



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

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

1 APRIL 2025

SM MARITZ AJ

CASE NO: 17766/2023

In the matter between:

MINISTER OF WATER AND SANITATION

APPLICANT/DEFENDANT

and

LIMPHOTA HOUSING CC

RESPONDENT/PLAINTIFF

JUDGMENT

MARITZ AJ

[1] The applicant brought an application for leave to appeal in terms of section 17(1)(a)(i)(ii) and (b) of the Superior Courts Act, 10 of 2013 on 2 May 2024, against my judgment delivered on

17 April 2024. The judgment appealed against concerned an application by applicant/defendant to uplift the bar to plead, which was dismissed with costs, including the costs of two counsel.

- [2] Despite filing the Notice for Leave to Appeal, the applicant failed to set the matter down for hearing or to arrange a hearing date with me, resulting in it being *ipso facto* barred. Instead, the respondent set the matter down, as evidenced by the Notice of Set Down, dated 21 February 2025, which was electronically served on the State Attorney's offices, the applicant's attorneys, on the same date, followed by service of a hard copy on 24 February 2025.
- [3] The applicant's papers provided no explanation for the failure to set the application down timeously, as required by the consolidated practice directive of the Gauteng Division of the High Court. Nor did they offer any reason for not arranging a hearing date with the registrar or with me. As noted, the respondent took the initiative to set the matter down, after which a hearing date was arranged with me on or about 17 to 24 February 2025. This conduct reflects a lackadaisical approach by the applicant towards the finalization of this matter.
- [4] I will outline the applicable legal principles set out in section 17(1)(a)(i)(ii) and (c) of the Superior Courts Act 10 of 2013, which the applicant must establish to succeed in its application for leave to appeal. Under this section, leave to appeal may only be granted if the judge is satisfied that:
- (a) The appeal **WOULD (NOT MIGHT)** have a reasonable prospect of success; or
 - (b) There is some other compelling reason why the appeal should be heard including conflicting judgments on the matter under consideration, and
 - (c) Where the decision sought to be appealed against does not dispose with all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.
- [5] The applicant's grounds for leave to appeal are outlined in its Notice of Application for Leave to Appeal dated 2 May 2024. I will not verbatim repeat these grounds, but they should be incorporated herein by reference to the Notice for Leave to Appeal. I will deal with these grounds below.

[6] Both parties filed heads of argument, in which their arguments are outlined, which should be incorporated herein by reference to the parties' respective heads.

[7] The judgment against which the application for leave to appeal is filed pertains to an application for the upliftment of the bar to enable the applicant to file its plea.

[8] An application for the upliftment of bar is an application in terms of Rule 27 of the Uniform Rules of Court, which governs extensions of time, removal of bars, and condonation. To succeed in such an application, the applicant must show '*good cause*'. The court has a broad discretion in this regard. '*Good cause*' requires the following:

(a) Satisfactory Explanation for the Delay:

The applicant must file an affidavit that adequately explains the delay. This means providing a sufficiently detailed account to enable the court to understand how the default occurred and to assess the applicant's conduct and motives. The applicant addresses this in paragraphs 6 to 7 of its Notice for Leave to Appeal.

(b) Existence of a *Bona Fide* Defence:

The applicant must demonstrate a *bona fide* defence based on factual grounds which, if proven, would constitute a valid defence. The alleged defences are set out in paragraphs 4.1 to 4.2.8 of the Notice for Leave to Appeal.

(c) Consideration of Prejudice:

The court must assess whether granting or refusing the application would cause prejudice to either party.

[9] In my judgment, I found the explanation for the delay and/or default unsatisfactory due to a lack of sufficient details to enable me to fully understand the circumstances surrounding the default. As noted in paragraph 22 of my judgment, read with paragraph 41, I agreed with the Respondent's submissions that the assertions of the deponent to the founding affidavit - the Director of Legal Services of the Department of Water and Sanitation – were inadequately substantiated. The claim that the State Attorney's email

server was down during the period the notice was sent lacked specifics, such as the duration, cause, and extent of the outage. Without supporting facts, this assertion did not fall within the deponent's personal knowledge and amounted to inadmissible hearsay evidence.

[10] Moreover, the applicant/defendant failed to provide a transmission report to confirm the alleged non-delivery of the notice from the destination server. In contrast, the respondent/plaintiff attached a copy of the notice of bar and the email confirmation of service to its answering affidavit (annexure "AA2") (paragraphs 6 of the judgment). Additionally, no confirmatory affidavit was submitted by the IT official from the State Attorney's office or any other relevant person to substantiate the deponent's claims. The judgment also notes, based on the evidence, that email was the agreed method of service. Furthermore, no explanation was provided for the late filing of the Notice of Intention to Defend (paragraph 5 of the judgment) or the failure to submit a plea within the prescribed 20-day period in terms of Rule 22(1) of the Uniform Rules of Court (paragraph 6 of the judgment). Consequently, the applicant, in seeking the upliftment of the bar, failed to meet this requirement.

[11] Regarding the second requirement – establishing a *bona fide* defence with reasonable prospects of success – I dismissed the application because the applicant/defendant failed to present admissible evidence. It was found that the deponent to the applicant's/defendant's founding affidavit lacks personal knowledge of the material facts, rendering it hearsay evidence, which is not admissible. Consequently, there is no need to further consider the merits of the application for upliftment (paragraph 45 of judgment). I found that the founding affidavit relied entirely on inadmissible hearsay from a deponent who lacked personal knowledge of the facts. None of the allegations were substantiated with confirmatory affidavits from relevant parties. Accordingly, there was no evidence before me to consider. The deponent's assertions were mere bald statements without any foundation. As stated in paragraph 42 of my judgment, the affidavit did not constitute evidence but rather unsubstantiated allegations. The application was therefore dismissed for the reasons outlined in my judgment (see paragraphs 13 to 46 – which should be incorporated herein by reference). It follows that no *bone fide* defence was established.

- [12] Regarding the issue of prejudice, the applicant/defendant failed to establish any case of prejudice suffered in its founding affidavit. In contrast, the respondent/plaintiff established its case of prejudice (See: paragraph 23 of judgment).
- [13] The applicant's grounds for leave to appeal, as set out in paragraphs 4.4.3 and 4.4.4 regarding the exceptions to hearsay and the interest of justice, are unsubstantiated and lack details; they are therefore disregarded. I refer to paragraph 44 of my judgement where I have dealt with the exceptions to the hearsay evidence rule.
- [14] The applicant's grounds for leave to appeal, raised in paragraphs 6 to 7, have been discussed above. The applicant has failed to meet the requirements for the relief sought and the application was dismissed for the reasons set out in my judgment.
- [15] In **Ramakatsa v African National Congress [2012] ZASCA 31 at par 10** the Supreme Court of Appeal summarised the test to be considered in an application for leave to appeal :

“Turning the focus to the relevant provisions of the Superior Courts Act, leave to appeal may only be granted where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success or there are compelling reasons which exist why the appeal should be heard such as the interests of justice. This Court in Caratco, concerning the provisions of section 17(1)(a)(ii) of the Superior Courts Act pointed out that if the court is unpersuaded that there are prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal. Compelling reason would of course include an important question of law or a discreet issue of public importance that will have an effect on future disputes. However, this Court correctly added that but ‘here too the merits remain vitally important and are often decisive’. I am mindful of the decisions at high court level debating whether the use of the word ‘would’ as opposed to ‘could’ possibly means that the threshold for granting the appeal has been raised. If a reasonable prospect of success is established, leave to appeal should be granted. Similarly, if there are some other compelling reasons why the appeal should be heard, leave to appeal should be granted. The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In other words, the appellants in

this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist."

[16] I have considered the applicant's ground for leave to appeal along with its submissions in its heads of argument, as well as the submissions of the respondent in its heads of argument. Based thereon I found that:

[16.1] None of these grounds (as outlined by the Supreme Court of Appeal case) were established by the applicant in this matter.

[16.2] There are no prospects of success that another court would find that the allegations contained in the founding affidavit fall within the deponent's personal knowledge and that the applicant's claims are not inadmissible hearsay evidence, which is unsubstantiated by any supporting documentation/confirmatory affidavits.

[16.3] The matter is not based on "*an important question of law or a discreet issue of public importance that will have an effect on future disputes.*"

[16.4] Neither would the appeal lead to a just and prompt resolution of the real issues between the parties.

[17] For reasons stated, I am not inclined to grant the application for leave to appeal.

THEREFORE, THE FOLLOWING ORDER IS MADE:

1. The application for leave to appeal is dismissed with costs, including costs of two counsel.

SIGNED AT PRETORIA ON THIS 1st DAY OF APRIL 2025.

BY ORDER



SM MARITZ AJ

Appearances on behalf of the parties:

Counsel for Applicant/Defendant:

Adv DT Skosana SC & Adv MC Phathela

Instructing Attorneys for Applicant/Defendant:

The State Attorney : Pretoria

Counsel for Respondent/Plaintiff:

Adv DJ Joubert SC & Adv GVR Fouché

Instructing Attorneys for Respondent/Plaintiff:

Bekker Brink & Brink Attorneys c/o VDT
Attorneys Inc

Date of Hearing: 28 March 2025

Date of Judgment: 1 April 2025