

SOUTH AFRICA / JUDGMENT

Modingwana v ABSA Bank Limited (Leave to Appeal) (2023-126064) [2025] ZAGPPHC 593 (4 June 2025) [2025] ZAGPPHC 593

COURT

North Gauteng High Court, Pretoria

BEFORE

SJ Myburgh

CASE / FILE NUMBER

2023-126064

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 2023-126064

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

DATE 4 June 2025

SIGNATURE

In the matter between:

SYDNEY THIPE MODINGWANA

APPLICANT

AND

ABSA BANK LIMITED

RESPONDENT

In re the matter between:

ABSA BANK LIMITED

PLAINTIFF

SYDNEY THIPE MODINGWANA

DEFENDANT

JUDGMENT ON LEAVE TO APPEAL

MYBURGH, AJ

INTRODUCTION:

[1] On 9 May 2025, and having heard the summary judgment application brought by the Respondent against the Applicant, I made the following order:

1. Ex abundanti cautela the cancellation of the Instalment Sale Agreement is confirmed.
2. Summary judgment is granted in favour of the Plaintiff against the Defendant, and the Defendant is directed to return the vehicle identified as a 2013 NISSAN JUKE 1.6 ACENTA motor vehicle with engine number H[...] and chassis number S[...] to the Plaintiff.
3. The Defendant is ordered to pay the costs of this application, such costs to include the costs of counsel on Scale B.
4. The remaining issues are postponed sine die.

[2] The Applicant is now seeking leave to appeal such order.

APPLICABLE LEGAL TEST: LEAVE TO APPEAL:

[3] In *Mothuloe Incorporated Attorneys v Law Society of the Northern Province and Another* (213/16) [2017] ZASCA 17 (22 March 2017) at para 18 the SCA stated that the test is simply whether there are any reasonable prospects of success in an appeal. It is not whether a litigant has an arguable case or a mere possibility of success.

[4] The SCA has bemoaned the regularity with which leave is granted in respect of matters not deserving. See *Shoprite Checkers (Pty) Ltd v Bumpers Schwarmas CC & others* 2003 (5) SA 354 (SCA) para 23.

[5] In *MEC for Health, Eastern Cape v Ongezwa Mkhitha & The Road Accident Fund* [2016] ZASCA 176 the SCA held that the test for granting leave to appeal is as follows (para 16-17):

“Once again it is necessary to say that Leave to Appeal, especially to this Court, must not be granted unless there truly is a reasonable

prospect of success. Section 17 (1) (a) of the Superior Courts Act 10 of 2013 makes it clear that Leave to Appeal may only be granted where the Judge concerned is of the opinion that the Appeal would have a

reasonable prospect of success, or there is some other compelling reason why it should be heard.”

[6] See in this regard also *Dexgroup (Pty) Ltd vs Trustco Group International (Pty) Ltd and Others* 2013 6 SA 520 (SCA).

[7] In *Fusion Properties 233 CC v Stellenbosch Municipality* [2021] ZASCA 10 (29 January 2021) (para 18), it was stated that –

“Since the coming into operation of the Superior Courts Act there have been a number of decisions in our courts which dealt with the requirements that an applicant for leave to appeal in terms of Section 17 (1) (a)

(i) and 17 (1) (a) (ii) must satisfy in order for leave to be granted.

The applicable principles have over time crystallised and are now well established. Section 17 (1) provides, in material part, that leave to appeal may be granted 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....

Accordingly, if neither of these discrete requirements is met, there would be no basis to grant leave”.

[8] In *Chithi and Others; in re: Luhlwin Mchunu Community v Hancock and Others, Chithi and Others; In re: Luhlwin Mchunu Community v Hancock and Others* (423/2020) [2021] ZASCA 123 (23 September 2021) it was held at para 10:

“The threshold for an application for leave to appeal is set out in section 17(1) of the Superior Courts Act, which provides that leave to appeal may only be given if the judge or judges are of the opinion that the appeal would have a reasonable prospect of success...”

[9] In *Nwafor v The Minister of Home Affairs and Others* [2021] ZASCA 58 (12 May 2021) at para 21 the court stated that:

“Section 17(1) of the Act sets out the statutory matrix as well as the test governing applications for leave to appeal. The section states in relevant parts, and in peremptory language, that leave to appeal may only be given where the judge or judges concerned are of the opinion that the appeal would have a reasonable prospect of success”.

[10] The test to be applied is that the Applicant should convince this court, on proper grounds, of a prospect of success.

GROUND OF APPEAL:

[11] The Applicant, in his application for leave to appeal, states that he will challenge specific elements of the judgment.

[12] The first such element is the Court Order, being paragraph 40 of the

judgment.

[13] The Applicant proceeded to state that the court order "...is the most sophisticated part of Rule 32 (Summary Judgement (sic)), it is the great equalizer. It can instantly highlight deficiencies in the written Judgement (sic), without reading the Judgement (sic) beforehand."

[14] The quoted passage above constituted the entirety of his submissions, in the application for leave to appeal, relating to the first element. Insofar as this statement attempted to argue a prospect of success on appeal, it is devoid of merit.

[15] The second such element was alleged "[p]rocedural Irregularities (Information Data Breach of the Pretoria High Court)". The Applicant alleged that the opposed Motion Court Roll for 05 May 2025 contained falsified information, and that this matter did not appear on the daily court roll on 06 May 2025.

[16] The matter was properly enrolled, and I allocated matters to be heard on certain dates during the week, and this matter was allocated by me to be heard on 6 May 2025. I am unaware nor could the Applicant show me any data breaches or falsified information that impact on the hearing of the matter and/or judgment. Insofar as these statements attempted to argue a prospect of success on appeal, it is devoid of merit.

[17] In addition, the argument does not relate to a 'decision' contemplated in section 16(1)(a) of the Superior Courts Act, as 'decision' refer to the substantive judgment or order in terms of which the court granted the relief sought. See *Neotel (Pty) Ltd v Telkom SA Soc Ltd and Others* (605/2016)

[2017] ZASCA 47 (31 March 2017) at para 13 and the authority cited therein.

[18] The third element listed is the National Credit Act 34 of 2005 ("NCA"), referencing specifically paragraphs 13 to 32 of my judgment. According to the application for leave to appeal "[t]he Court's interpretation and application of the NCA in this Judgement (sic) is quite a significant distance from rational. The interpretation and application is (sic) therefore unlawful."

[19] Again, the quoted passage is the totality of the criticism regarding the third element.

[20] In my judgment I went outside the narrow scope of what the Applicant argued and considered his argument against the NCA in toto. In his Heads of Argument, the Applicant however argues the following, and I quote:

“The Court tests NCA Section 8(2)(a) in two sentences on Paragraph 15, then uses Paragraph 16 to first make a disclaimer “Albeit not specifically argued”, then proceed on a wild goose chase through to Paragraph 31 to test sections in the NCA, that have nothing to do with the case before the Court. I will not waste the Court's time here.”

[21] In argument the Applicant was insistent that the matter should this be considered only on the narrow issue of section 8(2)(a) of the NCA. The mechanical breakdown warranty was not “a policy of insurance or credit extended by an insurer solely to maintain the payment of premiums on a policy of insurance.” The Applicant did not point to any authority in support of this criticism. Insofar as these submissions attempted to argue a prospect of success on appeal, it is devoid of merit.

[22] The fourth element was identified as the applicable test in summary judgments, referencing specifically paragraph 33 to 39 of my judgment. To ensure that the nuance of this argument is not lost in paraphrasing, I will quote it in toto:

“To understand the excessive levels of irrationality in the Judgement (sic), the Court ruled in favour of the “Defendant” in this Judgement. (This statement is not a typing error)

The trouble is that the Court is currently completely unaware that it has actually ruled in favour of the Defendant and against the Applicant. Oh, the irony.

On the basis that the Presiding Officer does not know what a Summary Judgement is, its purpose or its process, as demonstrated in the Judgement. I will not be able to accept that Acting Judge Myburgh has the requisite capability to adjudicate this “Leave to Appeal”.

I therefore humbly request the Honourable Court to set the Hearing date for Leave to Appeal, with the FULL COURT of the NORTH GAUTENG HIGH COURT, expeditiously.”

[23] In terms of section 17(2)(a) Of the Superior Courts Act 10 of 2013, 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.

[24] The Applicant is seeking leave to appeal against a judgment I handed down. I am available to attend to this application. This effectively disposes of the Applicant's request that this application be heard by a full court. My alleged lack of capability or irrationality does not entitle the Applicant to move this application before another judge or, as he is seeking, judges. In argument the Applicant also did not attempt to further this.

- [25] In my judgment I found that the Applicant had fully disclosed the nature and grounds of his defence and the material facts upon which it is founded. I however also found that the defence, so fully disclosed, is bad in law. The Applicant is simply misconstruing the importance of my finding on disclosure.
- [26] Apart from general derogatory statements directed at this Court and conspiracies, I found no legal substance in any of the arguments contained in the application for leave to appeal, the Applicant's Heads of Argument or the oral argument advanced by the Applicant.

CONCLUSION:

- [27] In *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and Others supra*, Wallis JA observed that a court should not grant leave to appeal and indeed is under a duty not to do so, where the threshold which warrants such leave, has not been cleared by an applicant. I agree with this.
- [28] Having considered the Applicants argument, and against the authority quoted above, I am unconvinced that another court would come to a different conclusion. There is no prospect of success on appeal.

COSTS:

- [29] There is no reason why costs should not follow the outcome of this application.
- [30] The Respondent in this application is seeking a punitive cost order, as between attorney and client. Mr Eastes submitted that the conduct of the Applicant and the level of disrespect displayed towards this Court justifies such.
- [31] In *Tjiroze v Appeal Board of the Financial Services Board (CCT271/19)* [2020] ZACC 18; 2021 (1) BCLR 59 (CC) (21 July 2020) para 23 Madlanga J refers with approval to *The Public Protector v South African Reserve Bank 2019 (6) SA 253 (CC)* at para 8, where Mogoeng CJ noted that "[c]osts on an attorney and client scale are to be awarded where there is fraudulent, dishonest, vexatious conduct and conduct that amounts to an abuse of court process".
- [32] At para 226 of *Tjiroze supra* Khampepe J and Theron J stated that "a punitive costs order is justified where the conduct concerned is 'extraordinary' and worthy of a court's rebuke".
- [33] Both judgments *supra* referenced *Plastic Converters Association of SA on behalf of Members v National Union of Metalworkers of SA* [2016] ZALAC 39; (2016) 37 ILJ 2815 (LAC) at para 46, where the Labour Appeal Court stated:

"The scale of attorney and client is an extraordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible manner. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium."

- [34] I have already quoted passages from the Applicant's application for leave to appeal. The content, and specifically the personal criticism levelled against me, is deserved of scorn. In addition, and during his argument, I had to reprimand the Applicant about the language used.
- [35] In awarding costs I accept that the Applicant is acting in person and therefore accept that his understanding of the applicable legal principles and processes is lacking. In exercising my discretion, I gave serious consideration to this, and I considered whether this should excuse the Applicant's conduct. I however find it to be no excuse.
- [36] I find the conduct of the Applicant to be exceptional and deserved of "extreme opprobrium".
- [37] In *Pheko v Ekurhuleni Metropolitan Municipality (No 2) 2015 (5) SA 600 (CC)* at para 1 it is stated that:
- "The rule of law, a foundational value of the Constitution, requires that the dignity and authority of the courts be upheld. This is crucial, as the capacity of the courts to carry out their functions depends upon it."*
- [38] Albeit that Pheko dealt with contempt proceedings, I find the quoted principle a relevant consideration in exercising my discretion on the appropriate cost order.
- [39] I therefore find that a punitive cost order, as show of disapproval, is warranted.

ORDER

[40] I therefore make the following order:

1. The application for leave to appeal is refused.
2. The Applicant is ordered to pay the costs of this application, such costs to be taxed on a scale as between attorney and client.

SJ MYBURGH

ACTING JUDGE OF THE HIGH COURT, PRETORIA

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Prepared on 9 October 2026 · Esheria