

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2018/9063

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: NO

2.OF INTEREST TO OTHER JUDGES: NO

3.REVISED: NO


Judge Dippenaar

In the matter between:

HUMBULANI SETH MUKWEVHO

APPLICANT

AND

CITY OF JOHANNESBURG

FIRST RESPONDENT

LUFUNO MASHAU

SECOND RESPONDENT

NDIVHONISWANI LUKHWARENI

THIRD RESPONDENT

Neutral Citation: *Humbulani Sethi Mukwevho v City of Johannesburg and Others* (Case No: 2018/9063) [2023] ZAGPJHC 321 (17 April 2023)

LEAVE TO APPEAL JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 17th of April 2023.

DIPPENAAR J:

[1] For ease of reference, the parties will be referred to as in the main application proceedings. The applicant applies for leave to appeal against the whole of the judgment and order granted by me on 13 January 2023. In terms of the order the applicant's application was dismissed with costs, including the costs of two counsel. During argument it was clarified that leave to appeal is sought to the Full Court of this Division.

[2] In his amended application for leave to appeal and in argument, the applicant raises various grounds in support of the contention that there are reasonable prospects of success on appeal as envisaged by s 17(1)(a)(i) of the Superior Courts Act¹. These grounds cover the themes of: (i) the applicant's reliance on the principle of legality; (ii) the consequences of the finding in paragraph 36 of the judgment; (iii) the finding that by noting the appointment of the second respondent, the Municipal Council accepted his appointment; (iv) the findings regarding the applicant's second dismissal; (v) the effect of the second respondent's unlawful and invalid appointment and (vi) the costs order granted.

[3] Leave to appeal may only be granted where a court is of the opinion that the appeal would have a reasonable prospect of success, which prospects are not too remote². An applicant for leave to appeal faces a higher threshold³ than under the repealed Supreme

¹ 10 of 2013

² Ramakatsa and Others v African National Congress and Another [2021] JOL 49993 (SCA) para [10]

³ S v Notshokovu Unreported SCA case no 157/15 dated 7 September 2016, para [2]

Court Act.⁴ A sound rational basis for the conclusion that there are prospects of success must be shown to exist⁵.

[4] During argument, emphasis was placed by the applicant on the contention that the applicant had in paragraph 11.2 of his founding affidavit squarely placed reliance on the principle of legality. It was argued that whilst correctly finding in paragraph 36 of the judgment that s 60(1)(b) of the Municipal Systems Act applies and that the first respondent cannot rely on the delegation to the third respondent as being valid in appointing the second respondent, it ought to have been found that the third respondent had no power to appoint the second respondent and that his appointment was unlawful and invalid. It was argued that the consequential act of the dismissal of the applicant should have been found to be unlawful and invalid.

[5] The other central pillars of the applicant's argument were based on the argument that the noting by the Municipal Council of the second respondent's appointment, inasmuch as it did not constitute an objection also did not constitute approval of the appointment and that the effect of the second respondent's appointment being unlawful was that the dismissal of the applicant as a consequential act was unlawful.

[6] The application is opposed by the first respondent who argues that the necessary threshold for granting leave to appeal has not been met by the applicant. It is argued that the municipal council approved the second respondent's appointment and that there is no merit in the applicant's legality argument. Lastly it is argued that the applicant pursued his case in the High Court on the basis of an alleged unlawful appointment of the second respondent as primary relief. On his own version, his dismissal and reinstatement are secondary consequential relief. On this basis it opposes the applicant's contention that a costs order should not have been granted, given that the matter was a labour matter.

⁴ 59 of 1959

⁵ Smith v S [2011] ZASCA 15; MEC for Health, Eastern Cape v Mkhitha [2016] ZASCA 176, para [17]

[7] I have considered the papers filed of record and the grounds set out in the application for leave to appeal as well as the parties' extensive arguments for and against the granting of leave to appeal. I have further considered the submissions made in their respective heads of argument and the authorities referred to by the respective parties.

[8] In applying the relevant principles to the grounds advanced in the notice of leave to appeal and in argument when measured against the facts and the cumulative effect of the grounds raised by the applicant, I conclude that on the merits the appeal would have a reasonable prospect of success as contemplated in s17(1)(a)(i) of the Act.

[9] I however conclude that the applicant's costs argument lacks merit and agree with the argument advanced by the first respondent.

[10] It follows that the application must succeed. It would be appropriate that the matter be referred to the Full Court of this Division.

[11] I grant the following order:

[1] Leave to appeal is granted to the Full Court of the Gauteng Local Division;

[2] The costs of the application for leave to appeal are to be costs in the cause in the appeal.



**EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG**

APPEARANCES

DATE OF HEARING	: 13 April 2023
DATE OF JUDGMENT	: 17 April 2023
APPLICANT'S COUNSEL	: Adv E Nwedo
APPLICANT'S ATTORNEYS	: Lebea & Associates Attorneys Ms Nekhavhambe
RESPONDENT'S COUNSEL	: Adv F Karachi
RESPONDENT'S ATTORNEYS	: Moodie & Robertson Attorneys Mr C Beckenstrater