REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 59109/20

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

29/2/2024
Date Signature

In the application for leave to appeal between:

CITY OF TSHWANE METROPOLITAN MUNICIPALITY	**1st Applicant**
THE MUNICIPAL MANAGER: CITY OF TSHWANE METROPOLITAN MUNICIPALITY	**2nd Applicant**

and

RDP'S BUSINESS ENTERPRISE CC	**Respondent**

In re:

RDP'S BUSINESS ENTERPRISE CC	**Applicant**

And

CITY OF TSHWANE METROPOLITAN MUNICIPALITY	**1st Respondent**
THE MUNICIPAL MANAGER: CITY OF TSHWANE METROPOLITAN MUNICIPALITY	**2nd Respondent**

JUDGMENT ON LEAVE TO APPEAL

K STRYDOM, AJ

Introduction:

1. This is an application for leave to appeal against the whole of my judgment delivered on the 2nd of June 2023 ("the main judgment"), brought by the City of Tshwane Metropolitan Municipality (first Respondent in the main judgment) and its Municipal Manager (second Respondent in the main judgment). To avoid confusion, the parties will forthwith be referred to as they were in the main judgment.

2. In terms of the main judgment, the Respondents were found to be in contempt of a prior court order granted on 15 July 2021 by Manamela J ("the PAIA order"), in terms of which the first Respondent was ordered to disclose certain records related to a tender bid which were previously requested by the Applicant in terms of the *Promotion of Access to Justice Act*, 3 of 2000 ("PAIA").

3. In evaluating the present application, the dictum in *Ramakatsa and others v African National Congress and another* is instructive*:*

   "*[10] … 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.*"[1]

Grounds for leave to appeal

4. I do not intend to pertinently deal with each ground raised, however where I do not, it should not be construed as a failure to consider (and refuse to grant leave to appeal on the basis of) such a ground.

5. The Respondents' grounds of appeal pertinent for discussion are principally centred around the following issues:

[1] *Ramakatsa and others v African National Congress and another* [2021] JOL 49993 (SCA)

5.1. The Court's failure to consider the Applicant's failure to join the Municipal Manager in his personal capacity and the effect it has on the evaluation of the contempt application vis-à-vis his committal. ("The failure to personally join the second Respondent")

5.2. The failure by the Court to accept that the Respondents' explanation for the failure to fully comply with the PAIA order, was reasonable. ["The non-compliance was not mala fide")

5.3. The order granted went beyond what was sought in the notice of motion or is too wide. ("The competency of the order granted")

Evaluation of grounds

The failure to personally join the second Respondent

6. The first nine grounds of appeal raised relate to non-service of the PAIA order on, and non-joinder of, the second Respondent in his personal capacity. It is argued that the Court failed to consider whether the second Respondent, being the person whose freedom is in jeopardy, in his personal capacity, was in contempt of court.

7. The Respondents relied on the dictum in *Matjhabeng Local Municipality v Eskom Holdings Limited*:[2]

"[103] Bearing in mind, that the persons targeted were the officials concerned − the Municipal Manager and Commissioner in their official capacities − the non-joinder in the circumstances of these cases, is thus fatal. Both Messrs Lepheana and Mkhonto should thus have been cited in their personal capacities − by name − and not in their nominal capacities. They were not informed, in their personal capacities, of the cases they were to face, especially when their committal to prison was in the offing. It is thus inconceivable how and to what extent Messrs Lepheana and Mkhonto could, in the circumstances, be said to have been in contempt and be committed to prison."

8. The applicant seeks to distinguish the present mater from that of *Matjhabeng* on the basis that, in casu, the second Respondent had given notice of intention to oppose along with the first and had chosen to not deliver an answering affidavit (and was content to align himself with the second Respondent's contentions). It is argued that he, unlike Mr *Matjhabeng* had at all times been aware of the fact that his committal was sought and had had legal representation.

[2] *Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Limited* (CCT 217/15; CCT 99/16) [2017] ZACC 35; 2017 (11) BCLR 1408 (CC); 2018 (1) SA 1 (CC) (26 September 2017)

9. Furthermore, the issue of non-joinder of the second Respondent in his personal capacity was raised for the first time in the current application for leave to appeal. In the contempt application no mention was made of, for example, any objections regarding service or proof of non-compliance with the PAIA order pertaining to the second Respondent in his personal capacity.

10. Counsel for the Respondents, in Court, argued that the Court should have *mero motu* raised the issues pertaining to the second Respondent in his personal capacity. Whilst I take note of the fact that in *Matjhabeng* the non-joinder of Mr Mkhonto was raised *mero motu* by the Constitutional Court for the first time, this is hardly authority for holding that Courts have a duty to further a litigant's case on his behalf.

11. The Respondents' assertion in this regard contradicts their own submission in their heads of argument (relating to the order made) that: *"(i)n an adversarial system, like ours it is the parties that define the issues in their pleadings and the function of the court is to deal with those issues, and those issues only*."

12. A Court's duty to raise a point of law *mero motu* is, in fact, encapsulated in the dictum of the Constitutional Court in *CUSA v Tao Ming*,[3] as follows:

    'Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, mero motu, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law. That would infringe the principle of legality. Accordingly, the Supreme Court of Appeal was entitled mero motu to raise the issue of the Commissioner's jurisdiction and to require argument thereon"

13. In *casu*, whilst the second Respondent had opposed the application, he failed to address (in any sort of capacity) the averments made by the applicant by way of an answering affidavit. As such, not only was their no point of law apparent vis-à-vis the papers of the second Respondent, there was also no indication that the common approach by the parties was an incorrect application of the law.

14. The correct approach to new points of law raised on appeal is set out in *Barkhuizen v Napier*:[4]

[3] *CUSA v Tao Ying Metal Industries* 2009 (2) SA 204 (CC) at [67]
[4] *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC) (4 April 2007)

"The mere fact that a point of law is raised for the first time on appeal is not in itself sufficient reason for refusing to consider it. If the point is covered by the pleadings, and if its consideration on appeal involves no unfairness to the other party against whom it is directed, this Court may in the exercise of its discretion consider the point. Unfairness may arise where, for example, a party would not have agreed on material facts, or on only those facts stated in the agreed statement of facts had the party been aware that there were other legal issues involved. It would similarly be unfair to the other party if the law point and all its ramifications were not canvassed and investigated at trial."

15. In *Mokweni and Others v Plaatjies and Others - Appeal* [5] Nyeni J afforded the following interpretation to be followed to the admission of new issues on appeal:

"[25] It is further important to be mindful that for most purposes, the concept of fairness raises principles of justice. Fairness also speaks to the administration of justice. To this end, the two-steps test developed by Barkhuizen and Naude connotes more than fairness; it implies that the court of appeal should determine whether it would be in the interests of justice to allow the hearing of the new issue.

[26] In keeping with the abovementioned authorities [Barkhuizen and Naude] this Court before it allows a new issue, it should also decide as to whether the exclusion of the new issue would bring the administration of justice into disrepute; and moreover, before the new issue is allowed, this Court should also consider whether that would not prejudice the respondent."

16. In the present instance, this new issue raised clearly prejudices the Applicant as it had not been apparent from the papers nor had it been canvassed during argument. However, in view of the Constitutional Court's pronouncements in *Matjhabeng*, coupled with the severe infringement on the Municipal Manager's right to liberty and freedom of person, an order for committal would have, I am of the view that another Court on appeal could reasonably come to a different conclusion regarding the findings made against the second Respondent in his personal capacity.

17. In this regard it should be stressed that I make no finding as to whether or not the court of appeal should consider the new issues (re the second Respondent in his personal capacity) raised for the first time in this application for leave to appeal.

The non-compliance was not mala fide

[5] *Mokweni and Others v Plaatjies and Others* - Appeal (A178/2022) [2023] ZAWCHC 266 (26 October 2023)

18. With regards to whether or not the Respondents' non-compliance with the PAIA order was proven to be *mala fide* and wilful, it must be noted that here the reference to the second Respondent will relate to him in his official capacity. In that capacity he defended the application for contempt of court but had not delivered an answering affidavit.

19. The Respondents' grounds in this regard are to a large extent a re-iteration of their arguments in the hearing a quo. The main judgment comprehensively deals with most of the issues raised and, as such, I will not address each and every argument raised in this leave to appeal individually.

20. The Respondents argue that there was a factual dispute which I either failed to identify or had resolved incorrectly:

"*The first respondent provided explanation for the partial non- compliance with the court order. In particular the first respondent, by way of affidavit, contended that it was not in possession or control of the outstanding documents and that other documents were unavailable as they were destroyed. The applicant denied these allegations and contentions by the first respondent*."[6]

And

"14. It is trite that the law does not expect the impossible. This is expressed in the principle "lex cogit ad impossibilia". The learned judge, in finding the explanation proferred by the respondents, i.e the unavailability or destruction of the records and lack of control over same, as unreasonable, effectively failed to take into account this principle. She accordingly erred in this regard."

21. The first Respondent's answering affidavit contained no such positive averments. Instead, it was stated that:

"15.3 It is apposite to mention that <u>some</u> of these documents date as far back as the year 2017, and <u>may</u> not be available in the archives as the storage requirement is that documents be kept for a period of five years and thereafter they are disposed with. <u>The Respondents cannot confirm at this stage if such documents are available.</u>

15.4 We have however requested the documents from the archives and are awaiting a response from the different service providers. <u>Should the documents still be available</u> they will be provided to the Applicants."

And

[6] Notice of application for leave to appeal - Case Lines 37-3

"19…. Furthermore, the documents are not within the control of the First Respondent as they have been archived and a period of five years has lapsed since they were achieved. They <u>may</u> not be available."

[Underlining my own]

22. These contentions are, on the Respondents' own version, speculative. They are not statements of fact or explanations of cogent reasons for the failure to comply with the PAIA order. In fact, as pointed out in the main judgment, these explanation highlight the Respondents' lackadaisical approach to compliance with the PAIA order. In the two years that passed between the PAIA order and the contempt order, they had not even established or attempted to establish the status of the requested documents with any certainty.

23. The Respondents also argued that, as certain records had been sent to off-site storage, they were no longer under the first Respondent's control, and accordingly were not subject to the PAIA order. The main judgment considered and dismissed this contention on the facts as well as on the interpretation that the Respondents sought to be given to the concept of "control" per the PAIA order.

24. The Respondents were called upon to rebut the presumption that their non-compliance was *mala fide* and wilful. They failed to provide any positive factual averments to indicate that the non-compliance was 'out of their hands'. As such, and as amplified by the reasoning in the main judgment, I find that there are no reasonable prospects of a Court, on appeal, finding that the Respondents were not in contempt of Court.

The competency of the order granted

25. This ground does not form part of the grounds listed in the notice of application for leave to appeal and was mentioned for the first time in the Respondent's heads of argument. I agree with the Applicant that this is impermissible.

26. In any event, insofar as the argument is that the order is too wide, I find that there are no grounds properly furthered for this submission in the heads of argument either.

27. During argument it also appeared as if another basis for this "ground" was that the order is unclear as it refers to "external" documents. This objection relates to the interpretation of "control" afforded to the PAIA order and has been discussed in the main judgment (and reiterated in the discussion supra).

Finding

28. The findings, above, have the result that the application for leave to appeal insofar as the first Respondent and second Respondent, in his official capacity, are concerned, is refused. However, insofar as the order granted may implicate the second Respondent in his personal capacity, leave to appeal should be granted. By virtue of S17(5) of the Superior Court's Act, 10 of 2013, I intend to grant leave to appeal on this limited issue and its possible permutations only.

29. Whilst, in terms of the order made, the second Respondent, in his personal capacity, is presently only affected insofar as the sanction imposed is concerned, the questions of his personal contempt and that of the sanction to be imposed, are inextricably linked. As such, the order will be phrased wide enough to allow for full ventilation of these issues.

30. As far as the costs of the application for leave to appeal is concerned, costs will not be the usual "costs in the appeal". The Respondents have only been given leave to appeal a part of the order based on issues raised in the application for the first time. In the exercise of my discretion, I intend to hold them liable for the applicant's costs.

31. I accordingly order as follows:

Order

1. Save to the extent of the refusal as contained in paragraph 2 below, leave to appeal to a full bench of this division is granted.
2. Leave to appeal in respect of the finding that the first respondent and the second Respondent (in his official capacity) are, beyond reasonable doubt, in contempt of the court order granted on 15 July 2021 by Manamela J, is refused.
3. The first and second Respondents are ordered to pay the Applicant's costs of the application for leave to appeal, jointly and severally, the one paying the other to be absolved.

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K STRYDOM
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of hearing:

11 December 2023

Judgment delivered:

29 February 2024

Appearances:

For the Respondent/Applicant:

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