



**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

Reportable/Not Reportable

Case no: 1396/2025

In the matter between:

**MEC: DEPARTMENT OF COOPERATIVE GOVERNANCE,
HUMAN SETTLEMENTS AND TRADITIONAL AFFAIRS**

First Applicant

**DEPARTMENT OF COOPERATIVE GOVERNANCE, HUMAN
SETTLEMENTS AND TRADITIONAL AFFAIRS**

Second Applicant

and

NAMA KHOI LOCAL MUNICIPALITY

First Respondent

COUNCIL OF THE NAMA KHOI LOCAL MUNICIPALITY

Second Respondent

RODNEY KRITZINGER

Third Respondent

JAN IZAK SWARTZ

Fourth Respondent

Coram: MAMOSEBO J.

Heard: 24 November 2025.

Delivered: 05 December 2025.

Summary: Application for leave to appeal – Reliance on s 17(1)(a)(i) and (ii) of the Superior Courts Act 10 of 2013 – Whether the envisaged appeal has reasonable prospects of success and or – Whether there are compelling reasons for the appeal to be heard and or – Whether it would be in the interests of justice for the appeal to be heard – Neither of the grounds are established – Leave to appeal is refused.

ORDER

1. The application for leave to appeal is dismissed with costs, including costs of counsel on Scale C.
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JUDGMENT

Mamosebo J

- [1] This is an application for leave to appeal to the Full Court of this Division, alternatively, the Supreme Court of Appeal (SCA) against the whole of my judgment and order handed down on 27 June 2025 in which I dismissed the application for a declarator and ordered each party to pay its own costs. The applicants rely on s 17(1)(a)(i) and (ii) of the Superior Courts Act¹ that the appeal would have reasonable prospects of success and that there is a compelling reason for the appeal to be heard. The application is opposed by the first and second respondents (hereafter collectively referred to as respondents), the Nama Khoi Local Municipality and the Council of the Nama Khoi Local Municipality, respectively. The third and fourth respondents filed notices to abide the decision of the Court in the main application and are not parties in this application for leave to appeal.
- [2] The first and second applicants, MEC for the Department of Cooperative Governance, Human Settlements and Traditional Affairs and the Department of Cooperative Governance, Human Settlements and Traditional Affairs (COGHSTA), respectively, filed a notice of application for leave to appeal with the Office of the Registrar on 18 July 2025. Whereas it is settled that the grounds of appeal must be clearly outlined and succinct, the applicants'

¹ 10 of 2013.

grounds were presented not only in an argumentative but also in a repetitive form which is impermissible.²

[3] A brief background is that the respondents had appointed the 65-year-old fourth respondent as the acting municipal manager for three months in terms of s 54A of the Municipal Systems Act.³ The respondents intended for the fourth respondent to be in employment as a municipal manager for two more years after his employment contract of three years had ended. For various reasons, this plan was not supported by the MEC. Nonetheless, the respondents had accordingly applied to the Minister for Cooperative Governance and Traditional Affairs for a waiver of the requirement that a senior manager must retire upon the age of 65 as contemplated in Regulation 41(1).⁴ While the waiver application was pending before the Minister, the applicants had urgently sought an order declaring unlawful, invalid, null and void *ab initio* the employment of the fourth respondent as an acting municipal manager. As already alluded to, I dismissed that application.

[4] Aggrieved, the applicants seek leave to appeal against the dismissal of their application for a declarator. The surmised grounds upon which the applicants rely in substantiation of this application are that the Court had erred:

- 4.1. In relying on the purported achievements of the fourth respondent as a basis to determine whether his appointment as an acting municipal manager was unlawful, invalid, and thus null and void *ab initio*.
- 4.2. In not finding that the jurisdictional requirements for a declaratory order were met and subsequently declare the appointment of the fourth respondent unlawful, invalid and set it aside.
- 4.3. In finding that the declaratory order would not be appropriate whereas the finding made was influenced by an error of law thereby resulting

² See *Songono v Minister of Law and Order* 1996 (4) SA 384 (E) at 385B – H; see also *Hing and Others v Road Accident Fund* 2014 (3) SA 350 (WCC) para 4; see also *Mahori and Another v Firststrand Bank Ltd and Others (Leave to Appeal)* 2024 JDR 1108 (GP) para 7.

³ 32 of 2000.

⁴ Local Government: Regulations on Appointment and Conditions of Employment of Senior Managers GN 21, GG 37245, 17 January 2014.

in the failure to exercise its discretion judiciously. The error of law being the misconception of the actual dispute between the parties, namely the unlawfulness or not of the fourth respondent's appointment; and the reliance by the Court on the fourth respondent's achievements to the ignorance of evidence relevant in determining the main issue.

4.4. In not finding that absent a waiver by the Minister, the purported appointment was unlawful, invalid and ought to be set aside.

[5] The test whether to grant leave to appeal is trite.⁵ In *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd*⁶ the SCA held:

'In order to be granted leave to appeal in terms of s 17(1)(a)(i) and s 17(1)(a)(ii) of the Superior Courts Act an applicant for leave must satisfy the court that the appeal would have a reasonable prospect of success or that there is some other compelling reason why the appeal should be heard. If the court is unpersuaded of the prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal. A compelling reason includes an important question of law or a discrete issue of public importance that will have an effect on future disputes. But here too, the merits remain vitally important and are often decisive. Caratco must satisfy this court that it has met this threshold.'

[6] The gravamen of the applicants' complaint is that this Court had been influenced by the achievements of the fourth respondent in not granting the declarator sought by the applicants. The cited paragraph 19 of the Court's judgment reads:

'Since the fourth respondent assumed his duty on 30 August 2022 neither the MEC nor Council of the Municipality nor the Minister have raised complaints pertaining to his competence and performance. The uncontroverted evidence is that he brought about the turnaround that resulted in unqualified audits. This attribute strongly

⁵ *Mont Chevaux Trust v Goosen* 2014 JDR 2325 (LCC) para 6; *S v Notshokovu* 2016 JDR 1647 (SCA) para 2; *S v Smith* 2012 (1) SACR 567 (SCA) para 7; *Ramakatsa and Others v African National Congress and Another* (724/2019) [2021] ZASCA 31 (31 March 2021) para 10.

⁶ 2020 (5) SA 35 (SCA) para 2.

militates against setting aside the fourth respondent's appointment, **at least until the Minister's decision, as that would otherwise leave a lacuna in the municipal administration.**' (My emphasis.)

[7] The words in bold above show that my refusal to grant a declarator was partly influenced by the fact that the application for a waiver was pending before the Minister who would consider the same facts that this Court was privy to from the papers, particularly paragraphs 19 and 21 of the main judgment. I also clearly stated in the same sentence the need to avoid a *lacuna*, this being in light of the importance of the position of a municipal manager. The applicants are nit-picking and misconstruing the impugned judgment.

[8] In as far as prospects of success are concerned, the applicants' case faces two hurdles: an improperly raised legal issue for determination and mootness. The paragraphs which follow consider those aspects. The proceedings in the impugned judgment were launched by way of notice of motion. In the replying affidavit, the applicant tried to make a new case for the basis of the declarator sought, namely the question whether a waiver is only necessary for the appointment of a municipal manager or whether it is also necessary for the appointment of an acting municipal manager. The applicant has now raised the same issue as a ground for leave to appeal arguing that legal certainty is needed on the matter. The SCA has, in *Director of Hospital Services v Mistry*,⁷ held:

'When, as in this case, the proceedings are launched by way of notice of motion, it is to the founding affidavit which a Judge will look to determine what the complaint is. As was pointed out by KRAUSE J in *Pountas' Trustee v Lahanas* 1924 WLD 67 at 68 and as has been said in many other cases: "... an applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein, because those are the facts which the respondent is called upon either to affirm or deny".'

⁷ 1979 (1) SA 626 (A) at 635H – 636A; see also *Airports Company of South Africa (SOC) Ltd v Tswelokgotso Trading Enterprise CC* [2022] ZAGPJHC 410 para 9.

- [9] The relief sought by the MEC and COGHSTA in prayer 2 was to declare the appointment of the fourth respondent as the acting Municipal Manager of the first respondent unlawful, invalid, null and void *ab initio* and set it aside. The acting period has lapsed on 30 June 2025. The waiver was refused and the fourth respondent has vacated his office. The aforementioned point towards, borrowing from the phrase used by Ponnann JA, the envisaged appeal not getting out of the starting stalls. Even if it were to be found that the appointment of the fourth respondent was unlawful, a determination which was not made, the determination by the appeal court would have no practical effect within the meaning of s 16(2)(a)(i) of the Superior Courts Act. There is also no live controversy as a new incumbent has been appointed to that position.⁸ Accordingly, the matter would have no practical effect within the meaning of s 16(2)(a)(i) of the Superior Courts Act and has become purely academic or moot. Furthermore, it does not present any properly raised discrete legal issues as the question on when the waiver is necessary was only raised in reply.
- [10] Importantly, a declarator is a discretionary remedy.⁹ This Court exercised a discretion whether or not to grant the declarator having carefully analysed the matter objectively. Apart from the alleged error of law which cannot be sustained as already demonstrated above, the applicants have not alleged this Court's misdirection or irregularity. Therefore, taking cue from *Association of Voluntary Sterilization of South Africa v Standard Trust Limited and Others*¹⁰, the appeal court would not be at large to substitute its discretion for the lower court's in the absence of any misdirection or irregularity. In *Muldersdrift Sustainable Development Forum v Mogale City*¹¹, the SCA elucidated a two-stage substantive enquiry leading to the decision whether or not to grant a declaratory order. First, the applicant must have a direct and substantial interest in the order sought and secondly, the case must be proper for the exercise of the discretion. Although the MEC had the *locus standi* to

⁸ See *Public Protector v Chairperson, Section 194(1) Committee and Others* 2025 (4) SA 428 (SCA) paras 30, 31 and 32.

⁹ *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* 2005 (6) SA 205 (SCA) para 17.

¹⁰ (325/2022) [2023] ZASCA 87 (7 June 2023) para 11.

¹¹ (20424/14) [2015] ZASCA 118 (11 September 2015).

bring the application as held in the impugned judgment, in light of the subsequent mootness, neither the MEC nor the Minister has the sort of substantial and direct interest needed for the sought declarator. In my view, it would not be in the interests of justice to grant leave to appeal under the circumstances wherein the improperly sought legal certainty would be couched in a declarator that has no practical effect as there are no longer any parties upon whom the declaratory order would be binding.¹²

- [11] In conclusion, it is apposite to address the applicants' claims that the Court failed to conduct its duty of proper consideration by not pronouncing on certain aspects. I emphasise that the applicants in this regard are referring to new matters which were raised in reply as already stated. Similarly, I have already stated the impermissibility of such an approach. For completeness' sake, I point out that in any event, the Constitutional Court in *Vodacom (Pty) Ltd v Makate and Another*¹³ cautioned:

'Justice and, indeed, the court process are not about perfection; courts are not to be held "to some abstract standard of perfection".

Of critical importance is that "there is no duty on a judge in giving . . . reasons to deal with every argument presented by counsel in support of [their] case". I say of "critical importance" because some litigants may find this statement of the law attractive for nitpickingly arguing that a court's judgment failed to deal with this or that point and that, therefore, there was a breach of the right to a fair hearing. Let them be warned that they will not succeed. That is not what this statement of the law is about. It is about the substance of a judgment viewed holistically. So viewed, does the judgment tell a reasonable, if not discerning, reader that there was compliance with the duty of proper consideration? In that regard, it is enough if the judgment identifies the issues that were vital to the determination of the matter and then shows how they were determined. One or two issues may not necessarily be critical for that holistic look at the substance of the judgment.'

¹² *West Coast Rock Lobster Association and Others v Minister of Environmental Affairs and Tourism and Others* [2011] 1 All SA 487 (SCA) para 45.

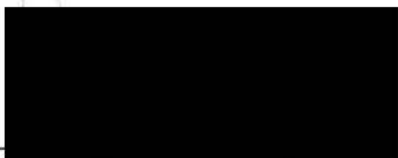
¹³ 2025 (10) BCLR 1174 (CC) paras 43 and 57.

[12] Having carefully and dispassionately considered the application for leave to appeal in order to determine whether there are reasonable prospects that another court would come to a different finding than this Court had reached, I have not found any. There are, in my view, no cognisable prospects of success nor compelling reasons that warrant the attention of the Full Court of this Division or the SCA to entertain this appeal. I am therefore satisfied that there are no reasonable prospects of a successful appeal. In the result, the application for leave to appeal to the Full Bench of this Division or the SCA must fail.

[13] Initially, in the main judgment I was of the view that because it is two organs of state litigating against each other, it would not be sensible to grant a cost order against the losing party because the source for either one of them is the public purse. However, and in this instance, I incline to grant the successful party its costs because it cannot be left out of pocket *ad infinitum*.¹⁴

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

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



MC MAMOSEBO
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

Appearances

For the Applicants:
 Instructed by:

Adv. P Mthombeni
 Motlhamme Pino Attorneys

For the First and Second Respondents:
 Instructed by:

Adv. A Nacerodien
 Webber Wentzel Attorneys
 c/o Elliot Maris Attorneys

¹⁴ *Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging* 1946 AD 597 at 607; see also *Limpopo Legal Solutions and Another v Eskom Holdings Soc Limited* 2017 (12) BCLR 1497 (CC) para 37.