



THE HIGH COURT OF SOUTH AFRICA
FREE STATE PROVINCIAL DIVISION

Reportable: yes/no Circulate to other Judges: yes/no Circulate to Magistrates: yes/no

Case Number 3367/2020

In the matter between:

ESKOM HOLDINGS SOC LTD

Applicant

and

MATHABENG LOCAL MUNICIPALITY

1st Respondent

**THE EXECUTIVE MAYOR:
MATHABENG LOCAL MUNICIPALITY**

2nd Respondent

**THE MUNICIPAL MANAGER
MATHABENG LOCAL MUNICIPALITY**

3rd Respondent

THE SHERIFF BLOEMFONTEIN WEST

4th Respondent

ABSA BANK LIMITED

5th Respondent

CORAM: Berry AJ

HEARD ON: 19 May 2023

DELIVERED ON: 10 November 2023

JUDGEMENT BY: Berry AJ

JUDGMENT – APPLICATION FOR LEAVE TO APPEAL

- [1] The Applicant obtained judgment for debt against the 1st Respondent under case number 924/2013 on 18 September 2014.
- [2] The Applicant attached money held in a bank account by the 1st Respondent in execution of the judgment debt.
- [3] The 1st Respondent approached the Court for relief and after negotiations between the parties, the following Order was made by agreement on 11 September 2020.

“IT IS ORDERED THAT: (by agreement)

1. The First Respondent (“*Eskom*”) shall immediately uplift the attachment of funds in the bank account of Applicant (“*the Municipality*”) held with ABSA Bank Limited (“*Absa*”), which attachment was perfected on **4 September 2020** and for this purpose, will immediately instruct the Second Respondent and Absa, in writing, to uplift the uplift (sic) and release the said attachment of the account.
2. Pending the final determination of the action under case number **5830/2019**:
 - 2.1 the funds currently in the bank account of the Applicant as at the date of attachment, namely **R2 781 586.14**, will remain under attachment with the Sheriff of Bloemfontein West, to be held in the Sheriff’s trust account which is to be a separate interest bearing account; and
 - 2.2 Eskom undertakes not to execute the terms of paragraphs 1 and 2 of the order of the above Honourable Court under case number **924/2013**, dated **18 September 2014**.
3. The Municipality undertakes unconditionally to provide Eskom with security for the judgment under case number 924/2013 and any judgment which the above Honourable Court may pronounce in respect of its claim in the main action under case number **5830/2019**, for the amount of **R2 525 017 401.66** (“*the Security*”).
4. The Security will be provided in the form of the registration of a Covering Bond (“*the Bond*”) to be registered over one hundred and thirty-nine (139) farms registered in the

name of the Applicant within its municipal boundaries (*"the Farms"*), all of which, on date of registration of such bond will be unencumbered.

5. The Municipality will, within fourteen (14) days of date of this order, provide Eskom's attorneys with a full description of the Farms, as per an electronic Deeds Search.
6. The Municipal Manager of the Municipality shall immediately on request but no later than twenty (20) days of this order provide Eskom's attorneys with all such consents / authorisations required together with all documents necessary and take all necessary steps in order to secure the registration of the Bond over the Farms.
7. Should the Municipality fail to comply with any terms of this order, Eskom shall, by delivering of written notice to the sheriff, be entitled to appropriate the funds held in trust by the Sheriff of Bloemfontein West and proceed with further execution steps in respect of the order under case number 924/2013.
8. Eskom will instruct its attorneys to attend to the registration of the Bond and the Municipality will be responsible for – and will pay the fees and disbursements associated with the preparing and registration of the Bond, which costs will be paid on demand.
9. The Applicant withdraws this application.
10. The costs of this application stands (sic) over for adjudication with the main action under case number 5830/19."

[4] The Applicant sought an Order finding the 1st Respondent in contempt of Court for its failure to comply with the 11 September 2020 Order.

[5] This Court dismissed the Application and held that the Applicant was bound to the relief it agreed upon in the Court Order of 11 September 2020.

7. Should the Municipality fail to comply with any terms of this order, Eskom shall, by delivering of written notice to the sheriff, be entitled to appropriate the funds held in trust by the Sheriff of Bloemfontein West and proceed with further execution steps in respect of the order under case number 924/2013.

- [6] The Applicant seeks leave to appeal the whole of the Judgment and Order granted on 22 March 2023.

GROUND OF APPEAL

- [7] The Applicant submits that the importance of the matter constitutes a compelling reason why leave to appeal should be granted under Sec 17(1)(a)(ii) of the Superior Court Act.
- [8] The Applicant further submits that the decision sought to be appealed against, involves important questions of law and the administration of justice in general.
- [9] The Applicant further submits that the Court *a quo* misdirected itself when it found that the Applicant was bound by the remedy it agreed upon in Paragraph 7 of the 11 September 2020 Order.
- [10] The Applicant further submits that it has a right to elect remedies such as specific performance, an interdict, a declaration of rights, cancellation of the agreement or a claim for damages.
- [11] These rights are available under contractual law. The Applicant elected the right it will exercise when it agreed to the 11 September 2020 Order¹.
- [12] The reality is that the bonds could not be registered over the 139 farms as ordered by agreement between the parties.
- [12] The 1st Respondent registered the bonds over the 69 farms which was unencumbered.
- [13] I do not see how this conduct meet the requirements of contempt of Court.

¹ BEKAZUKU PROPERTIES PTY (LTD) v PAM GOLDING PROPERTIES PTY LTD [1996] 1 ALL SA 509 (C) at 513

[14] A Court cannot order something to be done which the Court knows is an impossibility.

[15] The Applicant submits that I applied an incorrect standard of proof in contempt proceedings in Paragraph 48 of the Judgment in that:

“...Acting Justice Berry ought to have applied the standard of proof as being on a balance of probabilities.”

[16] Paragraph 48 of the Judgment reads:

“[48] Once these elements have been established, wilfulness and *mala fides* are presumed, and the Respondent bears an evidentiary burden to establish reasonable doubt.”

FAKIE N.O. V CCII SYSTEMS (PTY) LTD 2006 (4) SA 326 (SCA).

[17] Section 17(1) of the Superior Court’s Act 10 of 2013 provides that leave to appeal may only be granted if the judge concerned is of the opinion that:

- “1. The appeal would have a reasonable prospect of success or if there are some compelling reasons why leave should be granted.
2. The decision sought on appeal does not fall within the ambit of s16(2)(a) of the Act.
3. Where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.”

[18] In **Matoto v Free State Gambling and Liquor Authority and Others**² the Court held:

“There can be no doubt that the bar for granting leave to appeal has been raised. Previously, the test was whether there was a reasonable prospect that another court might come to a different conclusion. Now, the use of the word ‘would’ indicate a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.”

² (4629/2015) [2017] ZAFSHC 80 (8 June 2017)

[19] In **S v Smith**³ the Court dealt with the question of what constitutes reasonable prospects of success as follows:

“What the test of reasonable prospects 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. To succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a 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.”

[20] In **MEC for Health, Eastern Cape v Mkhitha and Another**⁴ the Court held:

“[16] 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 Court Act 10 of 2013 makes it clear that leave to appeal may only be given where 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.

[17] 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 sound, rational basis to conclude that there is a reasonable prospect of success on appeal.”

[21] The issues raised in this Application for leave to Appeal deals with nothing more than the agreement between the parties, which was made an order of Court.

[22] There is no reason why the Applicant should not be held to the terms of the agreement reached between the parties.

[23] The Appeal does not have reasonable prospects of success.

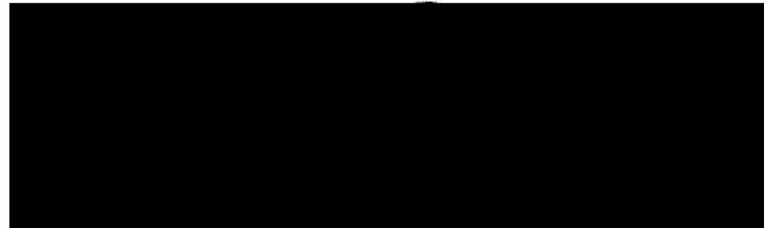
³ 2012(1) SACR 567 (SCA) par [7]

⁴ (1221/2015) [2015] ZASCA 176(25 November 2016)

[24] **ORDER**

The following order is made:

1. The Application for leave to appeal is dismissed with costs.



AP BERRY, AJ

APPEARANCES:

For the Applicant:

Adv. LT Sibeko SC

with **Adv. HN Moloto**

Instructed by:

Phatsoane Henney Attorneys

BLOEMFONTEIN

For the 1st to 3rd Respondents

Adv. S Ogunronbi

Instructed by:

BOKWA Law INC

BLOEMFONTEIN