IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION (MIDDELBURG LOCAL SEAT)

CASE NO: 5018/2022
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED
Date: 23/08/2024
SIGNATURE:

In the matter between:

DAMBUZA JUDAS MAHLANGU **FIRST APPLICANT**

JOYINA JOHANNES JIYANE **SECOND APPLICANT**

UNLAWFUL OCCUPIERS OF PORTION 1, 3, 4 AND 5 OF THE FARM VLAAKLAAGTE 221 JR **THIRD APPLICANT**

And

THEMBISILE HANI LOCAL MUNICIPALITY **RESPONDENT**

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

Coram Langa J

Introduction and facts

[1] This is an application for leave to appeal the judgment handed down by this court against the Applicants on 9 January 2024. The application for eviction was brought by the Respondent, the Thembisile Hani Local Municipality, ("the

THLM") as the owner of certain immovable properties which are occupied by the Applicants. In the application, the THLM sought an order evicting the Applicants (the Respondents) from the following properties:

1.1. The Remainder of Portion 1 of the Farm Vlaklaagte J[...] JR, Vlaklaagte Town, Mpumalanga Province, (hereafter "Portion 1");

1.2. The Remainder of Portion 3 of the Farm Vlaklaagte J[...] JR, Vlaklaagte Township, Mpumalanga Province, (hereafter "Portion 3");

1.3. The Remainder of Portion 4 of the Farm Vlaklaagte J[...] JR, Vlaklaagte Township, Mpumalanga Province, (hereafter "Portion 4");

1.4. The Remaining extent of Portion of Farm Vlaklaagte J[...], Registration Division J.R., Mpumalanga Province, (hereafter "Portion 5").

[2] In terms of the order granted, the First, Second and all Further Respondents and persons holding under them were ordered to vacate the immovable property described below by no later than 30 April 2024. In the event of any of the Respondents or any person holding under them failing to vacate the property by 30 April 2024, then the Sheriff of this Court is directed and authorized to evict such Respondents or other persons from the property and to demolish and/or removal of structures where necessary and applicable. The Applicant was ordered to provide suitable temporary alternative accommodation and/or land for those in need thereof, subject to the availability of such accommodation in the Manala-Makarena and Ndzundza-Somphalali area, alternatively, in Tweefontein K and Kwa-Mhlanga as per undertaking made. The Applicant was further ordered to file a full progress report regarding the matter to the court not later than two (2) months after the said eviction. The Respondents were ordered to pay the costs of the application on a party and party scale, jointly and severally, the one paying, the others to be absolved. The Respondents intend appealing the this judgment and order. For the sake of convenience will refer to the parties as cited in the main application.

The Applicable Legal Principles

[3] It is trite that applications for leave to appeal are now governed by the provisions of Section 17(1) of the Superior Courts Act 10 of 2013 which provides as follows:

> "*17 Leave to appeal*
> *(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;* (my underlining for emphasis).
>
> *(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.*"

[4] The test in such applications has changed substantially from the test ordained in terms of the repealed Supreme Court Act 59 of 1959. The current standard is captured succinctly in the case of *The Mont Chevaux Trust (IT2012/28) v Tina Goosen and Others* LCC14R/2014, (3 November 2014) in which the Court stated that "*the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act and that in terms of the former test, the question was whether or not there was a reasonable prospect that another court might come to a different conclusion, See Van Heerden v Cronwright and Others 1985 (2) SA 342 (T) at 343H. The use of the word "would' in the new statute is indicative of a measure of certainty that another will differ from the court whose judgment is sought to be appealed against."*

[5] This position has since been confirmed in other Divisions of the High Court and it is therefore clear that the current section is now more burdensome than its predecessor. Smith J in the *Valley of the Kings v Thaba Motswere (Pty) Ltd* [2016] ZAECGHC 137 (10 November 2016) acknowledged the new standard created by section 17 but added that the contextual construction of the phrase *"reasonable prospect of success' still requires of the judge, whose judgment is sought to be appealed against, to consider, objectively and dispassionately, whether there are reasonable prospects that another court may well find merit in argument advanced by the losing party."* See also unreported case of *Elias Sekgobelo Magashule v Cyril Ramaphosa and Others* Gauteng Division, Johannesburg Case number 2021/23795 (13 September 2021). In *MEC Health, Eastern Cape v Mkhitha* (1221/15) [2016] ZASCA 176 (25 November 2016), the SCA held that at para [17] that '*An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or that one is not hopeless, is not enough'.*

[6] It is therefore trite that leave to appeal may only be granted if the court of first instance is of the opinion that the appeal would have reasonable prospects of success or is arguable. *Hunter v Financial Services Board* 2017 JDR 0941 (GP). There must consequently be merit in the applicant's argument in support of the application and the applicant must satisfy the court that the appeal would, not might, have reasonable prospects of success either on facts or the law. Furthermore, the peremptory provisions of Rule 49 (1) (b) require a litigant in an application of this nature to clearly and succinctly set out the grounds of appeal in unambiguous terms. *Songono v Minister of Law-and-Order* 1996 (4) SA 384.

[7] The facts of the matter are detailed in the judgment and will therefore not be repeated here in full. The dispute and litigation over the properties was sparked by the occupation thereof by the First and Second Respondents who thereafter demarcated and allocated stands to other people for the purposes of erecting residential dwellings. The land in question had been identified for township development, with various amenities for residential, business and public uses.

[8] The First and Second Respondents had requested a portion of the land from the THLM for the expansion of their traditional communal land and the allocation of stands. Before the request could be finalised, the First and Second Respondents resorted to self help and started allocating stands on the municipal land without the Municipality's permission.

[9] That prompted the Municipality to approach court and on 08 February 2022 the Municipality obtained an order under case 3015/2019 interdicting the First and Second Respondents from unlawfully demarcating and allocating stands or structures on properties 1 and 3 above. The court did not make an order in respect of properties 4 and 5 as the Municipality had not proved ownership thereof essentially as the process of registration these portions in the name of the Municipality was still in progress.

[10] As dealt with fully in the judgment, after considering the evidence, this court found that it is just and equitable to evict the Respondents from the property and further that the Municipality be ordered to provide alternative accommodation for the evicted people in a suitable area identified.

The grounds of appeal

[11] From the papers the grounds of appeal are not clear but, in a nutshell, it appears to be alleged that the court erred in:

11.1. finding that there was an order of 2019 in respect of Portions 4 and 5.

11.2. by attaching weight on the purported breach of the order creating an impression that it was punishing the Respondents for the breach.

11.3. in its finding whether the Respondents had occupied the property for more than 6 months.

11.4. its interpretation of the donation agreement by failing to find that the Respondents had their right to the property impacted upon by the

Municipality's failure to obtain their authorization regarding the township establishment.

11.5 finding that the reason why the court previously refused to grant an interdict under case numbers 3015/2019 was the Municipality's failure to satisfy the requirements in terms of PIE when the reason was that it did not have title deeds for Portions 4 and 5.

Discussion

[12] Before turning to the merits, I deal with the First Respondent's authority to act on behalf of all the Respondents. The Municipality formally raised an objection in terms of Rule 7 to the First Respondent's authority to institute the proceedings on behalf of the rest of the respondents. Although the First Respondent purports to appeal for all the Respondents in thus application for leave to appeal, he failed to establish that he had the authority to do so. Notwithstanding the fact that he may be the traditional leader in the area, this did not give him the authority to act on behalf of the "community" and institute legal proceedings without the resolution or consent by the community for him to do so. From the facts the First Respondent has failed to demonstrate that he has been mandated to act on behalf of all the respondents in bringing this application. On the basis of lack of authority alone, the application stands to be dismissed as there is in essence no proper application in respect of the rest of the Respondents.

[13] Secondly, while the Respondents are legally represented, the "application for leave to appeal" was filed in an unorthodox manner to say the least. It was purportedly brought by way of a substantive application essentially dealing with the condonation application and partly the leave to appeal. While in the notice of motion, not appeal, the applicants pray for the condonation of the late filing of the application for leave to appeal, no application for leave to appeal has in essence been filed. A fleeting reference to leave to appeal is only made in paragraph 2 of the notice of motion. This clearly does not comply with the rules. This is particularly so given that the grounds of appeal are not concisely stated as required by Rule 49(1)(b). It is not clearly stated whether the appeal is against the factual findings or the findings on

points of law. Notwithstanding these apparent defects, I will nevertheless proceed therewith based on the papers before court.

[14] It is common cause that a deed of donation was concluded in terms of which the Mpumalanga Provincial Government donated land known as Portion 5 of the farm Vlaklaagte 221 to the Municipality. This land had been earmarked for township development. The First and Second Respondents requested a portion of this land from the Municipality for the expansion of their traditional community. Before the Municipality could respond to their request the First and Second Respondent decided to resort to self help and started allocating stands without permission.

[15] In response the Municipality obtained an urgent interdict against the First and Second Respondent in respect of Portion 1 and 3 of the farm, stopping them from allocating stands. In respect of Portion 4 and 5 the court declined to grant the interdict as these were still not registered in the name of the Municipality even though they were in the process of being registered.

[16] At the risk of repeating what is already in the judgment, after considering the evidence and submissions made, the court was satisfied that all the requirements of the Act had been complied with and that the First and Second and the Third Respondents had, as unlawful occupiers, failed to raise a valid defence to remain on the properties. An eviction order was consequently granted in respect of portions 1, 3, 4 and 5 against the First, Second and other respondents as unlawful occupiers.

[17] Contrary to the Respondent's assertions that they are the owners of the properties, this court made a factual finding that the Municipality was the owner of the properties with full established rights of ownership. It is important to mention that while the Respondents claimed to be the owners in terms of an award purportedly made in terms of the Restitution of Land Rights Act, 1994, they, however, also sought protection under PIE as unlawful occupiers. This contradiction shows not only the lack of bona fides on the part of the Respondents, but it also seriously undermines the basis of their claim. While they relied on the Restitution of Land Rights Act, 1994 for their claim, however, when it suited them, they also relied on the donation agreement to lay claim on the properties.

[18] The issue of the period of occupation of the properties by the Respondents has also been comprehensively dealt with in the judgment. Contrary to their assertions, there was sufficient evidence to show that the Respondents had not occupied the properties for more than 6 months when the Municipality initiated the litigation against the Respondents.

[19] Further, it is evident that despite the Municipality having obtained a court order against the Respondents, the latter still proceeded to engage in self-help and continued unlawfully demarcating and allocating stands. Whether or not the First Respondent considered himself a Traditional Leader, self-help is inimical to the rule of law and the constitution and cannot and should not be encouraged.

[20] The Respondents in my view failed to advance cogent grounds to sustain the application for leave to appeal as required by section 17 of the Superior Courts Act 10 of 2013. In the light of the aforesaid, and after hearing submissions by the party's counsels, I am not persuaded that the Applicant has established that there are prospects of success on appeal and that another court would come to a different conclusion. Consequently, the application for leave to appeal stands to be dismissed.

Order

[21] I accordingly make the following order;

The application for leave to appeal is dismissed with costs on Scale C.

MBG LANGA

JUDGE OF THE HIGH COURT

Appearances:

For the Applicant:	Mr OB Morare
For the Respondent:	Advocate M Makoti
Date of hearing:	30 May 2024

Date of delivery: 23 August 2024

This judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be the 23 August 2024 at 14h00.