



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

CASE NO: 1071/2022

In the matter between:

NOTSHE ATTORNEYS

Applicant

And

THE STATE ATTORNEY, MTHATHA

First Respondent

**THE MINISTER OF JUSTICE AND CORRECTIONAL
SERVICES**

Second Respondent

MEC FOR HEALTH, EASTERN CAPE

First Third Party

MINISTER OF POLICE

Second Third Party

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Third -Third Party

LEAVE TO APPEAL AND SECTION 18(3) JUDGMENT

Mjame AJ

[1] This Court is faced with three applications, namely, an application brought by 1st Applicant (State Attorney Mthatha) ,2nd Applicant (Minister of Justice and Correctional Services) who are the respondents in the judgement appealed against which was handed down on 17 October 2024.

The Applicants seeks leave to appeal this decision to a Full Bench of this Division, alternatively to Supreme Court of Appeal.

Advocate Jikwana appeared for the Applicants.

The second application is brought by Minister of Police, who is the Second Third Party in the judgement appealed against. The Applicant seek leave to appeal this decision to the Supreme Court of Appeal.

Advocate Haskins appeared for the applicant.

The third application is brought in terms of Section 18 of Superior Court Act 10 of 2013 by Notshe Attorneys, who is also the applicant in the judgement appealed against which was handed down by this court.

Advocate Notshe appeared for the applicant

All three applications are opposed by the affected parties.

[2] I shall first deal with two applications for leave to appeal, followed by application in terms of Section 18 of the Superior Court Act.

GROUND OF APPEAL BY STATE ATTORNEY MTHATHA AND MINISTER OF JUSTICE AND CORRECTIONAL SERVICES

[3] The application for leave to appeal is sought on the grounds appearing on the notice of application which I shall summarise as follows:

3.1. the court erred in accepting the unreliable evidence of the respondent, to the extent that: the respondent carried out the work that it was employed to do. The court should have found that the respondent failed to advance any evidence.

3.2 the court erred in finding that in letter dated "20 January 2022, Mr Hanise , Acting Head of the State Attorney Office to the applicant was admitting liability and undertaking to settle the outstanding amount .The court should have found that it has, throughout been the applicants case that this letter was not an admission of liability , but was a letter written in the course of negotiations with a view to having dispute resolved amicably.

3.3. the court erred in failing to attach sufficient weight, or none at all to its finding that the applicant's submission "that *the letter from the respondents,*

annexure “RA6 “is not an unequivocal acknowledgement of debt, does not set forth with the amount admitted and source of indebted, was written in the midst of negotiations towards the settlement of applicant’s alleged debt which did not materialise.”

3.4. the court erred in failing to find that the respondent failed to prove what services it rendered and how the amount claimed was computed.

3.5. the court erred in failing to evaluate the evidence properly or at all.

3.6 the court erred in failing to attach sufficient weight to the concessions made by the respondent, more particularly when they related to material issues.

3.7. the court erred in awarding costs against the applicants.

SUBMISSIONS

[4] The 1st and 2nd Applicant’s (State Attorney Mthatha and Minister of Justice) contentions are mainly set out in the grounds detailed in the Notice of Appeal.

Advocate Jikwana submitted on behalf of the applicants that there are reasonable prospects of success that another court would come to a different conclusion to those reached in the judgement therein. He referred the court to various authorities

The respondent’s main contention in opposing this leave to appeal, is contained in his Heads of Argument. In relation to the applicant’s submissions regarding prospects of success, the Respondent contended that the present application enjoys no such prospects and there exist no compelling reasons why the application for leave to appeal should not be dismissed with costs, citing various authorities.

GROUND OF APPEAL BY MINISTER OF JUSTICE (SECOND -THIRD -PARTY) ON APPLICATION FOR REVIEW.

[5] The Applicant’s (second third party) various grounds of appeal set out in its application for leave to appeal and, in summary form, are that the court erred in respective of practically all its findings.

5.1 the court failed to decide issues in respect of third-party notice and the review application on the following:

5.2 whether the State Attorney and Department of Justice pleaded facts and legal conclusions to be drawn from the facts, that disclose an entitlement in favour of the State Attorney to be indemnified by the Minister of Police or to contribute.

5.3. whether the State Attorney established a contract of mandate between it and the Minister of Police in relation to the relevant cases, which contract or mandate would entitle them to a contribution from or indemnification by the Minister of Police.

5.4 whether the decision to outsource the relevant cases to Notshe Attorneys was unlawful, irrational and unreasonable.

5.5 whether the Minister of Police has locus standi to pursue the review application

5.6 the court erred in concluding that the State Attorney and Department of Justice had set out a cause of action against Minister of Police for a contribution or indemnification.

5.7 the court erred in finding that the State Attorney acted within the scope of its duties under Section 8 of the State Attorney Act 56 of 1957.

5.8 the court erred in failing to uphold the Minister of police's objections to the third-party notice and set the third party notice aside.

5.9 the court erred in joining the Minister of Police in the main application by Notshe Attorneys against State Attorney and the Department of Justice.

5.10. the court erred in finding that the Minister of Police gave its unwavering consent to general outsourcing of cases to private attorneys.

5.11. the court erred in finding that the Minister of Police became aware of the impugned decision in January 2019.

5.12. the court erred in finding that the review application was instituted late and that a condonation application was necessary.

5.13. the court erred in failing to uphold the Minister of Police's review application and set aside the impugned decision.

[6] The Applicant submitted that the application involves a question of law of general importance, that is, the existence and / or extent of the powers of the State Attorney to outsource cases to private attorneys. It was submitted that the State attorney represents all government departments throughout the Republic, the

general administration of justice requires that the question about the extent of its powers be decided by a Court whose decision applies throughout the Republic.

Applicant submitted that the gravity of this matter deserves leave to the supreme Court of appeal, that the appeal has strong prospects of success and there are compelling reasons justifying its consideration.

[7] Advocate Jikwana on behalf of the 1st and 2nd respondents submitted that the application be dismissed with costs.

He submitted that third notice for indemnification was served to the parties.

He referred court to the founding affidavit. He submitted that the issue for outsourcing by State Attorney was communicated to the parties. There was a basis for joinder of the third parties by court.

He submitted that the 1st respondent, State attorney at all material times acted within scope of its powers in terms of Section 8 of State Attorney Act.

He submitted that there are no prospects of success on appeal.

[8] Advocate Notshe submitted on behalf of the third respondent in the application that the grounds raised by Minister of Police be dismissed with costs on a punitive, on the basis of undue and unexplained delay.

He submitted that Minister of Police has failed to come up with anything convincing the court on proper grounds that there is any realistic chance of success on appeal. They failed to come up with any sound and rational basis to conclude that there is a reasonable prospect of success on application.

He submitted that the review application by the applicant breached the principles of Co-operative Governance enshrined in sections 40 and 41 of the Constitution of the Republic of South Africa Act 9 of 1996.

He contended that the respondent cannot be denied justice because of misunderstandings between organs of the state.

LEAVE TO APPEAL

[9] Leave to appeal is now governed by section 17 (1) of the Superior Courts Act 10 of 2013 (the Act). The section provides that:

(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, submitted that grounds or
- (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgements on the matter under consideration.

[10] In *Ramakatsa and Others v African National Congress and Another* 2021 JOL 49993 (SCA) at paragraph 10, March 2021, in interpreting the section, the SCA held that:

“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.”

[11] When considering the judicial precedence, the Supreme Court of Appeal has held that the test that the test for granting leave to appeal is as follows: -

11.1 In the matter of *MEC for Health, Eastern Cape v Mkhitha and Another*¹ it was held

“[16] Once again it is necessary to say that leave to appeal, especially to this court, must not be granted unless there truly is a reasonable prospect of success. Section 17(1) (a) of the Superior Courts Act 10 of 2013 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

¹ [2016] ZASCA 176 (29 November 2016)

[17] An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough, there must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.”

The Court must decide whether the appeal would have a reasonable prospect of success and there must be a sound, rational basis for any conclusion to that effect.²

[12] The Supreme Court of Appeal set out the application for a test to grant leave to appeal in *Cook v Morrison and Another*³ as follows:

“[8] The existence of reasonable prospects of success is a necessary but insufficient precondition for the granting of special leave. something more, by way of special circumstances, is needed. these may include that the appeal raises a substantial point of law, or that the prospects of success are so strong that a refusal of leave would result in a manifest denial of justice, or that the matter is of very great importance to the parties or to the public. This is not a closed list (Westinghouse Brake & Equipment (PTY) Ltd 1986(2) SA 555 (A) at 564H-565E, Director of Public Prosecutions, Gauteng Division, Pretoria v Moabi 2017 (2) SACR 384 (SCA) [2017] ZASCA 85 paragraph 21.”

[13] Having considered the papers before me and the submissions made on behalf of 1st and 2nd Applicants (State Attorney Mthatha, Minister of Justice and Correctional Services, I am of the view that the applicants have passed the muster that the appeal would have a prospect of success.

Having regard to the papers and submissions before me, I am of the view that there are no prospects of success on appeal by applicant (Minister of Police) against the judgement and order issued by this court on the 17 October 2024.

Section 18(3) application

² Four Wheel Drive Accessory Distributors CC v Rattan No. 2019(3) SA 457 SCA @ 463F

³ 2019 (5) SA 51 SCA

[14] The Applicant, Notshe Attorneys, who is also the applicant in the main application brought an application in terms of section 18 of the Superior Court Act 10 of 2013 seeking a declaratory that the order made on 17 October 2024 not to suspend the operation and execution of the order granted by this court on 17 October 2024.

The application is opposed by the 1st and 2nd Respondents.

[15] In support of this application, Advocate Notshe on behalf of the applicant submitted that the facts of the in which judgement was given satisfied the requirements of Section 18 (3) of the Superior Courts Act. He referred the court to its founding affidavit.

He contends that he had lost time and money for services that were not paid for.

He further submitted that it employed the services of employees to carry out the services which in turn paid the employees. He contended that the respondents will not suffer irreparable harm if the order is granted.

He submitted that the respondents do not have any reasonable prospects of success in the application for leave to appeal.

[16] Advocate Jikwana on behalf of 1st and 2nd Respondents, opposing the application submitted that the applicant has failed to show any entitlement to approach this court and seek an order for payment pending the outcome of the appeal.

He argued that Section 18(1) of Superior Courts Act clearly shows that an order against suspension cannot be granted merely for the asking, something more is required.

He submitted that the applicant, Notshe Attorneys failed to prove that it will suffer irreparable harm should the application not granted and that respondents will not suffer irreparable harm if the court so orders. He submitted that the applicant has failed to prove both of these requirements.

He further argued that the contention of the applicant in its founding affidavit is that *“it paid the employees but has not been paid for such services.”* can not be used as a ground for future irreparable harm. That it paid its employees belongs to history.

He submitted that the respondents will suffer irreparable harm should the application be granted. He contended that there is no guarantee, more especially without any

security being furnished, that the respondents would get their monies back in the event of the appeal being successful.

He submitted that the application be dismissed with costs at a punitive scale.

[17] Section 18 of the Act provides as follows: -

“Suspension of decision pending appeal

(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.

(2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of final judgement, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.

(3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.

(4) If a court orders otherwise, as contemplated in subsection (1) –

(i) The court must immediately record its reasons for doing so;

(ii) the aggrieved party has an automatic right of appeal to the next highest court;

(iii) the court hearing such an appeal must deal with it as a matter of extreme urgency; and

(iv) such order will be automatically suspended, pending such an appeal.

(5) for the purposes of subsections (1) and (2), a decision becomes the subject of an application for leave to appeal, as soon as an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules.”

[18] The purpose of this kind of application is used when a party believes that suspending the original decision would cause significant harm or disruption and they want the ruling to be implemented while further legal challenges are considered.

There are certain requirements to be met, that:

- (1) The applicant must provide compelling reasons why the suspension would be detrimental, often including arguments about potential financial losses, damage to reputation or urgent needs.

The court will decide whether to grant the application based on the specific circumstances of the case and the legal arguments presented.

[19] The Superior Courts Act, 2013 provides that an application for leave to appeal suspends the operation and execution of a decision, pending the outcome of the application or appeal.

Consequently, a court order cannot be executed until the proceedings are determined.

[20] The test for consideration of section 18(3) application is well established and has been stated by our Courts that factors to be considered are as follows ⁴:

- (a) First, whether or not exceptional circumstances exists, and
- (b) Secondly, proof on balance on probabilities by the applicant of:
 - (i) The presence of irreparable harm to the applicant who wants to put into operation and execute the order, and
 - (ii) the absence of irreparable harm to the respondent/ loser, who seeks leave to appeal.

The court has no discretion to exercise and the circumstances must justify the departure from the process pertaining to appeals.⁵

The applicant must show that they will suffer irreparable harm if the order is not executed. Applicant do not need to show that there is certainty that they would suffer

⁴ Incubeta Holdings (Pty) Ltd v Ellis 2014 (3) SA 189 (GJ) para 16

⁵ Liesching and Others v The State (2018) ZACC, 2019(4) SA 219 (CC)., Seatrans Maritime v Owners MV Ais Mamas and Another 2006(2) SA 150 (C) 156 E-157

irreparable harm ⁶. Although it had been held in *Incubeta Holdings (Pty) Ltd v Ellis* ⁷ that in considering application in terms of section 18 the merits on the prospect of success of the appeal were of no consequence, this judgement was overtaken by the by the Supreme Court of Appeal.

[21] The prospects of success of the appeal are of relevance. In *University of Free State v Afriforum and Another* ⁸, the Court said the following:

“[14] A question that arises in the context of an application under section 18, is whether the prospects of success in the pending appeal should play a role in this analysis. In Incubeta Holdings Sutherland J, was of the view that the prospects of success in the appeal played no role at all. In Liviero Wilge Joint Venture Satchwell J, Moshidi J concurring, was of the same view. However, in Justice Alliance Binns-Ward J (Fortuin and Boqwana JJ concurring), was of a different view, namely that the prospects of success in the appeal remain a relevant factor and therefore .., the less sanguine a court seized of an application in terms of section 18(3) is about the prospects of the judgement at first instance being upheld on appeal, the less inclined it will be to grant the exceptional remedy of execution of that judgement pending the appeal. The same quite obviously applies in respect of a court dealing with an appeal against an order granted in terms of section 18 (3). It is also settled that where the prospects of appeal are weak, there is no need to find that the victorious party has demonstrated a sufficient degree of exceptionality to justify an order in terms of section 18(3).

[22] Having regard to the papers and the submissions before me, I am of the view that the applicant will not suffer irreparable harm and if the order is not executed pending appeal.

[23] Accordingly the following order is made:

⁶ Minister of Social Development Western Cape and Others v Justice Alliance of South Africa and Another [2016] ZA WCHC 34 @ paragraph 25

⁷ 2014(3) SA 1 189 (GJ) paragraph 16

⁸ [2017] ZACC 48, [2018] (2) SA 185CC, [2018] (4) BCLR CC (29 December 2017)

23.1 Application for leave to appeal by 1st and 2nd Applicants, State Attorney Mthatha and Minister of Justice to the Full Court of this Division is granted and the costs will be the costs in the appeal.

23.2. Application for leave to appeal by Minister of police, (Second -third - party) to the Supreme Court of Appeal is dismissed with costs.

24.3 Application in terms of Section 18 of Superior Courts Act 10 of 2013 by Notshe Attorneys to declare that the execution of order granted by this Court on 17 October 2024 not be suspended is dismissed with costs.

P.C.N. MJAME

Acting Judge of the High Court: MTHATHA DIVISION

APPEARANCES:

1. 1st and 2nd Applicants: Advocate Jikwana

Instructed by State Attorney, Mthatha, Minister of Justice and Correctional Services

2. Advocate Haskins for Applicant, Minister of Police

Instructed by Notyesi Attorneys

3. Advocate Notshe for Applicant Notshe Attorneys

Date Heard: 12 December 2024

Date Delivered: 20 February 2025