



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)
REPUBLIC OF SOUTH AFRICA

CASE NO: 27756/2021

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO
(4) DATE: 24 MAY 2023
(5) SIGNATURE: *ML SENYATSI*

In the matter between:

**THE MUNICIPAL EMPLOYEES
PENSION FUND**

Applicant

And

**CITY OF JOHANNESBURG
METROPOLITAN MUNICIPALITY**

First Respondent

**BUILDING CONTROL OFFICER, CITY OF
JOHANNESBURG METROPOLITAN MUNICIPALITY**

Second Respondent

NORDIC LIGHT PROPERTIES (PTY) LTD

Third Respondent

ASSOCIATED MOTOR HOLDINGS (PTY) LTD

Fourth Respondent

BASILEUS PROPERTIES P2 (PTY) LTD

Fifth Respondent

**WILLIAM NICOL WEST PROPERTY OWNERS
ASSOCIATION NPC**

Sixth Respondent

STANDARD BANK OF SOUTH AFRICA LIMITED

Seventh Respondent

Neutral Citation: *The Municipal Employees Pension Fund v City of Johannesburg Metropolitan Municipality & Others* (Case No: 27756/2021) [2023] ZAGPJHC 557 (24 May 2023)

Delivered: *By transmission to the parties via email and uploading onto Case Lines the Judgment is deemed to be delivered.*

JUDGMENT

(Leave to Appeal Application)

SENYATSI J:

A. INTRODUCTION

- [1] This is an application for leave to appeal the judgment handed down on the 24th February 2023 whereby an application was brought by the applicant for a declaratory order, alternatively reviewing and setting aside the decisions taken by the City of Joburg which was dismissed.

- [2] The application was dismissed on the basis that the applicant did not have the *locus standi* to bring the application. The applicant for leave to appeal has now raised several grounds, which will not be repeated to avoid prolixity, which it believes that the court erred in arriving at its decision to dismiss the application.

B. ISSUE FOR DETERMINATION

- [3] The issue for determination is whether there is prospect that the appeal would have a reasonable prospect of success.

C. THE LEGAL PRINCIPLES

- [4] The application for leave to appeal is regulated by s 17(1)(a) (i) and (ii) of the Superior Courts Act number 10 of 2013("the Act") which provides as follows:

"17. (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;"

- [5] Our courts have given the true meaning of what is ought to be proven as stated in section 17(1). In Acting National Director of Public Prosecutions and Others v Democratic Alliance v Acting National Director of Public Prosecutions and Others¹ the court said the following:

¹ (1957/09) [2016] ZAGPPHC 489 (24 June 2016)

"The Superior Court has raised the bar for granting leave to appeal in The Mont Chevaux Trust (IT 201/28) v Tina Goosen & 18 Others, Bertelsmann J held as follows:

'It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion see Van Heerden v Cronwright & Others 1985 (2) SA 342 (T) at 343H. The use of the word 'would' in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against."

[6] In Mount Chevaux Trust v Goosen², the court explains the test as follows:

"[3] The principle to be adopted in applications for leave to appeal has been codified in section 17(1) of the Superior Courts Act 10 of 2013 ('the new Act') and is, inter alia, 'whether the appeal would have a reasonable prospect of success'. Bertelsmann J, in The Mont Chevaux Trust (IT 2012/28) v Tina Goosen & 18 Others LCC14R/2014, (an unreported judgment of this Court delivered on 3 November 2014) in considering whether leave to appeal ought to be granted in that matter, held that the threshold for granting leave to appeal had been raised in the new Act. Bertelsmann J found that the use of the word 'would' in the new Act indicated a measure of certainty that another Court will differ from the Court whose judgment is sought to be appealed against. Consequently, the bar set in the previous test, which required 'a reasonable prospect that another Court might come to a different conclusion', has been raised by the new Act and this then, is the test to be applied in this matter."

² 2014 JDR 2325 (LCC)

- [7] In Matoto v Free State Gambling and Liquor Authority³, the court referred to Mount Chevaux Trust with approval and said that:

“...there can be no doubt that the bar for granting leave to appeal has been raised. The use by the legislature of the word ‘would’ ... is a further indication of a more stringent test.”

- [8] In S v Notshokovu⁴ the Supreme Court of Appeal reaffirmed that:

“an appellant ...faces a higher and stringent threshold in terms of the Act compared to the provisions of the repealed Supreme Court Act 59 of 1959”

- [9] In S v Smith⁵, Plasket AJA explained the meaning of ‘a reasonable prospect of success’ as follows:

“What the test of reasonable prospect of success postulates is 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 order to succeed, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that these prospects are not remote but have a realistic chance of succeeding. More is required to be established than there is mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.”

³ [2017] ZAFSHC 80 at para 5

⁴ [2016] ZASCA 112 para 2

⁵ 2012 (1) SACR 567 (SCA) at para 7

[10] In Pretoria Society of Advocates and Others v Nthai⁶ the court held that:

“The enquiry as to whether leave should be granted is twofold. The first step that a court seized with such application should do is to investigate whether there are any reasonable prospects that another court seized with the same set of facts would reach a different conclusion. If the answer is in the positive the court should grant leave to appeal. But if the answer is negative, the next step of the enquiry is to determine the existence of any compelling reason why the appeal should be heard.”

Based on the authorities referred to above it is apparent that our courts have been consistent in the application of the test on whether leave to appeal should be granted.

[11] The liberal approach to grant leave by courts is discouraged as being inconsistent with s17 of the Act. For instance, in Mothule Inc Attorneys v The Law Society of the Northern Provinces and Another⁷, the Supreme Court of Appeal stated as follows regarding the trial court’s liberal approach on granting leave to appeal:

“It is important to mention my dissatisfaction with the *court a quo*’s granting of leave to appeal to this court. The test is simply whether there are any reasonable prospects of success in an appeal. It is not whether a litigant has an arguable case or mere possibility of success.”

⁶ 2020 (1) SA 267 (LP) at [4]

⁷ (213/16) [2017] ZASCA 17 (22 March 2017)

- [12] More importantly, the approach is now also developed that if the inquiry into whether the appeal would not have a reasonable prospect of success, the court must now also inquire whether it is in the interests of justice that the appeal should be heard.
- [13] In the instant case, the issue of the legal standing, which is a point of law, was raised on the basis that when decision was taken by the City Council, the applicant was not the owner of the property and could therefore not have challenged such decision. The fact that the original applicant was substituted by way of a court order during May 2022 did not change that fact.
- [14] Consequently, there was merit in challenging the legal standing of the applicant. The submission that the court erred in making the finding is misplaced. Accordingly, I am of the view that there is no reasonable prospect that the appeal would succeed and more importantly, it is not in the interest of justice that the appeal should be heard. The application stands to be refused.

F. ORDER

- [14] The following order is made:

- (a) Application for leave to appeal is refused with costs.



ML SENYATSI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

DATE LEAVE TO APPEAL JUDGMENT RESERVED: 24 April 2023

DATE JUDGMENT DELIVERED: 24 May 2023

APPEARANCES

Counsel for the Applicant: Adv J Botha SC

Adv LM du Plessis

Instructed by: Strauss Scher Inc Attorneys

Counsel for the First and Second Respondent: Adv E Mokutu SC
Adv X Stemela

Instructed by: Malebye Motaung Mtembu Inc Attorneys

Counsel for the Third Respondent: Adv GF Porteous
Adv N Loopoo

Instructed by: Guthrie Colananni Attorneys