

Checklist for leave to appeal to the Supreme Court of Appeal

By
Sechaba
Mohapi

It is trite that an automatic right to appeal no longer exists, especially in the High Courts. The current legal position is that parties wishing to appeal must first seek the court *a quo*'s leave or permission to appeal in terms of the procedure laid down in ss 20 and 21 of the Supreme Court Act 59 of 1959 (the Act).

While the subject matter of applications for leave to appeal and the historical background thereto were dealt with extensively by Steph E van der Merwe in 1982 (Jan) *DR* 14, this article seeks to outline the practical aspects that attorneys must keep in mind when making applications for leave to appeal to the Supreme Court of Appeal (SCA).

The SCA practice is regulated by the Act, the Rules Regulating the Conduct of the Proceedings of the Supreme Court of Appeal of South Africa of 1998 (the rules) and the Supreme Court of Appeal Practice Direction of 2011 (the direction). However, despite the availability of these prescripts, problem areas remain due to the infrequency of referring matters to the SCA for most attorneys. It is therefore worthwhile to have a basic checklist highlighting the important, and often overlooked, aspects of SCA practice.

SCA leave to appeal checklist

This checklist is not intended to be a comprehensive guide to SCA practice, and does not deal with issues pertaining to the merits or demerits of applications for leave to appeal, as this is regarded as falling within counsel's province in the division of legal practice labour. The checklist is concerned more with

points of practical procedure relating to applications for leave to appeal to the SCA.

Applications for leave to appeal in general

Applications for leave to appeal to the SCA are an expeditious process ordinarily dealt with summarily by two judges of appeal designated by the President of the court.

Even though the Act makes provision for such designated judges of appeal to refer applications for leave to appeal to oral argument to be made before them or the court (s 21(3) of the Act), this rarely happens in practice.

In the case of a difference of opinion between the two designated judges, the President of the court or any other designated judge will make a majority decision of the court on the application. The decision of the majority of the judges of appeal who are considering the application to grant or refuse leave to appeal is final (s 21(3)(d) of the Act).

Applications for leave to appeal are most commonly brought to the SCA where leave to appeal has been refused by the court *a quo* (s 20(4)(b) of the Act) or, in the second instance, when seeking 'special leave' to appeal against the order or judgment of a full court of a provincial division sitting as a court of appeal (s 20(4)(a) of the Act).

An important point to remember in instances where the judgment or order against which leave to appeal is granted by a single judge is that it is imperative that the court order granting leave to appeal should explicitly state that leave is granted to appeal to the full Bench or to the SCA, as the case may be, since a single judge in the High Court may grant leave to appeal to either one of the mentioned courts of appeal (s 20(2)(a)). However, the President of the SCA may be petitioned by any interested party to set aside the single judge's order granting leave to appeal to the SCA within 21 days from the date of the single judge's court order granting leave to appeal to the SCA (s 20(2)(b) and (c)).

Procedure

Applications for leave to appeal to the SCA are brought on notice of motion supported by affidavit (r 1(1) of the rules). With regard to the form of the application for leave to appeal, as well as the answer and reply, the rules prescribe that these must be clear, succinct and to the point.

The parties must fairly furnish all information necessary to enable the court to decide on the application, and must deal with the merits only in so far as is necessary for purposes of explaining and supporting the grounds on which leave to appeal is sought or opposed (r 6(5) of the rules).

The starting point is to appoint a Bloemfontein correspondent firm in accordance with the rules, which prescribe that the lodging of documents with the registrar of the SCA should be done through an attorney practising in Bloemfontein or, if a party is not represented by an attorney, by registered post or by that party personally, after prior service of copies of such documents on any other party (r 1(1) of the rules).

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Below is a sample checklist that practitioners may find useful when dealing with applications for leave to appeal to the SCA.

Checklist

Applications for leave to appeal	Provision
Must be brought within 21 days from the date of the court <i>a quo</i> judgment or order (not necessary to apply for condonation if within 21 court days).	s 21(2)(b) of the Act; direction para 2
Must be served on the respondent(s) and the registrar of the court <i>a quo</i> .	practice
Must be lodged with the registrar of SCA in triplicate (original plus two copies).	r 6(1)
If longer than ten pages, must be printed and copied double-sided.	direction para 4
Should not exceed 30 pages in length.	r 6(5)(b)(iii)
Annexure of the judgment and order of the court <i>a quo</i> appealed against.	r 6(2)
Annexure of the judgment and order refusing leave to appeal.	r 6(2)
Binding by plastic ring-binder is appreciated by the court.	practice
Where the judgment and order refusing leave cannot be obtained, a letter from the registrar of the court <i>a quo</i> certifying the date of such order will be sufficient.	direction para 1
Where it is not possible to lodge the original application on the last day, a copy is sufficient, but the original must be lodged within ten days thereafter.	practice
Where it is not possible to lodge a copy of the application on the last day for lodging, an application for condonation must be made, failing which the application lapses.	r 12
Answer	
Must be lodged within one month after service of the application.	r 6(3)
Lodged in triplicate (original plus two copies).	r 6(3)
If longer than ten pages, must be printed and copied double-sided.	direction para 4
Should not exceed 30 pages in length.	r 6(5)(b)(iii)
Binding by plastic ring-binder is appreciated by the court.	practice
Where it is not possible to lodge the original affidavit on the last day, a copy is sufficient, but the original must be lodged within ten days thereafter.	practice
Where it is not possible to lodge a copy of the affidavit on the last day for lodging, an application for condonation must be made for non-compliance with the rules.	r 12
Reply	
Must be lodged within ten days after service of answer.	r 6(4)
Must strictly deal with only new matters raised in answer.	r 6(4)
Lodged in triplicate (original plus two copies).	r 6(3)
Should not exceed ten pages in length.	r 6(5)(b)(iii)
Binding by plastic ring-binder is appreciated by the court.	practice
Where it is not possible to lodge the original affidavit on the last day, a copy is sufficient, but the original must be lodged within ten days thereafter.	practice
Where it is not possible to lodge a copy of the application on the last day for lodging, application for condonation must be made for non-compliance with the rules.	r 12

Sechaba Mohapi LLB (NWU) is an attorney at Naudes Attorneys in Bloemfontein.

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CELL: 082 336 6772
E-Mail: azelle@armint.co.za