

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: 012058/2022

DELETE WHICHEVER IS NOT APPLICABLE

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

24/06/2025

In the matter between:

THE BOARD OF HEALTHCARE FUNDERS NPC

Applicant

and

COUNCIL FOR MEDICAL SCHEMES

First Respondent

THE REGISTRAR OF MEDICAL SCHEMES

Second Respondent

THE MINISTER OF HEALTH

Third Respondent

This matter was heard in open court and the judgment was prepared and authored by the judge whose name is reflected herein and is handed down electronically by circulation to the parties' legal representatives by email

and uploading it to the electronic file of this matter on Caseline. The date for hand-down is deemed to be the 24th June 2025

LEAVE TO APPEAL JUDGMENT

LEDWABA AJ

[1] In terms of section 17(1) of the Superior Courts Act 10 of 2013 (the Act) , the applicant applies for leave to appeal the order and judgment dated the 1st April 2025.

[2] Section 17 of the Act regulates applications for leave to appeal. Section 17(1)(a)(i) and (iii) provides that:

(1) Leave to appeal may only be given where the judge concerned is 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.

- [3] The applicant submits that the appeal would have a reasonable prospects of success and that there are other compelling reasons why the appeal should be heard, including the Constitutional right of access to healthcare implicated by the application as well as the alleged undisputed denial of increased access to healthcare for as many of ten million South Africans. This alleged undisputed denial of increased access to healthcare for ten million South Africans is denied by the third respondent.
- [4] The application is opposed by all the respondents. They contend that there are no reasonable prospects of success that another court would find in favour of the application. They also contend that there are no other compelling reasons why this appeal deserves to be heard.
- [5] On behalf of the third respondent, it is submitted that given the fact that the third respondent has received the report from the second respondent, which report recommends that the LCBOs are not viable, this renders prayer 3 of the amended notice moot with no practical effect referred to in section 16(2)(a)(i) of the Act
- [6] On behalf of the third respondent, it is further submitted that in so far as the applicant does not appeal against judgment regarding failure to bring the application within one hundred and eighty days, this is the additional reason for lack of prospects of success of the appeal.

- [7] The main application was dismissed on the basis of the *points in limine* raised by the respondents as well as on the merits.
- [8] The applicant submits that the judgment erred in ruling in favour of the respondents both on the points in lime and merits.
- [9] With regard to the *locus standi*, the applicant contends that the judgment erred in adopting a narrow approach to the issue of standing when dealing with Constitutional right to healthcare services referred to in section 27 of the Constitution. The applicant contends that the judgment should have adopted a generous or broad approach.
- [10] The legal position is that leave to appeal may only be granted where the presiding judge is of the opinion that the appeal would have a reasonable prospect of success or there are some other compelling reasons why it should be heard. A leave to appeal applicant must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless is not enough. There must be sound, rational basis to conclude that there is a prospect of success on appeal.¹

¹ MEC Health, Eastern Cape v Mkhitha and Another (2016) ZASCA 176 – par 16-17

[11] If the court is unpersuaded that there are reasonable prospects of success, it must still enquire into whether there are compelling reasons to entertain the appeal. If the reasonable prospect of success is established, leave to appeal should be granted. Similarly, if there are some other compelling reasons why the appeal should be heard, leave to appeal should be granted.²

[12] The use of the word “would” indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against. The word indicates that leave to appeal applicant faces a “higher and stringent” threshold. The test is not whether another court “may” come to a different conclusion, but “would” indeed come to different conclusion.³

² Ramakatsa & Others v African National Congress & Another (2021) ZASCA 31-par 10

³ Notshokuvu v S (2016) ZASCA 112- par 2

[13] Compelling reasons would include an important question of law or a discreet issue of public importance that will have an effect on future disputes.⁴

[14] On behalf of the third respondent it is submitted that on the merits, the Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623(A) at 634H-635C principle that the respondent version should prevail in the event of dispute of facts should result in the dismissal of the application.

[15] I am of the opinion that there are no reasonable prospects of success in this application. I also find that no other compelling reason why the appeal should be heard

[16] The application for leave to appeal fails both on the points in limine and the merits.

[17] In the light of the decision I take that the application deserves to be dismissed, I see no reason to provide further basis than to refer to the judgment itself.

⁴ Caratco (Pty)Ltd v Independent Advisory (Pty) Ltd (2020) ZASCA 17; 2020(5) SA 35(SCA)- par 2

[18] I see no reason why the costs should not follow the results. I do not understand Biowatch case⁵ to have removed the discretion regarding the costs. The applicant has failed to prove public interest *locus standi*

Order

[19] The application for leave to appeal is dismissed.

[20] The applicant is ordered to pay the costs of the employment of two counsels on scale B in respect of junior counsels and scale C in respect of senior counsels.



LEDWABA LGP

ACTING JUDGE OF THE HIGH COURT, PRETORIA

Date of hearing: 20 June 2025

Date of judgment: 24 June 2025

APPEARANCES:

⁵ Biowatch Trust v Registrar Genetic Resources & Others (2009) ZACC 14; 2009(6)SA 232(CC).

Counsels for applicant: Adv S Mohapi

Applicants' Attorneys: Werksmans Attorneys

Counsels for First and Second Respondents: Adv JJ Brett SC

Adv U Ahir

First and Second Respondents' Attorneys: Lawtons Incorporated

Counsel for Third Respondent: Adv AJ Louw SC

Adv MS Manganye

Third Respondent's Attorneys: State Attorneys Pretoria