

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO



**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION – MAHIKENG**

CASE NO: M133/2021

In the matter between:

BAKANG MOLWANTWA

Applicant

And

NAOMI JANSE VAN VUUREN

1ST Respondent

LISA CATHERINE BECKER

2ND Respondent

DEPARTMENT OF JUSTICE AND

CONSTITUTIONAL DEVELOPMENT

3RD Respondent

THE MAGISTRATE COMMISSION

4TH Respondent

Heard: **06 OCTOBER 2023**

Delivered: The date for the hand-down is deemed to be on **31
OCTOBER 2023**

ORDER

The following order is made:

1. The application for leave to appeal is dismissed.
2. The applicant is ordered to pay the costs.

LEAVE TO APPEAL JUDGMENT

DJAJE AJP

[1] This is an application for leave to appeal against my order of **29 April 2021** removing the matter from the roll. Subsequent to that, this matter was enrolled on the unopposed roll of **13 May 2021** and judgment was reserved. The applicant sought the following prayers in the main application:

- “1. An order directing First and Second Respondents to deliver the trial records and the reasons in respect of the conviction and sentence against the Applicant.*
- 2. In the event of the First and Second Respondents not being in possession of the required trial records, the Respondents must provide an explanation on affidavit indicating the whereabouts of the required trial records and the reasons for the conviction and sentence against the Applicant or the persons or entities who are in possession of the trial records and the reasons for the conviction and sentence of the Applicant.*
- 3. An order setting aside the conviction and sentence against the Applicant in the event that the First and Second Respondents failing to provide explanations regarding the trial records and the reasons for the conviction and sentence against the Applicant.*

4. *Costs of this application against the Third Respondent as employer of the First and Second Respondents on attorney and own client scale.*
5. *Granting Applicant further and/or alternative relief.”*

[2] On **2 June 2021** judgment was handed down with the following order:

- “(i) The DCRS Clerk (stenographer) responsible for the recording of the proceedings in the criminal trial in respect of the case number C136/2012 held at Bafokeng Regional.*
- (ii) The DCRS Clerk (sternographer) responsible for the recording of the proceedings in the criminal trial in respect of case number C136/2012 held at Bafokeng Regional Court, is ordered to depose to an affidavit about the missing parts of the transcription and steps taken to secure the transcript, including escalation to the IT Department responsible for retrieval of such transcriptions within ten (10) days of this order.*
- (iii) If the missing parts of the transcript cannot be retrieved after escalation to the IT Department responsible for retrieval of such transcriptions, within a further ten (10) days of order (i); the first respondent must be approached to arrange for a meeting of all the relevant parties involved in the proceedings to attend to the reconstruction of the missing parts of the record with their respective notes, including any reasons the first respondent may wish to add to her written reason for judgment and sentence, which process must be completed no later than **15 July 2021**.*
- (iv) The trial record, as reconstructed where necessary, must thereafter be transmitted by the clerk of the court to the Judge President of this Division, on petition.*
- (v) There shall be no order as to costs.”*

- [3] The court on **13 May 2021** fully dealt with the application having heard argument on behalf of the applicant. This leave to appeal is not brought against the order of **13 May 2021** but against the order of **29 April 2021** which was an interim order removing the matter from the roll.
- [4] Leave to appeal is sought to the Full Court of this Division alternatively to the Supreme Court of Appeal and that the appeal would have reasonable prospect of success. In the main the argument by the applicant was that the application on **29 April 2021** was unopposed and as such an order as sought in the notice of motion should have been granted. It is strange that the applicant does not refer to the proceedings of **13 May 2021** and that judgment was granted in the main application.
- [5] On **29 April 2021** after a long interaction with counsel on the issues involved, the matter was removed from the roll as counsel displayed lack of patience and understanding why there was a need to give a basis for the relief sought as there was no opposition. The matter was also heard on the virtual platform and there were connectivity issues. In avoiding to close the door for the applicant the matter was simply removed from the roll to enable it to be set down in open court, which was done.
- [6] In considering this application one has to bear in mind the test for leave to appeal and whether there are prospects of success.

[7] The test to be applied in an application for leave to appeal is set out in section 17 (1) (a) of the Superior Courts Act 10 of 2013 which provides that:

“(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;”

[8] In the matter of **The Mont Chevaux Trust (IT2012dcc/28) v Tina Goosen & 18 Others (LCC14R/2014) [2014] ZALCC 20** it was held that:

*“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”.*

[9] The SCA in **MEC for Health, Eastern Cape v Mkhitha (1221/15) [2016] ZASCA 176** (25 November 2016) stated that:

“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.

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.”

- [10] In dealing with the appealability of orders the following was said in **Pretoria Garrison Institutes v Danish Variety Products (Pty) Limited 1948 (1) SA 839 (A)**:

“The general principle of the Roman-Dutch law is that an interlocutory order is an order made during the progress of a suit. If the interlocutory order disposed completely of the claim it was regarded as an order equivalent to a definitive sentence, and could be appealed from. If the order did not completely debar the plaintiff from continuing his suit, then as a rule it was regarded as an interlocutory order not having the force of a final judgment, and could not be appealed from without leave of the higher Court.....”

- [11] The Constitutional Court in **International Trade Administration Commission v SCAW South Africa (Pty) Ltd 2012(4) SA 618 (CC)** warned against wasteful use of judicial resources and legal costs by allowing appeals against interim orders that have no final effect.

- [12] The main application was not entertained by myself on **29 April 2021** and as such the order granted did not have a final effect. Instead, the applicant was able to enrol the main application before court on **13 May 2021** on which date it was argued and disposed of. This is in line with what was said in **Pretoria Garrison** that the order granted on **29 April 2021** did not debar the applicant from continuing with the main application, which he did eventually. This

leave to appeal was brought as a wasteful exercise of judicial resources and legal costs. The judgment and order of **2 June 2021** rendered the order of **29 April 2021** moot and as such there is no basis why it was brought and stands to be dismissed.

[13] There was opposition by the state attorney The office of the state attorney acting on behalf of..... filed a notice to oppose and heads of argument which were late with no application for condonation. In fact, these were only brought before court during the hearing. As counsel for the applicant was desirous to have the matter finalised, there was no issue taken with the late filing of the heads by the respondent. The matter proceeded with submissions made on behalf of the applicant and the respondent. It is trite that costs follow the result. When the application served before me on **29 April 2021** it was unopposed however, the applicant served the leave to appeal on the office of the State Attorney which resulted in the filing of heads albeit late. Counsel from the state attorney appeared and argued in opposition of the leave to appeal that the leave to appeal was an abuse of court process. Further that the order appealed against is an interim order and not appealable.

[14] Counsel for the respondent, argued that a *de bonis propriis* cost order be made against the legal representative of the applicant. The basis for that being that the process of leave to appeal is not within the knowledge of the applicant but his legal representative. Further that the applicant could not be punished for the conduct of the legal representative abusing court processes. There is merit in the submission, however, the respondent failed to give such notice in its papers to enable the applicant's legal representative an

opportunity to respond thereto. As such the submission was withdrawn. The issue remains whether the applicant should still be ordered to pay costs of the leave to appeal. This application has no merit and there is no reason why it was brought. The order sought to be appealed against is not appealable. The application stands to be dismissed and the applicant should bear the costs.

ORDER

[15] Consequently, the following order is made:

1. The application for leave to appeal is dismissed.
2. The applicant is ordered to pay the costs.

**J T DJAJE
ACTING JUDGE PRESIDENT
NORTH WEST HIGH COURT**

APPEARANCES

DATE OF HEARING : 06 OCTOBER 2023
DATE OF JUDGMENT : 31 OCTOBER 2023

COUNSEL FOR THE APPLICANT : ADV T MOKWENA
COUNSEL FOR RESPONDENT : ADV SEREMANE