

REPUBLIC OF SOUTH AFRICA



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

CASE NO:64484/2020

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

13 DECEMBER 2021

DATE

A handwritten signature in black ink, appearing to be "M. M. M.", is written over a horizontal line.

SIGNATURE

In the matter between:

S N N MKHWANAZI-SIGEGE

FIRST APPLICANT

B C MKHWANAZI

SECOND APPLICANT

And

PETER LE MOTTÉE

FIRST RESPONDENT

LLOYD ROBERT BALL

SECOND RESPONDENT

**THE MASTER OF THE HIGH COURT,
PRETORIA**

THIRD RESPONDENT

CONSOLIDATED WITH:

CASE NO: 10475/2021

In the matter between:

**BONGEKILE CYNTHIA MKHWANAZI
obo XOLANI SIVIWE MKHWANAZI**

FIRST APPLICANT

**BONGEKILE CYNTHIA MKHWANAZI
obo NHLAKANIPHO OKUHLE MANQELE N.O.** **SECOND APPLICANT**

And

PETER LE MOTTÉE

FIRST RESPONDENT

LLOYD ROBERT BALL

SECOND RESPONDENT

**THE MASTER OF THE HIGH COURT,
PRETORIA**

THIRD RESPONDENT

MERCIA KHANYILE NGEMA

FOURTH RESPONDENT

MBALI NGEMA

FIFTH RESPONDENT

NHLANHLA NGEMA

SIXTH RESPONDENT

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on Caselines by the Judge or his/her secretary. The date of this judgment is deemed to be 13 December 2021.

APPLICATION FOR LEAVE TO APPEAL JUDGMENT

COLLIS J

INTRODUCTION

[1] This is an application for leave to appeal against the judgment and order I made on 21 September 2021. The full order of the court reads as follows:

1.1 “The applicants namely case no: 64484/2020 and case no: 10475/2021 are consolidated in terms of Rule 11 and shall proceed as one application;

1.2 The application is enrolled as an urgent application in terms of Rule 6(12);

1.3 The application is dismissed;

1.4 The applicants are ordered to pay the costs of the application.”

[2] The application is premised on the grounds as listed in the Application for Leave to Appeal dated 11 October 2021.

LEGAL PRINCIPLES

[3] Section 17 of the Superior Court’s Act provides as follows:¹

¹ 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 of success; or

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

(b) the decision sought to appeal does not fall within the ambit of section 16(2)(a);

and

(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.

[4] In the present instance the Applicant applies for leave on the first leg;

i.e. that the “...an appeal would have a reasonable prospect of success”.

[5] As to the test to be applied by a court in considering an application for leave to appeal, Bertelsmann J in *The Mont Chevaux Trust v Tina Goosen & 18 Others* 2014 JDR 2325 (LCC) at para 6 stated the following:

'It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see *Van Heerden v Cronwright & Others* 1985 (2) SA 342 (T) at 343H. 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] '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 word, be a sound, rational basis for the conclusion that there are prospects of success on appeal.'²

[7] In *Fair-Trade Independent Tobacco Association v President of the Republic of South Africa and Another*³ the Full Court of this Division observed that:

"As such, in considering the application for leave to appeal it is

² *S v Smith* 2012 (1) SACR 567 (SCA) at para 7.

³ Case no: 21688/2020 [2020] ZAGPPHC 311 (24 July 2020) at [6].

crucial for this Court to remain cognizant of the higher threshold that needs to be met before leave to appeal may be granted. There must exist more than just a mere possibility that another court, the SCA in this instance, will, not might, find differently on both facts and law. It is against this background that we consider the most pivotal grounds of appeal.”

[8] The applicant and the respondent on request by this court had filed written Heads of Argument in order to facilitate the virtual hearing of the matter.

[9] Having read the papers and having carefully heard counsel I come to the conclusion that there is a reasonable prospect that another court would come to a different conclusion on the order of the court.

ORDER

[10] Consequently I make the following order:

10.1 The application is granted leave to appeal to the Full Court of this Division, with costs to in the appeal, including costs of counsel.



**COLLIS C
JUDGE OF THE HIGH COURT**

Appearances

Counsel for the Applicants	: Adv. C.H.J. Badenhorst SC & Adv. N. Nortje
Attorney for the Applicants	: Aaron Stanger & Associates
Counsel for the 1 st & 2 nd Respondents	: Adv. J.D. Botha
Attorney for the 1 st & 2 nd Respondents	: Kotzé & Roux Attorneys Inc
Date of Hearing	: 01 December 2021
Date of Judgment	: 13 December 2021

Judgment transmitted electronically.