REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 32858/2020

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

DATE: **04 December 2020**

In the matter between :-

HELEN SUZMAN FOUNDATION **APPLICANT**

And

THE SPEAKER OF THE NATIONAL ASSEMBLY **1st RESPONDENT**

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA **2nd RESPONDENT**

THE CABINET OF THE REPUBLIC OF

SOUTH AFRICA **3rd RESPONDENT**

CHAIRPERSON OF THE NATION COUNCIL

OF PROVINCES **4th RESPONDENT**

THE MINISTER OF COOPERATIVE GOVERNANCE

AND TRADITIONAL AFFAIRS **5th RESPONDENT**

JUDGMENT (APPLICATION FOR LEAVE TO APPEAL)

The Court

Introduction and background

[1] This is judgment in the application for leave to appeal brought by the Applicant against the whole of the order and judgment of this Court of the 7 October 2020.

[2] While the notice of application for leave to appeal sets out comprehensively the grounds upon which the application is advanced they include in the main the following:-

a) That the Court erred in interpreting the Disaster Management Act to cover the field of interventions to SARS-CoV-2 and COVID-19 and that on a proper and constitutionally compliant

interpretation of the Disaster Act, it was intended to and did cover the state's response to disasters only to the extent that Parliament is unable to act to put in place COVID-specific legislation.

b) That the meaning ascribed to the Disaster Management Act, Act 57 of 2002 (DMA) by the Court impermissibly breaches the Constitution's separation of powers between the legislature and the executive and unlawfully locates primary legislative power in a single member of the National Executive, and renders the DMA unconstitutional.

c) That the Court's interpretation of the DMA leads to unconstitutionality and does not give best effect to the fundamental values of the Constitution.

d) That the Court erred in its conclusion that the DMA is the proper discharge by the State of its duty to adopt reasonable, concrete and effective measures in compliance with section 7(2) of the Constitution.

e) The Court erred in finding that the ministerial regulations and directions passed under the DMA to deal with COVID 19 were sufficient constitutional measures to meet the state's section 7(2) duties.

[3] The First, Second, Third and Fifth Respondents oppose the application.

The test to be applied

[4] Section 17(1)(a) of the Superior Courts Act sets the threshold for leave to appeal to be granted. It provides that leave to appeal may only be granted where the Court is of the opinion that the appeal would have a reasonable

prospect of success or that there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.

[5] The test under section 17(1)(a)(i) is whether there are reasonable prospects that the appeal "would" have reasonable prospects of success, rather than whether it "might' have reasonable prospects, as was the case prior to the amendment of Section 17.

[6] The full court in *Acting National Director of Public Prosecutions and Others v Democratic Alliance in re: Democratic Alliance v Acting National Director of Prosecutions and Others [2016] ZAGPPHC 489* explained that:

> *"The Superior Courts Act has raised the bar for granting leave to appeal in The Mont Chevaux Trust (IT2012/28) v Tina Goosen & 18 Others, Bertelsmann J held as follows '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 Cronwright & 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. The legal position articulated in Acting NDPP accords with the decision of the Supreme Court of Appeal in MEC for Health, Eastern Cape v Mkhita [2016] ZASCA 176. In that case, the Supreme Court of Appeal held: 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."*

[7] The Supreme Court of Appeal reiterated what would constitute reasonable prospects in the *Smith v S 2012 (1) SACR 567 (SCA)* where it held that:

> *"What the test of reasonable prospects of success postulates is 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 order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal."*

[8] In argument Counsel for the Applicant accepted that the application turned around a discrete fundamental point being the interpretation that this Court accorded to the DMA.

[9] This Court for the comprehensive reasons set out in its judgment of the 7 October 2020 concluded that the DMA was the State response to Covid-19 and was not a stop gap or interim measure but a measure that was intended to have long term effect and consequences. It is essentially this conclusion that the Applicant takes issue with and argues that there is a reasonable prospect that another court will come to a different conclusion.

[10] The Applicants stance is that the DMA is at least open to the interpretation contended for by it, namely that it is a short term measure, not suited to dealing with Covid-19 and accordingly triggered a duty on the part of the Executive and Legislature to initiate and pass Covid-19 specific legislation. It concludes by saying that if there is a reasonable

prospect that another Court would come to a different conclusion on the interpretation of the DMA then leave should be granted.

[11] In its judgment of the 7 October 2020 this Court after close analysis of the DMA including specific provisions thereof as well as its overall structure concluded that the DMA was intended to provide for disasters without limitation or restriction of the duration of the disaster.

[12] Of course this Court was not called upon to determine whether such an approach was desirable or consistent with the Constitution as the Applicant specifically cast its case not as a challenge to the DMA or its provisions. On the contrary the Applicant accepted the constitutionality of the DMA as well as the regulation making power of the Fifth Respondent. In addition, it did not seek to impugn any of the regulations made under the DMA. It advanced its case on the narrow and limited track that properly interpreted the DMA was only valid as a short term measure in relation to Covid-19. The interpretation that the Applicant contends for is not a reasonable one and militates against the language and structure of the DMA as a legislative response to long term and short term disasters. That being the case we must conclude that there is no realistic reasonable prospect that an appeal court would come to a different conclusion.

[13] Finally there is also no compelling reason why leave to appeal should be granted. The unprecedented context and what the Applicant calls the ongoing constitutional harms to the extent that they are relevant arise in the context of the DMA and indeed much of the argument in this matter, was about the undesirability of the Fifth Respondent having wide and effectively legislative powers for an indefinite period when the Executive and the Legislature should properly be exercising those powers.

[14] Whatever the merits of that complaint is, those powers in respect of which we are not called upon to make any finding find their origin in the DMA and the Applicant having elected not to challenge the provisions of

the DMA must accept the consequences of the litigation choice it has made.

[15] It is for these reasons that we conclude that the appeal does not have a reasonable prospect of success nor are there compelling reasons why leave to appeal should be granted.

[16] In the circumstances the application falls to be dismissed and for the reasons given in the judgment of the 7 October 2020, no order as to costs would be warranted.

Order:-

The application for leave to appeal is dismissed.

D MLAMBO
JUDGE PRESIDENT OF THE GAUTENG DIVISION OF THE HIGH COURT

I CONCUR.

N KOLLAPEN
JUDGE OF THE GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

I CONCUR.

S BAQWA
JUDGE OF THE GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Delivered: This judgment was prepared and authored by the Judges whose names are reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 04 December 2020.

APPEARANCES

Counsel for the Applicant	**:**	**Adv. M Du Plessis SC** **Adv. A Coutsoudis** **Adv. M Mbikiwa**
Instructed By	**:**	**Webber Wentzel Attorneys**
Counsel for the 1st Respondent	**:**	**Adv. I V Maleka SC** **Adv. M Salukazana**
Instructed By	**:**	**State Attorney, Cape Town**
Counsel For The 2nd, 3rd And 4th Respondent	**:**	**Adv. Mtk Moerane SC** **Adv. Nh Maenetje SC** **Adv. N Muvangua**
Instructed by	**:**	**State Attorney, Pretoria**
Date of Hearing	**:**	**19 November 2020**
Date of Judgment	**:**	**04 December 2020**