



**FREE STATE HIGH COURT, BLOEMFONTEIN**  
**REPUBLIC OF SOUTH AFRICA**

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

In the matter between: -

Case No: 5556/2017

MPHO SARAH MOLOI N.O

1<sup>st</sup> APPLICANT

MPHO SARAH MOLOI

2<sup>nd</sup> APPLICANT

and

THE PREMIER OF THE FREE STATE  
PROVINCE

1<sup>st</sup> RESPONDENT

MEC FOR PUBLIC WORKS & INFRASTRUCTURE  
FREE STATE PROVINCE

2<sup>nd</sup> RESPONDENT

MEC FOR HEALTH FREE STATE

3<sup>rd</sup> RESPONDENT

MANGAUNG METROPOLITAN MUNICIPALITY

4<sup>th</sup> RESPONDENT

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**JUDGMENT:**                      **MOLITSOANE, J**

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**HEARD ON:**                      **21 JANUARY 2021**

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**DELIVERED:**                      **28 JANUARY 2021**

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- [1] The applicants seek leave to appeal to the Full Court of this division, alternatively, the Supreme Court of Appeal the whole of this Court's judgment and orders granted on 26 November 2019. This application is with leave of this Court after Mbhele, J on 8 October 2020 granted an application for the late filing of the application for leave to appeal.
- [2] In terms of the provisions of s17(1) of the Superior Court's Act, 10 of 2013 leave to appeal may only be granted where the judge in the matter concerned is of the opinion that the appeal would have a reasonable prospects of success or there is some compelling reason why the appeal should be heard.
- [3] This court in the unreported case of **Hans Seuntjie Matoto v Free State Gambling and Liquor Authority**<sup>1</sup> said the following;
- “There can be no doubt that the bar for granting leave to appeal has been raised. Previously, the test was whether there was a reasonable prospect that another court might come to a different conclusion. Now, the use of the word ‘would’ indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.”
- [4] In **Smith v S**<sup>2</sup> the court dealt with the question of what constitutes reasonable prospects of success as follows:
- “[7] What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts on 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

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<sup>1</sup> 4629/2017[ZAFSHC] 8 June 2017.

<sup>2</sup> 2012(1) SACR 567(SCA) par [7].

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.”

[5] In **School Governing Body Grey College, Bloemfontein v Scheepers and Others (South African Teachers Union Intervening<sup>3</sup>)** the court said the following:

“[4] .... Section 17(1) (a)(ii) has not only raised the bar for applications for leave to appeal but also fettered the Judge’s discretion when considering such applications. Leave to appeal may only be given when the Judge or Judges are of the opinion that the appeal would have a reasonable prospect of success. The word ‘only’ is indicative of the fact that this section limits the judge’s discretion to grant leave to appeal. The Judge’s discretion is circumscribed because he or she may not grant leave to appeal based on a reason other than the one mentioned in it. Considerations such as an applicant for leave to appeal having an arguable case or that there is a possibility of success on appeal are irrelevant.

[5].....

[6] Whether there is a compelling reason why the appeal should be heard will depend on the facts of the particular case. There must be a strong reason for granting leave on this ground.’

[6] The Applicants contend that this court erred in not finding that the agreement the Applicants rely on had been revived. For this contention the Applicants, inter alia, rely on a fourth set of affidavit which was filed but not sanctioned by the court. It is the case for

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<sup>3</sup> (2612/2018) [2018] ZAFSHC 25(17 JANUARY 2019)

the Applicants that this court erred in not taking into account the fourth affidavit.

- [7] Rule (6)(5)(e) sets out clearly that only three sets of affidavits may be filed. The court may, however, in its discretion allow for further affidavits to be filed. It stands to reason that where leave has not been granted such an affidavit may not be taken into account. The Court in **Hano Trading v JR 209 Investments**<sup>4</sup> said the following:

“[11] Rule 6(5)(e) establishes clearly that the filing of further affidavits is only permitted with the indulgence of the court. A court, as arbiter, has the sole discretion whether to allow the affidavits or not. A court will only exercise its discretion in this regard where there is good reason for doing so.”

- [8] The Applicants filed an application to file a further affidavit. The Respondents in turn noted their opposition and filed an answering affidavit. Applicants did not deal with the said application in their heads of argument. During the hearing of the application before me, the Applicants did not move for leave to file the said further affidavit.
- [9] Counsel for the Applicants submitted that much as the Applicants did not move for the admission of this further affidavit in pertinent terms, reference was made to it upon a question from the court and the Respondents did not object to such referral. Counsel submitted that as a consequence of the reference and failure to object by the Respondents, such affidavit should be deemed to have been admitted. I do not agree.

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<sup>4</sup> 2013(1) SA 161(SCA)

[10] In dealing with an application for leave to file a further affidavit the court is called upon to exercise a discretion. For the court to exercise such a discretion the Applicants must give an explanation why it is necessary to file the said affidavit. In this way the court will weigh considerations of fairness and justice. (See **South Peninsula Municipality v Evans**<sup>5</sup>). The court will further measure the balance of prejudice for each party if leave is granted or refused.

[11] As indicated earlier no indulgence was sought from the court to file a further affidavit and consequently no explanation was given to court why Applicants wanted to file a further affidavit. Cursory reference to the further affidavit and failure by the Respondents to object to such referral will not render inadmissible evidence, admissible. This court was entitled to ignore the further affidavit as non-existent. In the words of Dlodlo, J in **Standard Bank of SA Ltd v Sewpersadh and Another**<sup>6</sup> :

“[13] Clearly a litigant who wished to file a further affidavit must make formal application for leave to do so. It cannot simply slip the affidavit into the Curt file....I am of the firm view that this affidavit falls to be regarded as pro non scripto.”

I am of the view that the affidavit was correctly ignored and the contention of the Applicants ought to be rejected.

[12] The Applicants have since conceded that they cancelled the purported agreement by way of a letter dated 2 March 2021. In

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<sup>5</sup> 2001(1) SA 271 ( C )

<sup>6</sup> 2005(4) SA 148 at 155

paragraph 12 of their heads of argument the Applicants contend that the interaction of Venter, Moletse and Ramonyai post the cancellation date, *'showed that there was a fresh meeting and concurrence of the minds of the parties'*. The interaction by way of correspondence do not evidence any revival. Such interaction serves to fortify the finding that the agreement was cancelled. By way of an illustration, in a subsequent letter dated 4 May 2015, appended to the founding affidavit as Annexure N, the Applicants afford the Department to *'reconsider'* its stance regarding payment within 2 days failing which an eviction and damages claims would be brought. It is common cause that no payment was effected. This in my view does not accord with an agreement which was revived. The Applicants were simply pleading with the Department to reconsider its stance. No case for the revival of the agreement has been made. The finding that the agreement was cancelled is unassailable as conceded by the Applicants. I accordingly find that there are no reasonable prospects of success on appeal and this application must fail. I accordingly order as follows:

[13] **ORDER**

1. The application for leave to appeal is dismissed with costs.

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**P.E. MOLITSOANE, J**

On behalf of the Applicants: Adv. M Khoza SC  
Instructed by: Jan Hugo Attorneys  
BLOEMFONTEIN

On behalf of the Respondents: Adv. N Snullenburg  
Appearing with: Adv.L. R. Bomela  
Instructed by: The State Attorney  
BLOEMFONTEIN