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

Case No:4523/2022

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

27 June 2025 [redacted]

DATE SIGNATURE

In the matter between:

PHILLIP HENRY ARNOLD Applicant

And

MONICA COWEN N.O. 1st Respondent

ANKIA VAN JAARSVELDT N.O. 2nd Respondent

JUDGMENT

NOKO J

[1] The applicant launched an application for leave to appeal the whole judgment and order I granted on 12 April 2024 in terms of which, first, I struck out the appellants' answering affidavit for failure to apply for condonation for the late failing of the said answering affidavit, secondly, I ordered the appellant to deliver documents which were requested by the respondents and, thirdly, I ordered applicants to pay costs on a punitive scale.

[2] The applicant contends that I erred in striking out the answering affidavit as the respondents had already agreed to the extension of the *dies* within which to serve the answering affidavit. The applicant attached proof of such agreement to the application for leave to appeal in the form of the letters exchanged between the parties. The respondents correctly submitted that the rules prescribe a process through which new evidence can be introduced during the application for leave to appeal, which has not been followed by the applicant.

[3] The counsel for the applicant further argued that the question of condonation was not argued during oral submissions by the parties, and as such, the court should have ignored the point *in limine* raised as was raised by the respondents in their replying affidavit. Under the circumstances, the counsel continued, there are good prospects of success and another court may come to a different conclusion.

[4] In retort, the counsel for the respondents contended that the issue of condonation was raised in the replying affidavit and had not been contested by the applicant at the time when the application was argued. The submission by the applicant's counsel that this was not raised during argument is of no moment as the issue served before me and required adjudication by the court.

[5] The respondents' counsel contended further that the order I made is interlocutory and not appealable. The applicant contended that it is final and appealable, and any event the constitutional court has decided in *AfriForum*[1] that the determining factors include that if it is in the interest of justice the court may still grant leave to appeal an interim order.

[6] The respondents' counsel submitted further that the order I granted is a default judgment since I refused to accept the answering affidavit, which was not preceded by a condonation application, the appeal process is not apposite instead, a rescission application is an appropriate application to follow. In retort, the respondents contended that the judgment and order are appealable as the applicant attended court and argued his case before the court made a finding to strike out the answering affidavit. This submission fails to take into consideration that the application proceeded unopposed, as there was no answering affidavit before me.

[7] With regard to the costs order, the applicant's counsel contended that I erred in granting costs at a punitive scale which order was predicated on the assumption that there was no need to apply for condonation unaware of the fact that the respondent had acceded to the request to grant an extension to file the answering affidavit. The respondent contended correctly that the argument regarding the alleged extension to file the answering affidavit is based on the evidence, which is being improperly introduced during the application process. On that basis, the contention is unsustainable and should be dismissed. Furthermore, in any event, the question of costs is discretionary and not appealable.

[8] It is trite that where the application for leave to appeal is predicated on section 17 of the Superior Court Act[2] must demonstrate that the court is, *inter alia*, of the opinion that the appeal would have a reasonable prospect of success and further that the adjudication of the appeal would be precedent-setting.

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1 *City of The Tshwane Metropolitan Municipality v Afri-Forum and Another* [2016] ZACC 19.
2 10 of 2013.

[9] It has been held by several courts[3] (and therefore trite) that the provision section 17 of the Superior Court Act has introduced a higher threshold to be met in application for leave to appeal, and the usage of the word '*would*' require the applicant to demonstrate that another court would certainly come to a different conclusion.

[10] The mere possibility of success, an arguable case or one that is not hopeless is not enough.[4] There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.[5]

[11] I will not repeat the *raison d'tre* underpinning my judgment and would I re-adjudicate the main application. I am not persuaded that the order I granted is definitive of the parties' rights, in fact the order is interim and is not appealable. (*vide Economic Freedom Fighters v Gordon[6])* The interest of justice argument is not supported by any substantive factual or legal arguments and has just been raised just to be dismissed. The incorrect belief that new evidence introduced was done properly compromised the wherewithal of the applicant to marshal a persuasive argument that the order to strike out the answering affidavit was without legal basis.

[12] The applicant has further failed to persuade me with relevant authority that in instances where the parties have not argued a point in limine during the hearing, I should presume that the said argument has been abandoned or withdrawn. Without such authority this argument pales into insignificance.

Conclusion

[13] The applicant has failed to meet the threshold, and I am not persuaded that the appeal has reasonable prospects of success, and further that another court would come to a different conclusion. To this end, the application for leave to appeal is bound to fail.

Costs

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[3] *Mont Chevaux Trust v Tina Goosen & 18 Others* 2014 JDR 2325. *MEC for Health, Eastern Cape v Mkhitha* 2016 ZASCA (25 November 2016), *Acting National Director of Public Prosecutions and Others v Democratic Alliance: In Re Democratic Alliance v Acting Director of Public Prosecutions and Others* 2016 ZAGPPHC 489.

[4] *MEC for Health, Eastern Cape v Mkhitha* 2016 ZASCA (25 November 2016) at para 17

[5] *S v Smith* 2012 (1) SACR 527.

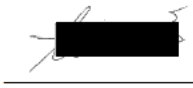
[6] *Economic Freedom Fighters v Gordhan and Others; Public Protector and Another v Gordhan and Others* [2020] ZACC 10.

[14] I have ordered that the applicant should pay costs on a punitive scale on the basis that the applicant has curated a stratagem to frustrate the finalisation of the *lis* instituted by the respondents. The order I granted is interim and cannot be assailed through an appeal process. The conduct of the applicant has invited the wrath of the court and the costs order should demonstrate its displeasure.

Order

[15] In the premises I grant the following order:

> *That the application for leave to appeal is dismissed with costs on scale C.*



Mokate Victor Noko
Judge of the High Court

This judgement was prepared and authored by Noko J is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **27 June 2025 at 15:30.**

Date of hearing: 26 June 2025.
Date of judgment: 27 June 2025.

Appearances

For the Applicant:	I Brewer, instructed by Mouyis Cohen Att.
For the Respondents:	C Read, instructed by Adam Creswick Att.