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

IN THE HIGH COURT OF SOUTH AFRICA

(NORTHERN CAPE DIVISION, KIMBERLEY)

CASE NUMBER: 1078/2019
DATE HEARD: 28 November 2022
DATE DELIVERED: 5 March 2024

In the matter between:

WASTE RE (PTY) LTD (FORMERLY WASTE BENEFICIATION (PTY) LTD), REG.NO: 2014/234102/07) **FIRST APPLICANT**

KHOTHATSO CHRISTOPHER MOLOI **SECOND APPLICANT**

and

RECYCLING AND ECONOMIC DEVELOPMENT INITIATIVE OF SOUTH AFRICA NPC **RESPONDENT**

JUDGMENT

EILLERT AJ

INTRODUCTION

[1] The Applicants seek leave to appeal to the Full Bench of this Division against the

whole of the judgment by this Court on 30 September 2022, in terms whereof both the Application for Reconsideration of the Order of this Court of 17 May 2019, as well as the Application for Rescission of the Order of this Court of 8 May 2020, was dismissed, and the Applicants were ordered to pay the costs of the Respondent on the attorney and client scale.

[2] The Application for Leave to Appeal is opposed by the Respondent, who seeks its dismissal, with costs.

THE GROUNDS OF APPEAL

[3] In their Application for Leave to Appeal the Applicants have propounded what may be reduced to four grounds of appeal upon which they assert that this court have erred and which they submit bear reasonable prospects of success on appeal. The Applicants further assert in their application that there is some other compelling reason why leave to appeal must be decided in their favour, and that the proposed appeal would lead to a just and prompt resolution of the real issues between the parties.

[4] The grounds of appeal set out in the application for leave to appeal are: (a)that this Court erred in delaying the issue of judgment and thereby infringed the Applicants' right of access to the Court enshrined in Section 34 of the Constitution of the Republic of South Africa; (b) that this Court erred in not rescinding the Order of this Court of 8 May 2020 whilst the Court was aware that the Applicants were not willfully absent from Court on 8 May 2020; (c) that this Court erred in not rescinding the Order of this Court of 8 May 2020 whilst this Court was aware that, subsequent to the Applicants' Application for Leave to Appeal to the Supreme Court of Appeal

in March 2020, all orders thereafter was a nullity; and (d) that this Court committed an error of law by on the one hand holding that the Applicant should have approached this Court for a suspension of this Court's order of 6 December 2019, while on the other hand holding that this Court's order of 6 December 2019 was of an interlocutory nature and therefore not appealable.

[5] As can be seen from the grounds of appeal set out in paragraph 4 above, the grounds of appeal that the Applicants advanced in the Application for Leave to Appeal all relate to the Application for Rescission, and not to the Applicants' Application for Reconsideration. In argument the Applicants sought to introduce additional grounds of appeal relating to the Application for Reconsideration, with a view to argue that this Court erred for not having granted the Order sought in the Application for Reconsideration. The Respondents objected to the introduction of additional grounds of appeal not covered in the Application for Leave to Appeal.

[6] This Court recorded in the judgment that the Applicants contended at the hearing that the Application for Reconsideration had become academic and that the Respondents in turn submitted that the application had become moot. The concession by the Applicants led to this Court holding that it would not be in the interest of justice to adjudicate the interlocutory application. The concession is one of law, which was held in **Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Co Ltd** 2014(5) SA 138 (CC) to be capable of being withdrawn, if the withdrawal does not cause any prejudice to the other party. However, in the instant case, the Applicants do not seek to withdraw their concession made at the hearing and did not challenge the aspects of this Court's judgment which recorded their concession. The Applicants also at no stage sought an amendment of the Notice of Application for Leave to Appeal to introduce the

additional grounds of appeal in a procedurally correct manner. The Applicants are therefore bound to their concession at the hearing and are thereby prevented from advancing the additional grounds of appeal. To allow the additional grounds of appeal would in any event cause significant prejudice to the Respondent, who will have been deprived of the opportunity to oppose the Application for Reconsideration at the hearing, and to oppose it during the Application for Leave to Appeal. This Court in the premise only proceeds to adjudicate the grounds of appeal propounded in the Applicants' Notice of Application for Leave to Appeal.

THE REQUIREMENTS FOR OBTAINING LEAVE TO APPEAL

[7] An Application for Leave to Appeal is determined in accordance with the provisions of Section 17(1) of the Superior Courts Act. The determining factors are that leave to appeal may be granted if, in the opinion of the Judge dealing with such an application, the appeal would have a reasonable prospect of success or there is some other compelling reason why an appeal should be heard.

[8] In **MEC for Health, Eastern Cape v Mkhitha and Another** [2016] ZASCA 176 (25 November 2016) at paragraph 16 to 17 the Supreme Court of Appeal explained the threshold on an Application for Leave to Appeal based on Section 17(1)(a) in the following terms:

"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 when 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."

[9] In **S v Mabena and Another** 2007(1) SACR 482 (SCA) at paragraph 22 the Supreme Court of Appeal put the position in the following terms relating to the essence of an application that is to be determined by this Court in granting or refusing 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."

DISCUSSION

[10] In **Pharmaceutical Society of SA and Others v Minister of Health and Another: New Clicks SA (Pty) Ltd v Tshabalala-Msimang NO and Another** [2005] 1 All SA 326 (SCA) it was held that the right to a fair hearing entrenched in Section 34 of the Constitution included a right to delivery of judgment without unreasonable or unjustifiable delay. The Court in such matter referred to the matter of Boodhoo and Others v Attorney General of Trinidad and Tobago (Trinidad and Tobago) [2004] UKPC 17 (PC), wherein the following statement was made:

"Delay in producing a judgment would be capable of depriving an individual of his right to protection of the law, as provided for in section 4(b) of the Constitution of Trinidad and Tobago, but only in circumstances where by reason thereof the Judge could no longer produce a proper judgment or the parties were unable to obtain from the decision the benefit which they should."

[11] The Applicants have not shown that the delay in delivering judgment had any demonstrable impact on the rights of either party, least of all the Applicants. This aspect therefore made no difference to the question of whether any prospect of success exists on appeal. It must then be considered whether the delay in the delivery of judgment would constitute some other compelling reason why the appeal should be heard. The Supreme Court of Appeal has stated that in respect of this criterion, the merits of the appeal remain vitally important and are often decisive. [1] This being the position, the Applicants are not granted leave to appeal on this ground.

[12] With regard to this Court's finding in the Application for Rescission that the Applicants failed to provide a reasonable explanation for their default, it is so that the transcribed record of the court proceedings before Makoti AJ on 8 May 2020 reflect that Makoti AJ queried whether notification of the proceedings had been served upon the Applicants, and that Counsel for the Respondent dealt with the query by submitting that previously the parties were present in Court on 14 February 2020 and that the parties are represented. It is correct that the Applicants were represented in Court on 14 February 2020, but a prospect does exist that

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[1] **Minister of Justice and Constitutional Development v Southern Africa Litigation Centre** 2016(3) SA 317 (SCA) at 330 C

another Court may find that the explanation given by the Applicants' Attorneys for the default was not unreasonable, specifically that they were justified in relying on the impression that the main application had been postponed *sine die* on 14 April 2020, that they subsequently awaited receipt of a Notice of Setdown, and that the version cannot be gainsaid that the Court Order of 14 April 2020, which only became available shortly before 8 May 2020, did not come to their attention, as it went into a so-called spam folder and not the Attorneys' e-mail inbox. I am of the view that the prospect is a reasonable one.

[13] The third and fourth grounds of appeal are inter-related. I am not persuaded that a reasonable prospect exists that another Court will find that the Order made by Vuma AJ on 6 December 2019 was anything other than an interlocutory order. Nor was there anything wrong in Vuma AJ on 14 February 2020 fixing the return date of the rule nisi, which had earlier been envisaged to be determined by this Court. Section 173 of the Constitution entrenches the principle that the High Court enjoys inherent jurisdiction to regulate its own process. This was recognized also apply to rules nisi in **Director of Public Prosecutions and Another v Mohamed NO** 2003(4) SA 1 (CC). With the order of 6 December 2019 being interlocutory, Section 18(2) of the Superior Court's Act applied to the effect that, unless this Court under exceptional circumstances ordered otherwise, the operation and execution of the order was not suspended. The section refers to both the operation and execution of the order, and not only to execution. I am therefore of the view that the further grounds of appeal carry no reasonable prospect of success on appeal, and do not constitute some other compelling reason why the appeal should be heard.

[14] Although the Applicants have included a reference to Section 17(1)(c) in their

Application for Leave to Appeal, I do not consider such section to be applicable in the instant matter.

ORDER

[15] The following Order is made:

15.1 The Application for Leave to Appeal in respect of the Application for Reconsideration of the Order of this Court of 17 May 2019 is dismissed;

15.2 The Applicants are granted leave to appeal to the Full Bench of this Court in respect of the Application for Rescission of the Order of this Court of 8 May 2020;

15.3 The costs shall be costs in the appeal.

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A. EILLERT
ACTING JUDGE

For the parties:

Applicants:	**Adv MS Sebola**
Instructed by	AA Solwandle Attorneys
Respondent:	**Adv J van Niekerk SC**
Instructed by	Duncan & Rothman