



<i>Reportable:</i>	<b>Yes/No</b>
<i>Circulate to Judges:</i>	<b>Yes/No</b>
<i>Circulate to Magistrates:</i>	<b>Yes/No</b>

**IN THE HIGH COURT OF SOUTH AFRICA  
(NORTHERN CAPE DIVISION, KIMBERLEY)**

**CASE NO.: 61/2021**  
**Date heard: 29-11-2023**  
**Date delivered: 23-02-2024**

In the matter between:

**DEPARTMENT OF AGRICULTURE, LAND REFORM  
AND RURAL DEVELOPMENT,  
NORTHERN CAPE PROVINCE, KIMBERLEY**

**Applicant**

and

**MASTER OF THE HIGH COURT, KIMBERLEY**

**Respondent**

**CORAM: PHATSHOANE DJP, WILLIAMS J and NXUMALO J:**

**JUDGMENT ON LEAVE TO APPEAL**

**PHATSHOANE DJP:**

[1] This is an application for leave to appeal against the whole of the majority judgment and order dated 18 August 2023 in which the application for condonation of the late filing of a s 23 of the Trust Property Control Act 57 of 1988 (the Act)<sup>1</sup> review was granted to the Department of Agriculture, Land

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<sup>1</sup> Section 23 provides that: 'Any person who feels aggrieved by an authorization, appointment or removal of a trustee by the Master or by any decision, order or direction of the Master made or issued under this Act, may apply to the court for relief, and the court shall have the power to consider the merits of any such matter, to take evidence and to make any order it deems fit.'

Reform and Rural Development, Northern Cape (the department), the applicant, and its review dismissed with costs.

- [2] The factual background leading to the review before the Full Court, as the Court of first instance, is set out in some detail in its judgment. Section 16 of the Act is at the heart of the dispute between the parties. It provides:

**“16 Master may call upon trustee to account**

(1) A trustee shall, at the written request of the Master, account to the Master to his satisfaction and in accordance with the Master's requirements for his administration and disposal of trust property and shall, at the written request of the Master, deliver to the Master any book, record, account or document relating to his administration or disposal of the trust property and shall to the best of his ability answer honestly and truthfully any question put to him by the Master in connection with the administration and disposal of the trust property.

(2) The Master may, if he deems it necessary, cause an investigation to be carried out by some fit and proper person appointed by him into the trustee's administration and disposal of trust property.

(3) The Master shall make such order as he deems fit in connection with the costs of an investigation referred to in subsection (2).”

- [3] Before the Full Court the department had sought orders setting aside the decision of the respondent, the Master of the High Court (the Master), in which he determined as follows:

“After applying my mind and in light of the above, I make the cost order in terms of Section 16(3) of the Trust Property Control Act No 57 of 1988, as amended that the Directorate of the Department of Agriculture, Land Reform and Rural Development (the Directorate: Farmer Settlement & Rural Development) to which Mr Jomo Bonokwane was attached to in 2017, dealing with the Equity Schemes, is liable for the cost of the investigation in terms of Section 16(2) (surpa) which was conducted by Mr Mpho Sebashe (Mr Sebashe) in the amount of R3 726 000,00.”

[4] The department's grounds of appeal are multifarious. However, in broad strokes, it was contended for the department that the Master did not exercise his discretion properly in awarding costs against it. This was so because, as the founder of the trust, the department did not instruct the Master to commission an investigation in terms of s 16 of the Act at the meeting of 30 June 2017 and therefore the department ought not to have been mulcted in costs of the investigation. It was argued that the Majority Court erred in finding that Malope Attorneys' electronic mail of 06 December 2016 did not trigger the Master's commencement of the s 16 investigation. The Master, so it was argued, had at all relevant times up to and including the date of the appointment of Mr Sebashe, as an investigator, associated himself with the instruction from Malope Attorneys and acted in terms of the said attorneys' mandate.

[5] The department further contended that the Master did not base his decision to award costs on what is set out in para 30 of his report of 30 June 2020, as found by the Majority Court. At para 30 of the Master's report he reasoned:

"I am further of the opinion that the Department of Agriculture, Land Reform and Rural Development failed to exercise [due] diligence and oversight management accountability over the spending of government funding on these farms or equity schemes. This infringement of the rights of the farm workers and the mismanagement of government funding, (being part of the [discourse] of the country), would not have occurred, if there was accountability. They failed to take reasonable care."

[6] The Master's decision, the department argued, was made prior to Mr Sebashe's appointment. It did not matter that the department was copied in contemporaneous written exchanges between the Master and Mr Sebashe. The Master awarded costs against the department solely because Mr Sebashe had accepted the invitation to conduct the investigation on condition that the department paid for his services. The duty of care, it was

argued, rested upon the trustees in terms of s 9 of the Act and so the costs of the investigation ought to have been borne by the trustees concerned.

[7] Lastly, the department contended that the Majority Court erred in finding that s 217 of the Constitution<sup>2</sup> read with the Public Finance Management Act 1 of 1999 (PFMA) did not find application in the appointments made by the Master in terms of s 16 of the Act. It was argued that the appointment of Mr Sebashe was in contravention of s 217 of the Constitution.

[8] In arriving at the decision she came to, my colleague Williams J, who penned the majority judgment, had regard to the second meeting of the equity scheme task team held on 30 June 2017 called at the behest of the department. The minutes thereof were produced under the Directorate: Farmer Settlement & Rural Development of the department. In this set of minutes the Master was specifically tasked to: “Look at the possible transgressions of the Act and to institute remedial action on all the trusts that did not comply with the Act and its regulations.” The “Action Plan” emanating from this meeting was to the effect that Mr Sebashe and the Master would facilitate the process and give feedback at the next meeting. Williams J also had regard to the minutes of the meeting of the department’s equity scheme task team held on 14 September 2017 where it was noted that the Master had instituted the s 16 enquiry for Badiramongo Trust and that *“there will be a need to develop an approach to this matter, because only the Badiramongo was issued with a section 16 investigation.”*

[9] From the foregoing exposition there is overwhelming evidence that the department commissioned the investigation. Section 16 (2) of the Act, as found by the Majority Court, does not provide that a written request or authorization be issued prior to the launching of an investigation by the Master. A discretion to call for such an investigation vests solely in the

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<sup>2</sup> The Constitution of the Republic of South Africa, 1996.

Master.<sup>3</sup> The department was copied in all relevant correspondence between the Master and Mr Sebashe. This notwithstanding, it did not respond nor raise any objection. In consonance with the department's request as contained in item 4 of the minutes of 30 June 2017 and its action plan, the Master appointed Mr Sebashe as the investigator in terms of s 16 of the Act.

[10] As to the Master's award of costs of the investigation against the department, the Majority found:

“. . .The findings of the respondent [Master] in his cost report abound with instances of maladministration and questionable compliance with the Public Finance Management Act, 1 of 1999 (the PFMA) on the part of the Department. The respondent found *inter alia* at paragraph 30 of his report that:

'I am further of the opinion that the Department of Agriculture, failed to exercise due diligence and oversight management accountability over the spending of government funding on these farms or in Equity Schemes. This infringement of the rights of farm workers and the mismanagement of government funding . . . would not have occurred if there was accountability. They failed to take reasonable care.'

It can hardly be said in these circumstances that the respondent did not exercise his discretion properly in finding that the costs of the investigation be borne by the Department and only made the costs order that he did because the department had requested the investigation.”

[11] The department was charged with the post-settlement support function of the equity schemes. The Master determined that it failed in its obligation. No persuasive argument had been advanced for the department which demonstrated that the Master had not exercised his discretion honestly or acted *mala fide* or that his decision to award costs against the department had been motivated by improper considerations.

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<sup>3</sup> *Ras NNo v Van der Meulen* 2011(4) SA 17 (SCA) at paragraph 10

[12] It is not necessary to traverse at any great length whether the Master ought to have applied the provisions of the PFMA in the appointment of the investigator. In my view, to find that the Master had acted in contravention of s 217(1) of the Constitution would be a bridge too far for reasons articulated in the considered majority decision. In any event, the principle articulated in *Yannakou v Apollo Club*<sup>4</sup> puts paid to any suggestion that the department was entitled to raise the argument that s 217 and the PFMA applied. It was there said:

“(I)f he relies on a particular section of a statute, he must either state the number of the section and the statute he is relying on or formulate his defence sufficiently clearly so as to indicate that he is relying on it (cf. *Ketteringham v City of Cape Town*, 1934 AD 80 at p. 90). And if his defence is illegality, which does not appear *ex facie* the transaction sued on but arises from its surrounding circumstances, such illegality and the circumstances founding it must be pleaded. It is true that it is the duty of the court to take the point of illegality *mero motu*, even if the defendant does not plead or raise it; but it can and will only do so if the illegality appears *ex facie* the transaction or from the evidence before it, and, in the latter event, if it is also satisfied that all the necessary and relevant facts are before it.”

[13] Save to state that the department did not authorise the Master to appoint the investigator there was no suggestion or any basis established in the founding papers that he acted illegally. Such a proposition would have been absurd as the Master acted within the confines of s 16 of the Act.

[14] In terms of s 17(1)(a)(i) of the Superior Courts Act 10 of 2013, leave to appeal may only be given where the judge or judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration. In *S v Smith*<sup>5</sup> it was said:

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<sup>4</sup> 1974 (1) SA 614 (A) at 623F-H

<sup>5</sup> 2012 (1) SACR 567 (SCA) para 7

“What the test of reasonable prospects of success postulates is 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 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 categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.”

[15] In my view, the grounds of appeal are unsustainable on the facts and the law. It follows that there are no reasonable prospects of a successful appeal. It is trite that even where the court is unpersuaded of the prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal. A compelling reason includes an important question of law or a discrete issue of public importance that will have an effect on future disputes. But still, the merits remain vitally important and are often decisive.<sup>6</sup>

[16] To my mind, there is no compelling reason why the appeal should be heard. The application did not raise an important question of law or a matter of public importance that will have an effect on future disputes which merits the attention of the SCA. The upshot of this is that the application stands to be dismissed. In the result, the following order is made:

## **ORDER**

1. The application for leave to appeal is dismissed with costs.

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<sup>6</sup> *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* 2020 (5) SA 35 (SCA ) para 2.

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V M PHATSHOANE  
DEPUTY JUDGE PRESIDENT

I concur

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CC WILLIAMS  
JUDGE

I concur

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APS NXUMALO  
JUDGE

For Applicant: Adv Y Abass  
Instructed by: Office of the State Attorney

For Respondent: Adv W Coetzee SC  
Instructed by: Haarhoffs Inc.