IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION: PRETORIA)

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

10 JULY 2026 ....
DATE SIGNATURE

Case number: 020740/2023

In the matter between:

ELASAH RISK CONSULTANTS (PTY) LTD	First Applicant
FUSION GUARANTEES (PTY) LTD	Second Applicant
and	
NATIONAL CREDIT REGULATOR	First Respondent
THE FINANCIAL SECTOR CONDUCT AUTHORITY	Second Respondent
PRUDENTIAL AUTHORITY	Third Respondent
IN RE:	
THE FINANCIAL SECTOR CONDUCT AUTHORITY	Applicant
and	
ELASAH RISK CONSULTANTS (PTY) LTD	First Respondent
FUSION GUARANTEES	Second Respondent

THE NATIONAL CREDIT REGULATOR Third Respondent

THE PRUDENTIAL AUTHORITY Fourth Respondent

JUDGMENT: LEAVE TO APPEAL

MINNAAR AJ

[1] Both Elasah and Fusion lodged respective applications for leave to appeal against my judgment and orders delivered on 23 March 2026.

[2] Save for the NCR, the application for leave to appeal is opposed, and all parties delivered their heads of argument and presented oral submissions.

[3] The spectrum of the applications that were before me related to the interpretation of the Insurance Act 18 of 2017 (which replaced certain parts of the Long-term Insurance Act, 1998 and the Short-term Insurance Act, 1998*)*, Elasah's *locus standi*, the binding nature of the judgments in *Becker and Another v Registrar of Financial Service Providers and Others* (61274/2015) [2017] ZAGPPHC 926 (30 November 2017) (per Rip AJ) ("*Becker")* and *Fern Finance and Another v Financial Services Tribunal and Others* 2022 (JDR) 3092 (GP) (as per Potterill J) (*"Fern Finance")* on the Insurance Act and the applicability of the provisions of

the Insurance Act on the Fusion guarantees and the construction guarantees relied on by Elasah.

[4] According to Elasah, I erred in my judgment in:

a. Finding that Elasah had no *locus standi*;
b. Excluding the current Fusion Guarantees from consideration;
c. Finding that *Becker* and *Fern* are binding precedents; and
d. My interpretation and findings of the essentials of an insurance contract.

[5] It is the case of Fusion that I erred in my judgment by:

a. Finding that FA22 to their founding affidavit was similar to the guarantee considered in *Becker*;
b. Not appreciating the relevant departure from the Short-Term Insurance Act, which circumscribed "guarantee policies" by the Insurance Act, which in Schedule 2, Table 2, Class 13 ("Class 13 guarantees"), the limited types of guarantees reserved for issue by the registered issuers.
c. Placing reliance on *Becker* and *Fern,* which were concerned with "guarantee policies" under the Short-Term Insurance Act and not with the newly introduced description of Class 13 guarantees under the Insurance Act.
d. Not finding that the "Fusion Guarantees" are on-demand guarantees independent of any accessory agreements and do not

cover loss resulting from insolvency, a failure by a person to discharge an obligation, or a suretyship.

e. Finding that FA22 clearly undertakes to indemnify loss or liability.

f. Finding that the "Fusion Guarantees " constitute non-life insurance business as defined by the Insurance Act.

[6] It is the case of both Fusion and Elasah that they have reasonable prospects of success on appeal. Fusion places reliance on section 17(1)(a)(i) and (ii) of the Superior Courts Act, 10 of 2013 ("the Superior Courts Act").

[7] Applications for leave to appeal are dealt with in terms of Rule 49 of the Uniform Rules of Court, read with sections 16 and 17 of the Superior Courts Act.

[8] Section 17(1) of the Superior Courts Act provides the test applicable to applications for leave to appeal. Section 17(1) reads as follows:

"(1) Leave to appeal may only be given where the judge or judges concerned are 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;

(b) *the decision sought on appeal does not fall within the ambit of section 16 (2) (a); and*

(c) *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."*

[9] Section 17(1)(a)(i) of the Superior Courts Act was dealt with in the decision of the Land Claim Court in *The Mont Chevaux Trust v Tina Goosen & 18 Others* 2014 (JDR 2325 (LCC); 2014 JDR 2325 in which Bertelsmann J held that the use of the word *"would"* (as opposed to could) in the provisions is an indication that the threshold for leave to appeal has been raised. It was further held that the word *"would"* indicates a measure of certainty that another court will differ from the judgment appealed against.[1]

[10] On the rigidity of the threshold, Plaskett AJA (as he then was), with whom Cloete JA and Maya JA (as she then was) concurred, wrote the following in *S v Smith 2012* (1) SACR 567 (SCA) ([2011] ZASCA 15) at paragraph 7:

'What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that the 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

[1] *Mont Chevaux Trust at* par 6. See further *Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others* (1957/09) [2016] ZAGPPHC 489 (24 June 2016) par 25

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.'

[11] Under section 17(1)(a)(ii) of the Superior Courts Act, the Court determining an application for leave to appeal ought to enquire whether there is a compelling reason for the appeal to be heard.[2] The enquiry is factual and, therefore, each application ought to be decided on its own facts.

[12] Other considerations beyond the abovementioned statutory provisions would include where the material case is of substantial importance to the appellant, and where the decision sought to be appealed against involves an important question of law[3] or where required by the interests of justice.[4]

[13] Applying the test for leave to appeal on the grounds raised by Fusion and Elasah, there is a reasonable prospect that another court

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[2] Erasmus, Superior Court Practice (2021) A2-56 to 57
[3] Erasmus, Superior Court Practice (2021) A2-56 to 57
[4] *City of Tshwane v Afriforum* 2016 (6) SA 279 (CC) par 40

would reach a different conclusion from mine. It follows that the application must be granted.

[14] In my view, the issues are novel and are likely to arise in the future. It raises an important question of law and, in the interest of justice, legal clarity is required. It would therefore be appropriate to grant leave to appeal to the Supreme Court of Appeal.

Consequently, I make the following order:

1. Leave to appeal is granted to the Supreme Court of Appeal.
2. The costs of this application for leave to appeal shall be costs in the appeal.

Minnaar AJ

Acting Judge of the High Court

Gauteng Division, Pretoria

For the first applicant	: Adv P F Louw SC with Adv N Daniels
Instructed by	: L Cirone Attorneys at Law
For the second applicant	: Adv E van Vuuren SC with Adv N Daniels
Instructed by	: CHM Attorneys
For the first respondent	: No appearance
For the second respondent:	: Adv C Loxton SC with Adv N Muvangua
Instructed by:	: Norton Rose Fullbright South Africa Inc
For the third respondent:	: Adv A E Bham SC
Instructed by:	: MacRoberts Attorneys Inc
Heard on:	: 6 July 2026
Date of judgment	: 10 July 2026