IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

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

30/11/2023
DATE

SIGNATURE

Case Number: 30085/09

In the matter between:

KOSMOS RIDGE HOMEOWNER'S ASSOCIATION **APPLICANT**

and

PAUL MASEKO **TENTH RESPONDENT**

PAUL MASEKO N.O. **ELEVENTH RESPONDENT**

JOSEPH RATLOI **TWELFTH RESPONDENT**

NOKO SEANEKO **THIRTEENTH RESPONDENT**

In Re:

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case Number: 30085/09

In the matter between:

KOSMOS RIDGE HOMEOWNER'S ASSOCIATION	**APPLICANT**
And	
MADIBENG LOCAL MUNICIPALITY	**FIRST RESPONDENT**
MEMBER OF THE EXECUTIVE COUNCIL: LOCAL GOVERNMENT [NORTH WEST PROVINCE]	**SECOND RESPONDENT**
MINISTER OF WATER AFFAIRS & FORESTRY	**THIRD RESPONDENT**
SF MOLOKOANE-MACHIKA	**FOURTH RESPONDENT**
P M MAPULANE	**FIFTH RESPONDENT**
MINISTER FOR CO-OPERATIVE GOVERNANCE & TRADITIONAL AFFAIRS	**SIXTH RESPONDENT**
THE EXECUTIVE MAYOR OF THE FIRST RESPONDENT	**SEVENTH RESPONDENT**
THE MUNICIPALITY MANAGER OF THE FIRST RESPONDENT	**EIGHTH RESPONDENT**
MINISTER OF FINANCE	**NINTH RESPONDENT**

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MINISTER FOR CO-OPERATIVE GOVERNANCE & TRADITIONAL AFFAIRS	**SIXTH RESPONDENT**
ERICK MATLAWE	**SEVENTH RESPONDENT**
HD MAKOBE	**EIGHTH RESPONDENT**
MPHO POPPY MAGONGOA	**NINTH RESPONDENT**

JUDGEMENT : APPLICATION FOR LEAVE TO APPEAL

MNYOVU A J:

Introduction

[1] This is an application for leave to appeal to the Supreme Court of Appeal, alternatively the Full Court of this Court, against my whole judgement dated 27 March 2023.

[2] The applicant launched an application of Contempt of Court Order against the First respondent as an organ of the State, being the Municipality and Seventh, Eighth, Tenth to Thirteen Respondents in their personal capacity. The Respondents opposed the applicant's main application. I had to determine whether the relief sought in prayers 1,2,3,4,5, (with its sub-paragraphs), 6,7,8 (with its sub-paragraphs), 9 and 10 of the Applicant's main application dated 5 May 2021 must be granted and whether the relief sought by the Respondents, and the relief sought in the counter-application, setting aside Court Orders and the dismissal of the Contempt application dated 5 May 2021 be granted.

[3] I have dealt with reasons for my order in a written judgement. I do not intend to traverse the reasons for my findings, as I have done so in my original judgement, I refrain below as far as possible from repeating my reasoning in the whole judgement, This is an application for leave to appeal the findings in my Order and the whole judgement. I made the Order considering both parties, in accord with the Constitution guided by the authorities and exercised my discretion, which discretion is challenged by the applicant.

[4] The applicant has taken issues with my approach, and seeks leave to appeal the whole judgement as they indicated in their papers that it has various serious patent errors and the erroneous exercising of judicial discretion.

Application for leave to appeal

[5] The applicant raised several grounds of appeal in the Notice of Application for leave to appeal against the whole judgement, such as I have erred and misdirected myself in the Order itself, main application and evidence, arguments presented on behalf of the applicant were not discussed or referred to at ALL and apart from what is stated above, the judgment contains patent errors, in its interpretation of the interest of justice and I wrongly exercised my discretion in this matter. The findings in my judgment are wrong in [104.1] to [104,4], further I had no jurisdiction or reason to make an Order [104.5]

[6] The Applicant submitted in its heads of argument in application for leave to appeal under paragraph 3, the grounds for application are in two folds:

> 6.1 The errors in the judgement and the nature of the evidence advanced are such that there are reasonable prospect that another court would come to a different conclusion in its favour, and,
>
> 6.2 There are compelling reasons why another court should hear this matter on appeal,
>
> 6.3 The test for leave to appeal is either that the appeal would have a reasonable prospect of success or that there is some other compelling reason why the appeal should be heard, including conflicting judgements in the matter under consideration. See: **Superior Courts Act 10 of 2023, section 17(1)(a)(i) and (ii)**

[7] The applicant repeatedly submitted that my judgement is wrong and apart that it has various serious patent errors and I have wrongly exercised my judicial discretion, misdirected myself in granting condonation for late filing of the respondent's rescission

application, I have misunderstood the 2019 application and made it an action, let alone the understanding of the Rule 42 (1) (a), by setting aside the orders and declared them to be granted erroneous, as those orders were correctly granted by the previous Judges. The Respondent has a constitutional duty to enforce those orders. This court has allowed the respondents to present arguments of legal duty and delictual liability, which this court would have not allowed as it has no jurisdiction to do so as the merits were concluded in the 2004, and pleaded, hence 2005 order was granted.This court has erred in believing that 2005 and consecutive orders were illegal, it is reasonably likely that another court will be correct in its application of the law to the facts in this matter.

[8] The applicant submitted that, interest of justice require that the uncertainty created by my judgment be addressed by court of appeal. I have rescinded the court orders without having regard to the vast practical, legal, financial and, last ecological implications. I did not consider the practicalities on the facts and arguments, despite being alerted thereto, therefore it is of vital importance that a court of appeal should authoritatively pronounce on the issues in this matter including technical issues and for purposes of authority and finality, if the court of appeal finds the 2005 and consecutive orders to be lawful (which it is reasonably likely to do) appeal court can proceed to adjudicate the question of contempt as set out in the main application.

[9] The applicant further submitted, that in view of significant errors in my judgement (**be patent errors or the erroneous exercising of judicial discretion**) and compelling considerations of public interest and the interest of justice, my findings especially setting aside the court orders are controversial, on this fact alone requires that leave to appeal be granted both on the ground that there would be reasonable prospect of success as well as on the basis of compelling reason why the appeal should be heard, the issues

involve huge financially implications for many people, huge environmental issues and huge public interest issues that are important enough to require the attention of the Supreme Court of Appeal.

Opposition to an application for leave to Appeal

[10] The application for leave to appeal is being opposed by the First, Seventh, Eighth, Tenth to Thirteen Respondents on the basis that the applicant is seeking to challenge the court's exercise of its discretion in granting the respondent condonation for the late filing of the rescission application, the exercise of discretion in relation to condonation application is in the true sense and is not easily interfered by appeal courts. The approach of an appellate court to the exercise of such a discretion is that, it will not set aside the decision of the lower court merely because it would itself, on the facts of the matter, have come to a different conclusion.

[11] The respondents submitted in its heads of arguments that in the contempt proceedings where the applicant sought to compel compliance with the Court orders, that being the case, the First respondent was entitled to launch a collateral challenge and to rescind the orders sought to be impugned, the court's view was that since the first respondent has been under administration for quite a long time from 2016, this raised a concern as there have been many succession of official bearers controlling the first respondent's administration, its duties and powers have been compromised. The first respondent's prospect of success on merits were strong in service agreement, that must be guided by the governing prescript, the first respondent as an organ of the state is constrained by the course and scope of governing. The interest of justice in the light of the first respondent's prospect of success require condonation be granted and the issues pertaining to this matter be placed before court and be ventilated on the doctrine of legal

principles. The court exercised its discretion in granting condonation and applicant has failed to make out any basis as to why the exercise of such discretion should be interfered with. The applicant's challenge against the granting of condonation has no prospects of success.

[12] The respondents further submitted in their arguments, that application for leave to appeal are dealt with in Section 17 of the Supreme Courts Act 10 of 2013, which provides that:

> The application for leave to appeal is regulated by Section 17 (1) (a) (i) and (ii) of the Act which states that:
>
> "17. (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 judgements on the matter under consideration".

[13] The Respondents as opposing the application for leave to appeal further submitted in its heads of argument in Para 7 to 8 that-

> " the phrase in Section 17(1)(a)(i) " would have a reasonable prospect of success" has been authoritatively interpreted to raise the bar for granting leave to appeal. This court for instance held in ***Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others*** [2016] ZAGPPHC 489 (24 June 2016) Para 25, *that :*

" The Superior Courts Act has raised the bar for granting leave to appeal in ***The Mont Chevaux Trust (IT2012/28) v Tina Goosen &18 Others,*** *Bertelsmann J held as follow:*

> *"It is clear that the threshold for granting leave to appeal against a judgement of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see* ***Van Heerden v Cronwright & Others 1985 (2) 342 (T) at 343H.*** *The use of the word "would" in the new statute indicates a measure of certainty that another court will differ from the court whose judgement is sought to be appealed against.*
>
> and further that-
>
> "This was reiterated *in* ***Gopaul and Another v Lutcham and Others*** where it was held-
>
> *"This is a more stringent approach than before, and thus the bar to qualify for leave to appeal has been raised. The word "only" means that leave to appeal maybe granted in the stated circumstances only.*
>
> *The new test requires a greater measure of certainty of a different outcome on appeal.*

[14] The respondents further submitted that the applicant 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. This honourable court has correctly held at paragraph 97 of its impugned judgement that, "no court can compel a party to fall foul of the law. This is because the orders the applicant seek to enforce in the contempt proceedings cannot be complied with without contravening the prescripts that regulate how the First Respondent is required to exercise its statutory and constitutional duties and functions. The applicant take issue with the court's finding that the orders which it sought to enforce were erroneously granted, this has no merit to the grounds of appeal.

[15] The respondent further submitted that in support of the above arguments this has already been explained that the First Respondent was placed under administration in 2016, and prior to the first respondent being put on administration, meetings were held by the Administrators, to resolve the issues between the parties as the new information was discovered, in that the terms that were imposed upon the first respondent were actually for the Developer. Applicant cannot merely state that the first respondent was in contempt of the court orders.

[16] The respondents submitted that there are no prospects of success even if the case will be arguable, the applicant has no sound, rational basis to conclude that there is a reasonable prospect of success on appeal, court orders that form the subject of this application are susceptible to being set aside on account of the invalidity and non-compliance with the governing prescripts. The interest of justice warrant that Court should rescind the 2019 court order, a reactive challenge should be available where justice requires it to be and the organ of the state is not disqualified from raising a reactive challenge because it is an organ of the state.

[17] The respondents further submitted that the approach adopted by this court was buttressed by the fact that the court orders which the applicant seeks to enforce were

granted without the determination of merits, and this was correctly noted by this Court at paragraph 91 of the judgement and this accord with Constitutional Court's findings and authorities. Therefore, it does not assist the applicant to contend that the merits of the application were conceded, as such the aforementioned exception does not find application, as such this contention was also rejected in the constitutional authorities, and case laws.,

[18] The respondents submitted in their arguments that in light of the provisions of Section 1(c) of the Constitution, sections 118(1) (a) and (b), 118(2) (a) and 119(1) Ordinance, the Notice, the Services Agreement, and the section 19(1)(a) and (d) of the MFMA and the SCM policy, it was not legally competent for this honourable court to have granted the court orders, the court orders were thus improperly and erroneously granted as contemplated in Rule 42 of the Uniform Rules. the court enjoys the relatively wide powers of rescission on those bases the respondents submitted that 2005, 2011 and 2019 court orders were correctly rescinded by this court in terms of Rule 42(1) (a) of the Uniform Rules there is equally no merit to this ground of appeal.

[19] The respondents in their arguments further raised that the plea of estoppel and ostensible authority was dealt with by this honourable court in the impugned judgement in paragraph 102 and 103, as such the applicant is misleading this court, in the light of the evidence placed before this honourable court, the respondent submitted that it cannot be said that the first respondent's conduct amounts to *wilful* and *mala fide* refusal or failure to comply with an Order of Court, this Court is not amenable to repeat the respondent's contentions in its arguments.

[20] The first respondent further argued that the applicant has failed to satisfy the requirements for contempt of court as the Municipality's conduct is not *mala fides* but

is informed by the scope and confines of its Constitutional obligations and the financial constraints which the Municipality finds in itself. The first respondent explains the basis of the action that took place under Paragraphs 113 to 131 on its arguments, proving the first respondent's bona fides, by the fact that there has at all material times been a change in the leadership of the Municipality as a result of the provincial interventions, in that each administration then dealt with the prerogative that they enjoy under the Constitution, thus the applicant has thus failed to prove its case beyond the reasonable doubt, and there is accordingly no prospects of success in making out the case for contempt.

[21] The respondents further submitted that in order to establish the *wilful* and *mala fide* conduct, it is trite that an applicant must establish that (a) an Order was granted *against the alleged contemnors(s),* (b) the alleged contemnor(s) *was served with order* or *had knowledge of it.* and (c) the alleged *contemnor failed to comply with the order,* in this matter, the court orders which the applicant seeks to enforce were not granted against the any of the officials which are alleged to being in contempt, neither of them were served personally with the court orders. And all the individuals that are sought to be joined commenced their duties with the first respondent only after the court orders have been issued, there were at no stage cited as parties in to the proceedings and others have left the first respondent's employ, thus showing that they cannot be in contempt of court order, other than the mere say, the applicant fails to produce evidence of personal service on an, which is the reason that the respondents submit that the requirements for the contempt have not been satisfied.

[22] The respondents submitted that in such circumstances, it is not in the interest of justice to grant leave to appeal and the requirements of section 17(1)(a) have not been satisfied, all the issues raised in the application for leave to appeal have all been settled by judgements of this honourable court and those of the Supreme Court, as indicated in their arguments, the application for leave to appeal stands to be dismissed with costs.

The issues requiring determination to an application for leave to appeal

[23] The issue for determination is whether there is reasonable prospect that the appeal would succeed in terms of Section 17 of the Superior Courts Acts 10 of the 2013 ("the Act")

[24] Our courts have given the true meaning of what is sought to be proven, as stated Section 17 (1) in this division, the legislated test set out in Section 17(1)(a)(i) has been held to be a higher test than the test previously, the test was whether the was a reasonable prospect that another court might come to a different conclusion, See **Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others** [2016] ZAGPPHC 489 (24 June 2016) Para 25, 26 and 29 especially Para 25. The use of the word "would" in the new statute indicates a measure of certainty that another court will differ from the court whose judgement is sought to be appealed[1]

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[1]2014 JDR 2325 (LCC at para 6

[25] The SCA in dealing with Section 17(1)(a)(i) of the Act, simply address the test in:

[25.1] **MEC for Health, Eastern Cape v Mkhitha and Another** [2016] ZASCA 176 (25 November 2016) Para 16-17:

> "[16] 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)(a) 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.
>
> [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.

[26] In **Matoto v Free State Gambling and Liquor Authority** [2017] ZAFSHC 80 at Para **5**, the court held that:

> "there can be no doubt that the bar for granting leave to appeal has been raised.... The use of legislature of the word 'only' is further an indication of a more stringent test".

[27] As such, in considering the application for leave to appeal, it is crucial for this Court to remain cognizant of the higher threshold that needs to be met before leave to appeal maybe granted. There must exist more than just a mere possibility that another court will not might, find differently on both facts and law. I am to consider whether there is substance in the arguments advanced by all the partiers that would justify leave to appeal. In the recent case of **Notshokovu v S** [2016] ZASCA (7 September 2016) 112 Para 2- where the SCA reaffirmed that:

"an appellant...faces a higher and stringent threshold in terms of the Act compared to the provisions of the repealed Supreme Court Act 59 of 1959".

[28] Having heard the arguments and debated the same, I have considered the following, Firstly, it is clear that the applicant is seeking to interfere and challenge my discretion un this whole judgement and the appeal court to interfere, as it has alluded in its papers. In order for the applicant to challenge my discretion, in the recent judgement of , De Villiers, AJ, Para 17, stated that a court of Appeal should first have to consider if there are grounds to interfere with the exercise of judge's discretion, once that hurdle is crossed, appeal court could alter judge's judgement if it believes the outcome to be wrong, but only then. The grounds for interfering with the exercise of judge's discretion are usually only where the judge's discretion was not exercised judicially, or where judge's decision was influenced by wrong principles, where judge's decision was affected by a misdirection on the facts, or where judge's decision could not reasonably have been reached by the court properly directing itself to the relevant facts and principles, the law in this regard is settled and needs no detailed discussion. See **Trencon Construction (pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another** 2015(5) SA 245 (CC) Para **83-89**.

[29] It is my view that when this court exercised its discretion to grant Condonation for late filing of first respondent's rescission did not erred and it has referred to legal authorities. The discretion exercised was in the true sense, the court had a wide range of equally permissible options available to it, the evidence presented to it for application of condonation and reasons for delay, actions taken by the first respondent. The court can never be said to be wrong as options applied were entirely permissible. Where a lower court exercises a discretion in the true sense, it would be ordinarily be inappropriate for an appellate court to interfere unless it is satisfied that this discretion was not correctly exercised judicially. Interference is warranted only where the discretion was not exercised judicially, the decision was influenced by wrong principles affected by misdirection on the facts, I have correctly considered all the facts and the law presented to me by both parties, my findings were not influenced by wrong principles. See **Public Protector v South African Reserve Bank**[2].

[30] Secondly, the test applicable on the facts of this case in the Notice of application for leave to Appeal and the arguments do indicate that an appeal should be heard as contemplated in 17(1)(a)(i) and Section 17(1) (a) (ii) of the Superior Courts Act, 10 of 2013 ("the Act").

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[2]2019 (6) SA 253 (CC) Para 145

[31] In **Pretoria Society of Advocates and Others v Nthai** 2020 (1) SA 267 (LP) at [4] the court held that:

> "The enquiry as to whether leave should be granted is twofold. The first step that a court seized with such application should do is to investigate whether there are any reasonable prospects that another court seized with the same set of facts would reach a different conclusion. If the answer is in the positive the court should grant the leave to appeal. But if the answer is negative, the next step of the enquiry is to determine the existence of any compelling reason why the appeal should be grant heard".

[32] The applicant raises a number of patent errors made in my judgement, giving opinions and directing what the court should have done or should have not done. I dealt with each and every aspect in my judgement. In order to overturn my findings on appeal, the applicant had to make out a case that I misdirected myself on the facts before me. The applicant has failed to provide the compelling reasons why the Court should grant leave to appeal, the applicant has failed to identify conflicting cases with similar facts but with different conclusion, no new evidence brought on similar judgment and relevant case laws, no conflicting judgements brought by the applicant on the dispute at hand,

[33] I have come to the conclusion that I am more than inclined to accept respondents' arguments that there are no merits in this application for leave to appeal. I am satisfied that the applicant has failed to convince this court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. The relief sought by the appellant is against the Constitution, the court is not persuaded that the applicant's request for leave to appeal would be in the interest of justice, this court is in agreement with the respondent's arguments as extracted from my judgement which I do not need to repeat myself, for these reasons, the court concludes it would not be in the interest

of justice to grant leave to appeal. Also, there is no factual basis why the interest of justice requires that this matter must continue, where there is lack of reasonable prospect of success The evidence brought before me by the applicant did not have a sound, rational basis to conclude that there is a reasonable prospect of success on appeal or any other court will come to a different conclusion. I have judicially exercised my discretion and it is unlikely that another court might find that the court exercised its discretion improperly,

[34] The liberal approach to grant leave by courts is discouraged as being inconsistent with Section 17 of the Act, the approach is now also developed that if the inquiry into whether the appeal would not have reasonable prospect of success, the court must now also inquire whether it is in the interest of justice that the appeal should be heard. See **Mothule Inc Attorneys v The Law Society of the Northern Cape and Another**[3]. It is my view that, there is no substance in the arguments advanced by the applicant that would justify leave to appeal.

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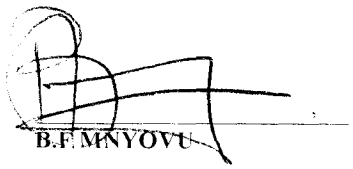
[3] (213/16[2017] ZASCA 17 (22 March 2017). it was further stated that: the courts even though the appeal was granted by the court a quo, it transpired that the interest of justice was not properly investigated by the presiding judge. Appeal should have never been granted.

ORDER

[35] In the result, having read the papers filed and heard the arguments from both parties, I make following order:

a) The application for leave to appeal to the Supreme Court of Appeal is dismissed with costs.



B.F. MNYOVU

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel on behalf of Applicant	:	**Adv A J Louw SC**
		Adv M.F. ACKERMANS
Instructed by	:	**Mr Christo Van Der**
	:	**Len Dekker Attorney**
Counsel on behalf of Respondents	:	**Adv L Kutumela**
Instructed by	:	**Gildenhuyd Malatji Inc Attorneys**
Date heard	:	**08 August 2023**
Date of Judgement	:	**30 November 2023**