

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 NUMBER: M184/2022

In the matter between:-

MAGALIES WATER

Applicant

and

THABAZIMBI LOCAL MUNICIPALITY

Respondent

ORDER

The following order is granted:

- i) The application for leave to appeal is dismissed.
- ii) The applicant is to pay the costs of the application.

JUDGMENT ON LEAVE TO APPEAL

FMM REID J

[1] The applicant seeks leave to appeal against the judgment granted on 13 June 2023 in which this court dismissed the application for a mandamus against the respondent (Thabazimbi Local Municipality; “the Municipality”) for payment of “*all arrear debts due and payable*” in terms of a Bulk Water Supply Agreement and Debt Repayment Agreement entered into between the parties, and alternative relief, with costs.

[2] The application for leave to appeal is brought on the following grounds of appeal:

2.1. That the court erred in law by finding that the principal relief sought would have no practical effect, alternatively would not be capable of enforcement due to vagueness.

2.2. That the court erred in fact in finding that the applicant

failed to exhaust its remedies as provided for resolution of the dispute as prescribed in section 40(1) of the **Intergovernmental Relations Framework Act 13** of 2005.

- 2.3. That the court erred in fact and law in finding that the relief sought would have been inimical to the public interest.

Legal Position: Leave to appeal

- [3] 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;”*

(own emphasis)

- [4] This application is on the ground that the appeal has a

reasonable prospect of success and that there are compelling reasons to grant leave to appeal as the relief sought would have been inimical to the public interest.

- [5] In **MEC for Health, Eastern Cape v Mkhita** 2016 JDR 2214 (SCA) the Supreme Court of Appeal emphasised the application for the test for leave to appeal and found as follows in paragraphs [16] to [18]:

*[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.***

*[18] In this case the requirements of 17(1)(a) of the Superior Courts Act were simply not met. The uncontradicted evidence is that the medical staff at BOH were negligent and caused the plaintiff to suffer harm. The special plea was plainly unmeritorious. **Leave to appeal should have been refused. In the result, scarce public resources were expended: a hopeless appeal was prosecuted at the expense of the Eastern Cape Department of Health and ultimately, taxpayers; and valuable court time and resources were***

taken up in the hearing of the appeal. Moreover, the issue for decision did not warrant the costs of two counsel.”
(own emphasis)

[6] The above illustrates that the legislation and the Supreme Court of Appeal requires more than a mere possibility than that another Judge might come to a different conclusion. The test is whether another Judge would come to a different conclusion.

[7] The bar has been raised and a judge considering leave to appeal has a duty to ensure that the appeal has a strong prospect of success. Due to the ever increasing workload in the judiciary, the judge considering the application for leave to appeal has a duty to ensure that unmeritous appeals do not become part of the workload of full courts or the Supreme Court of Appeal. Appeals without merits should not be granted leave to appeal.

Analysis

[8] The application essentially relates to two (2) governmental organisations which have a dispute about the failure to be remunerated for water and services delivered.

[9] In the judgment, I found that the main relief sought is not enforceable as it is vague to such an extent that it cannot be executed. The notice of motion sought an order to direct the respondent to pay *“all amounts... when such amounts are due and payable...”* as well as *“arrear debts”*. The specific amounts were not claimed, as it is disputed between the parties.

[10] The Intergovernmental Relations Framework Act specifically provides a medium in terms of which governmental institutions can resolve disputes relating to payments between the governmental institutions. I found that the parties had a duty to refer the dispute for resolution in terms of the Intergovernmental Relations Framework Act.

[11] I maintain the view that the relief, as sought in the notice of motion, is not capable of enforcement due to vagueness. I also maintain the view that the dispute is better suited to be dealt with in terms of the Intergovernmental Relations Framework Act, rather than in court proceedings.

[12] On the basis of the above, I hold the view that there are no prospects of success on appeal and that the application for leave to appeal should be dismissed.

Costs

[13] The normal rule is that the successful party is entitled to its costs. In this instance, both parties are established by statute.

[14] I find no reason to deviate from the normal rule and the successful party is entitled to its costs.

Order:

[15] In the premises I make the following order:

iii) The application for leave to appeal is dismissed.

iv) The applicant is to pay the costs of the application.

**FMM REID
JUDGE OF THE HIGH COURT
NORTH WEST DIVISION MAHIKENG**

DATE OF HEARING: 13 OCTOBER 2023

DATE OF JUDGMENT: 16 NOVEMBER 2023

APPEARANCES:

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