



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

Case Number: 18790-2020

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

30/09/2022
DATE

SIGNATURE

In the matter between:

QHAWA HLOMELO NGONYAMA N. O

First Applicant

KHANYA MALUNGELO NGONYAMA N. O

Second Applicant

NOKWAZI NOKWAZELELA NGONYAMA N.O.

(*Nomine Officio* of Khululekile Family

Trust IT10495/2007)

Third Applicant

LULAMA SMUTS NGONYAMA

Fourth Applicant

and

EYABANTU CAPITAL CONSORTIUM (PTY) LIMITED

First Respondent

THABO SINDISA KWINANA

Second Respondent

THABO SINDISA KWINANA N.O.

Third Respondent

ZOLISILE MTETELELI MAPIPA N.O.

(*Nomine Officio* of Eyabanto Development Trust)

Fourth Respondent

JUDGMENT APPLICATION FOR LEAVE TO APPEAL

COETZEE AJ

[1] The four applicants applied for leave to appeal against the whole of my order handed down on 20 November 2020. The application is dated 30 November 2020. The delay between the date of the application and the date of the hearing thereof has a history. Initially, the application was not brought to my attention. The parties then agreed for the application to await the outcome of some other related matters that went on appeal. After the finalization of those matters, the parties agreed to have the matter heard on 27 September 2022.

[2] Only the first respondent ("Eyabanto Capital") opposes the application for leave to appeal. The other respondents abide by the decision of the Court.

[3] The order that is the subject of this application suspended the operation of two default judgments of Dosio AJ in favour of the applicants. Dippenaar J by default rectified the share register. The applicants sought to hold the respondents in contempt of court ("the contempt application") according to a rule nisi issued by Bhoola AJ on the strength of the default judgments. Also before the court was a counter-application in which the respondents sought that the two court orders, granted by Dosio AJ, and that of Dippenaar J, be suspended pending the outcome of an application launched on 23 September 2020 by the Eyabantu Consortium, in which Eyabantu Consortium sought to be joined as an interested party ("the joinder application") to the action proceedings under case number 45883/1 8 ("the action").

In the joinder application, Eyabantu Consortium would also be seeking an order that the orders granted by Dosio AJ and Dippenaar J be rescinded and set aside.

[4] In addition to an order suspending the operation of the Dosio AJ orders, the respondents in the counter-application also sought an order postponing the contempt proceedings pending the final outcome of the joinder application.

[5] I am informed that the joinder application has been heard by Fischer J who postponed the application pending the outcome of an appeal. She called for further heads of argument after the Supreme Court of Appeal in a related matter dismissed the appeal of the second respondent in which the second respondent wanted to appeal the Dosio order.

[6] The first respondent submitted that the application for leave to appeal should fail as the order granted by this court is interlocutory and not appealable.

[7] With reliance on *Ndlovu v Santam*¹ the first respondent submitted that for the order to be final and appealable, it must:

[7.1] Not be capable of being altered by the court which granted it;

[7.2] Be definitive of the rights of the parties, and

[7.3] Have the effect "*of disposing of at least of a substantial portion of the relief claimed in the main proceedings*".

[8] The first respondent submitted that the order does not meet any of these requirements.

[9] The applicants maintained that the order meets those requirements. Firstly the order disposed of a substantial part of the relief that the applicants sought in the contempt of court application. By the order suspending the application, the court effectively definitively ruled on contempt of court for the duration of the suspension. The order disposes of the alleged contempt for that period. The first respondent disputed this.

¹ 2006 (2) SA 239 (SCA)

[10] Secondly, the court that made an order suspending the judgment that is relied upon for the contempt proceedings, cannot change or amend it to open the issue for the applicants to rely upon alleged contempt during that period. The order thus disposed of a substantial portion of the relief that the applicants sought. The applicants submitted that I did not give any or sufficient attention to this aspect when making the order and that the judgments should never have been suspended.

[11] The respondent submitted that the matter has become moot. It has become moot as the respondents pursued their counter-application with the joinder application. The joinder application has been heard and an order is to be made soon. Because thereof, the matter has become moot. Applicants submitted that contempt can never become moot as the court's Honour is not negotiable and court orders must at all times be obeyed. I agree that the matter has not become moot.

[12] The respondent submits that in any event, the court had the discretion to suspend the operation of the orders and that no basis has been advanced to attack the exercise of the discretion. The applicants are of the view that the permanence of the contempt of court renders the discretion objectionable. I am of the view that the exercise of the discretion should not stand in the way of an appeal.

Analysis

[13] Section 17 of the Superior Courts Act, No 10 of 2013 regulates an application for leave to appeal from a decision of a High Court. It reads as follows:

'17. Leave to appeal.—

(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'.

[14] The Supreme Court of Appeal more recently dealt with the test as follows in *Ramakatsa v African National Congress*²:

[10] Turning the focus to the relevant provisions of the Superior Courts Act (the SC Act), leave to appeal may only be granted where the judges concerned are 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.

This Court in *Caratco* [per Cachalia JA], concerning the provisions of s 17(1)(a)(ii) of the SC Act pointed out 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. Compelling reason would of course include an important question of law or a discreet issue of public importance that will have an effect on future disputes. However, this Court correctly added that 'but here too the merits remain vitally important and are often decisive'.

I am mindful of the decisions at high court level debating whether the use of the word 'would' as opposed to 'could' possibly means that the threshold for granting the appeal has been raised. If a reasonable prospect of success is established, leave to appeal should be granted. Similarly, if there are some other compelling reasons why the appeal should be heard, leave to appeal should be granted.

The test of reasonable prospects of success postulates 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 other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist".

² (SCA 724/2019) [2021] ZASCA 31 (31 March 2021)

[15] Given the order finally disposing of a substantial part of the contempt application, and the failure of the court to have sufficient regard thereto, the appeal would have a reasonable prospect of success. It is in the interest of justice that the order suspending the judgments and granting the respondents leave to apply for a joinder, be reconsidered on appeal.

[16] The order is appealable and has not become moot.

[17] Having regard to the nature of the dispute it is appropriate for a Full Bench to hear the appeal.

[18] I make the following order:

[18.1] The applicants are granted leave to appeal the order of 20 November 2020 to a Full Bench.

[18.2] The costs of the application for leave to appeal are costs in the appeal.

H S COETZEE
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 30 September 2022.

APPEARANCES

On behalf of Applicants:	LJ Morison SC
Instructed by:	Knowles Husain Lindsay Inc

On behalf of Respondents:	R Stockwell SC
Instructed by:	Erasmus De Klerk Inc

Date of Hearing:	27 September 2022
Date of Judgment:	30 September 2022