

SOUTH AFRICA / JUDGMENT

Educational Journey NPO v National Lotteries Commission (Leave to Appeal) (10737/2023) [2024] ZALMPPHC 130 (9 September 2024)

[2024] ZALMPPHC 130

COURT

Limpopo High Court, Polokwane

BEFORE

Sikhwari

CASE / FILE NUMBER

10737/2023

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REPUBLIC OF SOUTH

AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

(LIMPOPO DIVISION,

POLOKWANE)

CASE NO: 10737/2023

(1)

REPORTABLE: YES/NO

(2)

OF INTEREST TO THE JUDGES: YES/NO

(3)

REVISED

DATE: 09/09/2024

SIGNATURE

In the matter between:

EDUCATIONAL JOURNEY

NPO

APPLICANT

and

NATIONAL LOTTERIES

COMMISSION

RESPONDENT

JUDGMENT**[LEAVE TO APPEAL]**

This judgment is delivered electronically by way of dispatching same to email addresses of the parties' legal representatives and publishing same on SAFLII. The date of delivery of this judgment is deemed to be 9 September 2024.

SIKHWARI AJ

[1] This court has previously granted an order dismissing the applicant's application in the main case. The applicant sought relief in the following terms:

1. That the respondent's decision of declining applicant's application for access to public fund held at National Lottery Distribution Fund (NLDTF) is reviewed and set aside.
2. That the applicant's application for access to funding is granted.
3. Directing that the respondent ts to pay costs of this application.
4. Granting further and/or alternative relief that this honourable court deems appropriate.

[2] Aggrieved by the order- of this court, the applicant filed an application for leave to appeal. It is trite law that application for leave to appeal is regulated in terms of Section 17 of the Superior Courts Act 10 of 2013, which provides that:

17.(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 156(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."

[3] The courts have interpreted the above new provisions of the Act in several decisions and distinguished same from the previous test of "reasonable prospects of success" on appeal. The use of the word "would" in section 17 (1) (a) of the Act above in the new test has risen the bar to a very higher standard in that the test now is that the applicant for leave to appeal must demonstrate some level of certainty that the appeal may succeed, NOT that it may succeed, NOT that it is arguable, NOT that another court may arrive at a different decision.

- [4] The new test in terms of section 17 (1) (a) of the Act was first confirmed, and explained thoroughly, in the case of *The Mont Chevaux Trust (112012/28) v Tina Goosen & 18 Others* 2014 JDR 2325 (LCC) at para 6, where Bertelsman J held that:

"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."

- [5] The *Mont Chevaux Trust* test on leave to appeal was later followed by the court as good current law in the case of *Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others*, (19577/09) [2016] ZAGPPHC 489 (24 June 2016) at para 25, the full court of the Gauteng Division in Pretoria, per Ledwaba DJP, Pretorius J and Mothle J (as he then was) held that:

"The Superior Courts Act has raised the bar for granting leave to appeal ..."

- [6] In the case of *Fair-Trade Independent Tobacco Association v President of the Republic of South Africa and Another* (2168812020) [2020] ZAGPPHC 246 (24 July 2020) at para 6, the full court of the Gauteng Division in Pretoria per Mlambo JP, Molefe J and Sasson J considered the above-stated decisions on interpreting section 17 (1) (a) of the Act, and correctly held that:

"As such, in considering the application for leave to appeal, it is crucial for this court to remain cognizant of the higher threshold that needs to be met before leave to appeal may be granted. There must exist more than just a mere possibility that another court, the SCA in this instance, will, not might, find differently on both facts and law. It is against this background that we consider the most pivotal grounds of appeal."

- [7] The aforesaid new test was further confirmed as good current law by the Supreme Court of Appeal (SCA) in respect of section 17 (1) (a) of the Act in the case of *Smith v S* 2012 (1) SACR 567 (SCA) at para 7, where Plasket AJA 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 categorized 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 another case of MEC of Health, Eastern Cape v Mkhitha and Another (1221/2015) [2016] ZASCA 176 (25 November 2016, at paragraphs 1-6 and 17, Schippers AJA reaffirmed the SCA's disapproval to the granting of leave to appeal where the new threshold of a higher test was not met when the unanimous judgment of the SCA held that:

"[16] 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.

"[17] 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 one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a prospect of success on appeal."

[9] The essence of the application for leave to appeal is that this court has erred by making a finding that the respondent has no discretion to condone the applicant' was held that the respondent has authority to exercise its discretion on the application, notwithstanding the shortcomings on the audited statements. The material principle is the authority of the respondent to exercise discretion, which may include the decision to condone the shortcomings.

[10] This court relied on the decision in the case of Dr JS Moroka Municipality and Others v Betram (Pty) Limited and Another (93712012)

[2013] ZASCA186; [2014] 1 All SA 545 (SCA) (29 November 2013) at para 12, Leach JA where it was held that:

"As a general principle an administrative authority has no inherent power to condone failure to comply with a peremptory requirement. It only has such power if it has been afforded the discretion to do so."

[10] In this application for leave to appeal, the applicant referred this court to the judgment in Alpha Omega Youth Outreach v National Lottery Commission (2019) ZAECELLC 30 (12 November 2019) at para 13 & 15 where it was held that the respondent does have the power to exercise its discretion in circumstances where there are shortcomings

in the application for financial assistance from the Lottery Commission. This was conceded in the Alpha Omega Outreach case.

[11] The distinguishing factor between Dr JS Moroka Municipality case and Alpha Omega Outreach case is that the former was stressing the general principles whereas the latter is expressing the exceptional or specific case in which the power to exercise discretion should be invoked irrespective of the nature of the shortcomings in the application. The exercise of this discretion may or may not result in the granting of condonation; as opposed to

complete disregard of the application by merely detecting a shortcoming in the application relating to the qualifications of the auditors.

[12] In the-circumstances, we are seated with two conflicting decisions in the same issue. In the circumstances, there are other compelling reasons to grant the leave to appeal. Accordingly, the application for leave to appeal to the full court of the Limpopo Division sitting in Polokwane must succeed. Costs will be costs in the appeal.

[12] Accordingly, the following order is made:

1. That the application for leave to appeal is granted to the full court of this division, Limpopo Division, Polokwane.
2. Costs of the application for leave to appeal are costs in the appeal.

MS SIKHWARI

ACTING JUDGE

OF THE HIGH COURT OF SOUTH AFRICA,

LIMPOPO DIVISION,

POLOKWANE

APPEARANCES: For Applicant Adv NK Tsatsawane SC Adv Chauke Instructed by Diale Mogashoa Attorneys c/o Verveen Attorneys For Respondent Adv RJ Rasesemola Instructed by Gomba Attorneys c/o Maswangani (M) Attorneys Date of Judgment 09 September 2024

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