



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES**
- (2) OF INTEREST TO OTHER JUDGES: YES**
- (3) REVISED: NO**

**22 May 2024
DATE**

SIGNATURE

CASE NO: 2023-102560

In the matter between:

BUHLE WASTE (PTY) LIMITED

Applicant

and

THE MEC OF HEALTH GAUTENG PROVINCE

1st Respondent

**HEAD OF THE DEPARTMENT OF HEALTH
FOR THE GAUTENG PROVINCE**

2nd Respondent

THE MEC OF FINANCE: GAUTENG PROVINCE

3rd Respondent

**CHAIRPERSON OF THE BID ADJUDICATION
COMMITTEE**

4th Respondent

CHAIRPERSON OF THE BID EVALUATION COMMITTEE	5 th Respondent
CHAIRPERSON OF THE GAUTENG BID APPEAL TRIBUNAL	6 th Respondent
MAMPURU WASTE MANAGEMENT	7 th Respondent
ECOCYCLE WASTE SOLUTIONS JV VIKELA AFRIKA WASTE CARE	8 th Respondent
AVERDA SOUTH AFRICA (PTY) LTD	9 th Respondent
TSHENOLO WASTE (PTY) LTD	10 th Respondent
MAHLABANA WASTE JV NT CC4 WASTE	11 th Respondent
THUMA WASTE CC	12 th Respondent
MAKHATHINI MEDICAL WASTE (PTY) LTD	13 th Respondent
COMPASS MEDICAL WASTE SERVICES (PTY) LTD	14 th Respondent
PHUTING MEDICAL WASTE MANAGEMENT (PTY) LTD	15 th Respondent
BASMED XPRESS	16 th Respondent
PLEASANT MAPHOKA (PTY) LTD	17 th Respondent
A-THERMAL ENVIROPRO JV	18 th Respondent
ADDITY WASTE CO (PTY) LTD	19 th Respondent
HEALTHCARE WASTE SERVICES (PTY) LTD	20 th Respondent

JUDGEMENT

Summary: In a matter where a party appeals against an order refusing an application to execute an earlier order pending the outcome of an appeal, it may only be appealable if it can be shown that the order being appealed against is final in effect. The risk (no matter how great) of the order being appealed against being rendered academic because of anticipated delays (no matter how well founded) in the appeal process does not make it final in effect. Should the risk materialise and the appeal court finds that the delay was caused by any party to the litigation, it is free to make an appropriate order dealing with this.

While the new taxable costs regime ushered in by new Rule 67A read together with amended rule 69(7) does not consider seniority of counsel, but rather complexity of the matter and value of the claim or importance of the relief sought to be the deciding factor in the award of party and party costs, a court should be wary not to grant or approve costs on a scale which counsel of a certain seniority would not ordinarily charge his or her own attorney and client. This would run counter to the intention of the new costs regime.

CAJEE AJ

1. On the 10th of May 2024 I handed down the following order:

“1.The application by Buhle Waste (Pty) Ltd for leave to appeal the dismissal of its application in terms of Section 18(1) and 18(3) of the Superior Courts Act 10 Of 2013 for leave to execute the order dated the 30th of November 2023 is dismissed.

2. The Applicant is ordered to pay the party and party costs of the first, second, fourth and fifth Respondents as well as those of the 10th Respondent.

3. The aforesaid costs shall include the costs of two counsel where so employed.

4. For all legal services pertaining to this application rendered by Counsel after the 12th of April 2024, the costs of Senior Counsel shall be taxed on Scale C and that of Junior Counsel shall be taxed on Scale B of Rule 69(7) of the Uniform Rules of Court.

These are my reasons for doing so.

2. This is an application for leave to appeal in terms of section 17 of the Superior Courts Act 10 of 2013 to the full bench of the Johannesburg High Court. The applicant for leave to appeal is Buhle Waste (Pty) Ltd. The application for leave to appeal is against an order and judgment I granted on the 1st of March 2024 dismissing an application in terms of section 18(1) and 18(3) of the same act for leave to execute an earlier order I granted on the 4th of December 2023 which is the subject of a pending appeal in respect of which I also granted leave.
3. The applicant for leave to appeal was also the applicant in the main application. The respondents in this leave to appeal application were the first, second, fourth

and fifth Respondents (collectively referred to as the State Respondents) as well as the tenth Respondent (which is separately opposing this application), in the main application. For the sake of convenience I will refer to the parties as they were in the main application.

4. There are two issues I have to decide in this application for leave to appeal. The first is whether or not my order is appealable and if so, the second is whether the requirements for leave to appeal have been satisfied.

Is the Order Appealable

5. The dismissal of an application to execute an order pending an appeal is by its very nature interlocutory and hence not appealable unless a party can show that the order has final effect¹.
6. It is the Applicant's contention that given the relatively short duration (three years) of the tender contract granted to the 10th Applicant, that by the time the matter is argued and finalised before the SCA, it may become academic. Hence any relief it obtains in due course will likely have no practical effect as the contract will have already run its course.

¹ Absa Bank Ltd v Mkhize and Two Similar Cases 2014 (5) SA 16 (SCA) at paragraph [18]

7. The Respondents have argued that section 18(4) of the Superior Courts Act 10 of 2013 only allows an appeal against a decision to execute an order, and not against a decision not to execute it.
8. The Applicant's counter this argument by submitting that section 18(4) of the Superior Courts Act should not be read as depriving a person whose application for leave to execute an order which is the subject matter of a pending appeal of the right to appeal that order. It submits that the normal rights relating to appeal an order should still be open to such a litigant.
9. The provisions of section 18 of the Superior Courts Act read as follows:

"18 Suspension of decision pending appeal

(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, 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.

(2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.

(3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.

(4) If a court orders otherwise, as contemplated in subsection (1)-

- (i) the court must immediately record its reasons for doing so;
- (ii) the aggrieved party has an automatic right of appeal to the next highest court;
- (iii) the court hearing such an appeal must deal with it as a matter of extreme urgency; and
- (iv) such order will be automatically suspended, pending the outcome of such appeal.

(5) For the purposes of subsections (1) and (2), a decision becomes the subject of an application for leave to appeal or of an appeal, as soon as an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules.”

10. In my view there may well be cases where such orders are appealable, provided the jurisdictional basis for appealing such orders exist. It would depend on the facts of the case in question. I am not prepared to make a categorical ruling that under no circumstances are orders dismissing applications under section of the Superior Courts Act appealable. Clearly if a court finds there were no

exceptional circumstances within the meaning of section 181) when there clearly were, this order would be appealable.

11. However, an applicant who appeals the dismissal of an application under section 18 of the Superior Courts Act must still show that as far as its case is concerned, such order is of final effect within the meaning of section 18(2). In my view the applicant has failed to meet this standard.
12. While it is true that the appeal process to the SCA may be slow, and there may be any number of delays, I am not convinced that this in and of itself is a ground to find that it is final because it may render any order granted by the SCA in due course as academic in nature given the duration of the contract granted to the 10th Respondent in this matter.
13. No facts were placed before me that would suggest that the appeal process to the SCA will be unduly delayed or what the probable length of time it would take to execute the appeal would be. To the contrary all indications thus far are that the state Respondents attorneys have shown extraordinary zeal in executing the appeal to the SCA.
14. As pointed out in my earlier judgment dated the 1st of March 2024, it is in the interests of all parties to co-operate in ensuring that the appeal process to the SCA is not delayed and is heard as soon as possible. Should it be found that a party has delayed the appeal process, the SCA will be best placed to make an appropriate order when it hears the matter.

15. While in appropriate circumstances the refusal of an application to execute may be appealable pending an appeal, it is notable that section 18(4) of the Superior Courts Act only makes allowance for an expedited appeal procedure to a party adversely effected by an order to execute pending an appeal. This is once again an indication of the importance the legislature accorded to the pending of all execution processes pending an appeal.
16. In the case of *Mathale v Linda and Another*² the Constitutional Court allowed and upheld an appeal against an execution order pending an appeal to the SCA, even though the main appeal process appears to have been prolonged and unduly delayed due to difficulties in preparing a complete record. I am mindful of the fact that that case dealt with an appeal from the Magistrates Court and was concerned with the interpretation of the relevant provisions of the Magistrates Court Act dealing with the appealability of interlocutory orders and the important right to housing enshrined in the Constitution.
17. In my view, the risk (no matter how great) of orders being appealed against being rendered academic because of anticipated delays (no matter how well founded) in the appeal process do not make them final in effect. Should an appeal court find that the delay was caused by any party to the litigation, it is free to make an appropriate order dealing with this. The present matter is a case in point.

² 2016 (2) SA 461 (CC)

The Application for Leave to Appeal

18. Even if I am incorrect in my finding above, this does not end the enquiry. As pointed out in my previous judgment the test for whether a court should grant leave to appeal is governed by section 17 of the Superior Courts Act 10 of 2013. The Applicant needs to show that the appeal has a reasonable prospect of success. To this end the Applicant has argued that I incorrectly applied the test set out in section 18 of the Superior Courts Act. In particular it refers to paragraph 17 of the judgment wherein I stated:

“17. I am not convinced that any exceptional circumstances contemplated in section 18(1) of the Superior Courts Act exist to justify an order that the original order should be executed despite the pending appeal. Nor has the applicant demonstrated on a balance of probabilities that it will suffer irreparable harm as required by section 18(3). To the contrary, the tenth Respondent will probably be severely prejudiced should the application be granted and in due course the appeal is upheld.”

19. It is the contention of the Applicant that severe prejudice is not enough and that I should have found that the tenth Respondent would suffer irreparable harm if

leave to appeal were granted. This submission ignores the fact that for the issue of irreparable harm to the tenth Respondent to become a relevant consideration the Applicant first had to show that the Applicant itself would suffer irreparable harm if leave to appeal was not granted. In my judgment I found that it could not show this. Whether in addition the tenth Respondent suffered irreparable harm, or severe prejudice, or even no prejudice at all becomes irrelevant if the Applicant is unable to show irreparable harm to itself³.

20. During the course of argument I asked counsel for the Applicant what the practical effect of granting leave to appeal would be as the appeal to the full bench of the High Court would itself be subject to potential delays. At present the lead times for obtaining a civil appeal date can be between 1 to 2 terms⁴ from the date of applying for a date, not to mention the other procedural delays in prosecuting the appeal. It was submitted that the full bench would probably be able to hear the matter sooner than the SCA. However, no evidence was presented that this would indeed be the case.
21. Counsel for the State Respondents submitted that even if the Applicant succeeded in getting heard before the full bench, any decision by the full bench upholding the appeal would be subject to a potential further appeal in terms of section 18(4) of the Superior Courts Act to the SCA by the State Respondents and tenth Respondent, causing even further delays. This may well be the case. I make no pronouncement on whether section 18(4) only applies to court of first

³ Incubeta Holdings (Pty) Ltd v Ellis 2014 (3) SA 189 (GJ) at paragraph [24]

⁴ Notice from the office of the DJP to practitioners dated the 26th of March 2024

instance orders or appeal court orders too. Until there is a definitive judgment in this regard, the Respondents would be entitled to pursue this avenue should the full bench uphold the appeal had I been persuaded to grant leave to appeal.

22. In light of the fact that I find that on the facts before me, my dismissal of the Applicant's application in terms of section 18(1) and 18(3) of the Superior Courts Act is not final in effect within the meaning of section 18(2), but even if it were, that it has not satisfied the requirement that there are reasonable prospects that another court may come to a different conclusion based on the additional requirements contained in section 18 of the Superior Courts Act, the application for leave to appeal is dismissed with costs as set out in my order.

Costs

23. After the hearing of this matter, I asked the parties to make additional submissions on the issue of costs in the light of the new taxable party and party costs regime ushered in by the new Uniform Rule 67A⁵ and amended rule 69(7).
24. The relevant portions of the rules read as follows:

"67A. Costs

(1) Subject to any order of the court awarding costs, the fees and disbursements as between party and party, which may be included in a bill of costs submitted for taxation, shall be—

⁵ Rule 67A was inserted and amended Rule 69 was brought into effect by GoN R4477 in G. 50272 with effect from 12 April 2024.

- (a) for attorneys, in accordance with the tariff in rule 70;
- (b) for attorneys, which a right to appear in the Superior Courts and who appear in a matter, in accordance with rules 69 and 70, where applicable; and
- (c) for advocates, in accordance with the tariff in rule 69:

Provided that for services rendered by an advocate referred to in section 34(2)(a)(ii) of the Legal Practice Act, 2014 (Act No. 28 of 2014), for work which is ordinarily performed by an attorney, the fee for such work shall be in terms of rule 70.

(2) In considering all relevant factors when awarding costs, the court may have regard to—

- (a) the provisions of rule 41A;
- (b) failure by any party or such party's legal representative to comply with the provisions of rules 30A; 37 and 37A;
- (c) unnecessary or prolix drafting, unnecessary annexures and unnecessary procedures followed;
- (d) unnecessary time spent in leading evidence, cross examining witnesses and argument;
- (e) the conduct of the litigation by any party's legal representative and whether such representative should be ordered to pay such costs in his or her personal capacity; and
- (f) whether the litigation could have been conducted out of the magistrate's court.

(3)

- (a) A cost order shall indicate the scale in terms of rule 69, under which costs have been granted.
- (b) In considering the factors to award an appropriate scale of costs, the court may have regard to:
 - (i) the complexity of the matter; and
 - (ii) the value of the claim or importance of the relief sought.
- (c) If the scale in terms of paragraph (a) is not indicated in the order, scale A of rule 69(7) shall apply to the costs that the court has awarded.

(4) A cost order may upon application by any party indicate—

- (a) which portions of the proceedings are deemed urgent; and
- (b) whether the fees consequent upon the employment of more than one advocate or attorney having right of appearance in the Superior Courts and who appears, are allowed and the scale in terms of rule 69(7), under which such fees are allowed.

(5) The taxation of fees as between party and party shall be effected by the taxing master in accordance with rules 69 and 70 and the applicable tariffs therein.

69. Tariff of fees for legal practitioners who appear in the Superior Courts

(1) Save where the court authorizes fees consequent upon the employment of more than one advocate or attorney having right of appearance in the Superior Courts and who appears to be included in a party and party bill of costs, only such fees as are consequent upon the employment of one advocate or attorney having right of appearance in the Superior Courts and who appears, shall be allowed as between party and party.

(2) Where fees in respect of more than one advocate or attorney having appearance in the Superior Courts and who appears are allowed in a party and party bill of costs, the fees to be permitted in respect of any additional advocate or attorney having right of appearance in the Superior Courts and who appears, shall be on a scale in terms of subrule (7), as directed by the court.

(3) ...

(4) ...

(5) ...

(6) ...

(7) The scales of fees contemplated by subrule (3) of rule 67A shall be:

SCALE A
R375,00 per
quarter of an
hour or part
thereof
(maximum
allowed)

SCALE B
R750,00 per quarter of
an hour or part thereof
(maximum allowed)

SCALE C
R1125,00 per quarter of
an hour or part thereof
(maximum allowed)

25. The new tax regime came into operation one week before the hearing of this matter. I agree with the submissions of counsel for all sides that it should only be applicable to work done after the 12th of April 2024.
26. In the submissions sent to me by the parties, I was referred to the case of *Mashavha v Enaex Africa (Pty) Ltd* (2022/18404) [2024] ZAGPJHC 387 (22 April 2024). Wilson J held that on the facts of the case that had to be argued before him, Scale A was the applicable scale to be applied. In the course of his judgment at paragraphs 16 and 17 Wilson J held:
- “16 Likewise, the default position set under the rule is that, in the absence of contrary indication, counsel’s costs will be recovered on scale “A”. Scale “A”, it seems to me, is the appropriate scale on which to make an award unless the application of a higher scale has been justified by careful reference to clearly identified features of the case that mark it out as unusually complex, important or valuable. Run-of-the-mill cases, which must be the vast majority of cases in the High Court, should not attract an order on the B or C scales.
- 17 In the case presently before me, the issues were uncomplicated. The entire case was determined on the bases of jurisdiction and standing. The merits never became relevant. The hearing lasted well under an hour. The case was competently and ethically pursued by all concerned. The “A” scale is plainly applicable.”
27. It was submitted by all counsel in their submissions that given the complexity of this matter that Scale C should be the applicable tariff for all counsel, including junior counsel where so employed. I agree that the requirements in Rule 67A(3) have been satisfied. None of the provisions of Rule 67A(2) are applicable. In

addition I agree with the Applicant's submissions that the issues requiring determination in this leave to appeal were novel in nature. The Applicant itself was represented by senior counsel, junior counsel, and assisted by a third counsel and fourth counsel too. The State Respondents were fully entitled to employ two counsel.

28. While I am cognizant of the fact that the new taxable costs regime no longer considers seniority of counsel, but rather complexity of the matter and value of the claim or importance of the relief sought to be the deciding factors, in my view a court should be wary not to grant or approve costs on a scale which counsel of a certain seniority would not ordinarily charge his or her own attorney and client. This would run counter to the intention of the new regime and views expressed by Wilson J.
29. I note that junior counsel employed by the State Respondents, according to his Group website, was admitted as an advocate in January 2014. Before then he was an attorney of roughly eight years standing. Normally counsel in this category would charge out their services closer to the upper limit of Scale B rather than Scale C, irrespective of the complexity of the matter.
30. I further note that the two thirds rule in place at the GCB bars in terms of which second or junior counsel charge their services out to their clients at two thirds what their seniors charge is not expressly endorsed by the new regime. The previous costs regime allowed second counsel to recover only upto 50% the fees

of the first counsel⁶. If Adv. Mhambi is indeed charging two thirds of what his leader Adv. Mokhari SC is charging, the effect of my order will have the same tempering effect on what can be recovered in respect of both counsel's fees on the party and party scale.

31. These are the reasons for my order dated the 10th of May 2024.



CAJEE AJ

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

DATE OF HEARING: 19th April 2024

DATE OF ORDER: 10th May 2024

DATE OF JUDGMENT: 22nd May 2024

⁶ The now repealed Rule 69(2) before the current amendment

LEGAL REPRESENTATIVES OF PARTIES

For the Applicant:

S. Baloyi SC
083 631 5741
sesibaloyi@law.co.za

Kameel Premhid
071 676 3878
counsel@premhid.com
kameel.premhid@gmail.com

Casey Juries
061 651 7415
caseyjuries@counsel.co.za

Pumezo Vabaza
076 611 3763
pumezovabaza@gmail.com

For the First, Second,
Fourth & Fifth Respondents:

William Mokhare, SC
082 440 3944
wmokhare@duma.nokwe.co.za

Masonwabe Mhambi
082 313 9247
advmhmhambi@law.co.za

For the Tenth Respondent:

Kennedy Satsawane SC
083 326 2711
ken@law.co.za