

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

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

Case Number: 006480/2023

- | | |
|--|-----------|
| (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED: YES / NO | |
| DATE | SIGNATURE |

In the matter between:

INTRAX INVESTMENTS 28 (PTY) LTD

Applicant

And

CITY OF EKURHULENI METROPOLITAN MUNICIPALITY

First Respondent

ASTRON ENERGY(PTY) LTD

Second Respondent

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

MAKUME, J

[1] This is an application for leave to appeal against the whole of the judgement and order delivered and dated the 18th March 2024 in which judgement I granted the following order against the Applicant (first Respondent) in the main application:

1.1 That the first Respondent is hereby directed to vacate the property being Portion 4 Erf number 1[...] Etwatwa in extent 4120 square meters subject to what appears hereunder.

1.2 The Applicant is called upon to within 30 days from date hereof, advertise and call for prospective tenants in respect of the property described in (1) above.

1.3 The Applicant must within 30 days of such advertisement, adjudicate on such bids and announce the result publicly and individually to all tenders.

1.4 Once a successful bidder is announced the first Respondent should be granted 30 days to vacate if it is not the successful bidder.

1.5 The first Respondent is ordered to pay the taxed party and party costs of this application.

[2] The grounds of appeal advanced by the Applicant can be summarised as being the following:

2.1 That this court failed to pronounce on the non-joinder of Mr Vusumuzi Mthimkhulu as well as Etwatwa service Station in the application.

2.2 This Court erred in pronouncing on the review application that was not before it.

2.3 That this Court erred in making a finding that there are no merits in the Applicant's contention that the Respondent had promised to sell the property to the Applicant.

2.4 That this Court erred in granting a judgement that is in direct conflict with the judgement granted by Matsemela AJ.

2.5 That this Court erred in finding that the Applicant has failed to raise a stronger right to remain on the property.

[3] This Application for leave to appeal is opposed amongst others on the basis the Applicant has failed to meet the test set out in Section 17(1) (a) of the Superior Courts Act 10 of 2013 I deal with the test to be applied in considering an application for leave to appeal.

THE TEST FOR LEAVE TO APPEAL

[4] Section 17(1) (a) of the Superior Courts Act number 10 of 2013 provides that leave to appeal may be given where the judge or judges concerned are of the opinion that the appeal would have reasonable prospects of success, or that there is some other compelling reason why the appeal should be heard.

[5] The Supreme Court of Appeals in **MEC for Health Eastern Cape v Mkitha [2016] ZASCA 176** held as follows:

“An Applicant for leave to appeal must convince the Court on proper grounds that there is a reasonable prospects or realistic chance of success on appeal. A mere possibility of success an arguable case or one that is not hopeless is not enough. There must be sound, rational basis to conclude that there is a reasonable prospect of success on appeal.”

[6] The Applicant’s main contention is that this Court should have first awaited the outcome of a pending review and not pronounce on the success thereof before dealing with the eviction application.

[7] The Applicant’s application for leave to appeal does not clear the test and no compelling reason exist for an appeal to be heard as contemplated in S17(1)(a)(ii) of the Act.

[8] The Applicant anchored its whole argument both in the main application as well as in this application for leave to appeal on an alleged promise to sell the property to it or grant it a 99-year lease to it in 1991.

[9] That promise was never supported by evidence in fact it is later contradicted by Mr Mthimkhulu's own correspondence dated the 12th April 2015 in which he alludes to a conversation he had with Chevron about the desire to purchase the property. He, Mr Mthimkhulu, does not refer to any promise or undertaking to sell the property to him.

[10] The Applicant's other defence was that because it had been in occupation of the property for over 30 years it has in terms of the common law acquired the property as its own. That argument I have found not to be sustainable for the simple reason that since 1991 the Applicant occupied the property not as if it was an owner thereof but as a franchise to Caltex later Chevron and Astron. It acquired so such right.

[11] The next aspect in this application is that the Applicant alleges that this Court erred in finding that it was futile at this stage to ask a Court to review a decision taken in December 2010 and that there is still another review application pending filed in 2022.

[12] It is significant to note that in the review by Matsemela AJ he did not set aside the 2010 decision what he ordered is that the City Council revisit or make a decision on the unsolicited bid by the applicant. When the City revisited it and did not alter its 2010 decision it means it is that 2010 decision which the Applicant says it's a review.

[13] I stand by my decision that to re-open that decision is an exercise in futility and is meant to stall the tender proceedings at the expense of the City Council. It is not in the interest of justice to stop the tender process which is open to the Applicant as well.

[14] I agree with the Respondents' submissions that the Applicant's application for leave to appeal is hopeless and another Court would certainly agree with the decision that I have made. In the result the application for leave to appeal cannot succeed. I am also satisfied that in view of the history of this matter a punitive costs order is appropriate.

Order

1. The Application for Leave to Appeal is dismissed.
2. The Applicant is directed to pay the Respondent taxed costs on an attorney client scale.

Dated at Johannesburg on this day of September 2024

M A MAKUME
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Appearances:

Date of Hearing: 18 September 2024

Date of Judgment: 23 September 2024

For Applicant: Adv Mhambi

Instructed By: Messrs Makhuni Inc.

For Respondent: Adv C Shongwe

Instructed By: Messrs Sikunyana Inc.