

SOUTH AFRICA / JUDGMENT

Elmir Property Projects (Pty) Limited t/a as Elmir Projects and Another v Bankenveld Homeowners Association (Pty) Limited (1523/2020) [2023] ZAMPMHC 16 (11 May 2023) [2023] ZAMPMHC 16

COURT

Middelburg High Court, Mpumalanga

BEFORE

MBG Langa

CASE / FILE NUMBER

1523/2020

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IN THE HIGH COURT OF

SOUTH AFRICA

MPUMALANGA DIVISION

(MIDDELBURG LOCAL SEAT)

CASE NO: 1523/2020

(1) REPORTABLE: NO

(2) OF INTEREST TO

OTHER JUDGES: NO

(3) REVISED

DATE: 11/05/2022

SIGNATURE:

In

the matter between:

ELMIR
PROPERTY PROJECTS (PTY) LIMITED t/a as ELMIR PROJECTS
Registration
No. 2[...]
First Applicant
EMALAHLENI
LOCAL MUNICIPAL COUNCIL
Second Applicant
And
BANKENVELD
HOMEOWNERS ASSOCIATION (PTY) LIMITED
Registration
No. 2[...])
Respondent

JUDGMENT

Langa J

- [1] This application for leave to appeal is against the whole order made by court on 14 November 2022. For convenience the parties will be referred to as in the main application. The applicants in the leave to appeal are the First and the Second respondent in the main application, namely, Elmir Property Projects (Pty) Limited and eMalahleni Local Municipality.
- [2] The main application turned around the provisioning of proper sewage system to the Bankenveld residential estates in Emalahleni local municipality. In addition to other relief, the applicant in the main application, Bankenveld Homeowners Association NPC (“Bankenveld HOA”), sought an order to compel the first respondent, Elmir Property Projects (Pty) Ltd (“Elmir”), a developer of two private residential estates and/or the second respondent, the eMalahleni Local Municipal Council (“the Municipality”), to properly maintain two wastewater treatment plants which were erected by Elmir, (“the plants”) serving the Bankenveld HOA and the Bankenveld Golf Estate HOA (“together referred to as the Estates”). On 14 November 2022 judgment was granted in favour of the applicant in the main application with costs. The First and Second Respondents on the main application now seeks to appeal the said judgment. The respondent, applicant in the main application, opposed the application for leave to appeal and prayed for the dismissal of the

application on the basis that it does not have merits and asked for a costs order against the applicant.

- [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:

- (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 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] From the wording of this section the test has clearly changed substantially from that ordained by the repealed Supreme Court Act 59 of 1959. *Van Wyk v S, Galela v S* [2014] ZASCA 152; 2015 SACR 584 (SCA) para [14]. 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) at para 6 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] That the current section is now clearly more burdensome than its predecessor is clear. In *The Valley of the Kings Thaba Motswere (Pty) Ltd* [2016] ZAECHGC 137 (10 November 2016) the court acknowledged the new standard 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.” It is clear 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 therefore be merit in the applicant’s argument in support of the application for leave to appeal and the applicant must satisfy the court that the appeal would, not might, have reasonable prospects of success either on facts or the law.
- [6] The application in casu is based on a number of grounds which are clear from the notice of leave to appeal. The facts of the matter and the reasons for the judgment are comprehensively captured in the judgment appealed against and will not be repeated here. After a consideration of all the arguments I find that the appeal is arguable particularly as the matter involves constitutional interpretation. I am accordingly of the view that the application for leave to appeal to the Supreme Court of Appeal should be granted.

Order

[7] I consequently make the following order:

1. The application for leave to appeal to the Supreme Court of Appeal is granted;
2. Costs to be costs in the appeal.

MBG LANGA

JUDGE OF THE HIGH COURT MIDDELBURG LOCAL SEAT

Appearances:

For the Applicant; Advocate L Putter SC, with Advocate S Ogunronbi. For the First Respondent: Advocate FJ Erasmus SC For the Second Respondent: Advocate O Ben Zeev Reserved date: 10/03/2023 Date of delivery: 11/05/2023

This judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be the 11 May 2023 at 14h00.

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Prepared on 12 October 2026 · Esheria