



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Application number: 5265/2022

In the matter between:

SOUTH AFRICAN MUNICIPAL WORKERS' UNION

Applicant

and

MALUTI-A-PHOFUNG WATER (SOC) LTD
MALUTI-A-PHOFUNG MUNICIPALITY
ACTING CEO: MALUTI-A-PHOFUNG WATER
(SOC) LTD: MR LEPHUTHING
MEC: DEPARTMENT OF CO-OPERATIVE
GOVERNANCE AND TRADITIONAL AFFAIRS:
FREE STATE
DL ERNEST
M XOLANI
L MALAKOANE
TC SEKHELE
MR RANTSHO
JG MAHLANGU
I MOSIA
NM MBELE
LS MOKOENA
LW MAPHIKE

1st Respondent

2nd Respondent

3rd Respondent

4th Respondent

5th Respondent

6th Respondent

7th Respondent

8th Respondent

9th Respondent

10th Respondent

11th Respondent

12th Respondent

13th Respondent

14th Respondent

CORAM:

VAN ZYL, J

HEARD ON: Heads of Argument Delivered on 27 and 29
September 2023 for Consideration in Chambers.

DELIVERED ON: 20 AUGUST 2024

- [1] This is an application for leave to appeal against the whole of my judgment in terms whereof I struck the application from the roll, with the applicant to pay the costs of the application.
- [2] By agreement between the parties this application was dealt with in chambers in terms of section 17(2)(d) of the Superior Courts Act, 10 of 2013 ("the Act"), read with Free State Rule 16.5, without a hearing in open court, but on consideration of written heads of argument filed on behalf of both parties.
- [3] I profusely apologise for the delay in delivering this judgment which was due to a *bona fide* mistake on my side.
- [4] The late filing of the applicant's heads of argument are condoned.

Applicable legal principles in respect of applications for leave to appeal:

- [5] Section 17(1)(a) of the Act determines as follows:

"1. Leave to appeal may only be given where the judge or judges concerned are of the opinion that –
(a)(i) the appeal would have a reasonable prospect of success; or

- (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
- (b) ...”

[6] In the judgment of **Acting National Director of Public Prosecutions v Democratic Alliance In Re Democratic Alliance v Acting National Director of Public Prosecutions** (19577/09) [2016] ZAGPPHZ 489 (24 June 2016) the court held at paragraph [25] of the judgment that the Act has raised the bar for granting leave to appeal and in this regard it referred to the judgment of **The Mont Chevaux Trust (IT 2012/28) v Tina Goosen and 18 Others** 2014 JDR 2325 (LCC). See also **Rohde v S** 2020 (1) SACR 329 (SCA) at para [8] and **Fair-Trade Independent Tobacco Association v President of the Republic of South Africa and Another** (21688/2020) [2020] ZAGPPHC 311 (24 July 2020) at para [4].

[7] In considering whether there is some other compelling reason why the proposed appeal should be heard, an important question of law may constitute such a compelling reason. However, the merits thereof still need to be considered in deciding whether to grant leave to appeal or not. In **Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd** 2020 (5) SA 35 (SCA) at para [2] the court determined as follows in this regard:

[2] In order to be granted leave to appeal in terms of s 17(1)(a)(i) and s 17(1)(a)(ii) of the Superior Courts Act an applicant for leave must satisfy the court that the appeal would have a reasonable prospect of success or that there is some other compelling reason why the appeal should be heard. If the

court is unpersuaded of the prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal. A compelling reason includes an important question of law or a discrete issue of public importance that will have an effect on future disputes. But here too, the merits remain vitally important and are often decisive. Caratco must satisfy this court that it has met this threshold."

The first ground of appeal:

- [8] My aforesaid order of striking the application from the roll followed upon the resultant finding which I made at paragraph [37] of my judgment:

"[37] In the circumstances I am not satisfied that Kramer Weihmann Attorneys are properly authorised to act on behalf of the applicant and/or to have instituted and prosecuted the application on behalf of the applicant. I am *mutatis mutandis* not satisfied that the Provincial Secretary and/or the Free State provincial structure of the applicant is properly authorised to act on behalf of the applicant and/or to have instituted and prosecuted the application on behalf of the applicant."

- [9] The first ground of appeal deals with the issue of authority and is, *inter alia*, set out in the Notice of Application for Leave to Appeal as follows:

"4. The court erred through – respectfully – applying the Rule 7 Notice that was filed to both the deponent and Kramer Weihmann Attorneys. The Rule 7 Notice specifically challenges the authority of Kramer Weihmann to act on behalf of the Applicant (who the court had apparently accepted was SAMWU as a National entity). There was no similar challenge – in terms of Rule 7 – launched against the authority of the deponent to launch the proceedings on behalf of SAMWU.

5. As a consequence there was no valid challenge to the authority of the deponent to represent the Applicant.
6. Respectfully and as a consequence, the court could not find and indeed should not have found that the deponent to the Founding Affidavit lacked authority to institute the proceeding on the Applicant's behalf."

[10] I indeed found that the "applicant" is the national entity of SAMWU. The Rule 7 notice in fact challenged the authority of Kramer Weihmann to act on behalf of the applicant; hence, the national entity. At paragraph [31] onwards of my judgment I dealt with the e-mail which Kramer Weihmann filed in their reply to the Rule 7 notice and found as follows at paragraph [35] of my judgment:

"[35] From the aforesaid it is evident that the Free State provincial structure of the applicant purportedly "*authorised*" the institution of the application on behalf of the national entity, SAMWU, but the Provincial Secretary completely failed to indicate any basis upon which it can be accepted that the Provincial Secretary and/or the provincial structure of the applicant had the authority to and/or had been duly authorised to have instructed Kramer Weihmann Attorneys to act on behalf of the applicant and/or to institute the application on behalf of the applicant. The same lack of authority is applicable with regard to the Provincial Secretary's and/or the provincial structure's authority to act on behalf of the applicant and/or to have instituted the application on behalf of the applicant."

[11] As also cited in my judgment, the following principle, *inter alia*, was enunciated in **Eskom V Soweto City Council** 1992 (2) SA 703 (W) at 705 F – G:

"The developed view, adopted in Court Rule 7(1), is that the risk is adequately managed on a different level. If the attorney is authorised to bring the application on behalf of the applicant, the application necessarily is that of the applicant. There is no need that any other person, whether he be a witness or someone who becomes involved especially in the context of authority, should additionally be authorised. It is therefore sufficient to know whether or not the attorney acts with authority."

[12] The aforesaid led to my resultant finding at paragraph [37] of my judgment, already cited at paragraph [7], *supra*.

The second ground of appeal:

[13] The second ground of appeal as set out in paragraphs 14 and 15 of the Notice of Application for Leave to Appeal, cannot, in my view, constitute an independent and substantive ground of appeal unless I grant leave to appeal on the first ground. Only if and when the first ground of appeal succeeds, will the merits of the applicant's application become applicable.

Conclusion on the first ground of appeal:

[14] After I have duly considered the arguments raised by Mr Grobler in his heads of argument filed on behalf of the applicant, in conjunction with the opposition thereto raised by Mr Masihlelo in his heads of argument filed on behalf of the first (and third) respondents, I am of the opinion that the first ground of appeal would have a reasonable prospect of success on appeal. If indeed successful, the merits of the application will have to be decided although I did not deal with it in my judgment.

Other issues raised in the first (and third respondents`) heads of argument:

[15] Mr Masihlelo also raised two further points in his heads of argument regarding the finality, or not, of my order and mootness of the proposed appeal as from even before I issued my judgment in the main application. The said issues will be considered by the court of appeal in conjunction with the first ground of appeal.

Court of Appeal:

[16] The applicant requested in its Notice of Application for Leave to Appeal that leave to appeal be granted to the Full Court of this Division. Section 17(6)(a) of the Act determines as follows:

“(6) (a) If leave is granted under subsection (2) (a) or (b) to appeal against a decision of a Division as a court of first instance consisting of a single judge, the judge or judges granting leave must direct that the appeal be heard by a full court of that Division, unless they consider-

(i) that the decision to be appealed involves a question of law of importance, whether because of its general application or otherwise, or in respect of which a decision of the Supreme Court of Appeal is required to resolve differences of opinion; or

(ii) that the administration of justice, either generally or in the particular case, requires consideration by the Supreme Court of Appeal of the decision, in which case they must direct that the appeal be heard by the Supreme Court of Appeal.”

[17] In the circumstances of the present matter I agree with the request by the applicant that leave to appeal to the Full Court of this Division should be granted.

[18] There is no reason why the usual order as to costs is not to be granted.

Order:

[19] The following order is granted:

1. The applicant is granted leave to appeal against the whole of the judgment and order of Van Zyl, J to the Full Court of this Division.
2. The costs of the application for leave to appeal are costs in the appeal, which costs are to include the reserved costs of 11 September 2023.



C. VAN ZYL, J

On behalf of the applicant:

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third respondents:

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On behalf of the fourth
respondent (Notice to Abide
filed in the main application):

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