

**IN THE HIGH COURT OF SOUTH AFRICA**

**(GAUTENG DIVISION, PRETORIA)**

**Case Number:** 10139/2022

NOT REPORTABLE

**NOT OF INTEREST TO OTHER JUDGES**

**1/06/23**

In the matter between:

KABELO JOHN MATSEPE

FIRST APPLICANT

MOSHKATE INVESTMENT GROUP (PTY) LTD

SECOND APPLICANT

and

MINISTER OF FINANCE

FIRST RESPONDENT

MINISTER OF COOPERATIVE GOVERNANCE

AND TRADITIONAL AFFAIRS

SECOND RESPONDENT

NATIONAL DIRECTOR OF

THIRD RESPONDENT

PUBLIC PROSECUTION

SOUTH AFRICAN LOCAL

FOURTH RESPONDENT

GOVERNMENT ASSOCIATION

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**JUDGMENT: LEAVE TO APPEAL**

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**KUBUSHI J**

**INTRODUCTION**

[1] On 1 November 2022, this Court dismissed the Applicants' application for a declaratory order seeking to declare invalid Regulation 6(c) of the Municipal Investment Regulations promulgated in terms of section 13 of the Local Government: Municipal Finance Management Act ("the MFMA"),<sup>1</sup> insofar as it limited the powers of municipalities to invest funds in investment type deposits with banks registered in terms of the Banks Act ("the Banks Act").<sup>2</sup>

[2] The application was further dismissed on the basis that the Second Applicant's direct review application which sought to declare Regulation 6(c) invalid because of its irrationality and its affront to the principle of legality, was filed out of time.

[3] The Applicants are in the current application applying for leave to appeal against the whole of the said judgment and order. The application for leave to appeal is sought in terms of section 17 (1)(a) (i) of the Superior Courts Act ("the Superior Courts Act"),<sup>3</sup> to the Full Court of this Division, contending that there are reasonable prospects of success; alternatively, to the Supreme Court of Appeal on the basis that the matter raises a point of law of general interest that should be heard by the Supreme Court of Appeal, as envisaged in section 17 (1) (a) (ii) of the Superior Courts Act.

[4] The Application for Leave to Appeal is opposed on both bases by the First and Third Respondents on the basis that there are no reasonable prospects of success, no compelling reason that the appeal be heard, and no question of law of importance, whether because of its general application or otherwise, in respect of which a decision of the Supreme Court of Appeal is required.

[5] The matter was determined on the papers as uploaded on Caselines without oral hearing, the parties having been directed to upload their respective heads of argument on Caselines.

## **FACTS**

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<sup>1</sup> Act No. 53 of 2003.

<sup>2</sup> Act No. 94 of 1990.

<sup>3</sup> Act No. 10 of 2013.

[6] The First Applicant, who is the sole director of the Second Applicant, together with other accused persons, is facing criminal proceedings pertaining to VBS Bank (“VBS”). The charges against the First Applicant centre around the procurement of alleged unlawful investments into VBS. The Second Applicant who had a marketing contract with VBS, was the vehicle through which the First Applicant procured such investments. Although the Second Applicant is not an accused, its interests were said to be directly affected by the question regarding the legality of Regulation 6(c).

[7] The charges were formulated in terms of the contravention of various sections of the Prevention of Organised Crime Act,<sup>4</sup> and other prescripts set out in the indictment which include the Mutual Banks Act, the MFMA, the Municipal Investment Regulations, the Prevention and Combating of Corrupt Activities Act.<sup>5</sup> Various accused are also charged with contravening the common law offences of Theft and Fraud.

[8] The criminal proceedings levelled against the First Applicant, were alleged to rely on the validity of Regulation 6(c) and, were thus, said to constitute coercive proceedings against which the First Applicant was entitled to raise a collateral defence. The implication flowing from this contention was that should the impugned regulation be set aside as unlawful, invalid and unconstitutional, part of the charges against the First Applicant, which are premised on Regulation 6(c), would fall away.

[9] The application was dismissed on arguments *in limine* without engaging in the merits which raised the rationality challenge to the regulation, on the ground that the First Applicant did not have *locus standi* to challenge the regulation, and that his papers did not raise a collateral challenge as Regulation 6(c) did not form part of the charges proffered against him. Since it was said that the Second Applicant had a direct interest in the collateral challenge, his condonation application was, as a result, tied to the First Applicant succeeding in his collateral challenge. The First Applicant’s collateral challenge was

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<sup>4</sup> Act No 121 of 1998.

<sup>5</sup> Act No 12 of 2004.

unsuccessful, and resulted in the Second Applicant's condonation application being dismissed.

## GROUND

[10] The Applicants contend that leave to appeal should be granted on the grounds that there are reasonable prospects of another court finding otherwise; and that there are compelling reasons why leave to appeal should be granted, based on the following grounds that –

- 10.1. The Court erred in finding that the First Applicant does not have *locus standi* to bring a collateral challenge in respect of the legality of Regulation 6(c) of the Municipal Investment Regulations.
- 10.2. The Court erred in finding that the First Applicant is not raising a collateral challenge, since Regulation 6(c) does not form part of the charges. The Applicants contend that this is a misdirection which warrants the intervention of an Appeal Court.
- 10.3. The Court declined to decide the collateral challenge raised pertaining to Regulation 6(c) in circumstances where, upon an interpretation of the charges against the First Applicant, the unlawfulness of investments into VBS hinges on the legality of Regulation 6(c).
- 10.4. The Court erred in failing to decide a validly raised collateral challenge to Regulation 6(c), in breach of the *Oudekraal* principle<sup>6</sup> in respect of collateral challenges.
- 10.5. The Second Applicant's condonation application has reasonable prospects of succeeding since it has a material interest in the collateral challenge raised by the First Applicant. The interests of justice, therefore, require condonation to be granted as the matter

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<sup>6</sup> Oudekraal Estate (Pty) Ltd v City of Cape Town and Others.

is to be decided in any case as far as the First Applicant is concerned.

- 10.6. The Court erred in mulcting the Applicants in costs, where they are asserting constitutional rights. The submission is that the Court should have applied the *Biowatch* principle<sup>7</sup> in that the Applicants are asserting constitutional rights to a fair trial, to administrative action and to Section 22 rights to choose an occupation.

[11] The First Respondent opposes this application and submits that the application was correctly dismissed on the basis that –

- 11.1. the First Applicant failed to prove on a balance of probabilities that the collateral challenge was apposite and as a consequence, the First Applicant lacked *locus standi*;
- 11.2. the Second Applicant failed to lodge the review application in terms of the Promotion of Administrative Justice Act<sup>8</sup> within the prescribed time periods and as a consequence of the seventeen-year delay, the condonation application lacked merit.

[12] The Third Respondent is opposing this application on the grounds that the definition of the charges that the First Applicant faced in the criminal trial do not include Regulation 6(c) as an element and none of the charges in the indictment are so framed as being predicated upon the legality or otherwise of Regulation 6(c).

## **ISSUE FOR DETERMINATION**

[13] As earlier indicated the Applicant has approached this Court for leave to appeal in terms of section 17(1)(a)(i) and/or (ii) of the Superior Courts Act, which provides as follows:

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<sup>7</sup> *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC).

<sup>8</sup> Act No. 3 of 2000.

**"17. Leave to Appeal**

(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."*

[14] The issue for this Court to determine is whether the Applicants have made out a case to be granted leave to appeal in terms of the aforementioned section.

**DISCUSSION**

[15] The test for the granting of the application for leave to appeal based on section 17(1)(a) of the Superior Courts Act, is trite and need not be repeated in this judgment.

[16] Having considered the grounds of appeal raised by the Applicants and the arguments for and against such application raised by the parties in their respective heads of argument, this Court is of the opinion that there are no reasonable prospects of success on appeal.

[17] This Court is, also, of the view that the Applicants have not made out a case for the granting of the application for leave to appeal on the ground of some compelling reasons as envisaged in section 17(1)(a)(ii) of the Superior Courts Act.

[18] As regards the cost issue, this Court maintains that the application does not raise a constitutional point and that the *Biowatch* principle finds no application, hence the costs order as granted is correct.

[19] This application, as a result, falls to be dismissed.

## **ORDER**

[20] Consequently, the application for leave to appeal is dismissed with costs.

**E.M KUBUSHI  
JUDGE OF THE HIGH COURT  
GAUTENG DIVISION, PRETORIA**

**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 01 June 2023.

### **APPEARANCES:**

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|-------------------------------|----------------------------------------|
| APPLICANTS' COUNSEL:          | ADV. E LABUSCHAGNE SC<br>ADV. V MABUZA |
| APPLICANTS' ATTORNEYS:        | MALUKS ATTORNEYS                       |
| FIRST RESPONDENT'S COUNSEL:   | ADV. MOKOENA SC<br>ADV. N MAYET        |
| FIRST RESPONDENT'S ATTORNEYS: | STATE ATTORNEY                         |
| THIRD RESPONDENT'S COUNSEL:   | ADV. PD HEMRAJ SC<br>ADV. GP SELEKA    |
| THIRD RESPONDENT'S ATTORNEYS: | STATE ATTORNEY                         |