

SOUTH AFRICA / JUDGMENT

South African Human Rights Commission v Agro Data CC and Another (Leave to Appeal) (1448/2021) [2022] ZAMPMBHC 95 (9 December 2022)

[2022] ZAMPMBHC 95

COURT

Mbombela High Court, Mpumalanga

BEFORE

Greyling-Coetzer

CASE / FILE NUMBER

1448/2021

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IN

THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION,

MBOMBELA (MAIN SEAT)

CASE

NUMBER: 1448/2021

(1) REPORTABLE: YES/NO

(2)

OF INTEREST TO THE JUDGES: YES/NO

(3)

REVISED.

DATE:

9/12/2022

SIGNATURE:

In the matter between:-

THE

SOUTH AFRICAN HUMAN RIGHTS COMMISSION

Applicant

and

AGRO

DATA

CC

First Respondent

BOSHOFF

G

Second Respondent

JUDGMENT

: APPLICATION FOR LEAVE TO APPEAL

GREYLING-COETZER AJ

- [1] The applicant was partially successful in its application against the respondents wherein it sought:-
- (i) a general declarator that all directives issued by the applicant in terms of Section 184(2)(b) of the Constitution are binding;
 - (ii) a declaration that the respondents' refusal or failure to comply with the applicant's directives in respect of the complaint under file number MP/1819/0179 is unlawful and constitutionally invalid;
 - (iii) an order that the respondents restore the supply of borehole water to the occupiers of Portion 3 of Farm Doornhoek, 143 JT, Thaba Chweu, at no cost to the occupiers within 7(seven) days of the judgment;
 - (iv) and order that the respondents, within 30(thirty) days of the judgment, commence engagements with the occupiers in good faith on the future management of water supply on the farm; and
 - (v) an order that the respondents, within 14(fourteen) of the judgment, supply the occupiers with all relevant information to enable them to engage meaningfully in relation to the issue of water management of the farm, which information shall include all the scientific reports at the disposal of the respondents relating to the levels of the underground water on the farm, as well as the costs incurred by the respondents in the supply of water to the occupiers. The aforementioned was sought together with costs.
- [2] On 2 March 2022 judgment was handed down. The applicant was partially successful in that
- 2.1 the order the general declaratory relief sought by the applicant was dismissed on the basis that no case has been made out for the blanket order sought;
 - 2.2 the respondents, through facilitation of the applicant, was ordered to engage with the occupiers in good faith on the future management of the water supply on the farm;
 - 2.3 the respondents were ordered to make all relevant information available to the occupiers for the purpose of meaningful engagement in relation to the issue of water management, which information shall include all the scientific reports available and at the disposal of the respondents, related to the level of underground water on the farm, as well as the costs incurred by the respondents in supplying water to the occupiers;
 - 2.4 The applicant was ordered to facilitate and mediate the aforementioned engagement; and

2.5 No order as to costs was granted.

[3] From a cursory reading of the application for leave to appeal and considering the initial wording, it is suggestive that the applicant seeks leave to appeal the whole of the judgment and order so granted on 2 March

2022. However, on a closer look the applicant seems to qualify above by exclude from the application for leave to appeal paragraphs 2, 3, 4 and 5 of the order, and paragraphs 67, 68, 69 and 72 of the judgment. Consequentially the applicant is not applying for leave to appeal the whole judgment and order, but only the dismissal of the blanket declaratory relief.

[4] The application for leave to appeal was filed out of time. The applicant contends that notwithstanding the judgment being delivered on 2 March 2022, it was allegedly only communicated to the parties on 11 May 2022. Neither of the parties were able to provide assistance in establishing how or why this appears to be have been the case. The respondents did not seriously dispute the contentions in respect of the belated receipt. Considering that set out herein below and the applicable circumstances it would be in the interest of justice to grant the applicant condonation for the belated application.

[5] The facts of the case are set out in the judgment and need not be repeated herein.

[6] Section 17 of the Superior Courts Act 10 of 2013 (“the Act”) governs an application for leave to appeal as in the present instance. It reads as follows:-

“17 LEAVE TO APPEAL

(1) Leave to appeal my 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 decisions 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.

...

(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 on appeal or (b) that the appellant pay the cost of the appeal...

(6)(a) If leave is granted under sub-section 2(a) of (b) to appeal against a decision of the division as a court of first instance consisting of a single judge, the judge of 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 it because of its general application or

otherwise, or in respect of which a decision of the Supreme Court of Appeal is required to resolve difference 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...”

[7] The applicant argued that not only does it enjoy reasonable prospects of success, but there are other compelling reasons why the appeal should be heard. The applicant clustered the grounds of appeal as follows:-

- (i) There is no constitutional hierarchy of Chapter 9 institutions;
- (ii) The court erred in engaging in an overly technical interpretation of the wording pertaining to the powers of the Public Protector and those of the applicant;
- (iii) The court misinterpreted the powers and functions of the applicant;
- (iv) The court misdirected itself regarding the powers of the applicant to litigate;
- (v) The court’s analysis is contradictory;
- (vi) The court erred in its treatment of the issue of access to water by the occupiers of the respondents’ farm, and seems to have made remarkable pronouncements that will have implications for many who live on farms.

[8] Considering the grounds relied upon the applicant, the application for leave to appeal, is essentially focussed on the court’s reasoning and dismissal of the blanket declaratory relief on the facts of the matter.[1]

[9] After carefully considering both the written and oral arguments presented in support and against the application for leave to appeal, I am not of the opinion that the appeal would have a reasonable prospect of success on the grounds relied upon.

[10] That being said, I am of the opinion that the appeal should be heard never the less and on the basis set out in Section 17(1)(a)(ii) of the Act for the reason that the appeal involves not only an important

question of law, but the administration of justice generally require the appeal to be heard.

[11] The issue of whether all directives of the applicant issued as argued

for by the applicant is of public importance which will have an effect on future matters.
Therefore in my opinion does raise a

question of law of general importance and appears to be res nova. For this reason, and in terms of Section 17(6)(a)(i) and (ii) of the Superior Courts Act 10 of 2013, an appeal stands to be heard by the Supreme Court of Appeal.

[12] Having regard to the fact that the general declarator was sought in order to obtain clarity for the future, to the extent that all directives issued by the applicant cannot be ignored, the matter is in fact a test case. In terms of Section 17(5)(b) of the Act, the applicant ought to pay the cost of the appeal.

[13] In terms of Section 17(5)(b) the issues on appeal are limited to whether the applicant is entitled to a blanket declaratory order as sought in the court a quo and on the grounds set out in the application for leave to appeal, relating specifically thereto.

[14] I accordingly make the following order:

14.1 The applicant is granted condonation for the late filing of the application for leave to appeal.

14.2 The applicant is granted leave to appeal to the Supreme Court of Appeal.

14.3 The applicant shall pay the cost of the appeal.

FOR APPLICANT: Adv Marongo instructed by SAHRC

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FOR RESPONDENTS: Adv Lindhout

Instructed by Frey Inc

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[1] In Absa Bank Ltd v Mkhize and two similar cases 2014 (5) SA 16 (SCA) at [64] the Supreme Court of Appeal held that an appeal lies against an order and not against reasons.

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