



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

Case No.63060/2019

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


Julian YENDE
SIGNATURE

8 March 2024
DATE

In the matter between:

JAN JOACHIM JANEKE

Applicant

and

**CITY OF TSHWANE METROPOLITAN
MUNICIPALITY**

1st Respondent

**THE MEC FOR ROADS AND PUBLIC
TRANSPORT: GAUTENG**

2nd Respondent

JUDGMENT: LEAVE TO APPEAL

YENDE AJ

Introduction

[1] In the Applicant's condonation application *a quo*, I dismissed with costs *inter alia* the application for **condonation for failure to comply with section(s) 3(2)(a) of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002, failure to comply with the provisions of section 4(1)(a) of the Act and failure to comply with the provisions of section 5(2) of the Act**. The applicant seeks leave to appeal to the Full Bench of this Division, alternatively to the Supreme Court of Appeal against the judgment and order I delivered on the 5 September 2023.

[2] Apposite to the applicant's Notice for Leave to Appeal in terms of Rule 49 it is important to restate the following "*Applicant will apply before the said Mister Justice Yende AJ for leave to appeal against the whole judgment and order by Mister Justice Yende AJ on the 5th of September 2023, when*

a) Mister Justice Yende AJ refused and dismissed the Applicants application for condonation for failing to comply with Section 3(2)(a) of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002,....." I will explicate fully on this ground of appeal later in my judgment.

[3] The grounds of appeal are encapsulated in the Notice of Application for leave to appeal and I deem it unnecessary to restate same and now I turn to consider the legal principles applicable in this application.

[4] Section 17(1)(a) of the Superior Courts Act¹ ("the Superior Courts Act") provides that leave to appeal may be granted where the judge concerned is of the opinion that:

[4.1] "the appeal would have a reasonable prospect of success (section 17(1)(a)(i);

or

[4.2] there is some other compelling reason why the appeal should be heard (section 17(1)(a)(ii)".

¹ Act no 10 of 2013.

[5] The Supreme Court of Appeal has held that the test for granting leave to appeal is as follows;

[5.1] In the matter of *MEC for Health, Eastern Cape v Mkhitha and Another*² it was held (*footnotes omitted*)-

“[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”.

[5.2] The Full Court of this Division, Pretoria when dealing with section 17(1)(a)(i) of the Superior Courts Act, in the matter of *Acting National Director of Public Prosecutions and Others v Democratic Alliance*³ it was held that-

“[25] 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 follows:

‘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.....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’ ”.

[5.3] Four years later, the Full Court of this Division, Pretoria in *Fairtrade Tobacco Association v President of the Republic of South Africa*⁴ likewise held that-

² [2016] ZASCA 176 (25 November 2016).

³ [2016] ZAGPPHC 489 (24 June 2016).

⁴ (21688/2020) [2020] ZAGPPHC 311 (24 July 2020).

“As such, in considering the application for leave to appeal, it is crucial for this Court to remain cognisant 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 facts on law”

[5.4] *In Fusion Properties 233 CC v Stellenbosch Municipality*⁵, it was held that –

“[18] 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 application 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-

(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.’

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.....”

[5.5] Later, eight (8) months after the decision in *Fusion Properties 233 CC v Stellenbosch Municipality*, the very same court in *Chithi and Others; In re: Luhlweni Mchunu Community v Hancock and Others*⁶ held that –

“[10] The threshold for an application for leave to appeal is set out in s 17(1) of the Superior Courts Act, which provides that leave to appeal may only be given if the judge or judges are of the opinion that the appeal would have a reasonable prospect of success....”

[6] It is worthy to observe that all the decisions mentioned *supra* are in accordance with the judgment of the Supreme Court of Appeal in the matter of *Notshokovu v S*⁷

⁵ [2021] ZASCA 10 (29 January 2021).

⁶ [2021] ZASCA 123 (23 September 2021).

⁷ [2016] ZASCA 112.

in which it was held that – “an applicant in an application for leave to appeal faces a higher and stringent threshold, in terms of the Act compared to the provisions of the repealed Supreme Court Act 59 of 1959”.

[7] Having referred extensively to the legal precedence concerning section(s) 17(1) of the Superior Courts Act *supra* and its corresponding requirements it is clear that the practical effect thereof is to reduce the heavy workload of appeal courts and that the court *a quo* should not easily grant leave to appeal where the Applicant has not passed the litmus test referred to *supra*.

[8] In this regard this court share the sentiments that were echoed by the Constitutional Court in the matter of Tiekiedraai Eiendom (Pty) Limited v Shell South Africa Marketing (Pty) Limited⁸ that:

"it is well accepted that this Court functions better if assisted by a well-reasoned judgment of the High Court or the Supreme Court of Appeal" and Nicholls AJ in the matter of S v S and Another⁹ noted that "The wisdom of this logic cannot be faulted".

I have, *a quo* considered all the issues raised by the applicant's counsel and arrived at a well-reasoned judgment.

[9] Comprehensive reasons were provided for the order granted and the sound written judgment delivered and I do not propose to rehash those. Having considered the grounds of appeal raised by the applicant, the submissions and/or argument raised by the applicant's counsel in support of the application including both heads of argument, as well as the submission and/or argument by counsel for respondents. I am not of the view that on the grounds of appeal raised by the applicant, the appeal would have a reasonable prospect of success.

[10] I find that it would be counter-intuitive to grant leave to appeal in the circumstances where the applicant has failed to clearly demonstrate that this court has erred and/or misdirected itself and thus came to a judgment that no reasonable Court could have made.

⁸ [2019] ZACC14; [2019] JOL41705 (CC) at paras 19-20.

⁹ [2019] ZACC 22 at 23.

[11] Apropos of the high threshold that has been raised in the new Act and same confirmed by the legal precedence mentioned *supra* I am obliged to determine whether another Court would (*not might*) come to a different conclusion. Notwithstanding the able argument by Mr Z Schoeman, I am not convinced that another Court would come to a different conclusion other than that which I have made.

[12] I am constraint to find that the applicant has not made out a case for the application to succeed in terms of the provisions of section 17(1)(a) of the Superior Courts Act No 10 of 2013.

[13] Section 16(2)(a) of the Superior Courts Act provides as follows:

“(2)(a)(i) When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on the ground alone.

(ii) Save under exceptional circumstances, the question whether the decision would have no practical effect, or result is to be determined without reference to any consideration of costs”.

[14] As adumbrated in paragraph [2] *supra* the applicant seems to be aggrieved only by my decision not to grant condonation for failure to comply with Section 3(2)(a) of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 (in having failed to give notice of intended legal proceedings within six months of the debt having become due). I mention this because *prima facie* the applicant's application for leave to appeal, the application for leave to appeal is not made in respect of the court *a quo* decision having dismissed the Applicant's application for condonation for his failure to comply with section(s) 4(1)(a) of the Act (in having failed to serve notice of intended legal proceedings on the Head of Department: Roads and Transport, Gauteng).

[15] Neither, the dismissal of the applicant's application for condonation on the basis of his failure to comply with the provisions of section 5(2) of the Act is raised as ground for leave to appeal in the grounds set out in the entire application for leave to appeal. It is vividly clear from the application for leave to appeal that the

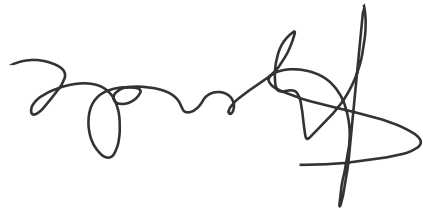
grounds set out in the application for leave to appeal relates only to the dismissal of the application for condonation of failure to comply with the provisions of section 3(2)(a) of the Act.

[16] As a consequence of this fact, it is my firm view that irrespective of any decision on appeal in respect of condonation of the failure on the part of the applicant to comply with the provisions of section 3(2)(a) of the Act, the decision sought on appeal will have no practical effect or result in the absence of condonation of failure to comply with the provisions of section(s) 4(1) (a) and 5(2) of the Act as per the court *a quo* judgment.

[17] In considerations of section 16(2)(a) mentioned *supra* I find that for the reasons mentioned above, the decision sought on appeal will definitely have no practical effect or result in the absence of condonation of failure to comply with the provisions of section(s) 4(1)(a) and 5(2) of the Act.

Order

[18] Consequently, for reason mentioned *supra* the application for leave to appeal is dismissed with costs, including the costs of two counsel.



J YENDE
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA.

Yende AJ prepared this judgment. It is handed down electronically by circulation to the parties or their legal representatives by e-mail, by uploading the electronic file on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date of hand-down is deemed **8 March 2024**.

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Heard: 20 February 2024

Delivered: 8 March 2024