



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

Reportable: Yes/No

Case no: 3805/2022

In the matter between:

**KOPANO UITKYK FARMING ENTERPRISE
(PTY) LTD**

Applicant

and

**THE NATIONAL GOVERNMENT
OF THE RSA**

First Respondent

[Through its Department of Agriculture,
Land Reform and Rural Development,
previously known as the Department of
Rural Development and Land Reform]

**THE MINISTER OF AGRICULTURE, LAND
REFORM AND RURAL DEVELOPMENT**

Second Respondent

**MEMBER OF THE EXECUTIVE COUNCIL,
FOR THE FREE STATE DEPARTMENT OF
AGRICULTURE AND RURAL DEVELOPMENT**

Third Respondent

**THE CHIEF DIRECTOR/ACTING CHIEF DIRECTOR
IN THE DEPARTMENT OF AGRICULTURE AND
RURAL DEVELOPMENT**

Fourth Respondent

MACHABEDI DINAH KOMETSI N.O.

Fifth Respondent

[In her capacity as trustee of the Kopano
Uitkyk No. 2 Trust]

PHATEDI JOHANNES MOKONE N.O.

Sixth Respondent

[In his capacity as trustee of the Kopano
Uitkyk No. 2 Trust]

PHAKELA BEN MAPHAKISA N.O.

Seventh Respondent

[In his capacity as trustee of the Kopano
Uitkyk No. 2 Trust]

NAMEDI FRANS MELATO N.O.

Eight Respondent

[In his capacity as trustee of the Kopano
Uitkyk No. 2 Trust]

TEBELLO JOHANNES MOTSOANI N.O.

Ninth Respondent

[In his capacity as trustee of the Kopano
Uitkyk No. 2 Trust]

Coram: Opperman J

Heard: Matter disposed of without oral hearing in terms of s 19(a) of
the Superior Courts Act 10 of 2013

Delivered: 27 February 2025. This judgment was handed down in court
and electronically by circulation to the parties' representatives by email and

release to SAFLII. The date and time for hand-down is deemed to be 15h00 on 27 February 2025.

Summary: Application for leave to appeal – application for filing of further affidavits – rule 6(5)(e)

ORDER

The application for leave to appeal is dismissed with costs; costs to include two counsel and on party and party scale B.

JUDGMENT

Opperman J

Introduction

[1] Manye AJ presided over the application *a quo*. His tenure ended and consequently the Acting Judge President of this division referred the application for leave to appeal to me for consideration.¹

[2] The application for leave to appeal is from the applicant *a quo* (applicant) to the Full Court of this Division alternatively, to the Supreme Court of Appeal. The fifth to ninth respondents *a quo* (respondents) oppose the application. It seems as if the first to fourth respondents did not join in the proceedings of the application for leave to appeal.

¹ Section 17(2)(a) of the Superior Courts Act 10 of 2013 finds application in that: 'Leave to appeal may be granted by the judge or judges against whose decision an appeal is to be made or, if not readily available, by any other judge or judges of the same court or Division.' Hereafter referred to as the Superior Courts Act.

[3] The case turns on the admission of further affidavits as contemplated in rule 6(5)(e) of the Uniform Rules of Court.

The judgment and order

[4] The crux of the judgment and the order is:

‘[12] I differ with the submission of the Applicant’s counsel that there is no prejudice to be suffered by the Respondent as a result of this application to allow further filing of a further founding affidavit. This simply cannot be true. It is clear that the Applicant’s conduct is to revive the main application removed from the roll on the 16th March 2023 without supplementary papers.

[13] The Applicant’s conduct amounts to nothing else but multi-duplication of actions between the parties under the following case numbers **4076/2021, 1993/2022, 223/2023, 3493/2023** including the application currently before this court **3805/2022**.

[14] The essence of this application places this Court in a difficult position as the Applicant does not seek a final relief in this application. The Court has to determine the issues herein as responded to by the Respondents where a glaring dispute of fact arises. It is undisputed that the rights of the parties are a matter pending for determination before the full Court of this division.

[15] In view of the case law stated above in relation to the request to exercise the discretion to allow further founding affidavit, further answering affidavit and further replying affidavits as submitted by the Applicant’s counsel, it goes without saying that the Court can only do so if there are exceptional circumstances.

[16] I find no exceptional circumstances for the exercise of the discretion to allow affidavits above as there are pending litigious matters between the parties. As such I exercise my discretion in not allowing the further filing of further founding affidavits in *casu*.

In the result, the following order is made:

1. The application in terms of Rule 6(5)(e) is dismissed.
2. The main interim application is removed from the roll.
3. The Applicant is ordered to pay the costs of this application including the costs of two counsel where so employed on scale B.’

The application, the objection to the application and leave to appeal

[5] The respondents objected on the basis of the reality that the application for leave to appeal 'lacks concise, clear and proposed grounds.' This is a peremptory legal requirement. In *Songono v Minister of Law and Order*² it was correctly noted that compliance with the Uniform Rules of Court in this regard is peremptory. An application for leave to appeal may be dismissed for this very reason.

'In attempted compliance therewith, the applicant filed a document headed 'Application for leave to appeal', in which he purported to set out the grounds upon which leave to appeal was to be sought. These so- called 'grounds' constitute a diatribe of some 17 pages criticising the judgment, analysing (at times incorrectly) certain of the evidence and the findings made, putting forward certain submissions and quoting various authorities. This lengthy, convoluted and at times disjointed criticism of the judgment did not clearly and succinctly spell out the grounds upon which leave to appeal is sought in clear and unambiguous terms - indeed, it served more to deceive, particularly as, during the course of argument, there were several points which the applicant's counsel, Mr *Burse*y, sought to raise which were not indicated in the document.

I am not aware of any judgment dealing specifically with grounds of appeal as envisaged by Rule 49(1)(b); however, Rule 49(3) is couched in similar terms and also requires the filing of a notice of appeal which shall specify 'the grounds upon which the appeal is founded'. In regard to that subrule it is now well established that the provisions thereof are peremptory and that the grounds of appeal are required, *inter alia*, to give the respondent an opportunity of abandoning the judgment, to inform the respondent of the case he has to meet and to notify the Court of the points to be raised...

... Mr *Burse*y suggested that grounds of appeal could be gleaned from the notice but that is not the point - the point is that the notice must clearly set out the grounds and it is not for the Court to have to analyse a lengthy document in an attempt to establish what grounds the applicant intended to rely upon but did not clearly set out. On this basis alone the application seems to me to be fatally defective and must be dismissed.³ (Accentuation added.)

² *Songono v Minister of Law and Order* 1996 (4) SA 384 (E) at 385I-J.

³ *Songono v Minister of Law and Order* 1996 (4) SA 384 (E) at 385I-J; *Hing v Road Accident Fund* [2014] ZAWCHC 15; 2014 (3) SA 350 (WCC) at 353J. In *Xayimpi v Chairman Judge White Commission (formerly known as Browde Commission)* [2006] 2 All SA 442 (E) an application for leave to appeal was dismissed due to non-compliance with this subrule (the applicants simply having attached an affidavit of some 45 pages instead of setting out the grounds of appeal clearly and succinctly). See Erasmus, *Superior Court Practice*, Volume 2:

[6] The manner in which the case was brought for leave to appeal justifies an immediate dismissal of the application. If I am wrong on this score, the reading of the papers and the judgment show that the applicant did not pass the threshold decreed in s 17 of the Superior Courts Act.

[7] I noted in *Matjhabeng Local Municipality v Down Touch Investments (Pty) Ltd and Another*⁴ that:

‘[1] Meritless appeals may not be allowed. In *Mothuloe Incorporated Attorneys v Law Society of the Northern Province and Another* 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) 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 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

Uniform Rules and Appendices, Rules of Court, 49 Civil Appeals from the High Court at RS 23, 2024, D1 Rule 49-29 fn 3 and 4, *Juta Law Online Publications*.

⁴ *Matjhabeng Local Municipality v Down Touch Investments (Pty) Ltd and Another* (5000/2023) [2025] ZAFSHC 14 (28 January 2025).

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 for 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."

[8] From the many papers filed, which included amended heads of argument by the applicant; three main contentions crystallised. The issue of exceptional circumstances, prejudice to the fifth to ninth respondents and the awarding of costs in favour of the fifth to ninth respondents.

[9] The first two issues were carefully and meticulously considered by the court *a quo* and with a stern eye on the applicable law. The conclusion that it is clear that the applicant's conduct is to revive the main application removed from

the roll on 16 March 2023 without supplementary papers and that the applicant's conduct amounts to a multi-duplication of actions between the parties under the following case numbers 4076/2021, 1993/2022, 223/2023, 3493/2023 including the application currently before this court 3805/2022, stands correct in law and fact. There is not a reasonable prospect of success on appeal, there does not exist some other compelling reason as to why the issues must be reconsidered and an appeal cannot be said to cause a just and prompt resolution of the real issues between the parties as contemplated in s 17(1)(c) of the Superior Courts Act.

[10] The issue of the *Biowatch*-principle as to costs is clear. The mere fact that the 'government' is a party to litigation does not put costs in the sphere of public interest litigation or even for that matter, constitutional challenge. The facts in *casu* are plain. This case has its origin in a private relationship that is regulated by a sale agreement. This case is about the filing of further affidavits in terms of rule 6(5)(e).

[11] The law that was reiterated in *Hotz and Others v University of Cape Town*⁵ is what it is and the court *a quo* did not err as to the costs order to the extent that there would be success on appeal:

'[21] Section 172 of the Constitution vests in courts wide remedial powers when dealing with constitutional matters. In terms of this provision a court may make any order – including a costs award – that is just and equitable. Since an award of costs is a discretionary matter, the discretion must be exercised judicially, having regard to all the relevant circumstances.

[22] It is now established that the general rule in constitutional litigation is that an unsuccessful litigant in proceedings against the state ought not to be ordered to pay costs. UCT is recognised as a public institution in terms of the Higher Education Act. The rationale for this rule is that an award of costs may have a chilling effect on the litigants who might wish to vindicate their constitutional rights. But this is not an inflexible rule. In accordance with its wide remedial powers, this Court has repeatedly deviated from the conventional principle that costs follow the result.

⁵ *Hotz and Others v University of Cape Town* (CCT280/16) [2017] ZACC 10; 2017 (7) BCLR 815 (CC); 2018 (1) SA 369 (CC) (12 April 2017).

[23] The rationale for the deviation was articulated by this Court in *Affordable Medicines* where Ngcobo J remarked:

“There may be circumstances that justify departure from this rule such as where the litigation is frivolous or vexatious. There may be conduct on the part of the litigant that deserves censure by the Court which may influence the Court to order an unsuccessful litigant to pay costs. The ultimate goal is to do that which is just having regard to the facts and circumstances of the case.”⁶ (Accentuation added.)

[12] Costs on party and party scale B was granted *a quo* and there is not any reason to deviate from the order here.

Order

[13] The following order is made:

The application for leave to appeal is dismissed with costs; costs to include two counsel and on party and party scale B.


OPPERMAN J

⁶ Ibid paras 21-23.

Appearances

For applicant:

GV Meijers

N Lebona

Instructed by:

JC Uys Attorneys

Vereeniging

c/o McIntyre & Van der Post Attorneys

Bloemfontein

For fifth to ninth respondents:

M Ramaili

V Vilakazi

Instructed by:

Jam Jam Attorneys

Sasolburg

c/o Rampai Attorneys

Bloemfontein