

29/9/2009

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

REPORTABLE

Case No: 5573/2005

In the matter between:

DINA MARIA MAKGOBATHLOU APPELLANT

(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

And

2009/09/19
DATE

SIGNATURE

TRANSNET PENSION FUND

RESPONDENT

JUDGMENT

MAVUNDLA, J.

- [1] On the 2 December 2005, I dismissed with costs the appellant's claim, on a point *in limine* that the appellant approached this Court not as an appeal court but as court of first instance. I held that the appellant has not approached the Adjudicator of Pension Funds as the result there is no decision taken by the adjudicator and that therefore this Court has no jurisdiction.

[2] The appellant lodged on 14 December 2005 her application for leave to appeal the aforesaid decision. For unknown reasons, the application for leave to appeal was only set down for hearing before me on 1 September 2006, on which date the matter by agreement between the parties was postponed *sine die*. Nothing happened since then until when the matter was heard by me on 23 September 2009. There is no explanation as to why there has been such an inordinate delay before the matter was again set down. I have decided, for the sake of justice, not to demand an explanation for such inordinate delay, but to deal with the merits of the application for leave to appeal.

[3] The grounds of the application are that: (a) This court erred in dismissing the applicant's claim on the basis that this Court has no jurisdiction to hear the matter; (b) The respondent in paragraph 5 of her opposing affidavit admitted that this Court has jurisdiction; (c) That this Court erred in allowing counsel for the respondent to raise a new issue of jurisdiction for the first time at the hearing, while in the documents filed at court jurisdiction was not an issue; (d) That the opposing affidavit of

the respondent was never supplemented at any stage to raise the issue of lack of jurisdiction on the part of this Court.

[4] It is trite that the consideration of an application for leave to appeal, is whether there are reasonable prospects of another court arriving at a different decision as the one I have arrived at, vide *Roman Catholic Church (K' Dorp) v Southern Life Assoc*¹; *Finbro Furnishers v Registrar of Deeds*.²

[5] It has been submitted by Mr. Motloba, on behalf of the applicant, that, since the respondent had made a formal admission in its paragraph 5³ that this Court has jurisdiction, such admission could not be withdrawn by mere submission by counsel for the respondent, by contending that the court has no jurisdiction. Motloba further contends that an admission can only be withdrawn by filing an affidavit, explaining why the admission was made and why it is now withdrawn. He submits

¹ 1992 (2) SA 807 at 812.

² 1985 (4) SA 773 (AD) at 774.

³ In paragraph 3 of the applicant's founding affidavit it was averred that this Court has jurisdiction. In its paragraph 5 the respondent pleaded as follows: "AD paragraph 2.3 thereof: The contents of this paragraph are admitted."

that until such time that the admission is properly withdrawn through the filing of an affidavit, the admission stands. He submits that this Court has therefore erred in entertaining the point *in limine* and that another court may arrive at a different conclusion.

[6] Ms Ngomane, for the respondent has stated, *inter alia*, that the respondent should be granted leave to file a supplementary affidavit to amend its opposing affidavit so as to be consistent with its initial point *in limine* on jurisdiction.

[7] Ms Ngomane further submits that there are no prospects of success in the appeal, because, *sp* she submits, this Court's decision was correctly arrived at. For this submission, she relies on the matter of *Meyer v Iscor Pension Fund*.⁴

⁴ 2003 (2) SA 715 (SCA).

- [8] The submission on behalf of the applicant that an admission can only be withdrawn by way of an affidavit, is indeed correct, vide *Swartz v Van Der Walt T/A Sentraten*.⁵
- [9] It needs mention that the question of whether a point in law, is being entertained or not, is a matter of discretion, vide *Sibeka v Minister of Police*. 1984 (1) SA at 794H-795A.
- [10] Since I allowed the point *in limine* to be argued without the respondent having formally withdrawn the jurisdictional concession by way of an affidavit, there is a possibility that another court may find that in doing so I erred, which I do not concede.
- [11] Even if it were to be found that I was wrong in upholding the point *in limine*, the next question is whether the applicant has any prospects of success in the appeal. That question will

⁵ 1998 (1) SA 53 at 57 A-C; vide also *Bellairs v Hodnett and Another* 1978 (1) SA 1109 (AD) at 1150F-G.

depend on whether the respondent effects an amendment to its affidavit.

[12] The respondent seeks leave to amend its affidavit so as to withdraw the concession it had made, so as to reconcile its affidavit with its submission that the Court has no jurisdiction. Indeed, leave to amend pleadings may be granted at appeal stage, vide *Bellairs v Hodnett and Another*⁶. However, since I am *functus officio*, I do not think that it is competent of me to grant such leave at the stage of an application for leave to appeal. The granting of leave to amend, is a matter of the discretion of the appeal court. I am of the view that the respondent will have to file the necessary application for leave to amend once the appeal date has been allocated, so as to enable the applicant to file her affidavit dealing with the

⁶ 1978 (1) SA 1109 (AD) at 1150F-G the full Bench of the Appellate Division stated that "The Court's power, in its discretion to allow amendment of pleadings, even on appeal, is undoubted. (See *Gordon v Tarnow*, supra at p.532.0 But, as it has frequently been stated, an amendment cannot be had merely for the asking. This is equally, if not especially, true of opposed amendment which involves the withdrawal of an admission- in such cases the Court will generally require to have before it satisfactory explanation of the circumstances in which the admission was made and the reasons for seeking to withdraw it (Cf., Innes C.J. in *Northern Mounted Rifles v O' Callaghan*, 1909 T.S 174 at 178; per Ogilvie Thomson (then A.J).)."

averments that shall have been made by the respondent in regard to the application for leave to amend. All this will have to be done immediately once the date of the hearing of the appeal, but in a manner so as not to delay the hearing of the appeal, preferably before the filing of the heads of argument of the respective parties

[13] Since I decided the matter on a point which I regarded as dispositive of the matter, the point *in limine* of jurisdiction, in the event the application for leave to amend is unsuccessful, then the matter would have to be decided on the merits. As I did not address the matter on the merits, an appeal court, assuming that it does not uphold the point *in limine*, in the interest of justice, will be within its powers to decide the matter on those issues rather than remit the matter to this Court.

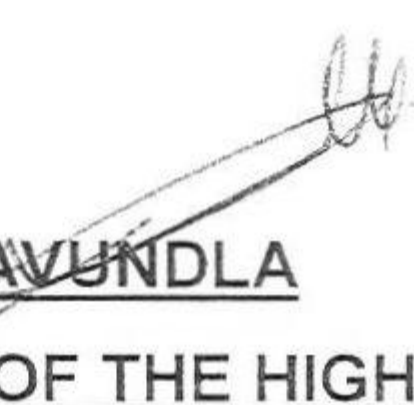
[14] Although I am of the view that the issue of jurisdiction was properly decided and there are no prospects of success of the appeal on this point, for the reason that there is always that possibility that another court deciding the matter on the merits,

might find in favour of the applicant, I am accordingly obliged to grant leave to appeal.

[17] Although the applicant is the successful party, the general applicable rule is that the costs must be awarded to her. However, in applications for leave to appeal matters, it is always advisable to reserve these costs for the outcome of the appeal, and I shall accordingly do so.

[16] In the result I make the following order:

1. That leave to appeal to the Full Bench of the North Gauteng is granted.
2. That cost of application for leave to appeal will be costs in the outcome of the appeal.


N. M. MAVUNDLA
JUDGE OF THE HIGH COURT

HEARD: 23 SEPTEMBER 2009
DELIVERED: 29 SEPTEMBER 2009

APPLICANT'S ATT : ATTORNEY B.W. MOTLOBA.
APPLICANT'S ADV : Mr. B.W. MOTLOBA (attorney).
RESPONDANT'S ATT : MOLEFU DLEPU ATTORNEYS.
DEFENDANT'S ADV : MS. H. L. NGOMANE.