IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

CaseNumber

: 5795/2023

In the matter between:

MATJHABENG LOCAL MUNICIPALITY **FIRST APPLICANT**

ADV. RONALD NGOQO N.O. **SECOND APPLICANT**

DAVID KHALIPHA N.O.
THIRD APPLICANT

and

JOSEPH NDAYI N.O.
RESPONDENT
(PHF KINDERTRUST – IT 292/95)

CORAM: **BUYS, AJ**

DELIVERED ON: **22 MARCH 2024**

[1] This is the judgment in the application for leave to appeal by the applicants to the Full Court of the High Court of South Africa, Free State Division, Bloemfontein, alternatively to the Supreme Court of Appeal, against the whole judgment and order handed down by Mthimunye AJ on 10 November 2023. I will refer to the parties as they are referred to in the notice of application for leave to appeal referred to *infra*.

[2] Reasons for the judgment were handed down by Mthimunye AJ on 1 December 2023. The reasons followed a request by the applicants (the respondents in the application before Mthimunye AJ) for reasons in terms of rule 49(1)(c) of the Uniform Rules of Court ("the Rules") filed on 17 November 2023.

[3] The notice of application for leave to appeal was filed on behalf of the applicants on 12 December 2023.

[4] The legal representatives of the applicants and the respondent (the applicant in the application before Mthimunye AJ) were directed on 29 January 2024 to file written heads of argument on 2 and 9 February 2024 respectively. A further request was made to dispense with oral argument and to adjudicate the application for leave to appeal on the papers and heads of argument filed by the parties.

[5] The applicants filed their heads of argument timeously and consented to the application for leave to appeal to be adjudicated on the papers. The heads of argument on behalf of the respondent was filed out of time, and only after enquiries were made if the respondent intended to file heads of argument, and further, whether the respondent consented to the adjudication of the application for leave to appeal on the papers. The respondent filed heads of argument on 15 February 2024 and consented to the adjudication of this application on papers.

[6] The application for leave to appeal premised from an urgent application launched by the respondent against the applicants on 10 November 2023 in terms of which the following order was issued in favour of the respondent:

> "1 The application is heard as one of urgency in accordance with Rule 6(12), the requirements of the Rules of Court in respect of notice, service and time periods being dispensed with and Applicant's departure therefrom is condoned.
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> 2. The 1st Respondent, Matjhabeng Local Municipality, the 2nd Respondent, Advocate Ronald Ngoqo, and the 3rd Respondent, Thanduxolo David Kalipha, are in contempt of paragraph 1.1 of this Court's order dated 31st October 2023 under Case No 5795/2023.
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> 3. The 2nd and 3rd Respondents are to be imprisoned for a period of 30 days, suspended for 30 days on condition that they comply with para 1.1 of the order of Mhlambi J granted on 31 October 2023.
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> 5. (sic) The 1st and 2nd and 3rd Respondents shall bear the costs of this application jointly and severally, on the attorney and client scale."

[7] Paragraph 1.1 of Mhlambi J's order issued on 31 October 2023 reads as follows:

> "1.1 The Respondents are directed to restore the Applicant's utility services referred to as prepaid electricity at 100 Nobel Street, Saaiplaas, Virginia, 9460, within 2 hours of service of this order;"

[8] In his supporting affidavit in support of the application referred to *supra*, the respondent relies on the following allegations:

[8.1] He is a farmer trading as PHF Kindertrust and he is duly authorise to depose to the supporting affidavit as the applicant in the application. However, it should be mentioned, the respondent is cited (as the applicant) in the heading of the notice of motion and supporting affidavit as "JOSEPH NDAYI N.O. (PHF KINDERTRUST IT 292/95)").

[8.2] The respondent, as basis for the application, relies on the court order issued by Mhlambi J (by agreement) on 31 October 2023.

[8.3] In terms of the court order dated 31 October 2023, the applicants were ordered to restore the respondent in peaceful and undisturbed possession of his utility services referred to as prepaid electricity at 100 Nobel Street, Saaiplaas, Virginia within 2 hours of service of the court order and they were further directed to return the respondent's property seized by the employees of the first applicant on 24 October 2023 as per the inventory attached to the application as annexure JN3.

[8.4] The court order issued by Mhlambi J *supra*, including an invoice for wasted costs were served electronically on the legal representatives of the applicants before 15h00 on 31 October 2023.

[8.5] The applicants refused to do what they undertook to do as per the court order issued by Mhlambi J, and have not complied with paragraphs 1.1, 1.2 and 2 of the said court order.

[8.6] In an electronic mail from the applicants' attorney of record, dated 1 November 2023, the applicants "changed tack" and indicated that "a statement" must be subjected to taxation and requested an "itemized bill of cost". Nothing was mentioned in the said electronic mail about complying with the court order issued by Mhlambi J. It is my understanding that reference to "a statement" refers to the invoice for wasted costs referred to *supra*.

[8.7] According to the respondent, the non-compliance by the applicants of the court order by Mhlambi J is wilful and *mala fide*.

[8.8] The respondent sought an order directing the second and third applicants to take the necessary steps to implement the court order by Mhlambi J, and, according to him, he had no alternative other than to hold the said applicants' personally accountable for the first applicant's non-compliance of the said court order.

[8.9] It is further the respondent's case that the application is urgent, based thereon that an application for *mandament van spolie* in the main application is by its very nature urgent. The respondent relies furthermore on the first applicant's constitutionally and statutory duty towards the respondent and his family, especially his minor children being at school and them having health conditions that require the use of a nebuliser machine. Without utility services the children are at risk of complications from these health conditions. The lack of electricity caused the respondent and his family not to cook or bath and his children are unable to study (at the time, the exams were nearing). The

respondent was furthermore unaware where his properties were kept and the condition thereof.

[8.10] According to the respondent, he would be denied substantial redress if the application was to be heard in due course, and non-compliance by the applicants with the court order by Mhlambi J would continue unimpeded. The respondent further contended that contempt proceedings are inherently urgent, as it is intolerable to the rule of law in a Constitutional dispensation that court orders can be treated as optional.

[9] The applicants opposed the application and in support of their opposition, relied on the following:

[9.1] A point *in limine* was raised challenging the respondent's *locus standi*. The applicants' denies the respondent's authority to act on behalf of the PHF Kindertrust. The respondent does not mention that he is the only Trustee of PHF Kindertrust, and it is furthermore highly unlikely that he is the only Trustee. After a diligent search, no record could be found of PHF Kindertrust. It is evident from the citation of the applicant in the heading of the notice of motion and the supporting affidavit that the respondent intended to act in his capacity as representative of the PHF Kindertrust.

[9.2] The applicants never removed the utility services referred to as pre-paid electricity from the respondent's premises. The pre-paid services were installed at the respondent's premises. However, the pre-paid services were not activated due to the non-compliance by the applicant as referred to in the opposing affidavit in the main application. The respondent failed to pay the agreed R37 000.00 before receiving the pre-paid services and further failed to provided an electricity certificate of compliance and to meet the conditions relating to pre-paid. If the

respondent complied with the above, the applicants would have activated the respondent's electricity supply. The applicants were never directed to restore the electricity supply to the deponent of the supporting affidavit. The respondent lied to officials of the applicants when they installed the pre-paid meter, namely that the agreed amount of R37 000.00 was paid.

[9.3] No property, as listed in the inventory, were removed by the applicants.

[9.4] The respondent is only entitled to costs in terms of a cost order after taxation.

[9.5] The respondents did not fail to comply with the court order by Mhlambi J and is not in contempt of Court. According to the applicants, the first applicant bent backwards to comply with the court order by Mhlambi J, namely to override its computer system to grant the applicant access to purchase electricity. This was done despite that it is fraught with danger of a fire outbreak. The respondent, after having utilised the free electricity units in the installed electricity meter installed on the property referred to *supra*, has been making electricity coupon purchases since 1 November 2023.

[9.6] The respondent last paid for any services on 27 January 2021 and is in arrears for services rendered by the first applicant in the total amount of R138 178.43.

[10] The following reasons were given by Mthimunye AJ for the order granted on 10 November 2023:

[10.1] The applicants have failed to restore the respondent's utility services as directed in the court order by Mhlambi J on 31 October 2023. This conclusion premised from what has been established during argument

on 10 November 2023, namely that the applicants have only activated a switch to enable the respondent to purchase electricity units, but the respondent was unable to load the electricity units purchased for the power to come on. Attempts were made to resolve the issue, but for unknown reasons it has not been resolved.

[10.2] It has been directed that the second and third applicants be imprisoned should they fail to comply with the court order by Mhlambi J, because "Contempt by its very nature is punitive".

[10.3] The cost order on an attorney and client scale in favour of the respondent is reasoned along the lines of the court exercising its discretion guided by the principles where a litigant's conduct is so serious that it warrants a punitive scale and to punish a litigant where there has been conduct which is unreasonable and objectionable, demonstrating a total disregard of the court's process and its authority. Another objective considered to grant a cost order on a punitive scale is to ensure that the successful litigant is not out of pocket in respect of expenses caused to him or her by the losing party's approach to litigation.

[11] The applicants rely on the following grounds in their application for leave to appeal, namely, Mthimunye AJ erred:

[11.1] in allowing the application on the roll as an urgent application in circumstances where the main application was placed on the roll to be properly ventilated on 23 November 2023, namely two weeks later;

[11.2] in not ruling that the application be heard simultaneously with the main application on 23 November 2023;

[11.3] in finding that Joseph Ndayi had authority to act on behalf on behalf of the PHF Kindertrust;

[11.4] in not allowing the applicants to argue the *locus standi* point taken *in limine*;

[11.5] in not finding that the respondent did not have *locus standi* in the proceedings;

[11.6] in not finding that the PHF Kindertrust was not properly before court;

[11.7] in allowing evidence that was not confined in the affidavits;

[11.8] erred in ignoring the applicants' version when deciding on material dispute of facts;

[11.9] by not applying the principles when hearing opposed motions;

[11.10] by finding that the applicants acted wilful or *mala fide*;

[11.11] in finding that the applicants were in contempt of court;

[11.12] in granting a punitive cost order against the applicants.

[12] In terms of the provisions of *s* 16(1)(a)(i) of the Superior Courts Act[1] an appeal against any decision of a Division as a court of first instance lies, upon leave having been granted, if the court consisted of a single judge, either to the Supreme Court of Appeal *supra* or to the full court of that Division, depending on the direction issued in terms of s 17(6) the said Act.

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[1] 10 of 2013.

[13] The application for leave to appeal is made in terms of the provisions of s 17(1)(a)(i) of the Superior Courts Act in that the appeal would have reasonable prospects of success.

[14] In *S v Mabena and Another*[2] Nugent JA explained the manner in which a court should approach an application for leave to appeal:

> "It is the right of every litigant against whom an appealable order has been made to seek leave to appeal against the order. Such an application should not be approached as if it is an impertinent challenge to the Judge concerned to justify his or her decision. A court from which leave to appeal is sought is called upon merely to reflect dispassionately upon its decision, after hearing argument, and decide whether there is a reasonable prospect that a higher court may disagree."

[15] An applicant was previously required to merely show that there is a reasonable possibility that another court, differently constituted, would find differently to the court whose judgment leave to appeal is sought. S 17(1) of the Superior Courts Act provides now for a somewhat different situation, namely an applicant in an application for leave to appeal is required to convince the court that there is a reasonable prospect of success and not only merely a possibility of success.[3]

[16] The Supreme Court of Appeal held in *Ramakatsa and Others v African National Congress and Another*[4] as follows:

> "I am mindful of the decisions at high court level debating whether the use of the word 'would' as opposed to 'could' possibly means that the

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[2] 2007(1) SACR 482 (SCA) para 22.

[3] See *Mthethandaba v The State*, Case No. AR463/2007 (KZN) delivered on 21 January 2014 and reported at www.saflii.org/za/cases/ZAKZPHC/2014/4.rtf. See also *Van Heerden v Cronwright* 1985 (2) SA 342 (T); *Botes v Nedbank Ltd* 1983 (3) SA 27 (A) and *Normkow Administrators (Pty) Ltd v Fedsure Health Medical Scheme* 2005 (1) SA 80 (W).

[4] (724/2019) [2021] ZASCA 31 (31 March 2021).

> threshold for granting the appeal has been raised. If a reasonable prospect of success is established, leave to appeal should be granted. Similarly, if there are some other compelling reasons why the appeal should be heard, leave to appeal should be granted. The test of reasonable prospects of success postulates 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 other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist."[5]

[17] The application for leave to appeal is firstly based on the submission made on behalf of the applicants that Mthimunye AJ refused to hear the two points in limine raised by the applicants, namely urgency and *locus standi*.

[18] In support of the submission that the application was not urgent, the applicants rely on the submission made that the respondent not only set the application down for hearing 13 days before the main application was set down for adjudication, but also this application was set down with very short notice to file opposing affidavits. It is the applicants' contention that this application should have been heard simultaneously with the main application.

[19] The respondent's *locus standi* is challenged based thereon that the respondent is not a Trustee of the PHF Kindertrust. According to the applicants, this aspect was properly ventilated by the applicants in the main application and the respondent failed to address this issue. The applicants' further submitted that it is trite that Trustees ought to be cited in their capacities as Trustees, since a trust, in itself, cannot be a plaintiff, a defendant, an applicant or a respondent in legal proceedings.[6]

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[5] Para 10.

[6] The applicants referred to *Land and Agricultural Development Bank of South Africa v Parker* 2005 (2) SA 77 (SCA) and *Cuba N.O. and others v Harlequin Global (Pty) Ltd and others* [2016] 4 All SA 7 GJ.

[20] With reference of rule 6(1) of the Rules, it was submitted on behalf of the applicants that the respondent did not state the facts and information he relies on regarding his *locus standi*[7] and he did not make the appropriate allegations to establish *locus standi* in the supporting affidavit.[8]

[21] The application for leave to appeal is secondly based on the finding of facts by Mthimunye AJ which was not part of the evidence contained in the affidavits filed in the contempt of court application. Reference is specifically made to paragraph 3.1 where the submissions from the bar were accepted as evidence and the conclusions drawn that the applicants have failed to restore the respondent's utility services as directed in the court order by Mhlambi J.

[22] It has been submitted further on behalf of the applicants that Mthimunye AJ ignored the evidence presented in the opposing affidavit, namely that the first applicant "bent backwards to comply with the Court order by overriding its computer system to grant the applicant an access to the purchase of electricity. This is done despite that it is fraud with the danger of a fire outbreak." The respondent "after having utilised the free electricity units in the installed prepaid meter installed on his property have been making electricity coupon purchases since the 1st November 2023." These allegations have not been dealt with by the respondent, and Mthimunye AJ, regardless the applicants' allegations, accepted the respondent's "say-so allegations" that it "still did not have electricity". It is therefore the applicants' case that if the principles set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[9] have been applied, the application should have been dismissed.

[23] I am in agreement with the submissions made on behalf of the applicants referred to *supra*. I am therefore satisfied that the applicants have met the

[7]The applicants referred to *Kommmissaris van Binnelandse Inkomste v Van der Heever* 1999 (3) SA 1051 (SC).
[8]The applicants referred to *Scott v Hanekom* 1980 (3) SA 1182 (C).
[9]1984 (3) SA 523 (A).

threshold as set out in s 17(1)(a)(i) of the Superior Courts Act, namely that the appeal would have a reasonable prospect of success.

[24] Accordingly I make the following order:

1. Leave is granted to the first, second and third applicants to appeal to the Full Court of the High Court of South Africa, Free State Division, Bloemfontein against the whole judgment and order handed down by Mthimunye AJ on 10 November 2023.

2. Costs of the application for leave to appeal to be costs in the appeal.

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JJ BUYS, AJ

On behalf of the Applicants:	Adv. P. Du P. Greyling
	Kemi Akinbohun Attorneys
	Bloemfontein
On behalf of the Respondent:	Mr. C. Salley
	Salley’s Attorneys

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