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

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

……………………… ………………………
DATE SIGNATURE

Case No: 36596/2016

In the matter between:

ROBERT SLAUGHTER	First Applicant
SHAHIT WADVALLA	Second Applicant
REGINALD LEGOABE	Third Applicant
STEVEN NJIIRI	Fourth Applicant

and

MUNICIPAL INFRASTRUCTURE SUPPORT AGENT	First Respondent
THE SHERIFF: PRETORIA EAST	Second Respondent

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date for the handing down of the judgment shall be deemed to be 26 January 2024.

JUDGMENT IN APPLICATION FOR LEAVE TO APPEAL

LG KILMARTIN, AJ:

INTRODUCTION

[1] This is an application for leave to appeal the judgment and order handed down on 13 June 2023.

[2] The Applicants' grounds of appeal are set out in the application for leave to appeal dated 26 June 2023.

[3] The Applicants rely on sections 17(1)(a)(i) and 17(1)(a)(ii) of the Superior Courts Act, 10 of 2013 ("the Superior Courts Act"). According to the Applicants, there is a reasonable prospect that another Court will reach a different conclusion and there are compelling reasons why the appeal should be heard.

[4] The application was opposed by the First Respondent and it argued that the application should be dismissed with punitive costs on the basis that it is frivolous. The First Respondent submitted that the Applicants continue to bring unnecessary applications for leave to appeal before this Court and superior Courts and contest all decisions found against them. The First Respondent

further contended that the Applicants continue to suffer from "*this Stalingrad strategy which has caused the first respondent not to successfully recover its costs to date*."

[5] Although it was initially arranged that this application for leave to appeal be heard on 6 October 2023, the Registrar of Appeals was advised the week prior to the hearing date that the parties' counsel were no longer available.

[6] In preparation for the application for leave to appeal, the Court noted from CaseLines that an urgent application had been brought by the Applicants during the week of 2 October 2023 which was heard by Her Ladyship Ms Janse Van Nieuwenhuizen ("Janse Van Nieuwenhuizen J") on 3 and 5 October 2023. In terms of an order granted by Janse Van Nieuwenhuizen J on 5 October 2023, a writ of execution dated 25 July 2023 and issued under case no. 39077/2016 was set aside and it was ordered that the execution of a cost order dated 14 August 2018 under case no. 39077/2016 (which forms the subject-matter of this application) be stayed pending the adjudication of the Applicants' application for leave to appeal and, if successful, any appeal under case no. 36596/2016.

[7] On 16 October 2023, an application in terms of sections 18(1) and 18(3) of the Superior Courts Act ("the section 18 application") was launched by the First Respondent. Although the issue of "*urgency*" was dealt with in the founding affidavit, no prayer requiring the matter to be heard as an urgent application was included in the notice of motion. Be that as it may, the timelines provided within that application were truncated, with the Applicants being required to file a notice

of intention to oppose by Thursday, 19 October 2023, and an answering affidavit, if any, by Tuesday, 24 October 2023.

[8] In response to the section 18 application, the Applicants delivered a Rule 30A notice ("the Rule 30A notice") in terms of which they submitted that the section 18 application constituted irregular proceedings in terms of Rule 30A(1) and constituted an abuse of court process.

[9] The Rule 30A notice was followed by an application in terms of Rule 30 ("the Rule 30 application") wherein the Applicants sought the setting aside of the section 18 application. Although the notice of motion stated that the Rule 30 application would be heard on 2 November 2023 (being the date arranged for the hearing of the application for leave to appeal) the matter was clearly not ripe for hearing and no time periods were provided for the delivery of a notice of intention to oppose or answering affidavits.

[10] At the commencement of the hearing, the parties were advised that the section 18 and Rule 30 applications were not ripe for hearing but the Court would proceed to hear the application for leave to appeal.

RELEVANT LEGAL PROVISIONS AND AUTHORITIES

[11] Section 17(1)(a) of the Superior Courts Act reads as follows:

"***Leave to appeal***

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 judgments*** *on the matter under consideration;…"*

(Emphasis added)

[12] The test to be applied in considering an application for leave to appeal was described as follows by His Lordship Mr Justice Bertelsmann in *The Mont Chevaux Trust v Tina Goosen and 18 Others:*[1]

"*It is clear that the threshold for granting leave to appeal against the 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 and Others 1985 (2) SA 342 (T) at 343 H.* ***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****.*"

(Emphasis added)

[1] 2014 JDR 2325 (LCC), para [6].

[13] The fact that the test for leave to appeal is more stringent under the Superior Courts Act was reaffirmed by the Supreme Court of Appeal in *S v Smith*[2] where the following was stated:

> "*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 than to establish that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless.* ***There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal****.*"
>
> (Emphasis added)

[14] In *MEC for Health, Eastern Cape v Mkhitha and Another*,[3] the following was stated:

> "*[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 or other compelling reason why it should be heard.*"

<u>DISCUSSION OF GROUNDS OF APPEAL</u>

[2] 2012 (1) SACR 567 (SCA), para [7].

[3] (1221/2015) [2016] ZASCA 176 (25 November 2016), para [16].

[15] The grounds of appeal are summarised by the Applicants in paragraph 1 of their notice of application for leave to appeal as follows:

> "*1. The Honourable Court erred and misdirected itself by:-*
>
> *1.1 Finding that the costs orders executed under Case No 39077/2016 and the 2022 taxed order are separate from the ongoing judicial review application.*
>
> *1.2 Finding that no real and substantial prejudice requires stay in execution.*
>
> *1.3 Finding that no injustice will result from stay of execution.*
>
> *1.4 Finding that no irreparable harm will result if execution is not stayed.*
>
> *1.5 Finding that the application to stay is frivolous and vexatious.*
>
> *1.6 Not considering the adverse implications of not granting stay of execution on Applicants' continued access to the Courts in terms of section 34 of the Constitution to finalise prosecution of the ongoing review application.*
>
> *1.7 Not considering First Respondent's expressly stated ulterior motive to obtain security of costs (stated in Par 2 of First Respondent's letter of demand dated 1 July 2022, annexure* ***RS18****.* ***CaseLines Section 0003-153 to 0003-154****).*

> *1.8 Not considering the absence of harm and prejudice to the First Respondent from a stay of execution pending finalisation of review application.*
>
> *1.9 Erroneously awarding costs in an ongoing Constitutional litigation matter contrary to the Biowatch principle considering the history of the ongoing review dispute between the parties.*
>
> *1.10 Injustice stands to result from judgement."*

[16] The Applicants contend that the costs in respect of case no. 39077/2016 were expended to facilitate the hearing of the main review application which was brought under case no. 36596/2016 ("the review application") and are therefore "*directly linked to the ongoing main review application*."

[17] The First Respondent's counsel submitted that nothing which will be decided in the review application will have any bearing on the cost order granted under case no. 39077/2016. This Court agrees with the First Respondent for the reasons explained below.

[18] It is clear from the papers that on 14 August 2018, pursuant to an opposed taxation, the Taxing Master taxed costs in favour of the First Respondent in the amount of R220 216.98 under case no. 39077/2016. The aforesaid case number relates to an entirely separate contempt of court application which was brought by the Applicants against the First Respondent and its key officials ("the contempt application"). As is explained in paragraphs 28 to 30 of this court's judgment:

[18.1] the contempt application was heard and granted by Baqwa J on 30 June 2016 on an unopposed basis. According to the First Respondent, the contempt application was enrolled for hearing on 15 July 2016 but, for reasons unknown to it, the matter was set down and heard on the unopposed roll of 30 June 2016, without notice to the First Respondent;

[18.2] the First Respondent then launched an urgent application to rescind the order of Baqwa J on 30 June 2016. On 13 July 2016, Swartz AJ granted an order rescinding Baqwa J's order in the absence of the Applicants;

[18.3] the Applicants filed an application for leave to appeal the order of Swartz AJ but this was dismissed on 29 November 2017 by Tonjeni AJ, who also granted costs in favour of the First Respondent; and

[18.4] the Applicants then petitioned the Supreme Court of Appeal ("the SCA") for leave to appeal the decision of Swartz AJ, but this petition was also subsequently dismissed with costs.

[19] Insofar as the Applicants' counsel contended that case no. 39077/2016 (i.e. the contempt application) "*can't be separated*" from the pending review application and that it is an "*interlocutory application*", this is not so. The relief sought in the contempt application and the pending review application is entirely

different and there is no basis to suggest that the contempt application is an "*interlocutory application*" in the review application.

[20] In an attempt to forge a link between the contempt application and the review application, the Applicants argued that the aim of the contempt application was to enforce delivery of records that were required to proceed with the prosecution of the main review application.

[21] Had the contempt application genuinely been an interlocutory application to the main review proceedings, it would have been brought under the same case number as the review application, namely case no. 36596/2016, but it was not.

[22] Insofar as it was stated in paragraph 2.1 of the application for leave to appeal that the Court found that the 2022 cost order (which refers to a cost order granted on 22 August 2022 in the review application) is separate from the judicial review application, this is incorrect and does not reflect what is stated in paragraph [50] of the judgment. It was stated in paragraph [19] of the judgment that the 2022 cost order was the first valid taxation order in respect of the main review application. The 2022 cost order was not the basis for the granting of the writ of execution in issue and is therefore entirely irrelevant to the matter.

[23] The cost order in respect of which the writ of execution was issued was granted under case no. 39077/2016 and has not been challenged or overturned. The opposed taxation was finalised on 14 August 2018 and has not been the subject of any review. There is, in my view, no basis to deprive the First

Respondent of its right to recover costs which have been awarded in its favour and which have been properly taxed. There was no "*premature*" execution of legal costs by the First Respondent as contended by the Applicants.

[24] The cost order which formed the subject matter of the application before this court is not "*directly linked to the ongoing main review application*" as contended by the Applicants.

[25] Insofar as the Applicants contend that the execution of the cost order and mooted request for security has denied them of their right to access Courts in terms of section 34 of the Constitution, this is evidently not the case. Since judgment was handed down, the Applicants have continued to litigate unabated. The Applicants brought this application for leave to appeal, the urgent application before Janse Van Nieuwenhuizen J and the Rule 30 application. There is clearly nothing preventing the Applicants from continuing with litigation, including pursuing the relief sought in the pending review application should they wish to do so.

[26] Insofar as the Applicants contends that the Court erred by not considering the First Respondent's motive to obtain security for costs in reaching its decision, there is no evidence of any ulterior motive or malice on the part of the First Respondent or that it abused the Court process to frustrate the Applicants from pursuing the relief sought in the review application.

[27] In the papers filed in the stay application, there was no evidence of irreparable harm or prejudice to the Applicants if the stay was not granted. The

mere fact that the parties have been embroiled in litigation for 7 years in itself does not warrant such a conclusion.

[28] The Applicants have not demonstrated in the papers filed by them in the stay application that the execution in respect of the R220 216.98 under case no. 39077/2016 will prevent them from being able to prosecute the review application and have, in fact, failed to disclose any financial information or details of their assets and/or values. Although reference is made in paragraph 5.5 of the application for leave to appeal to "*some*" of the Applicants being unemployed and their inability to afford legal services, there is no detail provided in this regard or any evidence demonstrating their financial position.

[29] The mere fact that the litigation has been costly does not warrant a finding of prejudice and irreparable harm.

[30] The Applicants failed to demonstrate that real and substantial prejudice requires a stay or that an injustice would result if a stay was not granted. The Applicants further failed to deal with the requirements for interim interdictory relief.

[31] Insofar as it was contended by the Applicants that there would be no harm to the First Respondent if the stay in execution was not granted as it would merely be the timing of the execution that would be delayed, this is not so. The First Respondent is entitled to execute and recover the costs incurred by it and should not be deprived of this right merely because it is an organ of state.

[32] Insofar as the cost order is concerned, costs of the stay application were awarded in favour of the First Respondent based on the specific facts and circumstances of this case.

[33] Insofar as the Applicants rely on the *Biowatch* principle, the First Respondent submitted that the litigation is not "*constitutional litigation*" as referred to in *Biowatch Trust v Registrar Generic Resources and Others*[4] and therefore the principle does not apply and that, even if the *Biowatch* principle did apply, there is no blanket rule that costs should be awarded against an organ of state.

[34] Irrespective of whether this litigation could be characterised as "*constitutional litigation*" as envisaged in *Biowatch*, there is no general prohibition against granting costs in favour of state organs. This Court exercised its judicial discretion in awarding costs against the First Respondent for the reasons explained in paragraphs [57] to [59] of the judgment.

[35] Insofar as it was suggested that there is an ulterior motive on the part of the First Respondent in executing a cost order years after it was obtained, there is no basis to suggest this.

[36] Insofar as reference is made to a letter of 1 July 2022 where the First Respondent indicated that it intended to approach the court to request security for costs, this is not evidence of an ulterior motive.

---

[4] 2009 (6) SA 232 (CC) at para [43].

[37] In the circumstances, I am of the view that there is no reasonable prospect of another Court reaching a different conclusion in the stay application and no other compelling reason why leave to appeal should be granted.

[38] Insofar as costs are concerned, I see no reason why costs should not follow the result.

ORDER

In the circumstances, I make the following order:

1. The application for leave to appeal is dismissed;

2. The Applicants are ordered to pay the First Respondent's costs, jointly and severally, the one paying the others to be absolved.

____

LG KILMARTIN
ACTING JUDGE OF THE HIGH COURT
PRETORIA

Dates of hearing:	02 November 2023
Date of judgment:	26 January 2024
For the Applicants:	Adv V Makofane
Instructed by:	Serepong Attorneys
For the First Respondent:	Adv MH Mhambi
Instructed by:	The State Attorney, Pretoria