

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
22/6/2015 <i>EM Bushi</i>	

CASE NO: 49114/14

22/6/2015

In the matter between:

VALAZONE 268 CC & 6 OTHERS

APPLICANTS

and

**HEAD OF DEPARTMENT
MPUMALANGA DEPARTMENT OF EDUCATION**

RESPONDENT

J U D G M E N T
(LEAVE TO APPEAL)

KUBUSHI, J

[1] The applicant hereby applies for leave to appeal to the Supreme Court of Appeal of South Africa (SCA) alternatively to the Constitutional Court of South Africa (CC), against the whole of the judgment and order I delivered and made on Tuesday, 7 April 2015, inter alia, reviewing and setting aside the decision by the applicant not to award and to cancel and re-advertise the tender, bid no: EDU/069/13/MP, and that the applicant is to pay the costs of the applications of the first to third and fifth to eighth respondents.

[2] In terms of s 17 (1) (a) (i) of the Superior Courts Act 10 of 2013, leave to appeal may only be given where the judge or judges concerned are of the opinion that the appeal would have a reasonable prospect of success.

[3] The test for reasonable prospects of success postulates 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 a trial court. In order to succeed, therefore, the applicant must convince the court, on proper grounds, that he or she 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 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

[4] The applicant, in her application for leave to appeal, raises various grounds for the relief she seeks and in particular the following:

¹ See Smith v S (475/10) [2011] ZASCA 15 (15 March 2011) para 7 and Greenwood v S (20075/14) [2015] ZASCA 56 (30 March 2015) para 4.

[5] That I erred and/or misdirected myself in law in finding or holding, in paragraph [31] of my main judgment, that the fact that there are no allegations of bias or corruption in the respondents' founding papers, or that the first to seventh respondents' counsel only canvassed such allegations during oral argument does not make the respondents non-suited to rely on grounds of bias or corruption.

[6] That I erred and/or misdirected myself in finding or holding in paragraphs [30] and [31] of my main judgment that the applicant's supplementary heads of argument are of no assistance and that the authority in paragraph [14] of the SAPO judgment does not find application in the current matter because the requirements of the allegation of bias or corrupt (or fraudulent) conduct should be alleged where the claim is for damages (and where a party is *"seeking to review an administrative decision"*).

[7] That I erred and/or misdirected myself in finding or holding in paragraphs [32] and [37] of my main judgment, that the new relief sought by respondent 8 is ancillary to the main relief to have the decision of the applicant reviewed and set aside, that it is a remedy which respondent 8 seeks in the event that its main relief is granted, and that in that sense it does not mean respondent 8 is non-suited in the proceedings and thus that its main relief must still be considered.

[8] That I erred and/or misdirected myself in finding or holding in paragraph [42] of my main judgment that respondent 8 in its founding papers reconciles itself with the reasons advanced by respondents 1 to 7 as grounds of review of the applicant's decision and therefore that it would deal with their cases together.

[9] That I erred and/or misdirected myself in law in finding or holding, in paragraphs [57] to [62] that the applicant '*subverted*' the court order of Janse Van Nieuwenhuizen J, that she has not complied with the requirement of 'evaluation' as envisaged in the bid documents and that the applicant, in order to comply with the court order "*should have approached the court for an order to re-advertise*".

[10] That I erred and/or misdirected myself in finding or holding, in paragraph [69] of my main judgment, that costs of litigation (or possible litigation) cannot be considered as a factor when the regulation is involved, and also that the applicant's reliance on regulation 8 (4) (b) is further contradicted by the applicant's statement to extend the program for a further three years; and in taking judicial notice of "*budgeting process of a Department*" and source of "*funds*" from which the Department pays "*the costs of any litigation that may ensue in respect of a tender*".

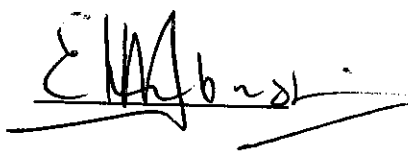
[11] The respondents are opposing the application and contend that the misdirections as quoted by the applicant do not show that there is a reasonable prospect of success on appeal.

[12] To my mind, the abovementioned alleged misdirections do justify a conclusion that, if leave to appeal is granted, the applicant's prospects of success on appeal are reasonable. The application for leave to appeal, therefore, ought to be granted.

[13] The applicant requests that leave to appeal be to the SCA or the CC, because according to her counsel, one of the points raised relates to the definition of '*reconsideration*' of a tender process which the SCA has already pronounced itself on. Counsel for respondents 1 to 7 expressed the same sentiments.

[14] In the circumstance, I issue the following order:

1. The application for leave to appeal to the Supreme Court of Appeal is granted.
2. Costs are costs in the appeal.

A handwritten signature in black ink, appearing to read 'E. M. Kubushi', written over a horizontal line.

E. M. KUBUSHI

JUDGE OF THE HIGH COURT

APPEARANCES**HEARD ON THE**

: 17 JUNE 2015

DATE OF JUDGMENT

: 22 JUNE 2015

APPLICANT'S COUNSEL

: ADV. SHAKOANE

APPLICANT'S ATTORNEY

: THE STATE ATTORNEY, PRETORIA

1ST -7TH RESPONDENT'S COUNSEL

: ADV. VORSTER

1ST -7TH RESPONDENT'S ATTORNEY

: HUGO&NGWENYA INC.

8TH RESPONDENT'S COUNSEL

: ADV. UYS

8TH RESPONDENT'S ATTORNEY

: C J MKHAVELE INC.