



Reportable:	YES / <u>NO</u>
Circulate to Judges:	YES / <u>NO</u>
Circulate to Magistrates:	YES / <u>NO</u>
Circulate to Regional Magistrates:	YES / <u>NO</u>

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

CASE NO: M373/2021

In the matter between:

**THE KGETLENGRIVIER CONCERNED
CITIZENS**

Applicant

And

**KGETLENGRIVIER LOCAL MUNICIPALITY
MAGALIES WATER BOARD**

1ST Respondent

2ND Respondent

Heard: 17 MAY 2024

Delivered: This judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses. The date for the hand-down is deemed to be **06 JUNE 2024**

ORDER

I make the following order:

1. Application for leave to appeal is dismissed
2. The applicant is ordered to pay costs on scale B.

LEAVE TO APPEAL JUDGMENT

DJAJE DJP

[1] This is an application leave to appeal against the judgment handed down on **26 January 2023** in which the following order was made:

- “1. Application is dismissed,*
- 2. The applicant is ordered to pay costs.”*

[2] The applicant raised several grounds for leave to appeal as follows:

- “3. The Court, with respect, should have found, and another Court may reasonably find, that:*
- 3.1. The respective respondents failed to disclose their complete records of decision.*
 - 3.2. Mr Mogale was not authorised to represent the first respondent on 12 January 2020, alternatively, the respective respondents did not address the material issue.*
 - 3.3. Absent the provision of a council resolution or minute of council where the accounting officer reported the reasons for any deviation in policy and absent a note to the annual financial statements, the first respondent failed to follow its supply chain*

management policy, leaves the decision vulnerable to a review thereof.

- 3.4. *Absent a due and proper explanation, the re-appointment of the second respondent on 12 January 2020 with the Municipal Manager stating on oath on 5 January 2020 that the second respondent caused or contributed to the water and sewage crisis, constitutes an irrational and unreasonable decision.*
- 3.5. *The second respondent was appointed on 12 January 2021 minutes after the settlement was made an order of Court, (and not on 18 January 2021 as erroneously held by the Court) which brings into question whether the decision to deviate was considered at all and considered and applied through a council resolution.*
- 3.6. *Absent evidence that the agreement between the respondents is funded, the court cannot find that the decision to appoint the second respondent as implementing agent was rational.*
- 3.7. *The ostensible decision of 12 January 2020 to appoint the second respondent soon after the decision to cancel the services of the second respondent, opens such latter decision to a review having regard to Kirland.*
- 3.8. *The Municipality admitted in court that its workers are not duly qualified to render the water and sewage services and both respondents failed to tender evidence that duly qualified employees are employed under the contract between the respondents. The failure or refusal to dispense the information on the employees' competence leaves the decision open to review inter alia as relevant considerations were not considered, the decision was taken arbitrarily or capriciously and/or such decision was so unreasonable that no reasonable person could have made the decision in the circumstances.*

- 3.9. *The refusal by the respondents to render complete records of decision, inclusive of the agreement between the parties and proof that such contract was funded, and the relevant council resolution has put the applicant to unnecessary trouble and expense which the respondents ought to bear, in an instance where the decision constitutes administrative action affecting the public.*
- 3.10. *The undisputed evidence confirms that raw sewage continues to flow into the Elands and Koster Rivers and that frequent lapses in the provision of potable water are experienced during the period that the second respondent acts as implementing agent for the first respondent casting doubt on the rationality of the decision, and shows that the decision may have been taken in bad faith, for ulterior purposes or motives and because relevant considerations were ignored.*
- 3.11. *The review succeeds with costs.*

And in respect of the ancillary relief that:

- *There is no proof of duly trained and qualified employees;*
- *Raw sewage spills into the Koster and Elands rivers since 18 March 2021 and again since the orders by Mahlangu AJ;*
- *Insufficient potable water is delivered in Koster and Swartruggens since 18 March 2021 and again since the orders by Mahlangu AJ;*
- *And accordingly, that the applicant is entitled to the relief per prayer 3 of the Notice of Motion; and or that the above continuous incidences support the view that the decision to appoint the second respondent as implementing agent was not rational or reasonable.*

3.12. *Alternatively and to the extent that the court found in the Applicant's favour on the review, that it was not necessary to make separate declaratory findings.*

3.13. *Further in the alternative to the above in the event that the court dismissed the application, that the respondents be ordered to pay the costs of the application."*

[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;"

[4] The Supreme Court of Appeal in **MEC for Health, Eastern Cape v Mkhita 2016 JDR 2214 (SCA)** on the test for leave to appeal held that:

"[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] The applicant argued that the agreement to appoint the second respondent was incomplete as the section referring to the services is not completed. As a result, it is not possible to establish whether the services rendered were cost effective. Further that the absence of an agreement is proof that no proper decision was taken in the appointment of the second respondent.

- [6] The applicant argued that the second respondent was previously appointed to manage the water works by the first respondent and the contract was terminated due to the second respondent's failure to perform. However, the second respondent was again appointed in **January 2021** as the implementing agent when it failed to perform. The applicant argued again on the issue of unqualified personnel employed by the second respondent.

- [7] In opposing the application the second respondent argued that the applicant is raising issues that were dealt with in the main application and were dealt with fully in the judgment. On the issue of the agreement appointing the second respondent, it was argued that such disclosure would serve no purpose as the second respondent was appointed in terms of section 110(2) of the Local

Government Municipal Finance Management Act 56 of 2003 (“LGMFMA”).

- [8] The applicant in the leave to appeal raised arguments which were argued in the main application and were fully dealt with in the judgement. The LGMFMA deals with procurement processes for municipalities and provides for deviation from the supply chain processes. The Act requires that the policy followed by municipalities should be fair, equitable, transparent, competitive and cost effective. In keeping with the procurement processes section 110(2) of the LGMFMA clearly provides that there can be deviation when the municipality seeks to acquire goods or services from an organ of state or a public entity or where the municipality seeks assistance in the provision of municipal services.
- [9] On the appointment of unqualified employees the applicant failed to establish in what respect the employees were unqualified. As such there is no prospect that another court would come to a different conclusion in the absence of facts relied on for such submission.
- [10] The applicant has not made out a case that another court would come to a different conclusion and the leave to appeal stands to be dismissed.

Costs

[11] I find no reason why costs should not follow the result.

Order

[12] Consequently, the following order is made:

1. Application for leave to appeal is dismissed
2. The applicant is ordered to pay costs on scale B.

J T DJAJE
DEPUTY JUDGE PRESIDENT
NORTH WEST HIGH COURT, MAHIKENG

APPEARANCES

DATE OF HEARING

: 17 MAY 2024

JUDGMENT RESERVED

: 17 MAY 2024

DATE OF JUDGMENT

: 06 JUNE 2024

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COUNSEL FOR THE DEFENDANT

: ADV K NONDWANGU