IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU NATAL DIVISION, PIETERMARITZBURG

Case No: 12119/2021

In the matter between:

SOLBETH SECURITY PROTECTION SERVICES CC — **APPLICANT**

And

AUDITOR-GENERAL OF SOUTH AFRICA — **FIRST RESPONDENT**

NONKUTHALO PHEPHU — **SECOND RESPONDENT**

ORDER

The following order is made:

1. The application for leave to appeal is dismissed with costs.

LEAVE TO APPEAL JUDGMENT

Siwendu J:

[1] The applicant, Solbeth Security Protection Services CC ("Solbeth"), seeks leave to appeal against the judgment delivered on 1 April 2026. In that judgment this Court set aside a subpoena duces tecum issued by the Registrar of this Court on 14 February 2025 against the Auditor-General of South Africa ("AGSA").

[2] The subpoena purported to compel the AGSA, in terms of s 36(5) of the Superior Courts Act 10 of 2013, to produce the documents listed therein. For convenience, the parties are referred to as they were cited in the application.

[3] The application for leave to appeal is opposed by the AGSA. As a preliminary point, it contends that Solbeth has failed to formulate concise grounds of appeal as required by Uniform Rule 49(4), which provides:

"(4) Every notice of appeal and cross-appeal shall state—

(a) what part of the judgment or order is appealed against; and

(b) the particular respect in which the variation of the judgment or order is sought."

[4] There is merit in that complaint. Rather than identifying specific grounds of appeal, Solbeth advances a broad and all-encompassing challenge to the judgment. Nevertheless, distilled to their essence, its complaints appear to be that:

(a) the Court erred in fact and law;

(b) the Court incorrectly assessed certain averments in the affidavits and reached unsustainable conclusions from those facts;

(c) the Court misconstrued Solbeth's contention that information had been provided by the AGSA pursuant to the subpoena;

(d) the Court failed to appreciate that the AGSA's engagement with Solbeth precluded it from seeking to set the subpoena aside;

(e) the AGSA responded to Solbeth in terms of the subpoena, rendering the application to set it aside unnecessary;

(f) the Court failed to consider Solbeth's responses demonstrating that the setting aside of the subpoena was unnecessary;
(g) the Court misinterpreted Solbeth's letter of 1 April 2025, in which it refused to withdraw the subpoena;
(h) the Court erred in its interpretation of the subpoena, its scope and Solbeth's responses; and
(i) the Court wrongly concluded that the subpoena had been unlawfully issued.

[5] One of Solbeth's criticisms concerns two observations made in the judgment, namely that it had previously instituted, and then abandoned, a PAIA application, and that the subpoena was issued out of the Pietermaritzburg High Court in relation to litigation pending in the Durban High Court. It characterises those observations as amounting to a finding that it was engaged in a "fishing expedition". Although the observations are revealing of Solbeth' s approach they are *obiter* and not appealable.

[6] The reasons for the order are fully set out in the judgment. They include the findings that:
(a) the subpoena was issued without lawful basis and constituted an abuse of the Court's process;
(b) it was issued on an incorrect premise because Solbeth knew, and had been informed, that the information sought did not exist or was not in the possession of the AGSA;
(c) the AGSA could not lawfully be compelled to disclose information relating to its audit functions in proceedings to which it was not a party, having regard to s 18(3) of the Public Audit Act; and
(d) the subpoena was employed as a mechanism to compel disclosure directly to Solbeth rather than production to the Registrar in accordance with the Rules.

[7] The AGSA opposes the application on several grounds. Having considered the merits of the proposed appeal, it is unnecessary to traverse each of those submissions. It suffices to note that the AGSA correctly identified both the applicable test and the threshold that Solbeth must satisfy. Equally correct is its

submission that a litigant may not seek, at the leave-to-appeal stage, to refashion its case or advance new grounds not properly raised before the Court whose decision is challenged.

[8] Turning to the merits, it is trite that an appeal lies against the order or judgment itself and not against every reason advanced in support thereof. In *Neotel (Pty) Ltd v Telkom SA SOC Ltd and Others*[1], and subsequently in *Lebea v Menye and Another*, it was reaffirmed that appellate intervention is directed at the correctness of the decision reached. Findings of fact will not lightly be disturbed absent a material misdirection or a conclusion that is clearly wrong.

[9] In my view, the Court's assessment of the facts and its interpretation of the affidavits are unassailable. The findings are firmly supported by the contemporaneous correspondence exchanged between the parties. That correspondence makes it plain that Solbeth was never furnished with information pursuant to the subpoena. The contention that the AGSA, by engaging with Solbeth as an organ of state, somehow relinquished its statutory rights or protections is unsustainable.

[10] Nor has Solbeth demonstrated that the subpoena served any legitimate forensic purpose. The Court's factual findings disclose no misdirection warranting interference by an appellate court.

[11] In relation to the alleged errors of law, Solbeth fails to engage meaningfully with the provisions of s 18(3) of the Public Audit Act. That section expressly protects the AGSA from being compelled to disclose information in proceedings

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[1] *Neotel (Pty) Ltd v Telkom SA SOC Ltd and Others* [2017] ZASCA 47 and *Lebea v Menye and Another* [2022] JOL 56369 (CC).

to which it is not a party. The subpoena was therefore fundamentally flawed from inception.

[12] Beyond attempting to place a different gloss on the facts, Solbeth has not engaged with the central legal conclusions underpinning the judgment.

[13] Although the notice of application does not expressly identify the subsection of s 17 of the Superior Courts Act upon which reliance is placed, I infer from its contents that leave is sought in terms of s 17(1)*(a)(i),* which provides that leave to appeal may only be granted where the Court is of the opinion that:

"the appeal would have a reasonable prospect of success".

[14] Solbeth does not contend that there are compelling reasons for the appeal to be heard, nor does it suggest the existence of conflicting judgments requiring resolution by an appellate court.

[15] Since the amendment of the Superior Courts Act, the threshold for obtaining leave to appeal has been set appreciably higher, and set out in *Mont Chevaux Trust v Tina Goosen*[2] or *Notshokovu v S,* both of which are frequently cited for the proposition that the word "would" in s 17(1*)(a)(i)* raises the threshold above the former test of a reasonable possibility of success. An applicant must demonstrate more than a mere possibility of success; there must be a realistic prospect that another court would come to a different conclusion.

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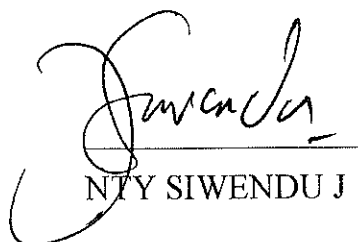
[2] *Mont Chevaux Trust v Tina Goosen* 2014 JDR 2325 (LCC) and Notshokovu *v S* (157/15) [2016] ZASCA 112.

[16] Solbeth has failed to meet that threshold. I am not persuaded that another court would reach a different conclusion on either the facts or the law. The proposed appeal enjoys no reasonable prospects of success.

[17] The following order is made:

1. The application for leave to appeal is dismissed with costs.



NTY SIWENDU J

Heard on: 27 May 2026

Delivered on: 5 June 2026

Appearances

For the Applicant: T Chetty

Instructed by: Theyagaraj Chetty Attorneys

Locally represented by: Cajee, Sethubi, Chetty Inc.

For the Respondent: L Kutumela

Instructed by: Fairbridges Wertheim Becker

Locally represented by: Snyman Leaker Williams