REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

CASE NO: 2017/0027774
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES:NO
DATE: 09/12/2022
SIGNATURE:

In the matter between:

KARIKI PIPELINE AND WATER PROJECT (PTY) LTD Applicant

and

RAND WATER BOARD First Respondent

CHIEF EXECUTIVE OFFICER: RAND WATER BOARD Second Respondent

JUDGMENT ON LEAVE TO APPEAL

MOKUTU AJ:

INTRODUCTION

1. The reasons and order dismissing the application for leave to amend the notice of motion were read into the record, in open Court, on 28 March 2021. The sequence of events dealt with at paragraphs 1 to 9 of the written reasons and order, dated 4 February 2022, is an account of events that transpired between 28 March 2021 and 4 February 2022 in regard to the lapse of time between the date the reasons were read into the record and the communication of the written reasons to the parties.

2. The application for leave to appeal the codified judgment and order of 4 February 2022 appears to have been timeously filed on 25 February 2022, before a lapse of the mandatory 15-day period within which such application must be launched.

3. That said, that the application for leave to appeal had been filed pursuant to the dismissal of the application for leave to amend the notice of motion, was never brought to my attention until 9 November 2022.

4. By agreement between the parties' legal representatives and I, it was, therefore, agreed that the application for leave to appeal be heard on 29 November 2022 *albeit* virtually.

THE APPLICABLE TEST FOR THE GRANT OF APPLICATIONS FOR LEAVE TO APPEAL

5. The Supreme Court of Appeal ("**the SCA**")[1] has authoritatively laid down the test applicable in the grant or refusal of leave to appeal. According to the SCA, leave to appeal must not be granted unless there truly is a reasonable prospect of success and 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.

6. The SCA (in ***Mkhitha*** *supra*) also emphasised that an applicant for leave to appeal **must** convince the Court on proper grounds that there is a reasonable or realistic chance of success on appeal. According to the Court, a mere possibility of success, an arguable case or one that is hopeless, is not enough.

7. The Court further remarked that there must be sound, rational basis to conclude that there is a reasonable prospect of success on appeal.

8. In ***The Mont Chevaux Trust (IT 2012/28) v Tina Goosen***[2] the Court remarked that the wording of the subsection raised the bar of the test that now has to be applied on the merits of the proposed appeal before leave should be granted.

---

[1] In ***MEC for Health Eastern Cape v Mkhitha*** (122/15) [2016] ZASCA 176 (25 November 2016) at paras. 16 and 17 [Unreported].

[2] Unreported, Land Claims Court judgment, case number LCC 14R/2014 dated 3 November 2014, cited with approval by the full Court in ***The Acting National Director of Public Prosecuting v Democratic Alliance*** (unreported), GP case number 19577/09 dated 24 June 2016 at para. 25; also cited with

9. Section 17(1)(a)(i) and (ii) of the Superior Courts Act 10 of 2013 ("**the Act**") provides that leave to appeal may only be given where the Judge concerned is of the view that the appeal would have reasonable prospect of success or there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.

THE GROUNDS CONTENDED FOR IN THE APPLICATION FOR LEAVE TO APPEAL

10. The application for leave to appeal records that leave should be granted, without specifying whether to the full bench of this honourable Court or to the SCA.

11. In the application for leave to appeal, the applicant contends, in the main, that I have erred in that I:

11.1. have found that the amendment sought by the applicant was incompetent, in law, on the reasoning that the applicant had no prospects of success in the main review application; and

11.2. have delved into the merits of the main review application in finding that the applicant had no prospects of success in the main review application.

12. It is undisputed in the pleadings filed of record that the review application was filed outside of the prescribed 180 days as contemplated in section 7(1) of the Promotion of Administrative Justice Act 3 of 2000 ("**PAJA**").

13. In terms of section 7(1)(b) of PAJA it is, *inter alia*, provided that any proceedings for judicial review in terms of section 6[3] thereof, must be instituted without unreasonable delay and not later than 180 days after the date on which the person concerned was informed.

---

approval in ***South African Breweries (Pty) Ltd v Commissioner of the South African Revenue Services*** (unreported, GP case number 3234/15 dated 28 March 2017 at para. 5).

[3] Section 6 of PAJA deals with judicial review of administrative actions.

14. In the heads of argument filed on behalf of the applicant it is also conceded that the review application was filed outside the 180 days calculated from 2 September 2016.

15. It was, however, submitted on behalf of the applicant that the concession around the late filing of the review application was unwittingly made by counsel who had settled the heads of argument and I was invited to disregard same.

16. Regrettably, in my view, paragraphs 14 to 27 of the judgment and order of 4 February 2022 deal specifically with the reasoning why I was persuaded (and I still remain of the same view) that there were and are no prospects of success that another Court would grant an amendment sought since the review application was not accompanied by an extension of the *dies* in terms of section 9 of PAJA.

17. Briefly, section 9(1) of PAJA provides that provides that 180 days referred to in sections 5 and 7 may be extended for a fixed period, by agreement between the parties or, failing such agreement, by a Court on application by the person concerned and the Court may grant an application in terms of subsection 9(1) where the interests of justice so require.

18. According to ssection 9(2) of PAJA it is provided that the Court may grant an application for an extension of fixed period if or where the interest of justice so require.

19. I also invited counsel for the applicant to have regard to the unreported judgment of ***Goodhope Plasterers CC (trading as Goodhope Construction) v IDT and Another***[4] to the extent that cancellation of a tender does not necessarily amount to an administrative action. There was no cogent submission offered by the applicant's counsel to counter reliance on the ***IDT*** case relied upon.

20. In regard to the failure on the part of the applicant to have filed an extension application in terms of section 9 of PAJA, I also invited the applicant's counsel to have

[4] Western Cape Division, Case number: 5472/2013 at paras. 1;5;11 to 18.

regard to the judgment of ***Trans-Drakensberg***[5] where the Court said the following in regard to amendment of pleadings:

"*Having already made his case in his pleading, if he wishes to change or add to this, he must explain the reason and show prima facie that he has something deserving of consideration, a triable issue, he cannot be allowed to harass his opponent by an amendment which has no foundation. He cannot place on the record an issue for which he has no supporting evidence, where evidence is required, or, save perhaps in exceptional circumstances, introduce an amendment which would make the pleading excipiable*. "

21. In my view, given the applicant's poor prospects of success in the review application based on its admission for the late institution of its review application, the reviewing Court will not, as a matter of law,[6] entertain such a review application absent the accompanying application contemplated in section 9 of PAJA.

22. Put differently and on the reason of the ***Trans-Drakensberg*** judgment (*supra*), similarly a Court is entitled to refuse an amendment that would result, if granted, in the pleadings to be excipiable. In *casu*, and based on the applicant's own admission that it had filed its review application after the lapse of 180 days contemplated in section 7 of PAJA, such an amendment would be academic.

23. The application for amendment of the notice of motion did not succeed for another reason being the applicant's intention to introduce a prayer seeking payment of damages against the respondent, notwithstanding the fact that review application is a public law remedy, whilst a damages claim is a private law remedy.

24. In my view, the institution of the review application and claim for damages, private law claim, are mutually exclusive. The Constitutional Court[7] has authoritatively

---

[5] ***Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd and Another*** 1967 (3) SA 632 (d) at 641A., quoted with approval in ***Magnum Simplex v The MEC Provincial Treasury*** (556/17) [2018] ZASCA 78 (31 May 2018) at para. 9.
[6] ***Mostert N.O. v Registrar of Pension Funds and Others*** 2018 (2) SA 53 (SCA) at para. 36.
[7] In ***Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others*** 2014 (4) SA 179 CC at paragraphs 29 – 31.

pronounced on the importance of distinction between a private law remedy as opposed to a public law remedy as follows:

"[29] In *Steenkamp* Moseneke DCJ stated:

'It goes without saying that every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief. In each case the remedy must fit the injury. The remedy must be fair to those affected by it and yet vindicate effectively the right violated. It must be just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law. ***It is nonetheless appropriate to note that ordinarily a breach of administrative justice attracts public-law remedies and not private-law remedies. The purpose of a public-law remedy is to pre-empt or correct or reverse an improper administrative function . . . Ultimately the purpose of a public remedy is to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law****."*

CONCLUSION

25. Resultantly, I find that the applicant has not made out a case for the grant of leave to appeal as prayed for in its application for leave to appeal.

26. I am not convinced that another Court would come to a different conclusion insofar as the dismissal of the amendment sought is concerned.

27. In the result I granted the following order.

ORDER

28. The application for leave to appeal is dismissed with costs;

MOKUTU AJ

ACTING JUDGE OF THE HIGH COURT

Date of hearing: 29 November 2022

Date of order: 9 December 2022

Counsel for the Applicant: IR Rakhadani
N Seme
(Heads of argument having been prepared by
S Mahlangu and N Ntingane, who did not appear)
Attorneys for Applicant: Rambevha Morobane Attorneys

Counsel for the Respondent: K Tsatsawane SC
T Loabile-Rantao
Attorneys for Respondent: Raborifi Attorneys Incorporated