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

CASE NO: 2174/2021

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

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SIGNATURE

5 MAY 2022

DATE

In the matter between:

BUSAMED GATEWAY PRIVATE HOSPITAL (PTY) LTD	First applicant (First respondent in the main application)
BUSAMED HEALTHCARE (PTY) LTD	Second applicant (Second respondent in the main application)
BUSAMED (PTY) LTD	Third applicant (Third respondent in the main application)
and	
VERAISON (PTY) LTD	First respondent (First applicant in the main application
TROPICAL PARADISE TRADING 165 (PTY) LTD	Second respondent (Second applicant in the main application

MAZARS CORPORATE FINANCE (PTY) LTD   Third respondent
                                                                    (First respondent in
                                                                    the main application

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J U D G M E N T (LEAVE TO APPEAL)
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KEIGHTLEY, J:

1.   The respondents (the Busamed entities) apply for leave to appeal against my judgment and orders handed down on 24 December 2021. I made the following orders:

    1.1.   First, I dismissed the Busamed entities application for a postponement together with their applications for relief ancillary thereto.

    1.2.   Second, I directed Mazars forthwith to deal with the valuation of the Consultancy Services Agreement as ordered in the arbitration award and to provide the parties with a valuation report.

    1.3.   Third, I directed the Busamed entities to pay the costs of the application.

2.   Under s17(1)(a) of the Superior Courts Act, leave to appeal may only be given where the Judge is of the opinion that the appeal (i) would have a reasonable prospect success or (ii) there is some other compelling reasons why the appeal should be heard, including conflicting judgments on the matter under consideration. The test for granting leave under this section is well settled. The question is not whether the case is arguable, or another court may come to a different conclusion (*R v Nxumalo* 1939 AD 580 at 588). Further, the use of the word 'would' in s 17(1)(a)(i) imposes a more stringent and vigorous threshold test than that under the previous Supreme Courts Act, 1959. It indicates a measure of certainty that another court will differ

(*Mont Cheveaux Trust v Goosen* [20014] SALCC 20 (3 November 2014); *Notshokuvo v S* [2016] ZASCA 112 (7 September 2016)). The *Mont Cheveaux* test was endorsed by a Full Court of this Division in the unreported case of *Zuma & Others v the Democratic Alliance & Others* (Case no: 19577/09, dated 24 June 2016).

3.   It is trite that the discretion of a Court to grant or refuse a postponement is a discretion in the true or narrow sense. Provided the discretion is exercised judicially, another court may not substitute its own decision simply because it disagrees with it. (*Trencon construction (Pty) Ltd v Industrial Development Corporation of SA* 2015 (5) SA 245 (CC) at paras 83-89). The decision to postpone is primarily one to be made by the Court of first instance. (*Psychological Society of SA v Dubula Johnathan Qwelane and Others* CCT226/16, 14 December 2016, paras 30-31).

4.   In exercising its discretion, a court consider whether the application for a postponement has been timeously made, whether the explanation for the postponement is full and satisfactory, and whether there is prejudice to any of the parties involved, among other factors. All these factors will be weighed to determine whether it is in the interests of justice to grant the postponement. It is not only the interests of justice as between the disputing parties that should be considered, but also the broader public interest. (*Qwelane*, above, at para 31).

5.   In my written judgment I provided full reasons for my refusal of the application for a postponement. I considered the relevant factors as outlined in the above jurisprudence. In weighing those factors, I found that the interests of justice did not warrant the grant of the order sought. The test for determining whether leave to appeal should be granted is not whether another court might disagree. When it comes to the exercise of a true discretion, the test is whether there is a reasonable

prospect that another court would find that I exercised my discretion in a manner that was not judicial. I am unpersuaded that the Busamed entities have met this threshold.

6.   As to the complaints that I did not grant the ancillary relief (that is, leave to file a supplementary affidavit, and a consolidation of the main application with the new application that had recently been instituted by the Busamed companies), these must follow the path of the complaint that I refused the postponement. Granting either of those remedies would have necessitated a postponement. The interests of justice did not warrant this. Finality of court orders is fundamental to the rule of law. In this matter, the Busamed entities had reached the end of the road once the Constitutional Court refused application for leave to appeal. The interests of justice would not have been served by granting a postponement, permitting the filing of a supplementary affidavit and the consolidation of the main application with the new one.

7.   As to the application for leave to appeal on the merits of my decision, once again, my judgment gives full reasons for the order I made. There is no need for me to repeat them here. I am not persuaded that there is a reasonable prospect that another court would find differently.

8.   For all these reasons, I make the following order:

'The application for leave to appeal is dismissed with costs, such costs to include those of senior counsel.'

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R M KEIGHTLEY

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' representatives *via* email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 11H00 on 5 May 2022.

Date Heard (Microsoft Teams):	01 March 2022
Date of Judgment:	05 May 2022
On behalf of applicant (leave to appeal):	Adv K Tstatsawane SC
Instructed by:	Cliffe Dekker Hofmeyr Inc
On behalf of respondent (leave to appeal):	Adv A South SC
Instructed by:	Webber Wentzel