



**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MAKHANDA**

CASE NO: 1838/2021

In the matter between:

RAYMOND MHLABA LOCAL MUNICIPALITY

Applicant

and

COEGA PACKAGING (PTY) LTD

Respondent

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

Rugunanan J

- [1] In this matter I delivered a judgment on 19 July 2022 in which an application for rescission of a judgment/order granted by Smith J on 27 July 2021 was dismissed with costs.
- [2] I shall refer to the parties as they were in the main application.

- [3] The applicant seeks leave to appeal either to a full court of this division or to the Supreme Court of Appeal against the whole of my judgment.
- [4] The judgment sets out in detail the background to this matter and the reasons for dismissing the application.
- [5] In essence it is argued that I erred on the issue of service of the notice of motion and the notice of set down; that I erred in holding that the respondent's claim was liquid; that I failed to deal with the arguments advanced concerning the competence of seeking a forced transfer of encroached upon land; and that I failed to deal with that component of the order which directed a solatium to be paid as calculated by the Expropriation Act 63 of 1975.
- [6] To a large extent the grounds for leave to appeal, both legal and factual, assert that my reasoning was erroneous and that I failed to take into consideration or give sufficient weight to other factors.
- [7] What I do not propose to do is to repeat that which is set out in my judgment in as much as that which was relevant was considered therein.
- [8] I am mindful that an appeal is solely aimed at an order of court and not its reasoning.¹
- [9] Section 17(1) of the Superior Courts Act 10 of 2013 deals with the circumstances upon which leave to appeal may be granted.
- [10] To make that determination, it is worth restating the provisions of the section.

¹ *The Minister of Justice and Constitutional Development and Others v The Southern Africa Litigation Centre* [2015] ZAGPPHC 675 para 5.

[11] It provides 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.”

[12] Turning the focus to these provisions, leave to appeal may only be granted where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success, or there are compelling reasons which exist why the appeal should be heard such as the interests of justice. ²As to the provisions of s 17(1)(a)(ii) of the Act, the Supreme Court of Appeal in *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* ³ indicated that if the court is unpersuaded that there are prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal.

[13] Compelling reason would include an important question of law or a discrete issue of public importance that will have an effect on future disputes. But here the merits as well remain vitally important and are often decisive.⁴

[14] I am cognisant of the decisions of the high court debating whether the use of the word ‘would’ as opposed to ‘could’ possibly means that the threshold for granting leave to appeal has been raised. If a reasonable

² *Nova Property Holdings Limited v Cobbett & Others* [2016] ZASCA 63: 2016 (4) SA 317 (SCA) para 8.

³ [2020] ZASCA 17; 2020 (5) SA 35 (SCA) para 2.

⁴ *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* [2020] ZASCA 17; 2020 (5) SA 35 (SCA) para 2; also *Ramakatsa and Others v African National Congress and Another* [2021] ZASCA 31 para 10.

prospect of success is established, leave should be granted. And similarly, if there are some other compelling reasons why the appeal should be heard, then leave should be granted. The test of reasonable prospects of success postulates ‘a dispassionate decision based on the facts and the law’⁵ that ‘another court may well find merit in [the] arguments advanced by the losing party’⁶ and ‘reasonably arrive at a conclusion different to that of the trial court’⁷.

[15] Foundational to the judgment is that I approached the matter principally on the basis that an encroachment onto the respondent’s land was treated as an expropriation. My decision impacts on the executive and functional competence of a municipality that has administrative authority with regard to the matters listed in Part B of schedules 4 and 5 of the Constitution and the rights of a landowner. This is an issue of public importance that conceivably will have an effect on future disputes. Matters in the realm of expropriation have a bearing on the Constitution and fundamentally affects rights and obligations. Moreover, it is not clear to me whether the judgment purports to establish a precedent that in all circumstances such as the present, a discretionary remedy to order compensation instead of the removal of the encroachment would be competent.

[16] Although differing contentions on the merits of the application were made I consider that the importance of this matter impels the conclusion that there are compelling reasons for allowing leave to appeal.

⁵ *Ramakatsa and Others v African National Congress and Another supra* para 10.

⁶ Per Smith J in *Valley of the Kings Thaba Motswere (Pty) Ltd and Another v Al Mayya International* [2016] ZAECHC 137 para 4. This test was cited with approval by Mbenenge JP in *Minister of Police v Abongile Zamani* [2021] ZAECHC 1 para 10.

⁷ *Ramakatsa and Others v African National Congress and Another supra* para 10.

[17] I do so on the basis essentially set out in this judgment – but do not limit such leave exclusively thereto as I consider that it will be unjust to preclude interference on appeal if it is found that the judgment and the order is obviously wrong in other respects⁸ – in particular, the asserted grounds of appeal. As for the latter I make it clear that the test – dispassionately applied – is that another court may well find merit in the applicant’s arguments and conclude differently than did I.

[18] In the result, the following order is made:

1. The applicant is granted leave to appeal to the full court of this division against the whole of the judgment and order of this court delivered on 19 July 2022.
2. The costs of this application shall be costs in the appeal.

M. S. RUGUNANAN

JUDGE OF THE HIGH COURT

APPEARANCES:

For the Applicant:

A. Beyleveld SC
Instructed by:

⁸ Compare *Qunta v Minister of Police* [2013] ZAECGHC 53 para 5.

Wheeldon Rushmere & Cole Inc.
119 High Street
Makhanda
Tel: 046-622 7005
(Ref: B. Brody)

For the Respondent:

D. De La Harpe SC
Instructed by:
Cloete & Company
112A High Street
Makhanda
Tel: 046-622 2563
(Ref: P. Cloete)

Date heard: 31 August 2022

Date Delivered: 29 November 2022