IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG HIGH COURT DIVISION, PRETORIA

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

05 July 2022

DATE SIGNATURE

CASE: 11527/22

In the matter between:

THE ACTING MUNICIPAL MANAGER	**FIRST APPLICANT**
MADIBENG LOCAL MUNICIPALITY	
MADIBENG LOCAL MUNICIPALITY	**SECOND APPLICANT**

and

MADIBENG BLACK BUSINESS CHAMBER	**FIRST RESPONDENT**
JUDAH MALEPE	**SECOND RESPONDENT**
GABY TSHEOLA	**THIRD RESPONDENT**
ANNAH MOSIDI	**FOURTH RESPONDENT**

ELIAS BUDA	**FIFTH RESPONDENT**
SELLO MONNAPULE	**SIXTH RESPONDENT**
THABISO RAMALEPA	**SEVENTH RESPONDENT**
T MMEBE	**EIGHTH RESPONDENT**
ALL PERSONS ASSOCIATED WITH OR MEMBERS OF THE MADIBENG BLACK BUSINESS CHAMBER	**NINTH RESPONDENT**

JUDGMENT - LEAVE TO APPEAL

TLHAPI J

[1] This is an application for leave to appeal premised on section 17(1) of the Superior Courts Act 10 of 2013, ("the Act") which section is set out in its entirety below which is quoted in its entirety:

"Section 17(1)

(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 reasonable prospect of success; or

(ii) there is some other compelling reasons why the appeal should be heard, including conflicting judgments on the matter under consideration;

(b) the decision sought on appeal does not fall withing the ambit of section 16(2); 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."

[2] The test applied previously to similar applications was whether there were reasonable prospects that another court may come to a different conclusion, *Commissioner of Inland Revenue v Tuck*[1] . The threshold of reasonable prospects has now been raised by the use and meaning attached to the words 'only' in 17(1) and 'would' in section 17(1)(a)(i). Therefore on the entire judgement there should be some certainty that another court would come to a different conclusion from the judgement the applicant seeks to appeal against. In *Mont Chevaux Trus v Tina Goosen and 18 Others*[2] :

"It is clear that the threshold for granting leave to appeal 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"

[3] In *S v Smith*[3] a more stringent test is called for in that an applicant must convince a court, on proper grounds that there are prospects of success which are not remote, a mere possibility is not sufficient. Therefore, where the applicant has satisfied either of the two identified requirements in the Act, leave to appeal should

1 1989 (4) SA 888 (T)
2 2014 JDR 2325 (LCC) para [6]
3 2012 (1)SACR 567 (SCA) para[7]

be granted, *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others*[4] . This standard was confirmed in *Notshokovu v S*[5] where it was stated:

> "…….An appellant on the other hand faces a higher and stringent threshold in terms of the Act compared to the provisions of the repealed Supreme Court Act 59 of 1959…."

[4] in *Ramakatsa and Others v African National Congress and Another*[6] Dlodlo JA stated:

Turning the focus to the relevant provisions of the Superior Courts Act [5] (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 [6]. The Court in Curatco[7] concerning the provisions s 17(1)(a)(ii) of the SC Act pointed out that if the court 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 the effect on future disputes. However, this Court correctly added that 'but hereto the merits remain vitally important and are often decisive'.[8] I am mindful of decisions at high court level debating whether the use of the word 'would' as opposed 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 compelling reasons why the appeal should be heard, leave appeal should be granted. The test of reasonable prospect of success postulates a dispassionate decision based on the facts

[4] 2016 (3) SA 317 (SCA)
[5] (157/15) [2016] ZASCA (7 September 2016) para [2]
[6] (724/20190 [2021] ZASCA 31 (31 March 2021) para [10]

and the law, that a court of appeal should be heard, leave to 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 chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist, [9]"

[5] I shall not mention all grounds of appeal as stated in the application for leave to appeal because they revolve around the application of Rule 7(1) of the Uniform Rules of Court[7]. Briefly, the main complaint is that I erred by allowing the respondents to raise the first applicant's lack of authority to launch the application as a *point in limine* in the answering affidavit, instead of raising such challenge by way of a Rule 7(1); that I erred and misdirected myself in the application of Rule 7(1) of the Rules of Court, to the challenge raised by the respondent by way of a *point in limine* in the answering affidavit of the first applicant's lack of authority to launch the application.

[6] It was contended that I had erred in disregarding a wealth of authority in particular that as established in *Ganes and Another v Telecom Namibia Ltd*[8] and *Unlawful Occupiers of the School Site v City of Johannesburg*[9] *; ANC Umvoti Council Caucus and Others v Umvoti Municipality*[10]*; BCM Supplies (Pty) Ltd v Marthinus*

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[7]POWER OF ATTORNEY

(1) Subject to the provisions of subrule(2) and (3) a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may, within ten day after it has come to the notice of the party that such person is so actin, or with the leave of the court on good cause shown at any time before judgment, be disputed, whereafter such person may no longer act unless he satisfied the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application.

[8] 2004 (3) SA 616 (SCA) para [19] "The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit, It is institution of the proceedings and the prosecution thereof which must be authorised."

[9] 2005 (4) SA 199 (SCA) at para [14] to[16]

[10] 2010 (3) SA 31 (KZN) paras 15-29

Christoffel Minnie[11] . It was argued that the failure by the respondents to utilize Rule 7(1) of the Uniform rules of court did not entitle the court to make a finding on the first applicant's lack of authorisation.

[7] Having applied my mind to the dictum in *Unlawful Occupiers supra* it has now been confirmed that the remedy for a respondent who wishes to challenge the authority of a person allegedly acting on behalf of the purported applicant is provided in Rule 7(1)'. The Rule 7(1) would then have required the respondents to have issued a notice to the applicants to provide documentary proof within 10 days of the service of the notice, copies of the necessary documents authorising the first applicant to institute the proceedings and prosecuting such. In as far as this was not complied with by the respondent as required by the authorities the next question to be dealt with in this application is to see if the finding of a lack of authority of the applicant was the only reason the application was dismissed with costs. If answered in the affirmative then the applicants should be granted leave to appeal. However, there are other considerations in my view which would impact on whether leave should be granted or not.

[8] The application was issued on 24 February 2022 for hearing on 1 March 2022. It is not clear why the matter was first set down in the unopposed motion court and not in the urgent court as seen from the notice of removal and reinstatement dated 28 February 2022. The respondent's were served with the papers between 25 February 2022 and 3 March 2022 and matter was the properly set down in the urgent court on 8 March 2022. There was no need for the issue of a *rule nisi* or a reconsideration as reflected in the notice of motion because the matter was opposed and the court had available to it the three affidavits. In the founding affidavit the deponent made two statements: Firstly, "I am authorised to depose to this affidavit and my delegation of authority is attached as Annexure "MM1" and secondly "I am duly authorised to depose to this affidavit on behalf of the Municipality". If the court

[11] [2021] ZAGPJHC 53 paras 12-15

was not entitled to pronounce on the first applicant's lack of authority which would also include the observation in the judgment that the applicants failed to respond to the issue of authority, then on the authorities as I conceded, it would mean that the applicants had a right to be heard. In my judgment I noted this distinguishing fact:

> "In *Unlawful Occupiers of the School Site supra,* Brand JA touches on the procedure in Rule 7(1) afforded to a respondent who challenges authority of any person to launch proceedings which was a procedure which was less costly. The distinguishing factor in my view, is that here one is dealing with urgency and a less costly method would have been for the municipal manager to produce the resolution. It is my further view that the procedure in Rule 7(1) if insisted upon by the applicant would have rendered the application moot in that the urgency claimed would have been removed and given the tile limitations, the procedure was definitely not available to the respondents,"

It is argued that the issue of urgency was not a distinguishing fact. I am still of the view that given the prayers sought the issue of urgency is an important, in view of the position of the applicant and also that Rule 7(1) was not peremptory.

[9] In my view the respondent alleged having failed to secure a meeting on 21 to 23 February 2022, on 24 February 2022 the respondents presented an application to the applicants to hold a peaceful strike on 28 February 2022 and this application was granted on 25 February 2022. The application was issued on 24 February 2022 and the notice of motion and founding affidavit without supplementation that the respondents were granted permission to strike, was served on the respondents between 25 February 2022 and 3 March 2022. The facts deposed to in the founding affidavit on 24 February 2022 pertaining to what preceded the to engage in a peaceful strike on 28 February 2022. In reply the applicant conceded that permission was granted to hold a peaceful strike and they have not disputed the claim in the answering affidavit that there was a peaceful march, that there were no incidents and that the applicants' council meeting peaceful and without interruptions. On these

grounds alone the application should still remain dismissed.

[10] However, I would therefore grant leave to appeal limited to my findings pertaining to the obligation by the first applicant to have filed a resolution and to my finding that there was a distinction to be applied with regard to Rule 7(1) in this application brought on urgency.

[11] The following order is granted:

"Leave to appeal to the full court of this division is granted limited to the issues in paragraph [10] above and costs in the appeal."

Thlapi

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THLAPI VV

(JUDGE OF THE HIGH COURT)

APPEARANCES

LEAVE TO APPEAL HEARD AND RESERVED	:	26 MAY 2022
COUNSEL FOR THE APPLICANT	:	ADV K MASERUMULA
INSTRUCTED BY	:	MATLALA VON METZINGER ATTORNEYS
COUNSEL FOR THE RESPONDENT	:	ADV F JOUBERT
INSTRUCTED BY	:	NDABENZIMA ATTORNEYS