

Reportable: Yes / No
Circulate to Judges: Yes /
No

Circulate to Magistrates: Yes / No

IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape Division)

Case no: 1038/03
Date heard: 2004-03-23

Date delivered: 2004-04-02

In the matter of:

MARIUS CHRISTIAAN BESTER

APPLICANT

versus

SOL PLAATJE MUNICIPALITY

FIRST RESPONDENT

P R O SEHUNELO N.O. SECOND RESPONDENT

C M MAGABANE N.O.

THIRD RESPONDENT

Coram: **KGOMO JP** *et* **MAJIEDT J**

**JUDGMENT ON APPLICATION FOR
LEAVE TO APPEAL**

MAJIEDT J:

1. This is an application for leave to appeal to the Supreme Court of Appeal ("*the SCA*") against the whole of our

judgment and orders, (excluding the question of the jurisdiction of the High Court) dismissing the Applicant's application for declaratory orders, the setting aside of certain resolutions of the council of the First Respondent, an interdict restraining the Respondents from proceeding with an appeal hearing of the Applicant before the Third Respondent and costs orders.

2. On behalf of the Applicant Mr Strydom has filed full heads of argument in support of the application before us and has further elaborated thereon during oral argument. He has advanced numerous submissions in support of the application, which I deem not necessary to deal with in this judgment, given the conclusion which has been reached herein.
3. At this juncture, the test is simply whether a reasonable prospect exists that another Court, namely the SCA, will reach a different finding on the issues which we have decided against the Applicant.
4. I am of the view that the following grounds of appeal advanced by the Applicant bear reasonable prospects of

success on appeal to the SCA:

- a) The contention that there is no inconsistency between the provisions of the Municipal Systems Act, 32 of 2000, and the collective agreement which forms the basis of the dispute between the parties herein, which inconsistency would set in motion the operation of section 52 of the aforementioned Act in terms whereof the labour legislation prevails in the event of such an inconsistency. It is without a doubt so that the judgment appealed against was to a large extent premised on such inconsistency in fact existing which would lead to the application of the provisions of section 52 of the aforementioned Act.
- b) I am also of the view that the Applicant has reasonable prospects of success, concerning the finding that the First Respondent's council has implied authority to delegate its power to hear the appeal. This particular finding is again crucial to the eventual outcome of the matter and it seems to me that the Applicant should be granted the opportunity to test our findings in another court.

Mr Strydom has referred us to the as yet unreported judgment of the SCA in **Denel (Pty) Limited v Vorster**, case no. 13/2003, delivered on 5 March 2004. That matter concerned the question whether an employer (the Appellant) had breached an employment contract which incorporated a disciplinary code. We have in particular been referred to pages 8 and 9 of the judgment of Nugent JA. It seems to me that the present case is distinguishable not only on the facts, but in particular on the law, from the Denel-case, *supra*. In the matter before us a central issue is the question of conflicting provisions between labour legislation (in the form of a collective agreement) and provisions in another statute. In any event, even if I am wrong in the assessment that the Denel-case does not assist the Applicant, it seems to me that the Applicant has advanced sufficient grounds on which leave to appeal should be granted as will be presently shown.

- c) I am also persuaded that there appears to be merit in the contention that this Court may have erred in its finding that the council has the right of delegation of the

power to hear the appeal and in this Court then not having addressed the issue that the subject matter of such delegation by the First Respondent to the Second Respondent in fact had consisted of the power to designate another person to hear the appeal. If the Applicant's contentions in this regard are upheld on appeal, the effect may well be that the Third Respondent had no authority to hear the appeal through delegated power, since he is neither an official nor a staff member of the First Respondent.

d) The Applicant's submissions on the finding that it is premature to consider the question of the alleged abdication of power by the First Respondent's council, can in my view also not be said to be devoid of merit. If the SCA finds that the impugned resolution itself is of sufficient finality so as to require adjudication on whether it amounts to an unlawful abdication of power or not, then concomitantly the Applicant would have reasonable prospects of success on appeal on this point. I say this because it is indicated in the judgment that there is considerable merit in Applicant's submissions on this aspect. The alternative argument that prejudice has in fact already ensued even if the resolution cannot be said to be of a final nature, also seems to me to have reasonable prospects of success on appeal.

e) Although I am convinced of the correctness of the rejection of the Applicant's averments that he was unaware of the existence and meaning of clause 7.2.8.5, there is much to be said for the contention that the Applicant cannot in law acquiesce to

such unlawfulness and that this Court cannot give legality to an unlawful act by enforcing it.

f) Finally, there may be reasonable prospects of success on appeal with regard to the fact that the need to refer the matter of waiver and the disputes of facts thereon for oral evidence was not addressed in the judgment.

5. In all the circumstances there appears to be reasonable prospects of success on appeal and that another Court might come to a different conclusion than the one that we have arrived at. Consequently the application for leave to appeal is granted.

**SA MAJIEDT
JUDGE**

I concur. The Applicant is granted leave to appeal to the Supreme Court of Appeal against the whole of the judgment and the orders issued therein excluding the question of the jurisdiction of the High Court. Costs of this application for leave to appeal will be costs in the appeal.

FD KGOMO
JUDGE-PRESIDENT

ADVOCATE FOR THE APPLICANT	:	ADV FP STRYDOM
ADVOCATE FOR THE RESPONDENTS	:	ADV CH BOTHA
ATTORNEY FOR THE APPLICANT	:	ENGELSMAN, BENADE & VAN DE WALT
ATTORNEY FOR THE RESPONDENTS	:	MJILA & PARTNERS
DATE OF HEARING	:	2004-03-23
DATE OF JUDGMENT	:	