



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

Not reportable

CASE NO.: 5000/2023

In the matter between:

THE MATJHABENG LOCAL MUNICIPALITY

Applicant¹

and

DOWN TOUCH INVESTMENTS (PTY) LTD

First Respondent²

THE SHERIFF: WELKOM

Second Respondent³

Coram: Opperman J

Heard: 27 August 2024

Delivered: 28 January 2025. This judgment was handed down in court and electronically by circulation to the parties' legal representatives via email and release to SAFLII on 28 January 2025. The date and time of hand-down is deemed to be 15h00 on 28 January 2025

Summary: Leave to appeal – Rescission of judgment.

¹ 'The Municipality/Applicant'.

² 'Down Touch/First respondent'.

³ The second respondent did not join the litigation.

ORDER

The application for leave to appeal is dismissed with costs on a scale as between attorney and client.

JUDGMENT

[1] Meritless appeals may not be allowed. In *Mothuloe Incorporated Attorneys v Law Society of the Northern Province and Another*⁴ it was decreed by the Supreme Court of Appeal that:

‘[18] . . . therefore it would always be advisable, when dealing with an application for leave to appeal to look at the enabling statute to find guidance. *It is important to mention my dissatisfaction with the court a quo's granting of leave to appeal to this court. The test is simply whether there are any reasonable prospects of success in an appeal. It is not whether a litigant has an arguable case or a mere possibility of success . . .* ;

. . . This court has in the past bemoaned the regularity with which leave is granted to this court in respect of matters not deserving its attention. (See *Shoprite Checkers (Pty) Ltd v Bumpers Schwarmas CC & others* **2003 (5) SA 354** (SCA) para 23.) *This is one case where leave to appeal should have been refused for lack of reasonable prospects of success.*’ (Emphasis added)

[2] The prevailing law was clarified in *H.B (Nee D.J) v R.J.B (Leave to Appeal)*⁵ in that a court may not grant leave to appeal where the threshold which warrants such leave has not been cleared by the applicant. The test is what the act decrees and it is nothing more and nothing less. The court noted that:

[6] The traditional test that was applied by the Courts in considering leave to appeal applications have been whether there is a reasonable prospect that another Court may come to a different conclusion to the one reached by the Court a quo [Commissioner of Inland

⁴ *Mothuloe Incorporated Attorneys v Law Society of the Northern Province and Another* (213/16) [2017] ZASCA 17 (22 March 2017).

⁵ *H.B (Nee D.J) v R.J.B (Leave to Appeal)* (21480/2014) [2024] ZAGPPHC 401 (2 April 2024).

Revenue v Tuck 1989 (4) SA 888 (T) at 890B]. With the enactment of **section 17**, the test obtained statutory force. In terms of **section 17(1)(a)(i)** leave to appeal may now only be granted where the Judge or Judges concerned is of the view that the appeal would have a reasonable prospect of success, which made it clear that the threshold to grant leave to appeal has been raised. In Mont Chevant Trust v Tina Goosen and 18 Others *supra*, at para 6, it was held that:

"It is clear that the threshold or granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another Court might come at a different conclusion, see Van Heerden v Cronwright & others 1985 (2) SA 342 (T) at 342H. The use of the word "would" in the new statute indicates a measure of certainty that another Court will differ from the Court whose judgment is sought to be appealed against." In Notshokuvu v S (2016) ZASCA 112 at para 2, it was indicated that an Appellant faces a "higher and strigent" threshold under the **Superior Courts Act. Thus**, in relation to said **section 17**, the test for leave to appeal is not whether another Court "may" come to a different conclusion, but "would" indeed come to a different conclusion.

[7] With regard to the meaning of reasonable prospects of success, it was held in S v Smith 2012 (1) SACR 567 (SCA) 570, at para 7, as follows:

"What the test of reasonable prospects of success postulates is a dispassionate decision, based on the fact and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal."

[3] The crux of the application for leave to appeal is or appears to be, *inter alia*, that the court *a quo* erred in finding that the order appealed against, as granted by Hefer AJ, was not erroneously granted, the argument concerning the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002, the application of the common law, allegations of an unfair hearing, the issue of *Eke v Parsons*⁶ and the matter of the 'serious intention to go on review'.

⁶ *Eke v Parsons* [2015] ZACC 30; 2015 (11) BCLR 1319 (CC).

[4] The first respondent opposes the application. The arguments for the first respondent cannot be faulted and is the law.⁷ There is not any convincing indication in the case for the Municipality that this matter must go on appeal. The conclusion in the judgment *a quo* summarises the position:

'GOOD CAUSE & CONCLUSION

[99] The impugned order was not granted erroneously. If I am mistaken on the rule 42 – defences; the Municipality did not explain their default adequately. The argument that the Municipality was poorly administrated and that the community and service providers must bear the brunt for it now, is unconvincing. Service was proper and effective.

[100] From the above it follows that the default order was granted in compliance with the law and the prayers for the relief in the rest of the application must fail. As indicated above; apparently execution was already effected and the money has been paid out. There is no claim for repayment in *casu*.

[101] The fact that the Municipal Manager subjectively and honestly believes in their defence does not raise it to bona fide in the sense required here and in law.

[102] The Municipality did not meet the yardstick summed simplistically in *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) on page 228:

. . . It will suffice, it seems to me, if the defendant swears to a defence, valid in law, in a manner which is not inherently and seriously unconvincing. (Emphasis added.)

COSTS

[103] The application is ambitious. It is a settlement solemnised in a court order between parties represented by experienced counsel that was simply not complied with. The Municipality did not join the litigation when it was invited to do so. The Municipality did not stand behind the allegations of fraud and corruption and take the service level agreements on review. The Municipality took the law into their own hands and *mero moto* disregarded the order.

[104] Costs must follow the cause. Down Touch asked the court for a *de bonis propriis* costs order and on the scale C as between attorney and client. I am duty bound to grant a punitive costs order and to hold the Municipal Manager accountable for the dismal litigation on the rescission application. The taxpayer may not be mulcted with the costs. I will not do the same with the application to strike out.'

⁷ Heads of argument for the first respondent.

[5] A reasonable prospect of success was not established. The application must be dismissed. Costs must follow the cause. The application was without merit and the scale to be punitive.

Order

[6] In the result, the following order is made:

The application for leave to appeal is dismissed with costs on a scale as between attorney and client.

 
OPPERMAN J

Appearances

For applicant:

JP Snijders

Sandton

Instructed by:

Botes Mahlobogoane Van Heerden Attorneys

Vereeniging

c/o Pieter Skein Attorneys

Bloemfontein

For first respondent:

S Grobler SC

Bloemfontein

Instructed by:

Peyper Attorneys

Bloemfontein