

12-2-2016 ✓✓

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 78454/2016

Not reportable

Not of interest to other judges

In the matter between:

NATIONAL UNION OF PUBLIC SERVICE AND

ALLIED WORKERS on behalf of MEMBERS

(As listed in Annexure "A" hereto)

Applicant

and

THE MEMBER OF THE EXECUTIVE COUNCIL

FOR HEALTH: GAUTENG DEPARTMENT

First Respondent

HEAD OF DEPARTMENT FOR THE DEPARTMENT

OF HEALTH: GAUTENG PROVINCE

Second Respondent

THE DEPARTMENT OF HEALTH: GAUTENG PROVINCE

Third Respondent

SMARTPURSE SOLUTIONS (PTY) LTD

Fourth Respondent

JUDGMENT

PETERSEN AJ:

[1] This is an application for leave to appeal against the whole of the judgment of this court delivered on 3 November 2017, dismissing the application for a *rule nisi* calling on the respondents, on a certain date determined by the court, to show cause why the court should not grant a final order, to the Supreme Court of Appeal.

[2] The applicant premises one of its grounds of appeal on an allegation that the court had found that the applicant failed to provide reasons for urgency and why the relief sought was sought on an urgent basis. With respect the court made no such finding as that clearly was not an issue before the court.

[3] The applicant in its submissions at the hearing of the application premised its right to the relief sought on section 217 of the Constitution and the right of access to courts provided for in section 34 of the Constitution distancing itself from submissions that it relied on section 38. In this application, the applicant submits that the right which is the subject of the relief sought by the applicant is that stipulated under section 23 of the Constitution and given meaning by section 185 of the LRA. The nature of the relief sought by the applicants premised on the Constitution is therefore not clear.

[4] Be that as it may the Court upheld a number of the points *in limine* raised by the respondents. The most significant ground of appeal is in respect of jurisdiction. The applicant submits that it sought a declaratory order envisaged by section 21(1)(c) of the Superior Courts Act 10 of 2013. In this regard the submission is made that by finding that the court lacks jurisdiction the court in effect disregarded the dictum in *Municipal Manager: Qaukeni Local Municipality and Another v FV General Trading CC* 2010 (1) SA 356 (SCA) at para [25] and in particular para [26]. It is submitted that on this ground there is reasonable prospects of success on appeal within the meaning of section 17(1)(a)(i) of the Superior Courts Act. The contention is that the applicant could not obtain the relief it sought in this court through the dispute

resolution mechanism provided for in Chapter VIII of the LRA, as they are distinct from the relief sought by the applicant in the present matter.

[5] Section 17(1) of the Superior Courts Act, Act 10 of 2013 ("the Superior Courts Act"), regulates applications for leave to appeal and provides:

'(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.'

[6] The test in an application for leave to appeal prior to the Superior Courts Act was whether there were reasonable prospects that another court may come to a different conclusion.¹ Section 17(1) has raised the test, as Bertelsmann J, correctly pointed out in *The Mont Chevaux Trust v Tina Goosen & 18 Others* 2014 JDR 2325 (LCC) at para [6]:

'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 to a different conclusion, see *Van Heerden v Cornwright & Others* 1985 (2) SA 342 (T) at 343H. 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.'

[7] Whilst the applicant pins its' application to section 17(1)(a)(i) of the Superior Courts Act, I remain mindful of the fact that the decision impacts on the role of Community Health Workers in society and their right to security of employment. This on its own to my mind in light of the points *in limine* having been upheld is a compelling reason within the ambit of section 17(a)(ii) of the Superior Courts Act to grant leave to appeal. In light of the significance of the matter, it would further not be misplaced to give a directive that leave to appeal be granted to the Supreme Court of Appeal.

¹ *Commissioner of Inland Revenue v Tuck* 1989 (4) SA 888 (T) at 890

[8] In the result:

1. Leave to appeal is granted to the Supreme Court of Appeal.
2. Costs shall be costs in the appeal.



AH PETERSEN

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Appearances:

On behalf of the Applicant : Advocate DZ Kela

On behalf of the First to Fourth Respondents: Advocate Mhambi

DATE HEARD: 02 February 2018

DATE OF JUDGMENT: 12 February 2018