



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

Case Number: 24261/2020

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
.....	
E.M. KUBUSHI	DATE: 02
DECEMBER 2022	

In the matter between:

SOUTH AFRICAN POLICE SERVICE MEDICAL SCHEME (POLMED) APPLICANT

and

REGISTRAR OF THE COUNCIL FOR MEDICAL SCHEMES	FIRST RESPONDENT
COUNCIL FOR MEDICAL SCHEMES RESPONDENT	SECOND
MINISTER OF HEALTH	THIRD RESPONDENT
MINISTER OF FINANCE	FOURTH RESPONDENT

JUDGMENT: LEAVE TO APPEAL

KUBUSHI J

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on **02 DECEMBER 2022**.

[1] The Applicant approached this Court for leave to appeal to the Supreme Court of Appeal, against the whole of the judgment and order of this Court dated and handed down on 02 November 2022. In the said judgment, the Applicant had applied for a declaratory relief for its future and/or contingent right to be given notice if the curatorship applications were brought against it by the First and Second Respondents.

[2] The application was dismissed on the ground that this Court found that the provisions of section 5(1) of the Financial Institutions (Protection of Funds) (“the FI Act”),¹ which the Applicant sought to be declared invalid, valid. Having found section 15(1) of FI Act valid, this Court refused to exercise its discretion in terms of section 21(1)(c) of the Superior Courts Act,² on the ground of its finding that the issue before it was hypothetical, abstract and academic because there was no *lis* between the parties and, it, also, found that there was no evidence on record establishing any future/contingent right of the Applicant.

[3] This Court had directed that this application be decided on the papers as filed on Caselines without the hearing of oral argument. The parties were directed to upload their written submissions on Caselines, which they did. Thus, the application was decided on the basis of all the papers including the parties heads of argument.

[4] The Applicant launched the present application on the basis that there are reasonable prospects of success on appeal as envisaged by section 17(1)

¹ Act No. 28 of 2001.

² Act No. 10 of 2013.

(a)(i) of the Superior Courts Act. Alternatively, that the legal question is of sufficient public importance to require consideration by the Supreme Court of Appeal as envisaged in section 17(1)(a)(ii) of the Superior Courts Act.

[5] The proper approach to whether leave to appeal should be granted under the Superior Courts Act, has been explained by the Supreme Court of Appeal in *Mkhitha*,³ as follows:

“Once again it is necessary to say that leave to appeal, especially to this court, must not be granted unless there truly is a reasonable prospect of success. Section 17(1) of the Superior Courts Act 10 of 2013 makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success; or there is some other compelling reason why it should be heard.

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.”

³ MEC for Health, Eastern Cape v Mkhitha and Another [1221/2015] [2016] ZASCA 176 (25 November 2016) at para 16 - 17.

[6] As will appear clearly hereunder, it is this Court's opinion that the Applicant has failed to convince this Court on proper grounds that there is a reasonable prospect or a realistic chance of success on appeal, in this matter.

[7] The Applicant seeks to appeal the judgment of this Court on the basis that the Court erred in fact and/or law on, effectively, two grounds. First, that the existence of a *lis* between the parties is not a prerequisite for the Court to exercise its discretion under section 21(1)(c) of the Superior Courts Act. Second, that the Court erred in finding that the parties are agreed that an *ex parte* application has to be justified by the facts of each case.

[8] The Applicant's argument that this Court was of the view that a suit for declaratory relief may only be entertained when there is a *lis* between the parties is indicative that the Applicant misconstrued the reasoning of this Court when it decided not to exercise its discretion in terms of section 21(1)(c) of the Superior Courts Act.

[9] The finding of this Court in this regard was that *'[i]n the exercise of its discretion, this Court declines to deal with this matter because there is no actual dispute as it has found'*. In reaching this finding, this Court had already determined on the facts of the case (following the dispute raised by the Applicant) that section 5(1) of the FI Act, does not provide a blanket authorisation to bring an *ex parte* application. As such, this Court reached the decision not to exercise its discretion in favour of the Applicant having already made a finding that section 5(1) of the FI Act, was not in conflict with the

Constitution and thus, section 172(1) of the Constitution would not come into play.

[10] It is indeed so that in the relief sought, this Court was approached to determine the legality/constitutionality of section 5(1) of the FI Act. It is, also, correct that the Court as the sole arbitrator of legality is obliged in terms of section 172(1)(a) of the Constitution to declare unconstitutional conduct invalid and exercise a remedial discretion. However, because of the language employed by section 5(1) of the FI Act, which states that the *ex parte* application must be on good cause, this Court ruled that the said words precludes the blanket authorisation to bring *ex parte* application. It, in that sense, found no conduct of invalidity that would have enjoined it to invoke the provisions of section 172(1) of the Constitution.

[11] It is common cause that the Respondents' launched a curatorship application which was subsequently abandoned. It is, in that regard, that this Court held that "*the ex parte application that Polmed wanted to challenge has been withdrawn, as such, there is no existing dispute between the parties.*"

[12] Additionally, the Applicant had contended that when the First Respondent approached the Court on *ex parte* basis, same has to be justified on the facts warranting an *ex parte* approach. The First and Second Respondents agreed with this contention, and it was submitted on their behalf that there was no actual controversy or dispute between the parties. This

submission was upheld by this Court on account of the fact that the parties were not at variance but instead were in agreement that an *ex parte* application has to be justified by the facts of each case.

[13] Even if, as the Applicant seeks to argue, the First and Second Respondents seemed to have been at variance, in their answering affidavit, with what the Applicant contended for in its founding affidavit, however, in oral argument, it was conceded on their behalf that it is correct that an *ex parte* application has to be justified by the facts of each case. It is on this basis that this Court concluded that there was agreement between the Applicant and the First and Second Respondents, on this point, and consequently, that there was no actual dispute between them.

[14] Moreover, on the basis of the contention by the Applicant that section 21(1)(c) of the Superior Courts Act authorises the Court to grant a declaratory order in respect of contingent rights, this Court made a finding that *'[t]here is no evidence on record that indicates a contingent right that requires the granting of a declaratory order by this Court'*.

[15] Having found section 5(1) of the FI Act to be valid, and there being no actual dispute between the parties and/or evidence of future/contingent right on record, this Court declined to deal with the matter as it regarded the issue before it as hypothetical, abstract and academic.

[16] The submission by the Applicant that the appeal involves a question of law of significant importance, is without merit. In fact, it was, in the first place, inappropriate for the Applicant to come to Court for the confirmation of a legal question which, as conceded by the First and Second Respondents, was common cause between the parties, which this Court, eventually, found to be indeed common cause, as well.

[17] Consequently, the application falls to be dismissed with costs.

**E.M KUBUSHI
JUDGE OF THE HIGH
COURT
GAUTENG DIVISION, PRETORIA**

APPEARANCES:

APPLICANT'S ATTORNEYS:	MALULEKE INCORPORATED
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FIRST & SECOND RESPONDENTS' ATTORNEYS:	Y EBRAHIM ATTORNEYS
FIRST & SECOND RESPONDENT COUNSEL:	ADV J J BRETT SC ADV DE MATLATLE
FOURTH RESPONDENT'S ATTORNEYS:	STATE ATTORNEY
FOURTH RESPONDENT'S COUNSEL	M T K MOERANE SC MUSATONDWA MUSANDIWA