

REPUBLIC OF SOUTH AFRICA



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

CASE NO: A5036/17

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| (1) | REPORTABLE: <del>YES</del> <u>NO</u>                  |
| (2) | OF INTEREST TO OTHER JUDGES: <del>YES</del> <u>NO</u> |
| (3) | REVISED.  |

In the matter between:

**NATIONAL EMPOWERMENT FUND**

Applicant

and

**SIVUYILE SANDILE ZILWA**

Respondent

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**J U D G M E N T O N A P P L I C A T I O N F O R L E A V E T O A P P E A L**

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**MODIBA J:**

[1] The applicant (respondent in the appeal), seeks leave to appeal the judgment and order granted on 6 February 2019 dismissing its rule 30, alternatively rule 30A application. The applicant brings this application in terms of sections 17(1) and (2)(a)

of the Superior Courts Act 10 of 2013. Unless otherwise specified, in this judgment, statutory provisions are to this Act.

[2] The respondent (appellant in the appeal) opposed the application on the following points:

[2.1] this court lacks jurisdiction in respect of the application;

[2.2] the application was lodged out of time;

[2.3] the judgment and order in respect of which the application is brought is not appealable.

[3] The applicant's opposition in respect of these points is found not to be sustainable. Therefore, the application stands to be dismissed on the respondent's points.

#### **THE COURTS JURISDICTION**

[4] The respondent contends that the judgment appealed against falls within the ambit of section 16(1) (b). Therefore, this court lacks jurisdiction to consider it. The applicant, denies that this court lacks jurisdiction. It contends that in the rule 30, alternatively rule 30A application, this court sat as the court of first instance. Further, the applicant contends that the rule 30, alternatively rule 30A is not incidental to the appeal. Hence, the applicant contends section 16(1) (b) does not apply.

[5] Section 16(1) provides:

**"16 Appeals generally**

(1) Subject to section 15 (1), the Constitution and any other law-

(a) an appeal against any decision of a Division as a court of first instance lies, upon leave having been granted-

(i) if the court consisted of a single judge, either to the Supreme Court of Appeal or to a full court of that Division, depending on the direction issued in terms of section 17 (6); or

(ii) if the court consisted of more than one judge, to the Supreme Court of Appeal;

(b) an appeal against any decision of a Division on appeal to it, lies to the Supreme Court of Appeal upon special leave having been granted by the Supreme Court of Appeal;"

[6] Being a judgment by a single judge, the appeal against Mokhari AJ's judgment was correctly brought before the full court of this Division as envisaged in section 16(1)(a)(i). The genesis of the rule 30, alternatively rule 30A application is the respondent's appeal against the judgment and order of Mokhari AJ, granted on 3 May 2017 in the applicant's (plaintiff *a quo*) favour, for the payment of an amount of R3, 620,173.18, interest and attorney client costs. This court's judgment in the rule 30, alternatively rule 30A application falls within the ambit of section 16(1)(b) read with section 16(1)(a)(ii). It is a decision of the Division of the court consisting of more than a single judge. Such a decision, even when made by the court sitting as the court of first instance, an appeal in respect thereof lies to the Supreme Court of Appeal upon special leave having been granted by the Supreme Court of Appeal.

[7] Accordingly, this application for leave to appeal against this court's judgment in respect of rule 30, alternatively rule 30A application, does not lie with this court. It lies with the Supreme Court of Appeal on special leave granted by that court. Thus, the application is not properly before this court.



## APPLICATION BROUGHT OUT OF TIME

[8] Applications for leave to appeal to this court are regulated by section 16 read with rule 49(1)(b)<sup>1</sup> of the Uniform Rules of Court. In terms of the said rule, such an application ought to be brought within 15 days of the judgment appealed against or if reasons for the judgment are granted later, within 15 days of the latter date. This court granted the order on 30 January 2019 and reasons on 6 February 2019. The *dies* in terms of rule 49 started running on 7 February 2019 and expired on the 27<sup>th</sup> of the same month. The application was only brought on 6 March 2019. If this court had jurisdiction, the application would have been brought outside the prescribed time frame, unless good cause for condonation was shown on application. Sections 17(2) and (3)<sup>2</sup> relied on by the senior counsel for the applicant in his contention that the

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<sup>1</sup> Rule 49(1)(b) provides that when leave to appeal is required and it has not been requested at the time of the judgment or order, application for such leave shall be made and the grounds therefor shall be furnished within fifteen days after the date of the order appealed against: Provided that when the reasons or the full reasons for the court's order are given on a later date than the date of the order, such application may be made within fifteen days after such later date: Provided further that the court may, upon good cause shown, extend the aforementioned periods of fifteen days.

<sup>2</sup> Sections 17(2) and (3) read as follows:

- (2)(a) Leave to appeal may be granted by the judge or judges against whose decision an appeal is to be made or, if not readily available, by any other judge or judges of the same court or Division.
- (b) If leave to appeal in terms of paragraph (a) is refused, it may be granted by the Supreme Court of Appeal on application filed with the registrar of that court within one month after such refusal, or such longer period as may on good cause be allowed, and the Supreme Court of Appeal may vary any order as to costs made by the judge or judges concerned in refusing leave.
- (c) An application referred to in paragraph (b) must be considered by two judges of the Supreme Court of Appeal designated by the President of the Supreme Court of Appeal and, in the case of a difference of opinion, also by the President of the Supreme Court of Appeal or any other judge of the Supreme Court of Appeal likewise designated.
- (d) The judges considering an application referred to in paragraph (b) may dispose of the application without the hearing of oral argument, but may, if they are of the opinion that the circumstances so require, order that it be argued before them at a time and place appointed, and may, whether or not they have so ordered, grant or refuse the application or refer it to the court for consideration.
- (e) Where an application has been referred to the court in terms of paragraph (d), the court may thereupon grant or refuse it.
- (f) The decision of the majority of the judges considering an application referred to in paragraph (b), or the decision of the court, as the case may be, to grant or refuse the application shall be final: Provided that the President of the Supreme Court of Appeal may in exceptional circumstances, whether of his or her own accord or on application filed within one month of the decision, refer the decision to the court for reconsideration and, if necessary, variation.

application was brought within the prescribed one month period does not apply to an application for leave to appeal brought to this court, but to the Supreme Court of Appeal.

### **JUDGMENT AND ORDER NOT APPEALABLE**

[9] Even if this court had jurisdiction and the application for leave to appeal was brought timeously, (neither of which occurred), this court's judgment and order falls within the ambit of section 17(1)(c) as it is not dispositive of the issues in the appeal. The declaration that the applicant sought, in the event it succeeded in the rule 30 alternatively rule 30A application, that the appeal had lapsed, would not have disposed of the issues in the appeal because a lapsed appeal may be reinstated on good cause shown in terms of rule 49. Further, such relief is discretionary. In the event that the court deemed other relief to be appropriate as envisaged in rule 30A (2)<sup>3</sup>, the application would not have disposed of the issues in the appeal.

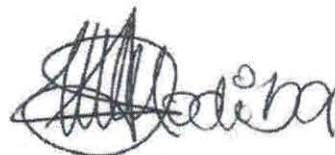
[10] In the premises, the application stands to dismissed. The contract that lies at the heart of the dispute between the parties makes provision for costs on the attorney and client scale. Consistent with that contractual agreement, the respondent is awarded the costs of the application on that scale.

[11] Therefore the following order is made:

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(3) An application for special leave to appeal under section 16(1)(b) may be granted by the Supreme Court of Appeal on application filed with the registrar of that court within one month after the decision sought to be appealed against, or such longer period as may on good cause be allowed, and the provisions of subsection (2)(c) to (f) shall apply with the changes required by the context.

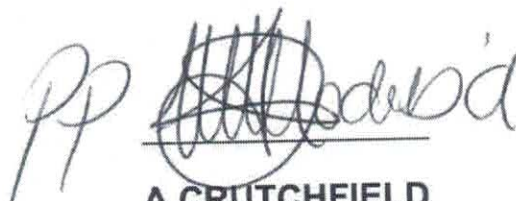
[11.1] The application for leave to appeal is dismissed with costs on the attorney and client scale.



**L MODIBA**

Judge of the High Court: Gauteng Local Division

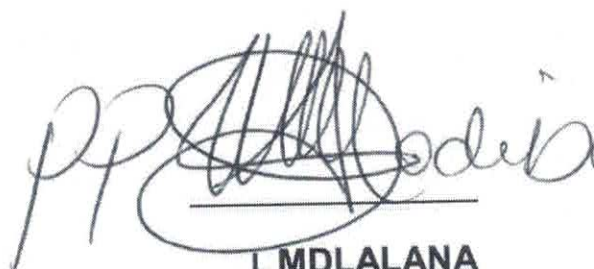
I agree.



**A CRUTCHFIELD**

Acting Judge of the High Court: Gauteng Local Division

I agree.



**L MDLALANA**

Acting Judge of the High Court: Gauteng Local Division

<b>Counsel for the Applicant:</b>	Adv G Shakoane SC, assisted by Adv TB Hutamo
<b>Instructed by:</b>	Madhlopa & Thenga Incorporated
<b>Counsel for Defendant:</b>	Adv A Ayayee



**Instructed by:**

Makaula Zilwa Incorporated

**Date of hearing:**

26 March 2019

**Date of judgment:**

29 March 2019