

SOUTH AFRICA / JUDGMENT

Hunter v Financial Services Board and Others (3275/2016) [2017] ZAGPPHC 258 (16 March 2017) [2017] ZAGPPHC 258

COURT

North Gauteng High Court, Pretoria

BEFORE

HF Jacobs

CASE / FILE NUMBER

3275/2016

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IN

THE HIGH COURT OF SOUTH AFRICA
(GAUTENG
DIVISION, PRETORIA)

Case

No: 3275/2016

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

REVISED.

16/3/2017

In

the matter between:

ROSEMARY
THÈRÈSE
HUNTER Applicant
and
FINANCIAL
SERVICES
BOARD 1st
Respondent
ABEL
MOFFAT SITHOLE
N.O. 2nd
Respondent
DUBE
PHINEAS TSHIDI

N.O. 3rd
Respondent
JURGEN
ARNOLD BOYD
N.O. 4th
Respondent
PRAVIN
GOROHAN
N.O. 5th
Respondent

JUDGMENT

HF JACOBS, AJ:

- [1] This is an application for leave to appeal brought by the unsuccessful applicant a quo where her application for amendment of her notice of motion was refused and her application for interdictory relief dismissed. The third and fourth respondents applied for leave to cross-appeal a cost order. The application for leave to cross-appeal is conditional upon leave being granted to the applicant. Counsel for the applicant urged me to grant leave to appeal to the Supreme Court of Appeal. I will return to the grounds upon which leave to appeal is sought presently. Before doing so, it is necessary to refer to the principles applicable to applications for leave to appeal which are set out in section 17[1] of the Superior Courts Act 10 of 2013 ("the Superior Courts Act";).
- [2] The Superior Courts Act[2] repealed the Supreme Court Act[3] and introduced according to Mont Chevaux Trust[4] and Minister of Justice and Constitutional Development & Others[5] a new and more stringent approach to be followed by a Court of first instance when considering an application for leave to appeal.
- [3] Unlike the Supreme Court Act, section 17 of the Superior Courts Act imposes substantive law provisions applicable to applications for leave to appeal. The following principles are distilled therefrom: First, it stipulates that leave to appeal "may only be given" if the judge is of the opinion that certain jurisdictional facts exist. The discretion of a judge sitting as a court of first instance is, therefore, fettered. Second, the jurisdictional facts which are in the "opinion" of the Judge required to be present are:
- [3.1] that the appeal would have reasonable prospects of success,[6] or
- [3.2] the existence of some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.[7]
- [4] The reasonable prospect of success-criterion is well established. Section 20(4)(b) of the Supreme Court Act and Rule 49 of the Uniform Rules of Court governed applications for leave to appeal before the advent of the Superior Courts Act. That subsection and rule contained no substantive law provisions applicable to applications for leave to appeal and

dealt exclusively with procedural aspects of appeals and applications for leave to appeal. Over the years our Courts have, in the application of section 20(4)(b) of the Supreme Court Act, adopted the criterion of "reasonable prospect of success". The criterion appears from Baloyi, Nxumalo Ngubane, Olivier and Paulsen.[8]

- [5] An appeal will have prospects of success if it is arguable in the narrow sense of the word. It requires that the argument advanced by an applicant in support of an application for leave to appeal must have substance. The notion that a point of law is arguable on appeal, entails some degree of merit in the argument. The argument, however, need not be convincing at the stage when leave to appeal is sought but it must have a measure of plausibility.[9]
- [6] Third, the decision sought on appeal may not fall within the ambit of section 16(2)(a) of the Act and should, therefore, not be "of such a nature that the decision sought will have no practical effect or result" and that "the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs." [10]
- [7] Fourth, section 17(6)(a) of the Superior Courts Act provides that if leave is granted under section 17(2)(a) or (b) to appeal against the decision of a court of first instance consisting of a single judge, the judge "must direct that the appeal be heard by a Full Court of that Division" unless the judge considers that the decision to be appealed Involves a question of law of importance, whether because of its general application or otherwise, or in respect of which a decision of the Supreme Court of Appeal is required to resolve differences of opinion or that the administration of justice, either generally or in the particular case, requires consideration by the Supreme Court of Appeal of the decision, in which case the judge granting leave must direct that the appeal be heard by the Supreme Court of Appeal.[11]
- [8] Fifth, whether a Court of first instance grants or refuses leave to appeal it is required to provide reasons for its order Furnishing reasons -
- "... explains to the parties, and to the public at large which has an interest in Courts being open and transparent, why a case is decided as it is. It is a discipline which curbs arbitrary judicial decisions. Then, too, it is essential for the appeal process, enabling the losing party to take an informed decision as to whether or not to appeal or, where necessary, seek leave to appeal. It assists the Appeal Court to decide whether or not the order of the lower court is correct And finally, it provides guidance to the public in respect of similar matters."* [12]
- [9] In her notice of motion and her proposed amended notice of motion the applicant sought declaratory orders and interdictory relief ordering the FSB to "procure the conduct of an investigation by a firm of independent and appropriately qualified forensic auditors (the investigator) chosen by it in consultation with the fifth

respondent (the Minister)" and to mandate the FSB to determine "on the basis of information and records and any other past or present employee of the FSB who, in the opinion of the investigator, may have information or records relevant to the investigation in relation to each of the 500 funds" and to require from the Investigator when to commence the investigation, to produce a written interim report, to make written

recommendations, perform reasonably required conduct for the successful and expeditious conclusion of the investigation and to

appoint an inspector in terms of the Inspection of Financial Institutions Act, 1998 and to confer such powers and authority in terms of that Act on the inspector as may be reasonably required and that the actions of the FSB and its appointees be supervised by the Court.

[10] It was common cause throughout the proceedings that the FSB appointed Mr Mort to undertake the Investigation and inspections the FSB considered appropriate in the circumstances. The relief sought by the applicant in her main application and the proposed amended application is to have another person or institution appointed to undertake the work and to prescribe by way of court order the manner of execution thereof and for monitoring of execution of that order by the Court.

[11] The application for amendment of the applicant's notice of motion and the main application failed due to a lack of standing in law on her part in the main application and, should the proposed amendment be allowed, the amended main claim would suffer the same fate. The applicant seeks a court order to prescribe to the FSB how, when and by whom its statutory functions should be performed. I have listed the grounds in law on which the applicant relies in my main judgment. The grounds there stated do not, in my view, afford the applicant the right to claim the relief sought against the respondents. During argument of the application for leave to appeal Mr Loxton SC relied on the Judgments of the Constitutional Court in *Khumalo*,^[13] *Areva*,^[14] and *Merafong*^[15] in support of the submission that application of the rule of law to the facts in *casu* imposed upon the respondents, when they became aware of irregularities in the cancellation of pension funds, the duty to deal with the irregularities in the manner in which her relief is framed in her main application. In this regard the applicant relies on the dictum in paragraph [61] in *Merafong* which reads as follows:

"This was out of kilter with Merafong's duty as an organ of State and as constitutional citizen. This Court has affirmed as a fundamental principle that the State 'should be exemplary in its compliance with the fundamental constitutional principle that proscribes selfhelp'. What is more, in *Khumalo*, this Court held that State functionaries are enjoined to uphold and protect the rule of law by, inter alia, seeking the redress of their department's unfavourable decisions. Generally, it is the duty of the State functionary to rectify unlawfulness. The Courts have a duty 'to insist that the State, in all its dealings, operates within the confines of the law and, in so doing, remains accountable to those on whose behalf it exercises power'. Public functionaries 'must, where faced with an irregularity in the public administration,

in the context of employment or otherwise, seek to redress ii'. Not to do so may spawn confusion and conflict, to the detriment of the administration and the public. A vivid instance is where the President himself has sought judicial correction for the process

misstep in promulgating legislation.”

- [12] The submission in my view loses sight of the fact that the FSB In the present matter considered the applicant's views on the cancellations project, the recommendations of the O'Regan report and that of KPMG and acted in a manner not fully in line with the-aforesaid recommendations, but as the FSB saw fit Absent In the present matter is conduct which the FSB and the Minister consider irregular or unlawful to obligate the FSB to act in the manner claimed by the applicant. The FSB did act but in a different manner by appointing Mr Mort and not the entities the applicant has in mind.
- [13] In my view the judgments of Areva and Merafong[16] do not, if applied to the facts in the present matter, afford the applicant locus standi in iudicio to claim the relief sought.
- [14] Under the circumstances I am not of the opinion that the appeal would have reasonable prospects of success and in my view no other compelling reason exists why the appeal should be heard. The investigation of Mr Mort continued at the time of the hearing and beyond. The applicant herself handed up at the hearing a further interim report prepared by Mr Mort shortly before the hearing. That interim report was supplied to the applicant by the FSB. Once Mr Mort has completed his investigation, inspection and has reported to the FSB, the FSB and the Minister would be in a position to take a decision on the cancellation project. On completion thereof the FSB and/or the Minister may decide on appropriate action to be taken in regard to the cancellations project. An appeal on the relief sought by the applicant would in my opinion have no practical effect or result, and would as contemplated by the provisions of section 16(2)(a) of the Superior Courts Ac not be allowed.
- [15] The application for leave to appeal s refused with costs which costs shall include the cost of two counsel where so employed.

H F JACOBS

ACTING JUDGE OF THE HIGH COURT

PRETORIA

Counsel for Applicant:

C D A Loxton SC

A Milovanovic

Counsel for 1st & 2nd Respondents:

W H Trengove SC

H Rajah

Counsel for 3rd & 4th Respondents:

M C Maritz SC

T Manchu

Counsel for 5th Respondent:

F B Pelser

- [1] "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, (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. (2)
- (a) Leave to appeal may be granted by the judge or judges against whose decision an appeal is to be made or, if not readily available, by any other judge or judges of the same court or division ... (4) The power to grant leave to appeal - (a) is not limited by reason only of the fact that the matter in dispute is incapable of being valued in money; and (b) is subject to the provisions of any other law which specifically limits it or specifically grants or limits any right of appeal. (5) Any leave to appeal may be granted subject to such conditions as the court concerned may determine, including a condition - (a) limiting the issues in appeal; or (b) that the appellant pay the costs of the appeal (6)
- (a) If leave is granted under subsection (2)(a) or (b) to appeal against a decision of a Division as a court of first instance

consisting of a single judge, the judge or judges granting leave must direct that the appeal be heard by a full court of that

Division, unless they consider – (i) that the decision to be appealed involves a question of law of importance, whether because of its general application or otherwise,

or in respect of which a decision of the Supreme Court of Appeal is required to resolve differences of opinion; or (ii) that the administration of justice, either generally or in the particular case, requires consideration by the Supreme Court of Appeal of the decision, in which case they must direct that the appeal be heard by the Supreme Court of Appeal. (b) Any direction by the court of a Division in terms of paragraph (a), may be set aside by the Supreme Court of Appeal of its own accord, or on application by any interested party filed with the registrar within one month after the direction was given, or such longer period as may on good cause be allowed, and may be replaced by another direction in terms of paragraph (a). (7) ...

[1] "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,

(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.

(2)

(a) Leave to appeal may be granted by the judge or judges against whose decision an appeal is to be made or, if not readily available, by any other judge or judges of the same court or division

...

(4) The power to grant leave to appeal -

(a) is not limited by reason only of the fact that the matter in dispute is incapable of being valued in money; and

(b) is subject to the provisions of any other law which specifically limits it or specifically grants or limits any right of appeal.

(5) Any leave to appeal may be granted subject to such conditions as the court concerned may determine, including a condition -

(a) limiting the issues in appeal; or

(b) that the appellant pay the costs of the appeal

(6)

(a) If leave is granted under subsection (2)(a) or (b) to appeal against a decision of a Division as a court of first instance

consisting of a single judge, the judge or judges granting leave must direct that the appeal be heard by a full court of that

Division, unless they consider -

(i) that the decision to be appealed involves a question of law of importance, whether because of its general application or otherwise,

or in respect of which a decision of the Supreme Court of Appeal is required to resolve differences of opinion; or

(ii) that the administration of justice, either generally or in the particular case, requires consideration by the Supreme Court of Appeal of the decision, in which case they must direct that the appeal be heard by the Supreme Court of Appeal.

(b) Any direction by the court of a Division in terms of paragraph (a), may be set aside by the Supreme Court of Appeal of its own accord, or on application by any interested party filed with the registrar within one month after the direction was given, or such longer period as may on good cause be allowed, and may be replaced by another direction in terms of paragraph (a).

(7) ...

[2] 10 of 2013 which took affect on 23 August 2013

[3] 59 of 1959.

[4] The Mont Chevaux Trust (IT2012/28) v Tina Gosen (unreported judgment Land Claims Court, Case No LCC 14R/2014 dated 3 November 2014.

[5] The Minister of Justice and Constitutional Development and Others v The SA Litigation Centre and Others (Case No 27740/2015, Gauteng North High Court, Pretoria, unreported judgment of 15 September 2015.

[6] Section 17(1)(a)(i).

[7] Section 17(1)(a)(ii).

[8] R v Baloyi 1949 (1) SA 523 (A) at 524, R v Nzumalo 1939 AD 580, R v Ngubane 1945 AD 185 at 187; Afrikaanse Pers Bpk v Olivier 1949 (2) SA 890 (O); Paulsen & Another v Slip Knot Investments 777 (Pty) Ltd 2015 (3) SA 479 (CC) at [21]–[24]

[9] Paulsen *supra* at [21].

[10] Section 16(2)(a) of the Superior Courts Act

[12] Botes & Another v Nedbank Ltd 1983 (3) SA 27 (A) at 28A-F; Strategic Liquor Services v Mvumbi N.O 2010 (2) SA 92 (CC) at [16]–[19].

[13] Khumalo v Member of the Executive Council for Education: KwaZulu-Natal [2013] ZACC 49; 2014 (5) SA 579 (CC): 2014 (3) BCLR

333 (CC)

[14] Areva NP v Eskom Holdings Soc Ltd & Another [2016] ZACC 51.

[15] Merafong City Local Municipality v AngloGold Ashanti Ltd [2016] ZACC 35.

[16] See footnotes 14 and 15 *supra*.

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