

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO



IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY

Case No: 2804/2016
Heard on: 12/12/2017
Delivered on: 26/01/2018

In the matter between:

OCEAN ECHO PROPERTIES 333 CC

APPLICANT

And

**THE MEC NORTHERN CAPE PROVINCIAL
GOVERNMENT DEPARTMENT OF ROADS
AND PUBLIC WORKS**

1st RESPONDENT

ALKARA 79 CC

2nd RESPONDENT

And to

EXILACLOX (PTY) LTD

Interested Party

Mamosebo J et L Lever AJ

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

Mamosebo J

- [1] This is an application by Ocean Echo Properties 333 CC for leave to appeal to the Full Bench of the Northern Cape Division against part of the judgment and order concurred in by Lever AJ granted on 21 July 2017 in which we reviewed and set aside the decision of the Department of Roads and Public Works to grant the tender to Alkara 79 CC and declared that Exilaclox (Pty) Ltd the preferred bidder. The first respondent is the MEC for the Department of Roads and Public Works who, represented by the State Attorney, placed on record that the MEC is not opposing the application and will abide the decision of the Court. Exilaclox, however is opposing this application.
- [2] The grounds upon which the applicant relies are that the Court erred in finding:
- 2.1 That the Ocean Echo bid was unresponsive and its application stood to be dismissed;
 - 2.2 That Exilaclox submitted the only responsive bid and was to be the preferred bidder and ordering the Department to negotiate further with Exilaclox in respect of the finishes in compliance with the terms of reference and the building specifications.
- [3] Ocean Echo and Exilaclox approached the court separately seeking the same relief to review and set aside the order which granted Alkara 79 CC the tender. Lever AJ granted a consolidation order of their respective applications which were then to be heard simultaneously.
- [4] Consequent to the final judgment on the merits of the review and the order set out in such judgment, Alkara applied for the rescission of the judgment and order. While Ocean Echo applied for leave to appeal. The two applications were heard together.

- [5] The test to be applied in determining whether an application for leave to appeal should be granted or not is governed by s 17¹ which stipulates:

“(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 reasonable prospects of success; or*
- (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;*
- (b) The decision sought on appeal does not fall within the ambit of s 16(2)(a); and*
- (c) Where the decision sought to be appealed does not dispose of all issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.”*

- [6] In *S v Smith*² Plasket AJA stressed:

“[7] 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. In order 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.”

¹ Of the Superior Courts Act, 10 of 2013

² 2012 (1) SACR 567 (SCA) para 7

As reiterated by Leach JA in *S v Kruger*³ the Courts should follow the aforementioned test scrupulously in the interests of justice.

[7] The initial argument advanced on behalf of the applicant was that because it had submitted the cheapest or lowest bid the tender ought to have been awarded to it. During the proceedings in the main case Mr Grobler was asked to particularly address us on whether or not the letter filed in response to the mandatory requirements for a proxy or agreement or proof of ownership have been met. This Court was not satisfied with the submissions because the letter did not serve as any of the specified documents. Ocean Echo also argued that substitutory relief was not appropriate and the matter should be referred back for reconsideration. The main judgment has dealt extensively with the basis for granting substitutory relief and need not be repeated here.

[8] Astonishingly, Ocean Echo is presenting a completely new argument during this application for leave to appeal which did not form part of the review application. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*⁴ the Court said the following:

“However, it must be emphasized that it is desirable for litigants who seek to review administrative action to identify clearly both the facts upon which they base their cause of action, and the legal basis of their cause of action.”

Ocean Echo has failed to make out its case in both the founding and supplementary affidavits but as pointed out has done so belatedly. This cannot be allowed.

³ 2014 (1) SACR 647 (SCA) at 649d (para 3)

⁴ 2004 (4) SA 490 (CC) at para 27

- [9] There is really no acceptable reasons advanced on behalf of Ocean Echo why the founding papers in the review application fall short of identifying the facts and grounds of review clearly. The Supreme Court of Appeal made the following remarks in *Tao Ying Metal Industry (Pty) Ltd v Pooe N.O. and Others*⁵

“Our courts do not allow applicants in review proceedings to raise new grounds of review in replying affidavits or from the Bar during argument (Director of Hospital Services v Mistry 1979 (1) SA 626 (A) at 635H – 636B).”

- [10] Mr Grobler argued that this Court has exercised a discretion in the loose sense. The following remarks by the Supreme Court of Appeal on this aspect in *Knox D' Arcy Ltd and Others v Jamieson and Others*⁶ are instructive:

“[87].....In the instance of a discretion in the loose sense, an Appellate Court is equally capable of determining the matter in the same manner as the Court of first instance and can therefore substitute its own exercise of the discretion without first having to find that the court of first instance did not act judicially. However, even where a discretion in the loose sense is conferred on a lower court, an Appellate Court's power to interfere may be curtailed by broader policy considerations. Therefore, whenever an Appellate Court interferes with a discretion in the loose sense, it must be guarded.

[88] When a lower court exercises a discretion in the true sense, it would ordinarily be inappropriate for an Appellate Court to interfere unless it is satisfied that this discretion was not exercised –
 ‘judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result would not reasonably have been made by a court properly directing itself to all the relevant facts and principles.’

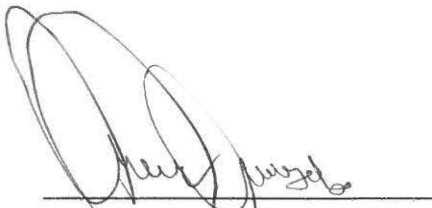
⁵ 2007 (5) SA 146 (SCA) at 175

⁶ 1996 (4) SA 348 (SCA) at 3611 para 87

An Appellate Court ought to be slow to substitute its own decision solely because it does not agree with the permissible option chosen by the lower court.”

- [11] The main judgment dealt with the reasons why Ocean Echo’s bid remained unresponsive. Of importance is that Alkara had waived its rights to be served with further pleadings and did not oppose the application by Exilaclox and Ocean Echo. The judgment and order had taken into consideration all the circumstances placed before it and eliminated Ocean Echo as a bidder for failing to meet the mandatory requirements. I am not persuaded that Ocean Echo has any prospects of success on appeal.
- [12] In my view Ocean Echo is being opportunistic relying on the knowledge that there is an application for rescission of the judgment. The doors to litigation cannot remain open indefinitely as this will amount to abuse of court process particularly where the prospects of success are poor or non-existent.
- [13] Having dispassionately considered the application I am of the view that the main judgment has adequately dealt with the aspect of Ocean Echo’s non-responsiveness and disqualification. I am satisfied that the applicant has no reasonable prospects of success on appeal and his application stands to fail.
- [14] In the result the following order is made:

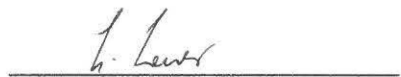
The application for leave to appeal is dismissed with costs.



MAMOSEBO J

NORTHERN CAPE DIVISION

I concur



L LEVER AJ

NORTHERN CAPE DIVISION

For the applicant:

Instructed by:

Adv S Grobler

Van den Heever Attorneys

For the first respondent:

Mr Modisa

Office of the State Attorney

For the interested party:

Instructed by:

Adv APJ Els

Waldick Jansen Van Rensburg Inc

Duncan & Rothman Inc