

REPUBLIC OF SOUTH AFRICA



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

Case Number: 2024-091679

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED: NO
<u>8 September 2026</u>	
DATE	SIGNATURE

In the matter between:

DANSABE TRADING 17 PROPRIETARY LIMITED

Plaintiff (Applicant)

and

FIRE & ICE FITNESS (PTY) LIMITED

First Defendant (First Respondent)

JACQUELINE BRIDGET DAVIS N.O.

Second Defendant (Second Respondent)

JUDGMENT

MODIBA, J

Introduction

- [1] This is an application for leave to appeal against the order granted by this court on 6 March 2026, which dismissed the plaintiff's application for summary judgment and granted the defendants leave to defend the plaintiff's action. As is customary, the applicant is the plaintiff in the main action, and the respondents are the defendants. It is convenient for this court to refer to the parties as they are cited in the main action.
- [2] The plaintiff seeks leave to appeal to the Supreme Court of Appeal, alternatively to a Full Court of this Division, in terms of ss 17(1)(a)(i) and 17(1)(a)(ii) of the Superior Courts Act¹. The plaintiff relies on several grounds of appeal. The defendants oppose the application.
- [3] The plaintiff contends that the appeal enjoys reasonable prospects of success, as required in terms of s 17(1)(a)(i), because the defendants failed to satisfy the requirements necessary to resist summary judgment. It submits that:
- (a) the defendants failed sufficiently to disclose the nature and grounds of their alleged defences and the material facts upon which those defences were founded;
 - (b) that the defences relied upon were not *bona fide*; and
 - (c) that they did not constitute defences recognised in law.

¹ 10 of 2013. Unless otherwise specified, reference to statutory provisions are references to this Act.

- [4] According to the plaintiff, the various defences raised by the defendants were vague, contradictory, unsupported by the pleaded facts and devoid of legal merit. More specifically, the plaintiff contends that the defendants' reliance on the dispute-resolution provisions of the Memorandum of Agreement of Sub-Lease and Development (MASD), their challenge to the validity of the settlement and suretyship agreement, their dispute regarding quantum, the counterclaims and ancillary defences advanced in the plea and affidavit resisting summary judgment, either lacked legal foundation, were mutually destructive, or were inconsistent with the settlement and suretyship agreement upon which the action was based. The plaintiff submits that these contentions did not raise triable issues and therefore did not justify the granting of leave to defend.
- [5] On that basis, the plaintiff submits that the court ought to have granted summary judgment against the defendants, jointly and severally, for payment of R 659 883.41, together with interest *a tempore morae* and costs on the attorney-and-client scale. It further contends that, at most, the defendants should have only been granted leave to defend in respect of the balance of the plaintiff's claim of R 231 500.01.
- [6] Relying on s 17(1)(a)(ii), the plaintiff also contends that compelling reasons exist for the appeal to be heard. Central to this contention is the allegation that, despite repeated requests made in terms of rule 49(1)(c), the court declined to furnish reasons for its order. The plaintiff submits that the furnishing of reasons is an incident of the rule of law, promotes judicial accountability, enables a litigant meaningfully to exercise its right of appeal, and assists an appellate court in determining the correctness of the decision concerned.
- [7] The plaintiff further contends that, in the absence of reasons, it is impossible to ascertain the basis upon which the court concluded that the defendants had disclosed bona fide and legally sustainable defences or whether the discretion to refuse summary judgment was properly exercised. For that reason and relying on various Constitutional Court and appellate authorities concerning the

duty to furnish reasons, the plaintiff submits that the interests of justice require that leave to appeal be granted.

- [8] The plaintiff also submits that the interests of justice enquiry now informs both appealability and the granting of leave to appeal and that, notwithstanding the interlocutory nature of an order refusing summary judgment, leave to appeal should be granted where the absence of reasons and the alleged merits of the matter warrant appellate intervention. It accordingly contends that the order is patently wrong and that leave to appeal should be granted.
- [9] The defendants submit that the plaintiff has failed to satisfy the requirements for leave to appeal as set out in s 17(1)(a), relying on authorities such as *MEC for Health, Eastern Cape v Mkhitha*² and *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd*³. They contend that leave to appeal may only be granted where there is a reasonable prospect that another court would reach a different conclusion or where compelling reasons exist for the appeal to be heard. They submit that the plaintiff has demonstrated neither.
- [10] According to the defendants, the plaintiff's notice of application for leave to appeal discloses no sound or rational basis for concluding that the proposed appeal enjoys reasonable prospects of success. Instead, the plaintiff merely repeats the arguments advanced in support of summary judgment and seeks a reconsideration of issues already determined by this court.
- [11] In relation to the plaintiff's reliance on s 17(1)(a)(ii), the defendants submit that no compelling reasons exist for the appeal to be heard. They argue that the plaintiff has not identified any conflicting judgments, any issue of substantial public importance, or any important question of law warranting the attention of an appellate court. For this reason, the plaintiff has failed to establish any compelling reason justifying leave to appeal.

² *MEC for Health, Eastern Cape v Mkhitha* 2016 JDR 2214 (SCA) at paragraphs 16 and 17.

³ *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* 2020 (5) SA 35 (SCA) at paragraph 2.

- [12] The defendants also challenge the appealability of the order sought to be appealed. They submit that an order refusing summary judgment is interlocutory in nature and ordinarily not appealable because it does not finally determine the rights of the parties, dispose of any portion of the relief claimed in the main action, or bring the litigation to an end. They rely on s 16(1)(a) which provides for an appeal against any decision of a division as a court of first instance, together with the principles articulated in *Zweni v Minister of Law and Order (Zweni)*⁴, *Ewels v Francis and Others (Leave to Appeal)*⁵ and *MV Smart: Minmetals Logistics Zhejiang Co Ltd v Owners and Underwriters of MV Smart and Another (MV Smart)*⁶.
- [13] According to the defendants, none of the recognised exceptions under which an order may be appealable are present in this matter. They contend that the action proceedings remain pending and that the plaintiff retains the opportunity to pursue its claims at trial. The defendants further submit that permitting an appeal at this stage would result in piecemeal litigation and unnecessary delay in the final determination of the dispute.
- [14] Lastly, the defendants submit that it is not in the interests of justice to grant leave to appeal. They argue that the plaintiff, as dominus litis, should proceed to trial where the disputes between the parties can be fully ventilated. The defendants therefore contend that the plaintiff has failed to make out a case for leave to appeal and that the application should accordingly be dismissed.

⁴ 1993 (1) SA 523 (A) at 532I-533B.

⁵ *Ewels v Francis and Others (Leave to Appeal)* 2025 JDR 1195 (WCC) paragraphs 6 and 12.

⁶ *MV Smart: Minmetals Logistics Zhejiang Co Ltd v Owners and Underwriters of MV Smart and Another* 2025 (1) SA 392 (SCA).

Issues for Determination

[15] The application raises the following issues for determination:

(a) Whether the order dismissing the application for summary judgment, reserving costs and granting the defendants leave to defend is appealable, having regard to its interlocutory character, the principles governing appealability and the interests of justice standard relied upon by the plaintiff.

(b) If the order is appealable, whether the plaintiff has established a compelling reason contemplated in s 17(1)(a)(ii), why the appeal should be heard, including whether the alleged failure to furnish reasons for the order constitutes such a compelling reason.

(c) If the plaintiff has surmounted the appealability hurdle, whether it has demonstrated, as contemplated in s 17(1)(a)(i), that the proposed appeal would have reasonable prospects of success. More specifically, whether there is a reasonable prospect that another court would find that the defendants failed sufficiently to disclose the nature and grounds of their defences and the material facts upon which they were founded; that the defences were not bona fide; and that they did not constitute valid defences in law, with the result that summary judgment ought to have been granted.

[16] It is convenient to cluster these issues under the following topics:

(a) Is the order appealable?

(b) If so, has the plaintiff established compelling reasons under s 17(1)(a)(ii)?

(c) Has the plaintiff established reasonable prospects of success under s 17(1)(a)(i).

Appealability

- [17] Before considering whether the plaintiff has satisfied the requirements for leave to appeal in terms of s 17, it is necessary to determine whether the impugned order is appealable. That issue is dispositive.
- [18] The order that is subject to this application is interlocutory in nature and is neither final in effect, nor definitive of the rights of the parties, nor dispositive of any substantial portion of the relief claimed in the action. The plaintiff's action remains pending and is yet to be determined on its merits. None of the recognised exceptions to the general rule against the appealability of a court's decision finds application in this matter. For reasons I outline below, the new interests of justice standard also does not render the order appealable notwithstanding its interlocutory character.
- [19] The rigid application of the test for appealability has been tempered by constitutional developments. The ultimate enquiry is whether the interests of justice warrant appellate intervention. However, the requirements set out in *Zweni* remain important considerations in that enquiry. As the Supreme Court of Appeal has explained in *MV Smart*⁷ the interests of justice standard should be approached with the "gravitational pull" of *Zweni*. An order lacking one or more of the traditional attributes will generally not be appealable unless the circumstances render appellate intervention necessary in the interests of justice.
- [20] Measured against those considerations, the order sought to be appealed lacks all the traditional hallmarks of appealability. Its consequence is simply that the plaintiff is required to prove its claim in the ordinary course at trial, while the defendants are afforded the opportunity to advance the defences pleaded by them. The litigation therefore continues unabated.
- [21] I am also not persuaded that the interests of justice require immediate appellate intervention. The refusal of summary judgment merely requires that the dispute

⁷ *Id* at paragraph 32.

be resolved in the ordinary course of litigation. The impugned order does not finally determine any issue in the action and leaves the plaintiff at liberty to pursue the entirety of its claim at trial. Should the plaintiff ultimately succeed, it will obtain the relief to which it is entitled.

[22] The interests of justice further militate against entertaining an appeal at this stage of the proceedings. As the appellate courts have repeatedly emphasised, piecemeal adjudication is generally undesirable because it fragments litigation, delays the final determination of the dispute and increases costs.⁸ The real dispute between the parties, namely whether the defendants are liable to the plaintiff on the claim advanced in the action, remains to be adjudicated.

[23] Permitting an appeal against the refusal of summary judgment would interrupt those proceedings and defer the ultimate resolution of the matter without finally disposing of any issue between the parties. There is also a risk of conflicting decisions by the court if it granted summary judgment on a portion of the plaintiff's claim and the trial court later finds that the basis for the defendants' liability is not established. In the circumstances, the interests of justice favour the expeditious progression of the action to trial rather than appellate intervention at this interlocutory stage.

[24] The plaintiff's complaint regarding the absence of reasons does not alter this conclusion. Whether reasons ought to have been furnished is distinct from the question whether the underlying order is appealable. Even assuming in the plaintiff's favour that a proper basis exists to complain about the absence of reasons, that circumstance does not, without more, transform an otherwise non-appealable interlocutory order into an appealable one. The question remains whether the nature and effect of the order, viewed through the prism of the interests of justice, justify immediate appellate intervention. For the reasons already stated, they do not.

⁸ *Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others* (288/11) [2012] ZASCA 15; 2012 (3) SA 486 (SCA); [2012] 2 All SA 345 (SCA); 2012 (6) BCLR 613. See also *Lebashe Investment Group (Pty) Ltd and Others v United Democratic Movement and Another* (1308/2023) [2025] ZASCA 29 (28 March 2025) at paragraph 18.

[25] I accordingly conclude that the order dismissing the application for summary judgment, reserving costs and granting the defendants leave to defend is not appealable. As already indicated, that finding is dispositive of the application.

[26] Lest I be wrong in that conclusion, and in deference to the submissions advanced by the parties, I nevertheless consider whether the plaintiff has established either compelling reasons for an appeal to be heard or reasonable prospects of success as contemplated in s 17(1)(a).

Compelling reasons

[27] I deal separately below with the plaintiff's contention that the alleged absence of reasons constitutes a compelling reason within the meaning of s 17(1)(a)(ii). Leaving that issue aside for present purposes, I am unpersuaded that the plaintiff has established any other compelling reason warranting the attention of an appellate court.

[28] The plaintiff has not identified any conflicting judgments on the issues arising in this matter. Nor has it demonstrated that the matter raises a novel question of law, an issue of public importance, or any other consideration transcending the interests of the parties. At its core, the application concerns whether the defendants disclosed triable issues sufficient to resist summary judgment on the facts pleaded and set out in the affidavit resisting summary judgment. That is an issue confined largely to the facts of the case.

[29] Save for the issue concerning reasons, which I address separately below, I therefore find that the plaintiff has failed to establish a compelling reason for the proposed appeal to be heard as contemplated in s 17(1)(a)(ii).

The request for reasons

[30] Before dealing with the plaintiff's contention that the absence of reasons constitutes a compelling reason for purposes of s 17(1)(a)(ii), it is necessary to address the various attempts made by the plaintiff to obtain reasons for the order. Following the dismissal of the summary judgment application, the plaintiff

filed a request for written reasons dated 20 March 2026. The request did not identify any procedural basis entitling it to reasons. It contended, among other things, that reasons were required to enable it to exercise rights allegedly arising under rule 32. When that request was declined, the plaintiff filed a further notice purportedly in terms of rule 49(1)(c).

[31] The plaintiff's reliance on rule 32 was misplaced. Rule 32(9)(b) regulates the circumstances in which a trial court may, after finally adjudicating the matter, may make an adverse cost order against a defendant who obtained leave to defend. Nothing in rule 32 confers a right to reasons for a refusal of summary judgment. Nor does the rule render the exercise of any subsequent rights dependent upon obtaining reasons from the court that refused summary judgment.

[32] The plaintiff's subsequent reliance on rule 49(1)(c) was similarly misconceived. That rule applies only where a court, when granting an order, declares that reasons will be furnished on application. No such declaration was made in this matter. The jurisdictional prerequisite for the operation of rule 49(1)(c) was therefore absent, and the rule conferred no entitlement to reasons.

[33] The interlocutory nature of the order reinforces this conclusion. Ordinarily, reasons are sought to enable a litigant to consider appellate remedies. As already found, the order refusing summary judgment and granting leave to defend is not appealable. The underlying rationale for insisting upon reasons was therefore significantly attenuated.

[34] The responses declining the plaintiff's requests for reasons were accordingly legally correct. Whether the absence of reasons nevertheless constitutes a compelling reason for the proposed appeal to be heard within the meaning of s 17(1)(a)(ii) is a separate question, to which I now turn.

Whether the absence of reasons constitutes a compelling reason

- [35] There can be no quarrel with the principle that reasons are an important feature of judicial decision-making. Reasons promote transparency, facilitate accountability, assist litigants in understanding the basis for a court's decision and, where an appeal lies, assist an appellate court in discharging its functions. The authorities relied upon by the plaintiff establish these principles beyond doubt.
- [36] However, it does not follow that the absence of reasons, without more, constitutes a compelling reason requiring an appeal to be heard. Whether a compelling reason exists must be determined in the context of the case, having regard to the nature of the order concerned and the procedural setting in which it was made, all as part of the broader enquiry into the interests of justice.
- [37] In the present matter, the order in question did not finally determine the parties' rights. It merely refused summary judgment and granted leave to defend. The action remains pending, and the substantive disputes between the parties will be determined at trial. The plaintiff therefore remains fully able to pursue its claim and obtain final relief should it ultimately succeed.
- [38] Equally important, the plaintiff's complaint concerning the absence of reasons cannot be divorced from the fact that it possessed no procedural entitlement to reasons under either rule 32 or rule 49(1)(c). As already found, both procedural avenues the plaintiff relied on were inapplicable. The absence of an entitlement to reasons in terms of the rules regulating the conduct of proceedings in this court does not necessarily answer the s 17(1)(a)(ii) enquiry but is a relevant consideration when assessing whether the interests of justice require appellate intervention.
- [39] The plaintiff's reliance on the absence of reasons tends to conflate two distinct enquiries: whether reasons ought to have been furnished and whether an appeal should be entertained. Even if the former issue were decided in the plaintiff's favour, it would not follow that the latter requirement has been met.

Section 17(1)(a)(ii) requires a compelling reason for an appeal to be heard. It does not create an appeal whenever a litigant is dissatisfied with the reasons provided, or the absence thereof.

[40] In the circumstances of this matter, the absence of reasons neither alters the interlocutory character of the order nor creates a basis for fragmenting ongoing proceedings through an appeal. Nor does it give rise to a discrete issue of law, conflicting authority or some other consideration transcending the interests of the parties. The complaint regarding reasons remains ancillary to the plaintiff's contention that summary judgment ought to have been granted.

[41] There are also sound practical considerations underpinning the longstanding practice in busy divisions that reasons are not ordinarily furnished for refusal of summary judgment. Such applications are frequently determined on the basis that triable issues arise from the papers. In those circumstances, the dispute proceeds to trial where the relevant factual and legal issues will be comprehensively adjudicated. Requiring reasons in every unsuccessful summary judgment application would divert scarce judicial resources away from the adjudication of matters requiring final determination, without advancing the ultimate resolution of the dispute. The practice therefore reflects legitimate considerations of judicial economy and effective court administration rather than arbitrariness.

[42] The authorities relied upon by the plaintiff do not compel the conclusion that reasons were required to be furnished in the present circumstances. In *Mahlangu and Another v Minister of Labour and Others*⁹ (*Mahlangu*), the court was concerned with a High Court order declaring legislation constitutionally invalid without furnishing reasons. The order was final in effect, implicated constitutional review and required confirmation by the court.

⁹ *Mahlangu and Another v Minister of Labour and Others* 2021 (2) SA 54 (CC) at paragraphs 14-17.

- [43] Similarly, *Airports Company South Africa SOC Ltd v Big Five Duty Free (Pty) Ltd and Others*¹⁰ (ACSA) concerned the judicial approval of a settlement affecting a prior order relating to the exercise of public procurement powers, with consequences extending beyond the immediate litigants. In *Prithilal v Akani Egoli (Pty) Ltd and Another*¹¹ (*Prithilal*), the Constitutional Court dealt with the imposition of an exceptional punitive costs order and emphasised the necessity of reasons to permit meaningful scrutiny of the exercise of that judicial discretion.
- [44] In each of those matters the impugned decision was either final in character, constitutionally significant, punitive in effect, or otherwise carried consequences transcending the ordinary procedural course of litigation. By contrast, a decision granting leave to defend in summary judgment proceedings is interlocutory in nature and determines no substantive rights. The court does not pronounce upon the ultimate merits of the dispute but merely decides that the defendant has disclosed a *bona fide* defence, or triable issues, sufficient to warrant ventilation at trial.
- [45] Although the values of transparency, accountability and reasoned decision-making underpin all judicial proceedings, the weight to be accorded to those considerations must be assessed in context. In the summary judgment setting, the issues have yet to be fully ventilated, and the order serves only to permit the ordinary adjudicative process to continue. To require reasons where leave to defend is granted would risk elevating a desirable principle into an inflexible rule, notwithstanding the limited and preliminary nature of the decision.
- [46] The broader constitutional principle affirmed in the authorities relied upon by the plaintiff therefore does not displace the equally important need to preserve judicial economy, particularly in divisions where court rolls are extensive and where a grant of leave to defend simply restores the matter to the ordinary trial process. The cited cases accordingly provide support for the general value of

¹⁰ *Airports Company South Africa SOC Ltd v Big Five Duty Free (Pty) Ltd and Others* 2019 (5) SA 1 (CC).

¹¹ *Prithilal v Akani Egoli (Pty) Ltd and Another* 2026 (2) SA 1 (CC).

reasoned decision-making but are materially distinguishable on their facts and constitutional context.

- [47] I am therefore not persuaded that the absence of reasons, whether considered alone or together with the remaining grounds advanced by the plaintiff, constitutes a compelling reason within the meaning of s 17(1)(a)(ii) for the proposed appeal to be heard. Accordingly, even if the order were appealable, the plaintiff has failed to establish compelling reasons as contemplated in s 17(1)(a)(ii).

Reasonable prospects of success

- [48] Lastly, I determine whether there exists a sound, rational basis for concluding that another court would come to a different conclusion. This requires that I deal with the merits. Before doing so, it is appropriate to record that, although I concluded earlier in this judgment that the plaintiff had no procedural entitlement to reasons under either rule 32 or rule 49(1)(c), I nevertheless furnish reasons for the refusal of summary judgment in what follows. I do so because the plaintiff has persisted with its contention that the order was wrongly granted and may seek to pursue further appellate remedies if so advised. The reasons that follow are therefore intended to facilitate any further consideration of the matter and to explain why, in my view, the requirements for summary judgment were not met.

- [49] The summary judgment procedure is an extraordinary and stringent remedy.¹² The question before the Court was not whether the defendants would ultimately succeed at trial, nor whether their pleaded case was likely to prevail. The enquiry was whether the defendants had disclosed facts which, if established at trial, would constitute a defence to the plaintiff's claim and therefore justify leave to defend.¹³

¹² *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 423F-G.

¹³ *Id* at 423F-H to 426A-B.

[50] The defendants raised several defences and counterclaims in their plea and affidavit resisting summary judgment, including contentions concerning the effect of the MASD, the validity and enforceability of the settlement and suretyship agreement relied upon by the plaintiff, the authority and capacity of the signatories thereto, the quantum of the plaintiff's claim, and counterclaims arising from the parties' broader contractual relationship. The plaintiff largely bases its entitlement to summary judgment on its contention that the defendants' defences and counterclaims are devoid of merit. Significantly, the plaintiff's cause of action, the defendants' pleaded defences and their counterclaims all arise from the same commercial relationship and substantially the same factual matrix. Whether the defendants' defences and counterclaims are devoid of merit is an issue for the trial court. Further, the determination of the issues that arise is likely to depend on factual findings that can properly be made only after the hearing of oral evidence and the testing of that evidence under cross-examination. In those circumstances, the defendants have disclosed triable issues which are more appropriately determined at trial than in summary judgment proceedings.

[51] The purpose of summary judgment is not to resolve complex factual disputes, to determine whether defences are devoid of merit or to determine competing, contradictory or vague versions on pleadings and affidavit. Where the material issues arise from an interconnected factual matrix and the resolution of one issue may bear directly on the others, the interests of justice ordinarily favour ventilation of the evidence at trial. In my view, this is such a case.

[52] Whether the defendants' defences and counterclaims will ultimately succeed is not presently the question. For reasons set out above, I remain satisfied that another court would be unlikely to conclude that summary judgment should have been granted. The present application demonstrates no basis for concluding that another court would reasonably reach such a conclusion.

[53] In these circumstances, I am not persuaded that there exists a reasonable prospect that another court would conclude that summary judgment ought to have been granted, whether in whole or in part. Accordingly, even if the order

were appealable, I would find that the plaintiff has failed to demonstrate reasonable prospects of success for purposes of s 17(1)(a)(i).

Costs

[54] The defendants seek costs on a punitive scale. I am not persuaded that such an order is warranted. Although the plaintiff has failed to establish that the order is appealable or that there are compelling reasons or reasonable prospects of success as contemplated in s 17 of the Superior Courts Act, the application raised issues concerning appealability, the interests of justice and the consequence of the absence of reasons. While those contentions have not succeeded, they cannot be characterised as frivolous, vexatious or an abuse of process.

[55] No reasons were advanced as to why costs should not follow the result. Having regard to the nature of the issues raised, which were neither novel nor particularly complex, costs on scale B are appropriate.

Order

[56] The following order is made:

1. The application for leave to appeal is dismissed.
2. The plaintiff shall pay the defendants' costs of the application for leave to appeal, including the costs of counsel on scale B.




LT MODIBA
Judge of the High Court
Gauteng Division
JOHANNESBURG

APPEARANCES

For the plaintiffs: Adv. HP van Nieuwenhuizen

Instructed by: Barry Aaron & Associates JHB

For the Defendants: Adv. Aldrin Moodley

Instructed by: L. Mafetsa Attorneys

Date of Hearing: 18 June 2026

Date of Judgment: 8 September 2026