IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MAKHANDA)

CASE NO: 1254/2024

In the matter between:

ALFRED NZO DISTRICT MUNICIPALITY Applicant

And

SOKHANI DEVELOPMENT AND
CONSULATING ENGINEERS (PTY) LTD Respondent

JUDGMENT ON LEAVE TO APPEAL

ZONO AJ

Introduction

[1] This is an application for leave to appeal the whole judgment granted on 26th April 2024. The court was approached for an interlocutory or interim order set out in Part A of the notice of motion. This was an

application *pendete lite*. The interim court order sought was granted pending final determination of the review application set out or prayed for in **Part B** of the same application.

[2] In parenthesis for what will be discussed hereunder it is important to place on record that the applicant in this application for leave to appeal launched a counter review application in terms of which the applicant sought to set aside its decision to appoint the respondent to perform contractual duties and also a Service Level Agreement entered into by the parties.

[3] It is important to note that the counter application was directed to the main application which was review application set out in Part B of the application. The gravamen of the counter application is the challenge of respondent's appointment made without following supply chain management processes and imperative constitutional and legislative prescripts[1]. Effectively the applicant launched a legality review seeking to self-review its decision.

[4] With regard to the main application by the respondent, the applicant sought to assail same by delivering an answering affidavit. In that affidavit the applicant herein raises the same collateral defence relating to the legality of respondent's appointment. That defence, both in law and in fact, with a broad view to the context of the whole

[1] Section 33 and 217, of the Constitution; Section 32(1)(b) and 33 of the Municipal Finance Management Act 56 of 2003

proceedings, aimed at assailing Part B of the main application, which is the review application.

[5] In the judgment sought to be appealed I concerned myself with the interlocutory relief sought in Part A of the application and its requirements. I preliminarily dealt with the issue of urgency. I made findings both on urgency and the requirements of the interlocutory/interim interdict and thereafter came to a conclusion that favoured the respondent. It is this judgment against which an application for leave to appeal has been launched.

[6] Stripped of wordiness applicant's grounds of application for leave to appeal may be summarised as follows:

6.1 The court misdirected itself in deciding the issue of urgency based on the new case made out and introduced in the replying affidavit about semi-urgency as opposed to urgency referred to in the founding affidavit. Consequently, the judgment is inconsistent and contradictory as it found that no case for urgency has been made out, but later found on the basis of semi urgency raised only in the replying affidavit.

6.2 The court misdirected itself in not dismissing respondent's application based on the fact that it has found that the respondent failed to make out a case for urgency.

6.3 The court erred in deciding the issue of urgency on the basis of considerations of sympathy as opposed to the facts and law.

[7] The grounds were all in relation to the issue of urgency. A lot of time and effort was spent on urgency and how court misdirected itself in dealing with same both on the facts and on law. Essentially the applicant seeks to appeal a discretion this court exercised about the urgency of the matter.

[8] With regard to other issues, the application for leave to appeal proceeds to assail the judgment as follows:

8.1 The court misdirected itself in finding that the provisions of Rule 41A are not peremptory and that they are not fatal to the proceedings. It is suggested that Service Level Agreement is consistent with the provisions of Rule 41A as it provides for a dispute resolution mechanism.

8.2 The court misdirected itself in finding that the applicant has admitted or did not meaningfully dispute the respondent's claim that its procedural fairness and contractual rights have been violated.

8.3 The court misdirected itself in finding that the respondent would suffer irreparable harm and/or had no alternative adequate remedy available to it. As a subset of this the court is

criticized for failure to appreciate the nature, extent and reach of the collateral defence of illegality.

8.4 The court misdirected itself in expressely and/or impliedly finding and concluding that the collateral defence of illegality cannot be raised by the applicant in that the impugned decision to award the disputed contract to the respondent can only be set aside in proceedings for judicial review; and further that the applicant's decision to unilaterally cancel the disputed contract was not based on the law and thus without any lawful basis.

8.5 The court was obliged to have adjudicated on the issue as to whether or not the applicant's collateral defence has merit, and erred in not having done so.[2]

8.6 The court misdirected itself in finding that the respondent satisfied all the requirements of the interim interdict and that the application must succeed and accordingly that the respondent is well entitled to perform its duties in terms of the appointment letter until that appointment is set aside by a court of law. Performance of the duties is a legal consequence of the appointment.

[2] Reliance is placed on section 217 of the Constitution; and Local Government: Municipal Finance Management Act 56 of 2003 (Section 32 and 33)

8.7 The court has misconstrued the facts and the law in finding that the respondent has made out a case for the interdictory relief sought.

8.8 The court misdirected itself in not awarding an order of costs against the respondent.

Legal Principles

[9] Application for leave to appeal is governed by the provisions of section 17(1) of the Superior Court practice. Section 17(1) 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;*
> *(b) the decision sought on appeal does not fall within the ambit of section 16(2), and"*
> *(c) The decision sought to be appealed does not disposed of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between parties."*

[10] **Plasket AJA**[3] **(**as he then was) with **Cloete** and **Maya JJA** (as she then was) Concurring held that:

> "*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*

[3] ***Smith v S*** 2012(1) SACR 567 SCA Para 7

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."[4]

[11] **Schippers AJA**[5] with **Catchelie JA** and **Dlodlo AJA** Concurring shared the same sentiments:-

"[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."

The court must be convinced on proper grounds that there is a realistic chance of success on appeal. A mere possibility of success on appeal is not enough.

[12] The order sought to be appealed is interim in effect and form and is therefore generally not appealable[6]. There are no facts and or grounds set out in the application for leave to appeal to show that the interest of justice require that an appeal be entertained.

[13] **Harms JA** held:[7]

"A "judgment or order" is a decision which, as a general principle, has three attributes, first, the decision must be final in effect and not susceptible of alteration by the court of first instance; second, it must be definitive of the rights of the parties; and, third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings (Van streepen & Germs (Pty) Ltd case supra at 586I-

[4] **S v Mabena and another** 2007 (1) SACR 482 SCA Para 22
[5] ***MEC for Health, Eastern Cape v Mkhitha and another*** (1221/2015) [2016] ZASCA 176 (25 November 2016) Para 17
[6] ***UDM and Another v Lebashe Investment Group (Pty) Ltd Another*** 2021(2) ALL SA 90 SCA Para 26
[7] **Zweni v Minister of Law and Order** 1993 (1) SA 523 A at 532H -533A

587B; Marsay v Dilley ***[1992] ZASCA 114***; ***1992 (3) SA 944*** *(A) 962C-F) . The second is the same as of the-stated requirement that a decision, in order to qualify as a judgment order, must grant definite and distinct relief (Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue & Another* ***[1991] ZASCA 163***; ***1992 (4) SA 202*** *(A) 214D-G).”*

In *Casu*, substantial portion of the relief claimed in the main proceedings has not been disposed of, hence a complaint that the legality of the appointment of the respondent was left out or not dealt with.

[14] Before dealing with the grounds contained in the application for leave to appeal it is prudent to deal with what should have constituted grounds of appeal, which unfortunately are not part thereof.

Grounds of Appeal

[15] The nature of the order granted in the judgment sought to be appealed is interlocutory or interim in nature. What is required to render an order appealable is well trodden turf. The appeallability of interim orders in terms of the common law depends on whether they are final in effect.[8] Proper grounds must be set out in the application for leave to appeal which would justify the entertainment of the appeal.[9] Grounds of appeal are pivotal as they are the foundation of the appeal,[10] especially of the interim order. Grounds of appeal must clearly and succinctly be set out in clear and unambiguous terms to

[8] ***UDM and another v Lebashe Investment Group (Pty) ltd and others*** 2021 (2) ALL SA 90 SCA Para 7-8; ***Philani –Ma Africa v Maihila and others*** 2010 (2) SA 573 SCA Para 20.
[9] ***Avbob Funeral Services v Buzani*** (2810/2020) [2024] ZACEQBHC 28(17 April 2024) Para 4.
[10] Rule 49(1) (b) of the Uniform Rules.

enable the court and the respondent to be fully informed of the case the applicant seeks to make out and which the respondent is to meet in opposing the application for leave to appeal.[11]

[16] To buttress the point that grounds of appeal are pivotal in an application for leave to appeal, Rule 49(1)(b) of the Uniform Rules provides that:

> *"(b) When leave to appeal is required and it has not been requested at the time of the judgment or order, application for such leave shall be made and the grounds therefor shall be furnished within 15 days after the date of the order appealed against: Provided that when the reasons or the full reasons for the court's order are given on a later date than the date of the order, such application may be made within 15 days after such later date: Provided further that the court may, upon good cause shown, extend the aforementioned periods of 15 days."*

[17] The provisions of Rule 49(1)(b) of the Uniform Rules are couched in imperative terms. The Rule is peremptory.[12] In Xayimpi[13] an application for leave to appeal was dismissed due to non-compliance with this Subrule. It does not help the applicant to marshal grounds of appeal over the bar which have not been set out clearly and succinctly in the notice of application for leave to appeal, no matter how meritorious those might be[14].

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[11] ***Songono v Minister of Law and Order*** 1996 (4) SA 384 E at 385 I-J; ***Hing v Raf*** 2014 (3) SA 350 WCC at 353J; **S v Mc Laggan** 2013 (1) SACR 267 (ECG) Para 4-7; ***Avbob Funeral Services v Buzani*** (2810/2020) [2024] ZACEQBHC 28(17 April 2024) Para 4.

[12] ***Avbob Funeral Services v Buzani*** (2810/2020) [2024] ZACEQBHC 28(17 April 2024) Para 4.

[13] ***Xayimpi and others v Chairman Judge While Commission (formally known as Brown Commission)*** 2006 (2) ALL SA 442 (E).

[14] ***Municipality of Thabazimbi v Badenhorst*** (66933/2011) [2024] ZAGPPHC 212 (26 February 2024) Para 12-15.

[18] A statutory requirement construed as peremptory needs exact compliance for it to have that stipulated consequence and any purported compliance falling short of that is a nullity.[15] As a general Rule non-compliance with peremptory provisions results in a nullity.[16] An application for leave to appeal lacking necessary grounds of appeal is a nullity and must fail for that reasons.

[19] There is paucity of clear and succinct factual information in the application for leave to appeal about the necessity to entertain an appeal of an interim order. Even a benevolent approach that interests of justice require that the appeal of an order which is not final in effect must be entertained, cannot assist because that would lack the necessary factual grounds to support that kind of conclusion. Because of lack of necessary ground relating to appeallability of this interim order, the application for leave to appeal has to fail. Applicant's problems are compounded by the impirical facts at the disposal of the court and concession made in court. I now turn to that evidence.

Interest of Justice and Section 16(2) of Superior Court Act

[20] It is not without significance that the applicant penned a letter dated 06th June 2024 to the Office of the Deputy Judge President recording *inter alia*, that

> "*3. The purpose of this letter is to request the Honourable Deputy Judge President's (DJP) consent for special allocation of the hearing of the Part*

[15] ***Shalala v Klerksdorp Town Council and another*** 1969 (1) SA 582 at 587 A-C
[16] LAWSA Vol 25, Page 399 Para 366; GM Cockram: Interpretation of Statute, Page 163

B review and counter review application referred to in paragraph 1 above."

[21] Elsewhere in the same letter the applicant records that:

> *"6.1 All affidavits or pleadings have been fully exchanged in the Part A and Part B Review application by Sokhani. Thus, the application is ripe for hearing and argument before court.*
>
> *6.2 In the counter review application, the respondent being Sokhani is yet to deliver its answering affidavit, whereafter the Counter-applicant being the Municipality will deliver its replying affidavit within 5 (five) days.*
>
> *6.3 Thereafter the parties will each deliver the practice notes within 10 (ten) days.*
>
> *6.4 Based on the aforegoing, the parties humbly request that the Honourable DJP grant 2 (two) dates as special allocation of the two application for a hearing on 27 and 28 June 2024."*
>
> The applicant fully motivates in the letter for the special allocation of Part B of the application and counter review application.

[22] The court is mindful of the fact that the lifespan and operation of the interim court order is until the final determination of Part B. As things stand the finalization of Part B review application and its concomitant counter review application is likely to be heard before the hearing of appeal judgment in Part A. In the circumstances it cannot be in

interest of justice that this application be granted as such exercise will have no practical effect or result.

[23] This drives me to the provisions of Section 16 of Superior Court Act 10 of 2013 which provide as follows:

> *"(2)(a)(i) When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.*
>
> *(ii) Save under exceptional circumstances the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs."*

[24] During argument Mr Shakoene, Senior Counsel for the applicant was invited to make submissions about the implications of the contents of the letter dated 06th June 2024 referred to in the preceding paragraphs. The only submission in long sentences he could make is that the Deputy Judge President is likely not to grant applicant's request for special allocation for hearing of Part B on 27th and 28th June 2024. The reason for that was that, the respondent refused to be part of that joint letter. However, he could not make any submission about the fact that the request or letter is still under consideration by the Deputy Judge President as it was not withdrawn.

[25] Mr Nzuzo, in his submissions on behalf of the respondent started of by stating that Part B review application has been allocated a date of hearing, which date is **11th October 2024,** a thing Mr Shakoene did not mention in his submissions. In reply Mr Shakoene confirmed that

there is a date in October 2024 allocated for hearing of Part B application, but that date is **23rd October 2024.** What is important is the fact that there is a date in October 2024 for hearing of Part B review application and its concormitant counter review application.

[26] I was astounded by Mr Shakoene's failure to advise the court of the date of hearing of Part B review application, especially when that opportunity presented itself by reference to the letter dated 06th June 2024. Had Mr Nzuzo not mentioned that important fact the court would impliedly and passively have been misled into believing that no date yet had been allocated for hearing of review applications.

[27] It was accepted by all that the review applications referred to above will, for all intents and purposes, be heard before the appeal can be allocated a date of hearing. The practical effect of that is the interim order will have ceased to be in operation. In clear terms when review applications are heard there will be no extant interim order sought to be appealed. It will have lapsed by operation of law. There is absolutely no practical effect to be served by granting this application for leave to appeal as the interim order will have lapsed or become extinct at the time when the date of the hearing the appeal is allocated, or when the appeal is heard.[17] It is not in the interests of justice to grant this application. On that basis I find that the interim order

[17] Section 16(2)(a)(i) of the Superior Court Act 10 of 2013.

granted on 26th April 2024 is not appealable.[18]The application for leave to appeal must, for this reasons too, fail.

[28] The majority in the **United Democratic Movement** Case referred to above, the appeal was struck from the roll with costs on the basis, *inter alia*, that:

> *"(a) The order is interim in effect as well as in form.*
>
> *(b) The interest of justice does not require that an appeal be entertained, and (consequently)*
>
> *(c) The order is indeed not appealable"*[19]

I am therefore bound to follow this judgment and many judgments referred to therein[20]. This application cannot succeed on this ground alone.

[29] An attempt by Mr Shakoene to argue that the judgment herein granted on 26th April 2024 is in conflict with the judgment of ***NAC (Pty) Ltd v MEC, Eastern Cape Department of Health and others Case No 2103/2020*** was unavailing. That matter was distinguishable. In that case there was no unilateral cancellation of an appointment by a state organ, which must by all means source its power in law. The facts relating to an impending date of hearing of review application, coupled with considerations of **Section 16(2)(a)(i) of Superiors Court Act 10 of 2013** were never part of important distinguishing facts that were taken into account to consider the test of interests of

[18] ***United Democratic Movement and another v Lebashe Investments Group (Pty)Ltd and others*** 2021 (2) ALL SA 90 SCA Para 26; ***National Treasury v Opposition to Urban Tolling Alliance and others*** 2012 (6) SA 223 (CC)
[19] ***United Democratic Movement v Lebashe Investments Group (Pty)Ltd and others*** 2021 (2) ALL SA 90 SCA Para 26
[20] ***True Motives 84 (Pty) Limited v Mahdi*** 2009 (4 SA 153 SCA Para 100-101

justice. Accordingly, the case of **NCA (Pty) Ltd** is distinguishable from the present case.

[30] Having found that the interests of justice do not permit the grant of the application for leave to appeal, I also find that leave to appeal must fail with costs.

[31] Even if I am wrong on the finding I made above, the application for leave to appeal would still fail on other grounds.

[32] The applicant pinned its faith on the fact that, when I considered the requirements for interim interdict I should have also considered the issue of legality of the contract between the parties and respondent's appointment, as that is raised as a reactive challenge or collateral defence by the applicant. This submission should be given a short shrift.

[33] Firstly, requirements of interim interdict are trite and are sufficiently dealt with in the main judgment. An invitation to consider a requirement which is not part of the trite requirements settled by law, was effectively an invitation not to interprete the law but to make the law. There is an arm of government Constitutionally empowered to make the law.[21] In accepting such an invitation would be to usurp the powers of the legislature**. Baxter: Administrative Law, at Page 305** aptly puts it thus:

[21] Section 43 of the Constitution

"*without statutory authority, the court may not venture to question the merits or wisdom of any administrative decision that may be in dispute. If the court were to do this it would be usurping the authority that has been entrusted to the administrative body by the empowering legislation."*[22]

This applies with equal force in instances where courts or other arms of government overreach the exercise of their power.[23] Courts are warned not to cross the divide between interpretation and legislation.[24]`Whilst the legislative authority is vested in Parliament, Provincial Legislatures and Municipal Councils, only the judicial authority is vested in courts.[25]

33.1 It is the law giver that has the power to change or adapt the common law. I am not alone in this view, the Constitutional Court made the following *dictum*.[26]

"69. *First, the lawgiver has the power to change or adapt the common law provided that the change is not inconsistent with the Constitution. Section 39(3) acknowledges the existence of other rights or freedoms that are recognised or conferred by the common law, customary law or legislation to the extent that they accord to the supreme law. This does not mean that the Constitution limits the legislative power of Parliament in relation to adapting or abolishing parts of the common law, indigenous law or of existing legislation. Whilst existing rights, whatever their origin, remain important, it is indeed open to Parliament to adapt or abolish existing rights sourced in any existing law provided that in doing so, it acts within the confines of the Constitution."*

[22] ***National Treasury v Opposition to Urban Tolling Alliance*** 2012 (6) SA 223 (CC) Para 44.
[23] ***EFF v Speaker, National Assembly*** 2016 (3) SA 580 (CC) Para 92.
[24] ***Natal Joint Municipal Pension Fund v Endumeni Municipality*** 2012 (4) SA 593 at 603-604 Para 18.
[25] Section 43 and 165 of the Constitution.
[26] ***Law Society of South Africa and others v Minister for Transport an another*** 2011 (1) SA 400 (CC) Para 69.

[34] Secondly, the central issue to be determined in review applications is the legality of the contract between the parties and the appointment of the respondent. Part B is undoubtedly a review application. It is in the context of that review application that the applicant instituted a counter review application seeking to review its own decision on the basis that it does not comply with the Constitutional provisions[27]and statutory prescripts.[28]Counter review application itself is undoubtedly a legality review that will be heard in the context of Part B.

[35] The criticism is unfounded because had I had dealt with the merits of legality of respondent's appointment in Part A, I would have dealt with a matter that was not before me. That is legally impermissible. Part B would be dealt with separately and was not part of Part A which was a matter serving before me. That is apparent from the notice of motion and the manner in which the defence and argument was fashioned on the date of hearing. It is for that reason paragraph 1 of the main judgment is not sought to be impugned where it is stated that a matter for determination on that day was only Part A of the application only.

[36] **Theron JA**[29] held as follows:

> *"13. Turning then to the nature of civil litigation in our adversarial system,* ***it is for the parties, either in the pleadings or affidavits, which serve the function of both pleadings and evidence, to set out and define the nature of their dispute and it is for the court to adjudicate upon those issues****. That is so even where the dispute involves an issue*

[27] Section 217 of the Constitution
[28] Section 32 and 33 of Local Government: Municipal Finance Management Act 56 of 2003
[29] **Fisher v Ramahlele** 2013(4) SA 614 SCA at 620C- 621C Para 13

pertaining to the basic human rights guaranteed by our Constitution, for 'it is impermissible for a party to rely on a constitutional complaint that was not pleaded'. There are cases where the parties may expand those issues by the way in which they conduct the proceedings. There may also be instances where the court may mero motu raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being decided. ***Beyond that it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone."***

The dispute that was identified by the parties for determination was the one encapsulated in Part A of the application and nothing else.

[37] In any event a collateral defence or reactive challenge is suitably raised, not in the context of an interdict, which has its trite requisites, but in the context of a judicial review application.[30] An authority was requested in vain from the applicant for a proposition that a collateral defence or reactive challenge is a relevant consideration for purposes of deciding an interim or interlocutory interdict.

[38] With regard to urgency Mr Nzuzo made a very persuasive argument that a finding on urgency is ruling that is not appealable.[31] A ground of appeal about urgency was premised on the fact that the court relied on the case made out about semi urgency on the replying affidavit. No coherent answer was given when the applicant was referred to the contents of paragraphs 55 of the founding affidavit where a case about the semi urgency of the matter is made out. In fact, it is urgency that

[30] ***Department of Transport and others v Tasima (Pty) Ltd*** *2017 (2) SA 622 (CC) Para 138-140;* ***Opposition to Urban Tolling Alliance and others v The South African National Roads Agency Ltd and Others*** 2013 (4) ALL SA 639 SCA.
[31] ***Nobumba v Presbyterian Church*** 1996 (3) SA 241.

must be established and in doing so the applicant must give proper consideration to the degree of urgency and tailor the notice of motion to that degree of urgency.[32] I accordingly find that even this point is without merit.

[39] In conclusion, and with regard to the ground about non-compliance with Rule 41A of the uniform and other grounds, I stand by my reasons in the main judgment. I sufficiently dealt with Rule 41A and requirements of interim interdict on my main judgment. Accordingly, I find that the application for leave to appeal does not pass the standard laid down by **Section 17(1) (a) of the Superior Court Act 10 of 2013** and therefore it must fail with costs.

Order

[40] In the result I make the following order:

40.1 **Application for leave to appeal is hereby dismissed.**

40.2 **The applicant in the application for leave to appeal is hereby ordered to pay costs of this application.**

A.S ZONO

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

For the Applicant :ADV SHAKOENE WITH ADV MEMELA

[32] ***Nelson Mandela Metropolitan Municipality and others v Greyvenouw CC & Others*** 2004 (2) SA 81 (EC) Para 37.

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