IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 006386/2022

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED: YES/NO

DATE: 02 November 2023 Signature: _____

In the matter between:

THE MINISTER OF HOME AFFAIRS	**FIRST APPLICANT**
THE DIRECTOR GENERAL OF THE DEPARTMENT OF HOME AFFAIRS	**SECOND APPLICANT**

and

VINDIREN MAGADZIRE	**FIRST RESPONDENT**
ZIMBABWE IMMIGRATION FEDERATION	**SECOND RESPONDENT**
THE MINISTER OF POLICE	**THIRD RESPONDENT**
THE NATIONAL COMISSIONER OF THE SOUTH AFRICAN POLICE	**FOURTH RESPONDENT**
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	**FIFTH RESPONDENT**

THE BOARDER MANAGEMENT AUTHORITY **SIXTH RESPONDENT**

THE SOUTH AFRICAN NATIONAL DEFENCE FORCE **SEVENTH RESPONDENT**

LEAVE TO APPEAL JUDGMENT

THE COURT

Introduction

[1] This is an application for leave to appeal an interim order made by this court on 28 June 2023. This order lapses within twelve months from 28 June 2023. Perhaps, it is telling that in his opening prologue the applicants' counsel, Mr Mokhare, stated that common sense dictated what the outcome of this application should be in view of the court's dismissal of the leave to appeal in the *Helen Suzman Foundation (HSF)* matter.[1] He submitted that his duty was to persuade the court to keep an open mind.

Legal Framework

[2] Foremost in a court's mind when dealing with an application for leave to appeal is section 17(1) of the Superior Courts Act 10 of 2013 (the Act). Dealing with this section, the court in *Khathide v State*[2] stated the following:

> "Section 17(1) of the Superior Courts Act 10 of 2013 (the Act) provides that:
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> '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.' (My emphasis)

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[1] *Helen Suzman Foundation and Another v Minister of Home Affairs and Others* [2023] ZAGPPHC 490.
[2] [2022] ZASCA 17 (14 February 2022).

In considering an application for leave to appeal, a court must be alive to the provisions of s 17(1) of the Act as quoted above."[3]

[3] Since the introduction of the Act, the use of the word "would" in subsection 17 (1) (a) (i) has been seen by our courts as imposing a more stringent threshold. In the matter of *Mont Chevaux Trust (IT2012/28) v Tina Goosen & 18 Others*[4] the court held that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act.[5]

[4] Looking at sections 17(1) (a)(i) and 17(1) (a)(ii), the court in *Fusion Properties 233 CC v Stellenbosch Municipality*[6] held the following:

> "Since the coming into operation of the Superior Courts Act, there have been a number of decisions of our courts which dealt with the requirements that an applicant for leave to appeal in terms of ss 17(1)*(a)*(i) and 17(1)*(a)*(ii) must satisfy in order for leave to be granted. The applicable principles have over time crystallised and are now well established. Section 17(1) provides, in material part, that leave to appeal may only be granted '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. . . .'
>
> It is manifest from the text of s 17(1)*(a)* that an applicant seeking leave to appeal must demonstrate that the envisaged appeal would either have a reasonable prospect of success, or, alternatively, that 'there is some compelling reason why an appeal should be heard'. Accordingly, if neither of these discrete requirements is met, there would be no basis to grant leave. I shall revert to this aspect later."[7]

Grounds of appeal

[5] As a point of departure, it must be stated that the applicants' counsel took the court and the respondents by surprise. He made submissions which are neither in their application for leave to appeal nor in their heads of argument. Only in reply did he ask

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[3] Supra para 4.
[4] 2014 JDR 2325 (LCC).
[5] Supra para 6.
[6] [2021] ZASCA 10.

[7] Supra para 18.

to supplement their papers from the bar. Since the court must consider objectively and dispassionately whether the appeal would have a reasonable prospect of success, it permitted them to supplement their papers. This court will address four topics, namely: the unpleaded grounds, pleaded grounds, appealability and costs.

The unpleaded grounds

[6] The applicants' *coup de grace* is the submission that there are two conflicting judgments made by this court. Counsel for the applicants submitted that in terms of section 17(1)(a)(ii) of the Act there is a compelling reason why the appeal should be heard. The kernel of the applicants' submission is that, on the one hand, in the *HSF* case, the court found that the Minister's decision was administrative action in nature and, therefore, relied on the Promotion of Administrative Justice Act 3 of 2000 (PAJA). On the other hand, the argument goes, in the *Magadzire* matter,[8] the court found that the Minister's decision was an executive decision; therefore, reviewable under the principle of legality.

[7] This submission is misconceived. From paragraph 54 to 58 the court in the *HSF* judgment canvassed the review under section 1(c) of the Constitution. Under the rubric **Review Under the Principle of Legality,** the court could not have been clearer as to what it was dealing with. During the hearing of the leave to appeal the *HSF* matter, the applicants' counsel criticized the court for reviewing the Minister's decision using both the principle of legality and PAJA.

[8] He further submitted that the orders granted in *HSF* are dispositive of Part B in this matter. In substantiation of this submission, he referred the court to the notice of motion in particular the prayers under Part B. His submission was that the prayers in *HSF* and *Magadzire* under Part B are the same. Therefore, the granting of the HSF prayers disposed of the need to hear Part B of the *Magadzire* matter. He contended that the order in HSF is tantamount to a final order in *Magadzire*.

[9] This submission too is without merit. As stated in paragraph 74 of the *Magadzire* judgment, the applicants in *Magadzire* rely on the *ultra vires* argument. None of the

[8] *Magadzire and Another v Minister of Home Affairs and Others* [2023] ZAGPPHC 491.

parties, both in the *HSF* and CORMSA, argued this point. To simply look at the orders the parties seek, as the applicants' counsel does, and conclude that the HSF has disposed of Part B in the *Magadzire* matter is to miss the point. The HSF argument is procedural in that the Minister can still consult and correct the failure to consult. The *ultra vires* point makes the Minister's decision completely incompetent. Therefore, it is dispositive of the matter. Consequently, this submission must be fail.

[10] Having totally disregarded paragraph 3 of the judgment, which indicates that the court was taking a judicial peek into the grounds of review, Mr Mokhare submitted that this court made findings which rendered Part B moot. This submission is at variance with what transpired in court. Paragraphs 11, 12 and 13 succinctly captures the essence of the applicants' submission in this regard. In short, the applicants contended that they would be prejudiced if Part B was heard, because they wanted time to supplement their papers. Furthermore, the court made a ruling, at paragraph 16, that it was only proceeding with Part A, an interim interdict. Thus, this submission must be stated to be rejected.

[11] Mr Mokhare further submitted that the court made findings relating to *ultra vires* and good cause. To prove that the court made these findings, he referred to paragraphs 34 and 44, which posed two questions, namely: whether the Minister acted *ultra vires* and whether the Minister's action was informed by good cause.

[12] In the same way he referred to paragraph 16 of the judgment and ignored it, the applicants' counsel referred to paragraph 33, which deals with section 31(2)(b) and reads:

> "It is this that is the *raison détre* of this case. However, the main battle is reserved for the Part B hearing."

[13] He disregarded the import of this paragraph and submitted that it is not clear which issue was reserved for the Part B hearing. As if that was not enough, he again disregarded the heading Prima Facie Right and, more importantly, paragraph 40 thereof.

[14] Paragraph 40 dovetails with paragraph 3 and is indispensable to a comprehensive conceptual exposition of the facts and law in this judgment. Referring to the court's discussion on the two questions posed under paragraph 44, he submitted that the court did not answer these two questions on a prima facie basis. It answered them as definitive answers coming from the court. Therefore, he continued, this court made findings which can only be dealt with on appeal. This is incorrect. Paragraph 40 and the heading makes it clear that the court was dealing with prima facie views. He referred to paragraph 45 and elevated the court's view therein to a finding and maintained that the *Magadzire* matter had become moot. The applicants' erstwhile counsel submitted during the main hearing that they needed time to supplement their papers for Part B. It begs the question how this court could make final findings, let alone dispose of Part B, without those papers.

[15] Dealing with the second question of good cause, Mr Mokhare submitted that the issue of good cause was intertwined with the issue of separation of powers. After accepting that good cause is measured objectively, he referred to paragraph 60 in which the court said it did not share the view of the applicants because of the polycentric nature of the argument. At paragraph 66 the court amplified its position by stating that because of high policy content, the court (referring to the court in Part B) might view it as an executive decision. Again, he ignored the use of the word might. He maintained that the court had made a finding. He totally avoided the discussion on this topic encapsulated in paragraphs 64, 65, 66 and 67. Paragraph 67 concludes that the Court does not have to adjudicate the issue as it is "better left for the correct forum, which is Part B."

[16] Lastly, paragraph 68, under the rubric Prima Facie Right, is dispositive of the applicants' submissions. It states that: "...the applicants have established facts on a prima facie basis, if proven finally, will entitle them to a relief sought in the main application." Consequently, the applicants cannot find refuge in section 17(1)(a)(ii) of the Act.

`Pleaded grounds

[17] In its application for leave to appeal, the applicants submitted that the first respondent failed to make a case for an interim interdict. It is noteworthy that the first

respondent's main argument of *ultra vires* is not attacked. This is the main subject of the interim interdict. Therefore, if it is not challenged the court is left wondering what the applicants are appealing against.

[18] Mr Mokhare submitted that all the requirements of an interim interdict were not met. This submission is misplaced in the light of erstwhile applicants' counsel's concession that the ZEP holders were holders of rights such as the right to equality, human dignity and life under sections 9, 10 and 11, respectively, of the Constitution, to mention but a few. Therefore, the existence of a prima facie right is unassailable. Upon being pressed by the court to mention the interim interdict requirements which were not met, he mentioned two, namely: the balance of convenience and irreparable harm.

[19] Looking at irreparable harm, the court in its judgment pointed out to the harm that will be visited to the children of ZEP holders who stood to be denied education. By terminating ZEP in June, the ZEP holders' children face a bleak prospect of being uprooted from their schools in South Africa and face a struggle to find schools in the middle of the year in Zimbabwe. Without rewriting the judgment, paragraph 78 captures the essence of irreparable harm.

[20] In dealing with the balance of convenience the court referred at great length to *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* (OUTA).[9] By granting a further extension to 31 December 2023, the Minister was inadvertently confirming the correctness of paragraphs 86 and 87 of the judgment. In their answering affidavit in the *HSF* matter, the applicants record that "(a)s indicated above, the Minister is not closed off to any future Directive(s) being issued should the circumstances dictate."[10] This court is left wondering as to the purpose of this application for leave to appeal, since the Minister has not been prejudiced by the six (6) months covered by this judgment as displayed by the extension to 31 December 2023. Furthermore, the Minister will not be prejudiced by the next six (6) months between January 2024 and June 2024 even if they are not contemplating another extension.

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[9] 2012 (6) SA 223 (CC).
[10] Answering affidavit in HSF matter Caseline 066-168 para 14.

[21] There can be no harm endured by the applicants from June 2023 to December 2023. Hence, the extension. This is in sharp contrast to the chilling effect of the potential harm that will be suffered by the ZEP holders and their children if they were uprooted. There cannot be any clearest of cases than this one. The first respondent's counsel referred to the matter of *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and Others.*[11] Dealing with the issue of balance of convenience, the court said:

> *"OUTA* must be read in the context of the fact that what was at issue there was a highly policy laden decision by a member of the Executive arm of government *and* violations of fundamental rights protected in the Bill of Rights were not at issue. In the main, it is those two considerations that informed the Court's final conclusion... But courts must never lose sight of the fact that this remains a balancing exercise. Affected fundamental rights must always play a critical role in that balance. And in some cases the affected rights may be of such a nature and their breach so grievous that they may influence the decision in favour of the victim of the rights violation even in the face of a highly policy laden and polycentric executive decision. The ultimate question is: what is the outcome dictated by the balancing exercise?"[12]

[22] In *casu*, the court is dealing frontally with the Bill of Rights which is a cornerstone of the democracy in South Africa and enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.[13] With this background in mind, this court concluded that the balance of convenience scale was tilted in favour of the first respondent.

[23] On the absence of an alternative adequate remedy element, the applicants did not advance any meaningful argument save to restate what is dealt with in the judgment. The fact that the functionaries must interpret the law in *favourem liberatis* does not amount to an alternative relief. It would be idle to regurgitate what is dealt with in paragraph 79 of the judgment. There is no adequate alternative relief open to

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[11] 2023 (4) SA 325 (CC).
[12] Supra para 303.
[13] Section 7 of the Constitution.

the first respondent other than to approach this court for relief. Accordingly, the applicants have failed to meet requirements of section 17(1)(a)(i) and (ii) of the Act.

Appealability

[24] In dealing with appealability, the court examined the matter of *TWK Agriculture Holdings (Pty) Ltd v Hoogveld Boerderybeleggings (Pty) Ltd and Others.*[14] This case largely resonates with this court because of its resuscitation of the *Zweni* test. However, there are a number of judgments that enthrone the supremacy of the interest of justice as a determining factor for appealability. Despite this court gravitating towards *TWK Agriculture Holdings* matter and in view of the presence of constitutional issues, it must look at the test ordained by the constitutional courts in dealing with appealability. Looking at interim orders, the court in *OUTA* held:

> "This Court has granted leave to appeal in relation to interim orders before. It has made it clear that the operative standard is "the interests of justice."[15]

[25] As mentioned earlier, the applicants sought to be afforded an opportunity to file their supplementary papers for Part B. It would not be in the interest of justice to hear this matter in a piece meal fashion, as was stated in the matter of *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others,*[16] when the court said;

> "It would not be in the interests of justice that the issues in this matter are determined in a piecemeal fashion. Moreover, the issues in this matter are of such a nature that the

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[14] 2023 (5) SA 163 (SCA) para 25: "[25] I recognise that there is thought to be a compelling basis to render this Court's approach to appealability consistent with that of the Constitutional Court. And hence to recognise the interests of justice as the ultimate criterion by reference to which appealability is decided. I consider this to be a misreading of the Constitution. Section 167 of the Constitution constituted the Constitutional Court as the highest court. Section 167(3) sets out matters that the Constitutional Court may, and is thus competent, to decide. The Constitutional Court may decide constitutional matters. This competence was extended, by constitutional amendment, to any other matter, but under the qualification that the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court. The Constitution thereby states a principle of appealability in respect of the Constitutional Court. The Constitution does so also to allow a person to bring a matter directly to the Constitutional Court or by way of direct appeal (s 167(6) of the Constitution). National legislation or the rules of the Constitutional Court must allow a person to do so in the interests of justice and with the leave of Constitutional Court."

[15] Supra note 10 para 25.

[16] 2023 (1) SA 353 (CC).

decision sought will have a practical effect if the application for leave to appeal is granted."[17]

[26] In essence, the effect of this judgment was to maintain a status *quo ante*. By extending the period until 31 December 2023, the applicants implicitly confirmed that they experienced no harm and status *quo ante* can be maintained. The first respondent submitted that they are still waiting for the record in terms of rule 53. The applicants must file their supplementary papers. In short, the parties must get on with Part B. With the matter still in a state of flux, it would not be in the interest of justice to grant leave to appeal. Accordingly this matter is not appealable.

Costs

[27] The court canvased the views of both counsel on the role of *Ubuntu*[18] on costs. The appellants' counsel submitted that *Ubuntu* played no role and urged the court to apply the principle of *Biowatch Trust v Registrar Genetic Resources and Others.*[19] The first respondent's counsel submitted that *Ubuntu* was critical even in the issue of costs. He submitted that his clients were disadvantaged by race, because they are black, by nationality, because they are foreigners and by poverty. It was his submission that he could not think of any better case than this one to apply the principle of *Ubuntu*. This court is convinced that *Ubuntu* plays a critical role under the issue of costs as one of the principles of *Ubuntu* is fairness. Having said that, this court will apply the *Biowatch* principle.

[28] The established *Biowatch* principle is: "a private party seeking to assert a constitutional right ... ordinarily, if the government loses, it should pay the costs of the other side, and if the government wins, each party should bear its own costs."[20] In the result the court makes the following order:

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[17] Supra para 36.
[18] *S v Makwanyane and Another 1995* (3) SA 391.
[19] 2009 (6) SA 232 (CC) para 22: "Although Ngcobo J in substance rejected the appeal by the medical practitioners on the merits, he overturned the order on costs made by the High Court against them, and held that both in the High Court and in this Court each party should bear its own costs. In litigation between the government and a private party seeking to assert a constitutional right, Affordable Medicines established the principle that ordinarily, if the government loses, it should pay the costs of the other side, and if the government wins, each party should bear its own costs."
[20] Supra.

Order

[29] The first and second applicants' application for leave to appeal is dismissed with costs, including costs of two counsel where so employed.

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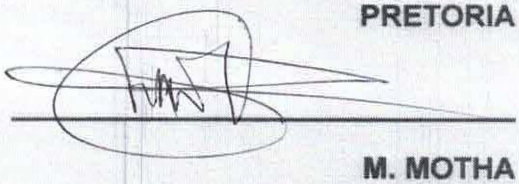

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DATE OF HEARING: 23rd OCTOBER 2023

DATE OF JUDGMENT: 02nd NOVEMBER 2023.