated a sound and rational basis for concluding that another court would arrive at a different result.²⁷

²⁶ *MEC: Police, Roads and Transport Free State Provincial Government v Bovicon Consulting Engineers CC and Another* (278/2022) [2023] ZASCA 99 (14 June 2023) paras 13–17.

²⁷ *Ramakatsa and Others v African National Congress and Another* (724/2019) [2021] ZASCA 31 (31 March 2021) para 10; *MEC for Health, Eastern Cape v Mkhitha and Another* (1221/2015) [2016] ZASCA 176 (25 November 2016) para 17.

[85] In summary, the Plaintiffs have failed to demonstrate reasonable prospects that another court would interfere with the conclusions reached concerning the claims against the First and Third Defendants. In relation to the Second Defendant, they have likewise failed to demonstrate reasonable prospects that another court would conclude that a prima facie case of fraudulent non-disclosure was established. Those difficulties are compounded by the findings relating to quantification and the CPA claims, each of which presents an independent obstacle to the success of the appeal.

[86] In addition, the Plaintiffs have failed to demonstrate the existence of a compelling reason, as contemplated in section 17(1)(a)(ii), which would warrant the grant of leave to appeal in the absence of reasonable prospects of success.

[87] In all the circumstances, I am satisfied that the Plaintiffs have failed to establish either reasonable prospects of success or any compelling reason why an appeal should be heard. Consequently, the requirements of section 17(1) of the SC Act have not been satisfied.

Costs

[88] There is no reason why costs should not follow the result. The Defendants successfully opposed the application and are entitled to their costs.

Order

[89] In the result, the following order is made:

1. The application for leave to appeal is dismissed.
2. The Plaintiffs are directed, jointly and severally, the one paying the other to be absolved, to pay the costs of the application for leave to appeal on Scale B.

P D ANDREWS AJ
Acting Judge of the High Court,
Western Cape Division

Legal Representatives

Plaintiff's Counsel: Adv. Hanri Loots SC

Instructed by: Trudie Broekman Attorneys

Defendant's 1st & 3rd Counsel: Attorney Mr. Michael Wagener

Instructed by: Michael Wagener Attorney

Defendant 2nd Counsel: Adv. Ria Matsala

Instructed by: Ad Astra Law (prev. TSP Attorneys)