



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

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

RE

DATE: 4/09/2026

CASE NO: 2023/132900

In the matter between:-

CLEAR ACCESS (PTY) LTD

Applicant

and

LASERNET (PTY) LTD

Respondent

LEAVE TO APPEAL (JUDGMENT)

INTRODUCTION

[1] This is an application for leave to appeal against the whole of my judgment and order dated 20 July 2026.

[2] The applicant applies for leave to appeal in terms of section 17(1)(a)(i) and section 17(1)(a)(ii) of the Superior Courts Act 10 of 2013 to the Supreme Court of Appeal, alternatively, the full court of this Division.

BACKGROUND

[3] Applicant alleges numerous grounds for the set application and raised 19 grounds and 38 points wherein I erred and/or misdirected myself. The bulk of these grounds are directed at the court's findings of fact.

[4] Nothing new has been raised by the applicant. In my original written judgment, I have dealt with most, if not all, of the issues raised by the applicant and it is not necessary for me to repeat those in full.

[5] For the sake of completeness, I will deal briefly with some of the points raised.

DISCUSSION

[6] In the matter of *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd*¹ it was held: "[2] In order to be granted leave to appeal in terms of s 17(1)(a)(i) and s 17(1)(a)(ii) of the Superior Courts Act an applicant for leave must satisfy the court that the appeal would have a reasonable prospect of success or that there is some other compelling reason why the appeal should be heard. If the court is unpersuaded of the prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal. A compelling reason includes an important question of law or a discrete issue of public importance that will have an effect on future disputes. But here too, the merits remain vitally important and are often decisive."²

¹ 2020 (5) SA 35 (SCA)

² *Minister of Justice and Constitutional Development and Others v Southern Africa Litigation Centre and Others* 2016 (3) SA 317 (SCA) (2016 (4) BCLR 487; [2016] 2 All SA 365; [2016] ZASCA 17) paras 23 and 24.

[7] Applicant must satisfy this court that it has met this threshold.

[8] In paragraph 1 to 3 of the application for leave to appeal, the applicant avers that where an agreement contains an "in perpetuity clause and contains a non-variation clause":

"[8.1] Does an oral termination of the agreement constitute a variation of the "in perpetuity clause"?

[8.2] Can the agreement be orally terminated by consent, or is it prohibited by the non-variation clause? "

[9] The applicant contends that there is a reasonable prospect of success on appeal on the non-variation clause and/or that this issue constitutes a compelling reason to grant leave to appeal.

[10] Applicant avers that this raises an important question of law not previously determined. In my judgement I have dealt extensively with the consensual termination and that a party may not unilaterally give notice of termination and consensual cancellation is a separate agreement whereby another agreement is terminated.³

[11] Consensual termination is not prohibited by the non-variation clause and applicant is not at variance with the non-variation clause (clause 16.3) of the Joint Venture agreement ("JV"). This clause is only a non-variation clause and not a non-termination clause.

³ In *Northern Estate and Trust Administrators (Pty) Ltd v Agricultural and Rural Development Corporation* **2013 JDR 2677 (SCA)** at paragraph 4 it was said: "[4] Consensual cancellation is simply '... a contract whereby another contract is terminated' (as Per Corbett JA in *Van Streepen & Germs (Pty) Ltd v Transvaal Provincial Administration* **1987 (4) SA 569 (A)** at 588H-I. The express consensual cancellation of the sale agreement is alleged to have been concluded expressly at a meeting held on 5 November 2007 and, alternatively, by conduct during September 2008 when the ARDC repaid the purchase consideration to Boyes and he accepted the repayment. The question for decision in this appeal is whether the court a quo correctly endorsed the decision of the court of first instance that the ARDC discharged its onus of proving a consensual cancellation of the sale agreement. Appellant's counsel also raised a further argument before us, raised neither at the trial nor in the court below, that Boyes had been divested of his right to claim transfer of the shares by virtue of the cession of that right to the appellant on 1 April 2008 and that, consequently, only the appellant could thereafter have agreed to cancel the sale agreement." See also *Van Streepen and Germs v Transvaal Provincial Administration* **1987(4) SA 569 (A)** at 588 G-J

[12] Unilateral cancellation is, however, prohibited. In the instant matter consensual cancellation is at hand and not unilateral cancellation. It is also common cause that the current state of the law is that a non-variation clause in itself does not prohibit consensual cancellation.

[13] The common cause facts are:

1. Clause 4 of the JV reads:

"4 DURATION

4.1 The Joint Venture shall commence on the Effective Date of and shall continue in perpetuity.

4.2 The parties agree that

4.2.1 no Party shall be entitled to renounce the Joint Venture or give notice to dissolve it save as expressly provided for in this Agreement and a repudiation shall not dissolve the Joint Venture."

2. The joint venture would endure into perpetuity in terms of this clause.
3. An agreement that provides an agreement is of unspecified duration or in perpetuity is valid⁴.
4. A notice to dissolve the JV in terms of clause 4.2.1 shall be as provided for in the agreement.
5. Clause 16.3 is the non-variation clause and reads:
"This Agreement constitutes the entire Agreement, and no other agreement, provision, document or determination shall form part of this Agreement unless such other Agreement, provision, document or determination is in writing and has been signed by both Parties."
6. This non-variation clause does not expressly refer to the termination or cancellation of the JV.
7. The non-variation clause in itself does not prohibit consensual termination and is not a non-termination clause.
8. The JV was not terminated in writing and this clause does not expressly require it.

⁴ In the cases of *Trident Sales (Pty) Ltd v AH Pillman & Son (Pty) Ltd* **1984 (1) SA 433 (W)** at 436B and *Trio Engineered Products Inc. v Pilot Crushtec International (Pty) Ltd* **2019 (3) SA 580 (GJ)** in para [8]; *Transnet Limited v Rubenstein* **2006 (1) SA 591 (SCA)**; *Vansa Vanadium SA Ltd v The Registrar of Deeds* **1997 (2) SA 784 (D)** at 790G – 792A. It was held where parties have agreed for an agreement to continue in perpetuity, they will be held to that bargain, and cannot be unilaterally terminated.

[14] Clause 4 does not prohibit consensual termination and nothing needs to be varied in the JV to terminate it. A variation of the JV would mean it continued to exist in a varied form. The termination thereof consensually through a separate agreement means the JV comes to an end.

[15] Applicant's reliance is that clause 16.3 refers to "...no other agreement" which has to be in writing and that the consensual cancellation agreement of 31 March 2021 was in oral and does not fall within the ambit of clause 16.3. This "...such other agreement" refers to an agreement that should be in writing to form part of the JV. The intention of the parties was not that the cancellation agreement "shall form part" of the JV. In the instant case the JV was terminated.

[16] The applicant raised a number of factual findings with which it disagrees, but failed to show how the court's assessment was a misdirection.

The Test

[17] 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 me, as averred by applicant. This approach has now been codified in the Superior Courts Act.

[18] In terms of Section 17 of the Superior Courts Act, 10 of 2013:

"(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 success; or
- (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
- (b) "

[19] The word “would” in Section 17(1)(a)(i) of the Superior Courts Act was discussed in the matter of *Mont Chevaux Trust v Tina Goosen & 18 Others*⁵ as per *Bertelsman J*, held as follows: “It is clear that the threshold for granting leave to appeal against the judgement of a high court has been raised in the new Act. ... The use of the word “would” in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.”⁶

[20] The learned judge in the *Mont Chevaux Trust* matter, *supra*, indicated that the word “would” should include and be interpreted as a “measure of certainty” that another court could come to another conclusion. “Measure of certainty” should not be interpreted that another court will come to a *different conclusion* as a probability of success.⁷

[21] The courts as far back as 2013 in the *Mgezeni Gasbat Nxumalo v The National Bargaining Council for the Chemical Industry (NBCCI) and Others*⁸ summarized the approach one should follow in determining whether to allow an application for leave to appeal having due regard to the wording of Section 17(1)(a)(i) of the Superior Courts Act: “[12]...[3] The traditional formulation of the test that is applicable in an application such as the present requires the court to determine whether there is a reasonable prospect that another court may come to a different conclusion to that reached in the judgement that is sought to be taken on appeal. As the respondents observe, the use of the word “would” in section 17(1)(a)(i) are indicative of a raising of the threshold since previously, all that was required for the applicant to demonstrate was that there was a reasonable prospect that another court might come to a different conclusion.”

[22] “Reasonable prospect of success” was discussed in the matter of *MEC for Health, Eastern Cape v Mkhitha and Another*⁹ at para 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

⁵ Case No LCC14R/2014, dated 3 November 2014 at para [6]

⁶ *Daantjie Community and Others v Crocodile Valley Citrus Company (Pty) Ltd and Another* (75/2008) 2015 JDR 1534 (LCC) at para 3. *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) at para 25

⁷ *Van Zyl v Steyn* (83856/15) [2022] ZAGPPHC 302 (3 May 2022) at para 11

⁸ JR1170/2013 [2016] ZALCJHB 212 (15 June 2016)

⁹ (1221/2015) [2016] ZASCA 176 (25 November 2016)

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.”

[23] The statutory prerequisite derived from section 17(1)(a)(i) of the Superior Courts Act, is the prompt resolution of disputes where there is a reasonable prospect that the factual matrix could receive a different treatment or where there is some legitimate dispute of law which would allow another court to come to a different conclusion.

[24] In *Ramakatsa and Others v African National Congress and Another*¹⁰ at para 10 the court expressed itself as follows on “reasonable prospects of success” as provided for in Section 17(1)(a) of the Superior Courts Act: “.... 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. In other words, the appellants in this matter need to convince this court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist”.

[25] In the case of *S v Smith*¹¹ Plasket AJA (Cloete JA and Maya JA concurring) held as follows at para 7: “What the test of reasonable prospects of success postulates is 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. 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”.

[26] In the judgment of *Notshokovu v S*¹² at para 2 the SCA remarked that an

¹⁰ [2021] ZASCA 31 (31 March 2021)

¹¹ 2012 (1) SACR 567 (15 March 2011)

¹² Notshokovu v S (157/2015) [2016] ZASCA 112 (7 September 2016).

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 Courts Act 59 of 1959.

[27] I agree that there must be sound, rational, and compelling reasons that there are prospects of success on appeal before leave to appeal can be granted.

[28] In *Songono v Minister of Law and Order*¹³ it was stated: "I am not aware of any judgment dealing specifically with grounds of appeal as envisaged by Rule 49(1)(b); however, Rule 49(3) is couched in similar terms and also requires the filing of a notice of appeal which shall specify 'the grounds upon which the appeal is founded'. In regard to that subrule it is now well established that the provisions thereof are peremptory and that the grounds of appeal are required, inter alia, to give the respondent an opportunity of abandoning the judgment, to inform the respondent of the case he has to meet and to notify the Court of the points to be raised. Accordingly, insofar as Rule 49 (3) is concerned, it has been held that grounds of appeal are bad if they are so widely expressed that it leaves the appellant free to canvass every finding of fact and every ruling of the law made by the court a quo, or if they specify the findings of fact or rulings of law appealed against so vaguely as to be of no value either to the Court or to the respondent, or if they, in general, fail to specify clearly and in unambiguous terms exactly what case the respondent must be prepared to meet - see, for example, *Harvey v Brown* **1964 (3) SA 381 (E)** at 383; *Kilian v Geregsbode, Uitenhage* **1980 (1) SA 808 (A)** at 815 and Erasmus Superior Court Practice B1-356-357 and the various authorities there cited. "It seems to me that, by a parity of reasoning, the grounds of appeal required under Rule 49(1)(b) must similarly be clearly and succinctly set out in clear and unambiguous terms so as to enable the Court and the respondent to be fully and properly informed of the case which the applicant seeks to make out and which the respondent is to meet in opposing the application for leave to appeal. Just as Rule 49(3) is peremptory in that regard, Rule 49(1)(b) must also be regarded as being peremptory. In my view the lengthy and rambling notice of appeal filed in casu falls woefully short of what was required. Mr Bursey suggested that grounds of appeal could be gleaned from the notice but that is not the point - the point is that the notice must clearly set out the grounds and it is not for the Court to have to analyse a lengthy document in an attempt to establish what grounds the applicant intended to rely upon

¹³ **1996 (4) SA 384 (E)** at 385F-386B

but did not clearly set out. On this basis alone the application seems to me to be fatally defective and must be dismissed."¹⁴ (Emphasis added)

[29] In the instant case the lengthy application challenging every finding of fact and every ruling of law by the court also fell short of what was required. Furthermore, Applicant's heads did not address all the points.

[30] In *Doorewaard and Another v S*¹⁵, prolixity in grounds of appeal was deprecated where Hendricks J (as he then was) said: "[3] The law governing a notice of appeal (and also notice of application for leave to appeal) is trite. The grounds of appeal in a notice of application for leave to appeal must be clearly and succinctly set out in unambiguous terms so as to enable the Court and the respondent to be fully and properly informed of the case which the applicant seeks to make out and which the respondent is to meet in opposing the application for leave to appeal. The notice should not contain arguments. Therefore, heads of argument must also be filed and served in which the points to be argued will be set out in much more detail." (Emphasis added)

[31] In *Hing and Others v RAF*¹⁶ the following was stated: "[4] The explanation is unacceptable. The application for leave to appeal had listed 65 grounds on which the judge a quo was alleged to have 'erred and misdirected himself'. As the respondent's counsel justifiably observed, a number of those grounds were so vaguely formulated as to be of little or no assistance in meaningfully defining the bases of the intended appeals. In any event it should have been apparent to the appellants that the learned acting judge could not possibly have intended his words to be taken literally. The effect of the notice of application for leave to appeal was to suggest that he had misdirected himself at every turn in making any findings adverse to their claims. In the context of his detailed and fully reasoned judgment, it could not reasonably have been assumed by the appellants or their legal representatives that by granting leave to appeal in the terms he did, the judge meant to be understood to be acknowledging that such wide-ranging error and misdirection on his part might reasonably be established on appeal. On the contrary, the manifestly indiscriminate formulation of the grounds on which the application for leave to appeal was brought brings to mind the observation of a US Appeals Court judge that when he sees 'an appellant's brief containing

¹⁴ The decision in *Songono* was approved by the Full Court in *Xayimpi and Others v Chairman Judge White Commission (formerly known as Browde Commission) and Others* [2006] 2 All SA 442 (E) and has been consistently followed in various divisions of the High Court.

¹⁵ (CC33/2017) [2019] ZANWHC 25 (23 May 2019)

¹⁶ 2014 (3) SA 350 (WCC) on page 353

seven to ten points or more, a presumption arises that there is no merit to any of them".(Emphasis added)

[32] In the instant case I failed to find, erred and/or misdirected myself on 38 points directed at my findings of fact and every ruling of law.

[33] In the case of *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others*¹⁷ it was held:" [5] On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the *onus* of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."¹⁸

¹⁷ 2003 (1) SA 11 (SCA)

¹⁸ See also *Baring Eiendomme BK v Roux* 2000 JDR 0795 (SCA) at para 7.

[34] This holistic approach requires a conspectus of my findings on the credibility of the various factual witnesses¹⁹, their reliability, and the probabilities.²⁰ The applicant's approach failed to appreciate the manner in which credibility and probability interact.

[35] In the case of *Makate v Vodacom Ltd*²¹ it was held: "[37] In these circumstances interference with the factual findings made by the trial court is neither necessary nor justified. Ordinarily, appeal courts in our law are reluctant to interfere with factual findings made by trial courts, more particularly if the factual findings depended upon the credibility of the witnesses who testified at the trial.²² In *Bitcon Wessels* CJ said:

'(T)he trial judge is not concerned with what is or is not probable when dealing with abstract business men or normal men, but is concerned with what is probable and what is not probable as regards the particular individuals situated in the particular circumstances in which they were.'²³

[38] In our system, as in many similar systems of appeal, the cold record placed before the appeal court does not capture all that occurred at the trial. The disadvantage is that the appeal court is denied the opportunity of observing witnesses testify and drawing its own inferences from their demeanour and body language. On the contrary, this is the advantage enjoyed by every trial court. Hence an appeal court must defer to the trial court when it comes to factual findings. In *Powell & Wife* Lord Wright formulated the principle thus:

'Not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case.'²⁴

[36] The applicant elected to extract certain aspects from the conspectus of the evidence to persuade the court whereas a holistic approach consequently will result in a different conclusion.

[37] Applicant, for instance, avers that I should have rejected Otto's version of what transpired on 31 March 2021 and I did not scrutinize Otto's testimony during cross-

¹⁹ *Dreyer and Another NNO v AXZS Industries (Pty) Ltd* **2006 (5) SA 548 (SCA)** at para 30.

²⁰ See also *Merryweather v Scholtz and Another* 2024 JDR 4801 (SCA) at para 36.

²¹ **2016 (4) SA 121 (CC)**

²² *R v Dhlumayo and Another* **1948 (2) SA 677 (A)** and the authorities referred to therein.

²³ *Bitcon v Rosenberg* **1936 AD 380** at 396 – 397.

²⁴ *Powell & Wife v Streatham Nursing Home* **1935 AC 243 (HL)** at 265.

examination at all. This is misplaced as I did consider it holistically and is contained in my judgment.

[38] Applicant avers that I erred by not finding Minnaar to be a good and credible witness as to what transpired on 31 March 2021. Applicant elected to call Minnaar as the only witness. De Noon of applicant was also present at the meeting, but was not called to testify. His untested affidavit was considered and was not favourably for the applicant's case.

[39] The court's holistic approach towards the evidence, Otto's and Minnaar's evidence, as well as what transpired on 31 March 2021 was apposite the *SFW* case.

[40] Applicant avers that I erred in my findings regarding the Octotel litigation. Applicant did not lay a basis on the probabilities in this regard. Octotel was considered in the context of the factual framework before court. Applicant approached the issue in isolation.

[41] Applicant avers that I erred by referring to the case of *Barkhuizen v Napier*²⁵ and what was required of the applicant. Applicant elected to isolate a portion of a sentence, "...to demonstrate that in the particular circumstances it would be unfair to insist on compliance with the clause", of the paragraph I quoted to substantiate this averment and raised it out of context. In my judgment, however, the following was emphasized from the same paragraph: "that intruding on apparently voluntarily concluded arrangements is a step that Judges should countenance with care, particularly when it requires them to impose their individual conceptions of fairness and justice on parties' individual arrangements" and I dealt with clause 4 and 14 of the JV in the following paragraphs. This ground is of no moment.

[42] Applicant further avers that I erred in not finding that the agreement of 31 March 2021 constituted a *pactum de contrahendo*. No critical analysis was proffered. I have dealt with this at length in my judgment whereas applicant's propositions are not borne out by the facts or legal principles.

²⁵ *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at para 70.

[43] Applicant also avers that I erred in not finding that the respondent breached the JV by not giving applicant access to the books. Applicant was invited to the CLAN JV system, which invite was confirmed, but elected not to log in and no substance was proffered that applicant could not log in at the time or thereafter.

[44] Applicant, lastly, avers that I erred in finding that the applicant failed to proffer substance regarding the shared profits. No basis was laid why I erred.

[45] Applicant's application does not have a reasonable prospect of success and no compelling reasons were proffered. I have not erred in my interpretation of the non-variation and in perpetuity clauses and there is therefore no reasonable prospect that a court of appeal may find that the JV could only have been terminated in writing.

CONCLUSION

[46] 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 not reasonable prospects or compelling reasons of another court making factual findings and coming to legal conclusions at variance with my factual findings and legal conclusions and leave to appeal should not be granted. Costs are to follow the result.

ORDER

[47] In the circumstances, the following order is made:

1. The application for leave to appeal is dismissed.
2. The applicant is to pay the costs of this application, Scale C, including the costs of counsel.


[REDACTED]
ALLEN AJ
ACTING JUDGE OF THE HIGH COURT,
GAUTENG DIVISION JOHANNESBURG

This judgment was prepared by Acting Judge Allen. It is handed down electronically by circulation to the parties or their legal representatives by email, by uploading to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 4 September 2026.

HEARD ON: 28 August 2026

DECIDED ON: 4 September 2026

For the Applicant: Adv. P. van der Berg SC
Instructed by: Di Sienna Attorneys

For the Respondent: Adv. A. Bester SC
Instructed by: HJWA Attorneys