IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE PROVINCIAL DIVISION

Reportable:	**YES/NO**
Of interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case No.: 3339/2021

In the matter between:

JOHAN ALEXANDER ANTHONY UNGERER Applicant

and

MAFUBE LOCAL MUNICIPALITY 1st Respondent
JOSIE RALEBENYA 2nd Respondent
THE ADMINISTRATOR, MAFUBE LOCAL MUNICIPALITY 3rd Respondent
THE MINISTER OF HUMAN SETTLEMENTS, WATER AND SANITATION 4th Respondent

Coram:	Opperman, J
Date of hearing:	4 February 2022
Order Delivered:	28 February 2022
Reasons for Judgment:	The reasons for judgment were handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII on 28 February 2022. The date and time for hand-down is deemed to be 28 February 2022 at 15h00.
Summary:	The duty of an organ of the State towards its citizens - application for leave to appeal – order against Municipality to comply with constitutionally decreed responsibility

JUDGMENT

[1] This is an application for leave to appeal in terms of section 17(1) of the Superior Courts Act 10 of 2013.[1]

[2] There are two issues in the matter that must be disposed of first and foremost: Firstly, the issue of the late filing of the application for leave to appeal and then secondly; the alleged ambiguity of the order.

[3] The late filing of the application for leave to appeal was caused by an erroneous email address supplied to the Registrar of this Court by the respondents. The judgment was available in the Court file since 10 August 2021. The issue has been resolved and condonation was granted for the application for the leave to appeal to proceed after a comprehensive explanation and application for condonation was presented to the Court.

[4] The alleged ambiguity of the order was addressed during the hearing of the application and consensus were reached as to the issue. I reiterate:

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[1] See Proclamation R. 36 of 2013 dated 22 August 2013 (Government Gazette 36774). Section 17(1) to read:

(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
  (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.

Paragraph 2 of the order has perpetual force whilst the reporting of the progress to the compliance of the issues stipulated in paragraph 3 was only for a period of six months and on a two-weekly basis. The Court Order was made on a Draft Order perused and supplied by both parties and the parties did not struggle with or raise any ambiguity or confusion at the stage the order was made based on the Draft Order.

[5] The crux of the case is that the agonising and harrowing question for the law-abiding citizen in modern day existence in the Democratic Republic of South Africa is what do to with poor service delivery by the municipalities; what must be done if the Municipality does not cope with challenges?

[6] Mr. Lepolesa Josie Ralebenya the Municipal Manager of the first respondent, the Mafube Local Municipality, stated as follows in his opposing statement to the urgent application and dated 29 July 2021:

> 7. I have only recently been appointed as the municipal manager. The Municipality does have its challenges pertaining to service delivery. I have been, since my appointment, trying my utmost to ensure that the Municipality is managed and administered to such extent that it can meet its constitutional obligations.
> 8. Unfortunately, there is no "magic wand" that can cure all existing problems, even more so when dealing with infrastructure. In this specific matter the Municipality and the National Department did pro-actively increase the sewage treatment capacity of the Municipality. There are unfortunately what would be best described as growing pains.

[7] He continued to describe the disputes with the sub-contractors. The sub-contractor was not willing to assist the Municipality with the repairs to the sewage spillages. The sewage spillages are without a doubt and on the version

of Mr. Ralebenya, an ongoing challenge. It has been shown to be the situation in the replying affidavit of Mr. Ungerer dated 23 January 2022.

[8] Mr. Ralebenya is almost correct when he declared in paragraph 6 of his answering affidavit in so many words and simplistically put; that the executive authority must be left alone to do their work:

> In terms of section 156 read with Part B, Schedule 4 of the Constitution the Municipality has a constitutional obligation and executive authority in respect of, and has the right to administer, *inter alia*, water and sanitation services limited to potable water supply systems, domestic wastewater and sewage disposal systems.

[9] He and the executive authority are not above the law and he does not acknowledge the right of the citizen to rely on the checks and balances – doctrine principle that the *Trias Politica* and the Constitution of the Republic of South Africa, 1996 envisage and that was confirmed by the Apex Court.[2] According to the principle of checks and balances, each branch of the State

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[2] *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and another* 2010 (2) SA 415 (CC):

> [96] The power to make such an order derives from s 172(1)(b) of the Constitution. First, s 172(1)(a) requires a court, when deciding a constitutional matter within its power, to declare any law or conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency. Section 172(1)(b) of the Constitution provides that when this court decides a constitutional matter within its power it 'may make any order that is just and equitable'. The litmus test will be whether considerations of justice and equity in a particular case dictate that the order be made. In other words, the order must be fair and just within the context of a particular dispute.
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> [97] It is clear that s 172(1)(b) confers wide remedial powers on a competent court adjudicating a constitutional matter. The remedial power envisaged in s 172(1)(b) is not only available when a court makes an order of constitutional invalidity of a law or conduct under s 172(1)(a). A just and equitable order may be made even in instances where the outcome of a constitutional dispute does not hinge on constitutional invalidity of legislation or conduct. This ample and flexible remedial jurisdiction in constitutional disputes permits a court to forge an order that would place substance above mere form by identifying the actual underlying dispute between the parties and by requiring the parties to take steps directed at resolving the dispute in a manner consistent with constitutional requirements. In several cases this court has found it fair to fashion orders to facilitate a substantive resolution of the underlying dispute between the parties. Sometimes orders of this class have taken the form of structural interdicts or supervisory orders. This approach is valuable and advances constitutional justice, particularly by ensuring that the parties themselves become part of the solution. (Accentuation added)

has the power to limit or check the other two. This is democratic equilibrium. People must be free from governmental neglect; specifically, when basic human rights are concerned.

[10] It is indeed a shame that the matter lies in a Court and it is detrimental to the Municipality and the Municipal Manager and the struggling citizens of the town in issue. It will create more stability to the residents of the town if the Municipality and the citizens promote a democratic and autonomous governance of the town, *free from the interference of the Court*. That could have happened if all the parties collaborated to ensure that the services were rendered *in accordance with the law.* All the parties could have joined forces to ensure the services rendered are improved. They did not.

[11] This connects and brings me to the right to appeal a decision of a Court; it is a Constitutional Right. The Court, just as the Municipality and the Municipal Manager is not above the law. I do not agree that the bar was raised with the promulgation of the Superior Courts Act 10 of 2013.[3]

[12] The right to appeal is, among others, managed by the application for leave to appeal. It may not be abused but the hurdle of an application for leave to appeal may never become an obstacle to justice in the post-constitutional era. Access to justice is access to justice.

[13] Historically the rule was: "In that reasonable prospect exists that another Court, sitting as the Court of Appeal, would come to different findings and

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[3] *Moloi and Another v Premier of the Free State Province and Others* (5556/2017) [2021] ZAFSHC 37 (28 January 2021).

conclusions on the facts and the law."[4]

[14] The words "would" and "only" in the current legislation caused some to opinion that the bar for granting leave to appeal has been raised.[5] All it in reality articulates is that the matter must be pondered in depth and with careful judicial introspection. There must be a sound, rational basis for the conclusion that there are prospects of success on appeal and another Court would come to another conclusion.

[15] The final word was spoken recently in the Supreme Court of Appeal in *Ramakatsa and others v African National Congress and another* [2021] JOL 49993 (SCA) in March 2021:

> [10] Turning the focus to the relevant provisions of the Superior Courts Act (the SC Act), leave to appeal may only be granted where the judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there are compelling reasons which exist why the appeal should be heard such as the interests of justice. This Court in Caratco, concerning the provisions of section 17(1)(a)(ii) of the SC Act pointed out that if the Court is unpersuaded that there are prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal. Compelling reason would of course include an important question of law or a discreet issue of public importance that will have an effect on future disputes. However, this Court correctly added that "but here too the merits remain vitally important and are often decisive". I am mindful of the decisions at High Court level debating whether the use of the word "would" as oppose to "could" possibly means that the threshold for granting the appeal has been raised. *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.*

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4 *S v Smith* 2012 (1) SACR 567 (SCA) at [7].

5 *Moloi and Another v Premier of the Free State Province and Others* (5556/2017) [2021] ZAFSHC 37 (28 January 2021), *Hans Seuntjie Matoto v Free State Gambling and Liquor Authority* 4629/2017[ZAFSHC] 8 June 2017, *K2011148986 (South Africa) (Pty) Ltd v State Information Technology Agency (SOC) Ltd* 2021 JDR 0273 (FB).

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. (Accentuation added)

[16] The fact remains that *the judicial character of the task conferred upon a presiding officer in determining whether to grant leave to appeal is that it should be approached on the footing of intellectual humility and integrity, neither over-zealously endorsing the ineluctable correctness of the decision that has been reached, nor over-anxiously referring decisions that are indubitably correct to an appellate Court.*[6]

[17] There is a general pressing need for the restoration of oversight to realise the Constitution's vision of principled governance. Institutions such as the Municipality, must fulfil their mandates and align their governance with the ambitions of the Constitution. Constitutional municipal governance pronounces transparency and accountability. It does not make sense in a civilised society that a Court Order is engaged to enforce this; but it is a necessary reality in the current municipal epoch.

[18] The Supreme Court of Appeal said it all in *Kalil N.O. and Others v Mangaung Metropolitan Municipality and Others* (210/2014) [2014] ZASCA 90; [2014] 3 All SA 291 (SCA); 2014 (5) SA 123 (SCA) (4 June 2014) at paragraph [30]:

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6 *Shinga v The State and another (Society of Advocates (Pietermaritzburg Bar) intervening as Amicus Curiae); S v O'Connell and others* 2007 (2) SACR 28 (CC*).*

…This is public interest litigation in the sense that it examines the lawfulness of the exercise by public officials of the obligations imposed upon them by the Constitution and national legislation. **The function of public servants and government officials at national, provincial and municipal levels is to serve the public, and the community at large has the right to insist upon them acting lawfully and within the bounds of their authority**. *Thus where, as here, the legality of their actions is at stake, it is crucial for public servants to neither be coy nor to play fast and loose with the truth. On the contrary, it is their duty to take the court into their confidence and fully explain the facts so that an informed decision can be taken in the interests of the public and good governance.* As this court stressed in *Gauteng Gambling Board and another v MEC for Economic Development, Gauteng,* our present constitutional order imposes a duty upon state officials not to frustrate the enforcement by courts of constitutional rights. (Accentuation added)

[19] In *GGB & another v MEC for Economic Development* (620/2012) [2013] ZASCA 67 (27 May 2013) at [52] compliance to constitutional order was stressed:

Our present constitutional order is such that the State should be a model of compliance. It and other litigants have a duty not to frustrate the enforcement by courts of constitutional rights. In *Tswelopele Non-Profit Organisation v City of Tshwane Municipality* **2007 (6) SA 511** at para 17, this court stated the following:

'**This place intense focus on the question of remedy,** for though the Constitution speaks through its norms and principles, it acts through the relief granted under it. And if the Constitution is to be more than merely rhetoric, cases such as this demand an effective remedy, since (in the oft-cited words of Ackermann J in *Fose v Minister of Safety and Security*) "without effective remedies for breach, the values underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced":

"Particularly in a country where so few have the means to enforce their rights through the Courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated." (Accentuation added)

[20] The now familiar and proverbial Lawfare[7] in cases of this nature broke out between the parties and the Tax Payer has to foot the bill. The downward spiral continues. Instead of forming a workable collaboration there lies an application for leave to appeal before the Court. The Municipality loathes the interference by the Court. The Court endeavoured not to interfere. The applicant maintains that the sewage spillages continue.

[21] The Outa - test is stated in paragraphs 65 and 66 of the Constitutional Court judgment:[8]

> [65] When it evaluates where the balance of convenience rests, a court must recognize that it is invited to restrain the exercise of statutory power within the exclusive terrain of the executive or legislative branches of government. It must assess carefully how and to what extent its interdict will disrupt executive or legislative functions conferred by the law and thus whether its restraining order will implicate the tenet of division of powers. While a court has the power to grant a restraining order of that kind, it does not readily do so, except when a proper and strong case has been made out for the relief and, even so, only in the clearest of cases.
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> [66] A court must carefully consider whether the grant of the temporary restraining order pending a review will cut across or prevent the proper exercise of a power or duty that the law has vested in the authority to be interdicted. Thus, courts are obliged to recognize and assess the impact of temporary restraining orders when dealing with those matters pertaining to the best application, operation and dissemination of public resources. What this means is that a court is obliged to ask itself not whether an interim interdict against an authorized state functionary is competent but rather whether it is constitutionally appropriate to grant the interdict.

[22] During the litigation and hearing of this matter the Court did all it could not to interfere and interfered as little as possible outside its realm. The Court would have been in serious neglect of its duty if it did not interfere. The Court

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7 2020: Roux, T, *The Constitutional Court's 2018 Term: Lawfare or Window on the Struggle for Democratic Social Transformation?* Constitutional Court Review 2020 Volume 10, 1–42 https://doi.org/10.2989/CCR.2020.0002.

8 *National Treasury and other v Opposition to Urban Tolling Alliance and others* 2012 (6) SA 223 (CC).

endeavored to nudge the parties to mediation for them to stay out of the Court and out of respect to the *Trias Politica*.

[23] The order made on 29 July 2021 was enhanced by a short-term order and a stating of the obvious duties of the Municipality; nothing more and nothing less. If the Municipality does not comply with its constitutionally imposed duties the citizens of the town have a right to complain to the Court.

It reads as follows:

IT IS ORDERED THAT:

1. This application is heard as one of urgency in terms of Rule 6(12) and that noncompliance with the ordinary time periods and processes are condoned.
2. The first and second respondent, jointly and severally, are to implement the following steps immediately:
    - 2.1 To properly maintain and operate all the pumps at the Namahadi Pump House and Namahadi Sewage Works situated on the Remaining Extent of the Farm Paisley no 73, District Frankfort (Collectively referred to as "the works").
    - 2.2 To effect any repairs that may be required at the works.
    - 2.3 Inspecting the works on a regular basis.
    - 2.4 Attending to any operational crises at the works promptly and without undue delay when it arises.
    - 2.5 Specifically, to prevent any sewage spillages which may affect the Wilge River.
    - 2.6 To make available to the applicant samples of effluent produced at the works, upon request.
    - 2.7 To make timeous payment to ESKOM in order to ensure continuous functioning of the works.
3. First and second respondents, jointly and severally, are ordered to report back to the applicant's attorney (Ms van Schalkwyk) in writing regarding the progress

made with the required steps set out in the previous paragraph every two (2) weeks for 6(six) months from the date of this order. In the event of noncompliance by the respondents the applicant is granted leave to approach this court on the same papers for an order of contempt of court against the first and second respondents.

4. First respondent is to pay the costs of the application – including the costs for two Counsel.

[24] It is imperative to state what the order of the Court does not decree. It does not allow the applicant to micromanage the Municipality. It merely states in clear language what the Municipality must do to comply with its duty as imposed in the Constitution of the Republic of South Africa, 1996. The respondents must:

1. "Properly maintain and operate all the pumps at the Namahadi Pump House and Namahadi Sewage Works situated on the Remaining Extent of the Farm Paisley no 73, District Frankfort (Collectively referred to as "the works")." There is nothing strange or untoward in this order or an indication of micromanagement. In fact; it is the duty of the municipality.
2. "Effect any repairs that may be required at the works." There is nothing strange or untoward in this order or an indication of micromanagement. In fact; it is the duty of the municipality.
3. "Inspect the works on a regular basis." There is nothing strange or untoward in this order or an indication of micromanagement. In fact; it is the duty of the municipality.
4. "Attend to any operational crises at the works promptly and without undue delay when it arises. Specifically, to prevent any sewage spillages which may affect the Wilge River." There is nothing strange

or untoward in this order or an indication of micromanagement. In fact; it is the duty of the municipality.

5. "Make available to the applicant samples of effluent produced at the works, upon request." There is nothing strange or untoward in this order or an indication of micromanagement. In fact; it is the duty of the municipality.

6. "To make timeous payment to ESKOM in order to ensure continuous functioning of the works" definitely does not in any way or on any interpretation decrees that illegal accounts must be paid. Such an interpretation is ingenuous and immature.

[25] The relief of the citizens is in an application for a Contempt of a Court Order. The onus to prove this is immensely high and the Municipality has nothing to fear if they comply with their duties. The law on contempt of Court is established in the South African common law. Justice Cameron in the Fakie-case said it all:

> While the litigant seeking enforcement has a manifest private interest in securing compliance, the court grants enforcement also because of the broader public interest in obedience to its orders, since disregard sullies the authority of the courts and detracts from the rule of law. Orders must instil order.[9]

[26] The onus is on the applicant to prove beyond a reasonable doubt that the order was not complied with and that the respondent acted with *male fides* and wilfully so. If after the case for the applicant was concluded and *prima facie* evidence points to his guilt, the respondent has a case to answer. If reasonable

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[9] The Constitutional Court in *Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Limited* (CCT 217/15; CCT 99/16) [2017] ZACC 35; 2017 (11) BCLR 1408 (CC); 2018 (1) SA 1 (CC) (26 September 2017).

doubt exists at the end of the case the Court may not grant the remedy. The statement by the Municipal Manager points to his *bona fides* but also to the plight of the people. This brings the judgment to the Grounds of Appeal.

[27] Directly quoted the grounds for appeal are:

1. The uncertainty created by the difference in the wording of the order and the reasons for the order does make it difficult to address each and every possibility of its interpretation. I will respectfully pray that the Court accepts the submissions made herein, as per the Municipality's interpretation of the Court order.

2. The Municipality filed an application for leave to appeal stating the grounds for the appeal, which reads as follows:

"*The Learned Judge, with the greatest respect, erred in:*

1. By finding that there existed "an unending raw sewerage spillage".

2. By finding that the Applicant is entitled to micromanage the administration of the Municipality in circumstances where it is contrary to the separation of powers as contained in the Constitution.

3. By finding that raw sewerage and hazardous human waste are flowing past the residence of the Namahadi Township "unchecked".

4. By failing to appreciate that the Municipality has at the time of the hearing of the application attended to the spillages complained of.

5. By ordering the Municipality to the actions contained in paragraphs 2.1 to 2.7 of the order in circumstances wherein the Municipality indicated the impossibility and / or difficulty of complying with such order.

6. *That the order be awarded against the Municipality in circumstances where it is doing its utmost to attend to find a solution to the spillage and to prevent legal costs in this matter.*

7. *By including the costs for two (2) counsel where same was never sought for on the papers*."

AD GROUNDS 1, 3 AND 4:

1. These grounds of appeal deal with factual findings by the Court. In considering the version stated by the Municipality it is submitted that the Municipality did attent to the spillage with all due care and diligence.
2. Nothing turns on the fact that the Municipality was advised of the spillage by a member of the public and through his attorneys. It is expected (and hoped for) that conscientious members of the public will advise the Municipality of issues and problems.
3. It is not disputed that the Municipality's plan of action to remedy the issue was already in place and effective at the time of the hearing of the application.

AD GROUNDS 2, 5 AND 6:

3. The Municipality, as an organ of state has certain Constitutional obligations. In the facts of this matter the Municipality did attend to the issue as expeditiously as possible.

4. The Municipality has explained its challenges and its endeavours to effectively deal with the situation and to meet their Constitutional mandate. In the circumstances another Court would likely find that the order sought and made is unduly arduous on the Municipality.

5. The further effect of the Court Order is that orders are made that the Municipality cannot be expected to comply with. This should have served against the granting of the Order.

AD GROUND 7:

6. An order for the costs of two counsel was never sought. There existed no reason for such an order to be made in these circumstances.

[28] With due regard to the law and facts described above the applicant did not convince on grounds one to six that in the instance there is a sound, rational basis for the conclusion that there are prospects of success on appeal and another Court would come to another conclusion.

[29] The issue of costs for two counsel will also not cause another Court to come to a different conclusion. The order was granted on a Draft Order perused by both sides and there was no objection to the clause in the Draft Order. In addition; this is so-called public interest litigation. Public interest as an individual against an organ of state and an urgent application may become complicated in these instances.[10] The Court *a quo* has the discretion to allow two counsel. There is nothing untoward in these instances. The application for leave to appeal on this issue must also be denied.

[30] The Municipality will not succeed on appeal on the facts and law that is a reality. The leave to appeal may not be allowed. They will have to be responsible for the costs of the application.

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[10] *Biowatch Trust v Registrar, Genetic Resources, & Others* 2009 (6) SA 232 (CC) paras 22-23; *Affordable Medicines Trust and Others v Minister of Health & Others* 2006 (3) SA 247 (CC) para 139, *Centre for Child Law & Others v Minister of Basic Education & Others* 2020 (3) SA 141 (ECG).

ORDER

The application for leave to appeal is dismissed with costs.

M OPPERMAN, J[11]

[11] The original signed hard copy is available in the Court File.

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