



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

CASE NO. 3486/2022

In the matter between:

**THE DEPARTMENT OF HUMAN
SETTLEMENTS, EASTERN CAPE
PROVINCE**

FIRST APPLICANT

**THE HEAD OF DEPARTMENT
AND ACCOUNTING OFFICER OF
THE DEPARTMENT OF HUMAN
SETTLEMENTS, EASTERN CAPE
PROVINCE**

SECOND APPLICANT

and

OUMA GAEHUMELWE DIUTWILENG

RESPONDENT

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

Rugunanan J

[1] This is an application, at the instance of the respondent, for leave to appeal to the full court of this division against the judgment and order of this court handed down on 31 October 2023 (the judgment), in which she was declared to be in contempt of an order previously granted by Malusi J on 3 February 2022.

[2] The order by Malusi J was granted on confirmation of a rule *nisi* that had been obtained *ex parte* before Roberson J on 21 October 2021.

[3] The effect of the confirmation order was that the respondent was obliged to return a laptop to the applicants.

[4] The laptop was utilised by her for the purposes of performing her duties as chief financial officer of the first applicant. Following her precautionary suspension on serious allegations of misconduct she was instructed to return the laptop. This history is set out in greater detail in the judgment of Malusi J¹.

[5] The legislation dealing with the circumstances in which leave to appeal may be granted is set out in s 17(1) of the Superior Courts Act 10 of 2013.

[6] The section reads:

‘Leave to appeal

17.(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) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and

¹ *Department of Human Settlements, Eastern Cape Province and Another*, Unreported Case No. 3261/2021, Eastern Cape Division, Makhanda.

- (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.’

[7] The section makes it clear that leave to appeal may only be given where the ‘judge’ concerned is of the opinion that the appeal would have a reasonable prospect of success, or there is some other compelling reason why it should be heard.²

[8] The respondent seeks leave solely on the basis that the appeal would have a reasonable prospect of success.

[9] In *Ramakatsa and Others v African National Congress and Another*,³ the Supreme Court of Appeal re-affirmed its earlier approach in *S v Smith*⁴ and set out the manner in which applications for leave to appeal should be considered, as follows:

‘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.’

[10] In opposing confirmation of the rule *nisi*, the version presented by the respondent was that she is unable to return the laptop because it was stolen on 25 April 2021.

[11] Malusi J rejected this as false.

² *MEC for Health, Eastern Cape v Mkhitha and Another* [2016] JOL 36940 (SCA) para 16; *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* [2020] ZASCA 17 para 2.

³ [2021] ZASCA 31 para 10.

⁴ 2012 (1) SACR 567 (SCA) para 7.

[12] He did so on the basis of ‘compelling and persuasive evidence from a forensic expert’. The evidence indicated that the laptop was utilised in the vicinity of the respondent’s home with access to her home wifi and password after the theft had allegedly taken place.

[13] In attempting to avoid the declaration of contempt in the proceedings that served before this court, in particular that she was in wilful and *mala fide* default of the confirmation order, the respondent persisted in presenting the same version of the theft of the laptop.

[14] The deponent to the applicants’ founding affidavit pertinently makes the point that the false version that the respondent propagates is deliberately directed at concealing material evidence regarding her alleged misconduct.

[15] Central to the respondent’s complaint against the judgment in which she was declared to be in contempt is that the court misdirected itself in relying on the findings by Malusi J which are incorporated in his judgment confirming the rule *nisi*.

[16] The basis for this contention stems from the principle that in motion proceedings a party must make out its case in its founding affidavit and that it is impermissible for a court to decide a matter on the basis of a point contained in an annexure to an affidavit but which is not covered in the founding affidavit.⁵

[17] The soundness of the principle is unquestionable but the respondent’s refuge therein is misguided.

[18] The judgment incorporating the confirmation order remains undisturbed.

[19] It has not been set aside. It has legally valid consequences.

⁵ See generally *Genesis Medical Scheme v Registrar of Medical Schemes and Another* [2017] ZACC 16 para 171.

[20] The respondent's persistence in pursuing on appeal with a version roundly rejected as false loses sight of the fact that the issue has already been determined and is *res judicata*.

[21] The palpable implausibility of that version gained no traction in the contempt proceedings for reasons dealt with in the judgment.

[22] That said, it is not required here and now to justify the judgment or its interpretation. Nor is this an opportunity to rewrite it or to supplement it.

[23] The respondent has failed to return the laptop.

[24] She has not purged her contempt.

[25] I am unconvinced that there is a sound rational basis for any prospect of success on appeal.

[26] A word on costs.

[27] The parties had differing contentions. It is unnecessary to repeat them.

[28] The application for leave to appeal is dated 14 November 2023. The application was heard on 3 June 2025 at the instance of the court. The rules of practice in this division⁶ enjoin parties within ten days of an application being filed to approach the judge who is to hear the application to arrange a mutually convenient date for the matter to be heard. If this does not materialise the default position is that the date is unilaterally determined by the judge on at least ten days' notice to the parties.

[29] Neither of the parties advanced any sustainable reasons for their default.

[30] The usual order follows.

⁶ Rule 10 of the Joint Rules of Practice for the High Courts of the Eastern Cape Province.

[31] In the result, the application for leave to appeal is dismissed with costs.

M. S. RUGUNANAN
JUDGE OF THE HIGH COURT

Appearances:

For the Respondent, as applicant in the application for leave to appeal: *M Somandi*,
Instructed by Wheeldon Rushmere & Cole Inc., Makhanda (Ref: *B Brody*)

For the Applicants, as respondents in the application for leave to appeal: *S C Rorke*
SC, Instructed by Wesley Pretorius & Associates Inc., c/o Netteltons Attorneys,
Makhanda (Ref: *I Pienaar*).

Date heard: 03 June 2025.

Date delivered: 06 June 2025.