



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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

20_March 2023_

DATE

SIGNATURE

Case No: 39724/2019

In the matter between:

THE MINISTER OF ENVIRONMENTAL AFFAIRS
Applicant

And

THE TRUSTEES FOR THE TIME BEING OF
THE GROUNDWORK TRUST

First Respondent

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on CaseLines by the Judge or her Secretary. The date of this judgment is deemed to be 20 March 2023.

JUDGMENT

COLLIS J

1. This is an application for leave to appeal against the judgment and order made on 18 March 2022.

2. The application is premised on the grounds as listed in the Application for Leave to Appeal dated 08 April 2022. The said application albeit that same was filed last year already, was only brought to the attention of the Court towards the end of the year. This is regrettable and points to challenges experienced within the administration.

3. In anticipation of the hearing of the application for leave to appeal, the parties were requested to file short heads of argument. They both acceded to this request so directed by the Court.

LEGAL PRINCIPLES

4. Section 17 of the Superior Court's Act provides as follows:¹

“(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 to 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.”

¹Act 10 of 2013

5. In *casu* the applicant relies on both grounds of appeal mentioned in section 17(1)(a) of the Superior Courts Act 10 of 2013, namely, that the appeal would have reasonable prospects of success and that there are compelling reasons justifying the appeal.

6. The crisp issue on appeal is a question of law, namely, the proper interpretation of section 20 of the National Environmental Management: Air Quality Act 39 of 2004 ("*the AQA*"), specifically whether the regulation-making power in section 20 of the AQA vested the Applicant with a discretion to prescribe regulations or imposed a duty on her to do so.

7. The clarification of this interpretation is further of considerable wider importance as there are several statutes within the suite of environmental legislation which contain regulation-making powers similar to those contained in section 20 of the AQA, and many other statutes to similar effect.

8. The First and Second Respondents agreed with the Applicant that, subject to the requisite leave being given by this Court, that leave to appeal to the Supreme Court of Appeal should be granted.

9. As to the test to be applied by a court in considering an application for leave to appeal, Bertelsmann J in *The Mont Chevaux Trust v Tina Goosen & 18 Others* 2014 JDR 2325 (LCC) at para 6 stated the following:

‘It is clear that the threshold for granting leave to appeal against a judgment 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) SA 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 judgment is sought to be appealed against.’

10. ‘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 there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorized as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.’²

² *S v Smith* 2012 (1) SACR 567 (SCA) at para 7.

11. In *Fair-Trade Independent Tobacco Association v President of the Republic of South Africa and Another*³ the Full Court of this Division observed that:

“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 may be granted. There must exist more than just a mere possibility that another court, the SCA in this instance, will, not might, find differently on both facts and law. It is against this background that we consider the most pivotal grounds of appeal.”

12. Having read the papers and having carefully heard counsel I come to the conclusion that there is no reasonable prospect that another court would come to a different conclusion on the order of the court in terms of section 17(1)(a)(i) of the Superior Courts Act 10 of 2013.

13. There however exists compelling reasons justifying why the appeal should be heard in terms of section 17(1)(a)(ii) of the Superior Courts Act 10 of 2013. This is due to the novelty and importance of the constitutional issues raised in this matter and the broader public interest.

³ Case no: 21688/2020 [2020] ZAGPPHC 311 (24 July 2020) at [6].

ORDER:

14. Consequently, the following order is made:

14.1. Leave to appeal is granted to the Supreme Court of Appeal in terms of section 17(6) of the Superior Courts Act.

14.2. The leave granted is confined to paragraphs 241.2 to 241.5 of the order of the *court a quo*.

14.3. The costs of the application for leave to appeal to be costs in the appeal.



COLLIS J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION PRETORIA

APPEARANCES

Counsel for Applicant: Adv. J RUST SC

Instructed By: OFFICE OF THE STATE

ATTORNEYS

PRETORIA

Counsel Respondents: Adv. S. BUDLENDER SC,

Adv C. McCONNACHIE

Adv. C TABATA

Instructed By: CENTRE FOR ENVIRONMENTAL RIGHTS

CAPE TOWN

Date of hearing: 13 March 2023

Date of Judgment: 20 March 2023