



IN THE HIGH COURT OF SOUTH AFRICA  
FREE STATE DIVISION, BLOEMFONTEIN

**Reportable / Not  
reportable**

Case no: 5808/2021

In the matter between

**SOUTHERN AMBITION 1942 CC**

**FIRST APPLICANT**

**MAHLOENYENG TRADING (PTY) LTD**

**SECOND APPLICANT**

and

**THE COMMISSIONER FOR THE SOUTH  
AFRICAN REVENUE SERVICE**

**FIRST RESPONDENT**

**Neutral citation: Southern Ambition 1942 CC and Another v The  
Commissioner for the South African Revenue Service**

**Coram: Chesiwe J**

**Heard:** On the papers as per the directive with heads of argument filed on 11  
October 2024 and 18 October 2024 respectively.

**Delivered:** This judgment was handed down in open court and electronically by  
circulation to the parties' representatives by email and released to SAFLII. The

date and time for hand-down is deemed to be 10h00 on 15 November 2024

**Summary:** Application for leave to appeal – Non-compliance with the provisions of s 89 and s 96(1) (a) and (c) of the Customs and Excise Act 91 of 1964 - Test to be applied, reasonable prospects of success – Leave to appeal sought and to be heard by the Full Bench of the Free State Division of the High Court.

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## ORDER

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1. The application for leave to appeal to the Full Bench of this Division is dismissed with costs.
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## LEAVE TO APPEAL JUDGMENT

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### Chesiwe J

[1] The Applicant seeks leave appeal to the full bench of this Division against the whole judgment and order issued on 27 June 2024. The application is opposed by the Respondent.

[2] The grounds of this application for leave to appeal are listed in the application and will therefore no be repeated herein.

[3] The Applicant contends that there are reasonable prospects that another court would find that the court *aquo* erred in dismissing its application for condonation and upholding the special plea of the Respondent. The Respondent contends that the Applicant has not shown that another court would come to a different conclusion and has thus failed to meet the high threshold set in the leave to appeal application and did not make out a case in terms of s 17 of the **Superior Courts Act** <sup>1</sup>.

[4] In terms of the provisions of s 17(1) of the Superior Court's Act, leave to appeal may only be granted if the judge concerned is of the opinion that:

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<sup>1</sup> Act 10 of 2013



1. The appeal would have a reasonable prospects of success or if there are some compelling reasons why leave should be granted;
2. The decision sought on appeal does not fall within the ambit of s 16(2)(a) of the Act;
3. 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.

[5] This court in the unreported case of **Matoto v Free State Gambling and Liquor Authority and Others**<sup>2</sup> said the following:

"There can be no doubt that the bar for granting leave to appeal has been raised. Previously, the test was whether there was a reasonable prospect that another court might come to a different conclusion. Now, 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."

[6] In **Smith v S**<sup>3</sup>, the court dealt with the question of what constitutes reasonable prospects of success as follows:

"What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial Court. 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 words, be a sound, rational basis for the conclusion that there are prospects of success on appeal."

[7] In **MEC for Health, Eastern Cape v Mkhitha and Another**<sup>4</sup>, the court held as follows:

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<sup>2</sup> (4629/2015) [2017] [ZAFSHC] 80 (8 June 2017)

<sup>3</sup> 2012(1) SACR 567 (SCA) at para [7]

<sup>4</sup> (1221/2015) [2016] ZASCA 176 (25 November 2016)

"[16] 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 given 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.

[17] An applicant for leave to appeal 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 a sound, rational basis to conclude that there is a reasonable prospect of success on appeal."

[8] From the application it appears that the Applicant relies on s 17 (1)(a)(i) of the Superior Courts Act.

[9] The Applicant relies on several grounds as mentioned in the leave to appeal application and its assertion that the appeal would have a reasonable prospect of success. Most of the grounds sought to be relied upon are essentially a rehash of the case as set out in the pleadings and fully argued and dealt with in my judgment.

[10] In the main application, this court was called upon to adjudicate upon the following issues:

1. The application for condonation in terms of s 89 (2)(a) and (3) read with section 96 (1) of the **Customs and Excise Act** <sup>5</sup>; and
2. Whether there was a notice in terms of s 96 (1)(c)(i) of the Customs and Excise Act as well as the special plea raised by the Respondent.

[11] The issues raised in these grounds, entail a revisit to the seriously contended issues in which the Applicant contends that there are prospects of success. In an application for leave to appeal, the Applicant is not precluded to revisit the issues provided that the court is satisfied that there are reasonable prospects that the factual matrix would receive a different interpretation by another court.

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<sup>5</sup> Act 91 of 1964




[12] The Applicant's non-compliance with the provisions of s 89 and s 96(1) (a) and (c) of the Customs and Excise Act cannot be ignored nor disregarded, for the mere fact that the special plea was served as early as 28 March 2022. The Applicant delayed for a period of two years. Furthermore, the Applicant has failed to show that the Commissioner refused to extend the expiry period and not show the required notice in terms of s 96 of the Customs and Excise Act.

[13] Based on the submissions of the Applicant and those of the Respondent, indeed, the bar has been raised for granting leave to appeal against the judgment of a High Court. In my view I am inclined to agree with the submissions of the Respondent.

[14] I am therefore of the considered view that the application is without merit and that the Applicant has not shown that there are reasonable prospects that another court would come to a different conclusion.

[15] I accordingly make the following order:

1. The application for leave to appeal to the Full Bench of this Division is dismissed with costs.

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S. CHESIWE, J

## Appearances

On behalf of the Plaintiff:

Adv. M D J Steenkamp

Instructed by:

Jacobs Fourie Inc.

BLOEMFONTEIN

On behalf of the Defendant:

Adv. W N Mothibe

Instructed by:

Honey Attorneys

BLOEMFONTEIN