

**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION: MAKHANDA]**

CASE NO. 1284/2021

In the matter between:

TEKOA ENGINEERS (PTY) LTD

Applicant

and

ALFRED NZO MUNICIPALITY

1st Respondent

**THE MUNICIPALITY MANAGER: ALFRED NZO DISTRICT
MUNICIPALITY**

2nd Respondent

**ZINZAME CONSULTING ENGINEERS/CYCLE
PROJECTS/UBUNTU BAM JV**

3rd Respondent

EMLANJENI JV

4th Respondent

**OLON CONSULTING ENGINEERS JV
IMP PLANT HIRE**

5th Respondent

BM INFRASTRUCTURE JV MAGNACORP

6th Respondent

JUDGMENT

JOLWANA J:

[1] On 17 January 2023 this Court delivered a judgment dismissing the applicant's application for the granting of an execution order in respect of a judgment of this Court delivered on 14 June 2022. The said application is provided for in section 18 (3) of the Superior Courts Act 10 of 2013. The applicant now applies for leave to appeal against the judgment in the section 18 (3) application. It does so citing a raft

of grounds in its application for leave to appeal, to be precise, no less than 33 grounds have been cited therein. In all of those grounds, nothing is said about the appeal against the actual order that this Court made, that is, an order dismissing the section 18 (3) application for it to be granted an execution order. In other words, there is no leave to appeal sought against the order that this Court made on 17 January 2023 dismissing the said section 18 (3) application.

[2] This lacuna was not missed out by Mr Bodlani who appeared for the municipal respondents. He invited the court to carefully peruse and even scrutinize all of those grounds of appeal and submitted that the court will not find any suggestion that the order itself was under attack. What seemed to be under attack, he pointed out, were the reasons for the court coming to the conclusion that it did. In the final analysis, the submission was that this should be the end of this matter and the application for leave to appeal should meet its natural destiny of dismissal in the circumstances. I consider it convenient to start with this point which is in my view an issue that could potentially be dispositive of the application for leave to appeal.

[3] In *Ntshwaqela*¹ a case to which I was referred to by counsel for the municipal respondents, the Appellant Division, as the Supreme Court of Appeal was then called, explained in quite some detail what, in the context of court proceedings, a judgment or order is. It appears that, more than thirty years ago already when the court dealt with the matter of *Ntshwaqela*, the distinction between a judgment or order and a judgment in the general sense was so obvious that it called for a detailed explanation as it still does todate, if only to demystify the obvious, so to speak. I quote copiously from the said case below:

“An initial question arises in regard to the interpretation of Howie J’s judgment. In legal usage the word *judgment* has at least two meanings: a general meaning and a technical meaning. In the general sense it is the English equivalent of the American *opinion*, which is

¹ Administrator of Cape of Good Hope and Another v Ntshwaqela and Others 1990 (1) SA 705 (A) at 714 I to 715 A-D

‘(t)he statement by a Judge or court of the decision reached in regard to a cause tried or argued before them, expounding the law as applied to the case, and detailing the reasons upon which the judgment is based’.

... In its technical sense it is the equivalent of *order*. See Rule 42 of the Rules of Court, which deals with the rescission or variation of ‘an order or judgment’, and ss 20 and 21 of the Supreme Court Act 59 of 1959, which provide for appeals from a judgment or order. In *Dickson & Another v Fisher’s Executors* 1914 AD 424, it was explained at 427 that the distinction between a judgment and an order would probably be found to be this,

‘... that the term judgment is used to describe a decision of a court of law upon relief claimed in an action, whilst by an order is understood a similar decision upon relief claimed not by action but by motion, petition or other machinery recognised in practice’.

When a judgment has been delivered in Court, whether in writing or orally, the Registrar draws up a formal order of court which is embodied in a separate document signed by him. It is a copy of this which is served by the Sheriff. There can be an appeal only against the substantive order made by a Court, not against the reasons for judgment.²

[4] It is this distinction on what a judgment or order, at least, for the purposes of an appeal, is that has led to the undesirable but unfortunately very common practice of applications for leave to appeal which tend to be a monotonous monologue which sometimes almost rivals the judgment itself in length. In this practice, undersirable as it is, even the court’s comments made *obiter*, tend to be a subject of an application for leave to appeal as was the case in this matter. The rather overly extensive grounds of appeal tend to fruitlessly engage in a futile debate about a court’s reasoning for the judgment. Fortunately, counsel for the applicant, who, it was clear, did not draw the application for leave to appeal in this matter, understood this. As a result, she focused squarely on the real and the only issue before the

² My emphasis.

court. That is whether, to borrow from the language of section 17 (1) of the Superior Courts Act, the appeal would have a reasonable prospect of success. I turn now to this narrow issue hereinbelow.

[5] The central issue in the judgment sought to be appealed was whether, first, exceptional circumstances for the relief sought as provided for in section 18 (1) of the Superior Courts Act had been established by the applicant. When the matter was heard the respondents' application for leave to appeal against the main judgment had been dismissed. They had then applied to the Supreme Court of Appeal for special leave to appeal the main judgment. The Supreme Court of Appeal had not yet pronounced on the applications for the special leave to appeal.

[6] It appears that when the applicant's heads of argument were drawn by applicant's counsel on 10 March 2023, it had not yet been brought to her attention that the Supreme Court of Appeal had, on 9 December 2022, granted all the respondents leave to appeal to the full court of this Division. In fact, the heads of argument were filed on the 14 March 2023 apparently still under the mistaken impression that the decision of the Supreme Court of Appeal was still pending. As a result, at paragraphs 25 and 26 of the applicant's heads of argument, the following submission is made.

“25. A Full Court of the Pretoria High Court has articulated the position as follows [in *Liviero Wilge Joint Venture and Another v Eskom Holdings SOC Ltd* [2014] ZAGPPJHC 150 para 30]:

‘The less sanguine a court seized of an application in terms of s18 (3) is about the prospects of success of the judgment at first instance being upheld on appeal, the less inclined it will be to grant the exceptional remedy of execution of that judgment pending the appeal. The same quite obviously applies in respect of a court dealing with an appeal against an order granted in terms of s18 (3).’

26. It is submitted that the circumstances of this case demonstrate weak prospects of success. Indeed, this Court refused leave to appeal, with the

result that the respondent approached the Supreme Court of Appeal for special leave to appeal. The outcome of those applications is still awaited; as such, no court has found reasonable prospects that another court would come to a different conclusion on appeal. It is submitted that no such prospects can be demonstrated.”

[7] Counsel for the municipal respondents brought to the attention of the court that in fact the Supreme Court of Appeal has since granted all the respondents leave to appeal to the full court of this Division. The court order of the Supreme Court of Appeal is dated 9 December 2022 as I said before. It is not clear how this significant development was missed by the applicant’s attorneys with the result that they failed to bring it to the attention of applicant’s counsel. After all, these are the same attorneys who have been acting for the applicant from inception. They would also have been involved and interested in the application for special leave to appeal to the Supreme Court of Appeal as they are still acting for the applicant even now. The granting of the special leave to appeal is significant for two main reasons. First, it means that the respondents’ efforts to seek leave to appeal were not in pursuit of a vexatious appeal, or even an entirely meritless one, designed merely to delay the inevitable. Second, it means that in fact the Supreme Court of Appeal is of the view that the respondents do enjoy a reasonable prospect of success on appeal in respect of the main judgment hence it granted leave to appeal to the full court of this Division.

[8] Be that as it may, counsel for the applicant stressed that despite this development, nothing has changed in so far as the actual appeal itself is concerned. Indeed, no court has made any pronouncement on the appeal itself in that it is yet to be heard. This submission is correct in my view. The fact that leave to appeal has been granted does not mean that the appeal itself is a *fait accompli*. All that it means is that the appeal by the respondents enjoys a prospect of success –this being the test or requirement prescribed in section 17 (1) of the Superior Courts Act for the granting of an application for leave to appeal. This distinction is very important especially in light of the application for leave to appeal against this Court’s judgment in the section 18 (3) application. That application must consequently be

assessed on the basis that the appeal in respect of the main judgment is still pending and has not yet been determined.

[9] In the section 18 (3) application I made two principal findings. The first one was that a court has no discretion on the assessment of the section 18 requirements. In other words, it had to be established factually that exceptional circumstances for the granting of the execution order existed in the first place. In the second place it had to be established by applicant first, that it would suffer irreparable harm if the execution order was not granted. Secondly, the respondents would not suffer irreparable harm by the granting of the execution order pending the appeal processes. The second main finding was that the applicant had failed to establish any of the requirements provided for section 18 for the granting of the execution order all of which had to be established for the court to exercise the discretion that flows from a positive finding in that regard.

[10] Once the above conclusion was reached, the court had no discretion on whether or not to grant the execution order as the section 18 jurisdictional requirements had not been met. They are after all, a *condictio sine qua non* for the ultimate exercise of the discretion by the court to grant or not to grant the execution order. Absent a positive finding in that regard, there could be no talk of a discretion. The issue of the court having a discretion on whether or not to grant the execution order even if the requirements are met actually means that the fact that the section 18 requirements are met does not mean that the court must, under all circumstances, grant the execution order. The court is obliged to exercise a discretion, judiciously and it may very well decide against granting the execution order notwithstanding the fact that exceptional circumstances have been established and the applicant has shown that irreparable harm will befall it if the order is not granted and that the respondents will not suffer irreparable harm by the granting of the order. This kind of discretion ultimately depends on the facts of each case and must be exercised with great circumspection. The court's discretion in this regard is not without significance. It is undergirded by the legal position that the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal which is at the very core of section 18 as a whole.

[11] The central theme of the applicant in its quest for leave to appeal is that this Court should have found that it had established the exceptional circumstances and that it would suffer irreparable harm if the execution order was not granted. Furthermore, it was contended that applicant had established that the respondents would not suffer irreparable harm by the granting of this order and the court erred in not finding accordingly. As such, not granting the execution order would lead to the order granted in the main application evaporating during the remaining period before the contract comes to an end on 31 August 2023 unless the order was granted. And public funds that would be expended during the remaining period while the respondents continue with the works when they were ordered to stop by the court could be wasted. Therefore, exceptional circumstances were established, so went the submission.

[12] Counsel for the applicant, Ms Stein further submitted that the rights that accrued to the applicant, in particular, the right to participate in a procurement process that is fair, equitable, transparent, competitive and costs effective are of the ilk that our courts have, in a number of cases, said that they are worthy of protection. Reference was made in the applicant's heads of argument and during the oral hearing in court to a number of court decisions all the way to the Constitutional Court including the case of *Fose*³ in which the centrality of a litigant's rights to a just, equitable and effective relief in our constitutional order was emphasized in the following terms:

“Given the historical context in which the interim Constitution was adopted and the extensive violation of fundamental rights which had preceded it, I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have

³ *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 69.

the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to “forge new tools” and shape innovative remedies if needs be to achieve this goal.”

[13] What in essence was submitted on behalf of the applicant was that the rights that applicant has in a fair tendering process as provided for in section 217 of the Constitution are the entrenched rights that deserve protection from the courts. Therefore, leave to appeal should be granted to prevent the applicant’s rights which were vindicated in its success in the main application from coming to nought. The submission was that in all these circumstances, the applicant enjoys reasonable prospects of success on appeal.

[14] Counsel for the municipal respondents referred the court to the case of *South Cape Corporation*⁴ in which Corbett JA, as he then was said:

“Approaching the matter on principle, one starts with the basic rule that the due noting of an appeal suspends the operation of the judgment and that, if the party in whose favour it has been given wishes it to be put into execution, he must make special application for leave to do so. He, being the claimant for relief, must satisfy the Court that there are good grounds for the exercise by the Court of its general discretion in his favour. This means that the overall *onus* of establishing a proper case for the grant of leave to execute would rest upon the applicant and, if at the end of the hearing the Court were left in doubt as to the essential facts or as to whether it was an appropriate case of the grant of leave, then the application should be refused.”

[15] In the section 18 (3) application I came to the conclusion that the applicant had failed in establishing a proper case for the grant to it of the execution order it sought in that it had not satisfied the statutory requirements ordained in section 18 of the Superior Courts Act. Having read the well written heads of argument by both

⁴ *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 546 D-F.

counsel for which I am very grateful and having heard the incisive submissions made during the oral hearing of the application for leave to appeal, I am not swayed that I erred in dismissing the application for the granting of the execution order for the reasons stated in my judgment. Therefore, I am not of the opinion that the appeal would have a reasonable prospect of success. In fact, I am of the view that in addition to the appeal having no prospect of success, granting the application for leave to appeal now just before the appeal in the main judgment is heard would be counterintuitive. Furthermore, it was not argued that there was a compelling reason for the appeal to be heard. I also am not of the opinion that a compelling reason why the appeal should be heard exists.

[16] In the result the following order shall issue:

1. The application for leave to appeal is dismissed.
2. The applicant is ordered to pay costs of the application for leave to appeal including costs consequent upon the employment of two counsel.

M.S. JOLWANA
JUDGE OF THE HIGH COURT

Appearance:

Counsel for the applicant : N. STEIN

Instructed by : PN MOLETSANE ATTORNEYS INC.
c/o CLOETE AND CO. ATTORNEYS
GRAHAMSTOWN

Counsel for 1st & 2nd Respondent : A.M. BODLANI SC WITH S.H. MALIWA

Instructed by : V. FUNANI ATTORNEYS INC.
MTHATHA

Date heard : 15 March 2023

Date delivered : 23 March 2023