

REPUBLIC OF SOUTH AFRICA**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)****CASE NO: 81609/19**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
06/10/2021
DATE
SIGNATURE

In the matter between: -

**AFROCENTRICS PROJECTS AND SERVICES (PTY)
LTD t/a INNOVATIVE DISTRIBUTION
Registration No. 2012/119655/07**

Applicant

and

**STATE INFORMATION TECHNOLOGY AGENCY
SOC LIMITED
Registration No. 1999/001899/30**

First Respondent

**MICRO FOCUS SOFTWARE (IRELAND) LIMITED
Registration No. IE223694**

Second Respondent

AXIZ (PTY) LIMITED

Third Respondent

XUMA TECHNOLOGIES t/a TELECOMS
Registration No. 2004/006551/07

Fourth Respondent

DEPUTY MINISTER OF COMMUNICATIONS
AND DIGITAL TECHNOLOGIES

Fifth Respondent

MINISTER OF FINANCE

Sixth Respondent

THE DIRECTOR-GENERAL DEPARTMENT
OF NATIONAL TREASURY

Seventh Respondent

JUDGMENT LEAVE TO APPEAL

MADIBA A J

- [1] This is an application for leave to appeal against the whole judgment and order granted by this court on the 29 January 2021.

LEAVE TO APPEAL

- [2] The applicant's contention is that the court erred in law, alternatively, in fact and law and that there is a reasonable prospect that another court will come to a different conclusion on one or more of the grounds as set out in its notice of motion.
- [3] Briefly, the grounds for leave to appeal is premised on the following grounds namely: -
1. The learned judge erred in finding that Rule 30 of the Uniform Rules of

Court makes it clear that any irregular proceedings may be attacked under Rule 30 "including a complaint that goes to the heart of the application".

2. The learned judge should have found that he is bound by the judgment of the Full bench in ***Cochrane V City of Johannesburg 2011 (1) SA 553 (GSJ)*** which is the authority of the contrary legal proposition.
3. The learned judge is simply not entitled in law to make a finding in law that is contrary to a precedent of the Full Bench by which the learned judge is absolutely bound, whatever the learned judge may think of the soundness of the Full bench judgment. This ground alone vitiates the entire judgment.
4. The learned judge further erred in this regard by failing to take into account the plain commentary of the learned authors on Rule 30 in ***Erasmus Superior Court Practice Service 23 (2005) at B1-191*** which specifically questions the application of Rule 30 as an opposite procedure to address alleged irregular proceedings that go to the heart of the claim.
5. The learned judge erred in not finding that the grounds raised by the Second Respondent in the Rule 30 application are matters of substance and not of form.
6. The learned judge erred in finding that Afrocentrics failed to comply with Rule 53 and that, since the Second Respondent is a private company, Afrocentrics cannot utilise Rule 53.

7. The learned judge further erred in finding that the Second Respondent and Afrocentrics entered into a private agreement, the termination of which, does not fall within the ambit of an administrative action.
8. The learned judge erred in this regard because firstly these are substantive issues that cannot be decided in a Rule 30 Application. Secondly, the First Respondent is an organ of state, and the Second Respondent a juristic person exercising public power at the behest of an organ of state (the First Respondent) in terms of National legislation.
9. The learned judge further erred because the factual and legal bases for a Rule 53 review under both the principle of legality and the Promotion of Administrative Justice Act 2000 (PAJA) have, in any event, been sufficiently set out in the founding affidavit filed in support of the main application.

The Second Respondent was performing a public function and its decision to terminate must therefore meet the requirements of legality and rationality and must be consistent with the Constitution which it fails to do.
10. The learned judge erred in finding that there is no basis for the contention that the termination of the agreement entered into between the parties is unfair, arbitrary, capricious and violates Section 217 of the Constitution.

The learned judge further erred in finding that Afrocentrics has not satisfied the elements of the declaratory relief it seeks in the main application.

11. The learned judge erred in this regard because again, these are substantive issues that cannot be decided in a Rule 30 Application.
12. The learned judge erred in finding that the relief sought by Afrocentrics is contradictory and mutually destructive.
13. The learned judge erred in this regard because there is no contradiction or mutually destructive claims between the relief sought. The suspension of the agreement in Part A of the notice of motion is for interim relief pending the finalization of Part B. The setting aside of the agreements are to the portion of the agreements that relinquish the First Respondent's legislative and constitutional procurement mandate. It is not to the entire agreement hence the substitution in order to bring it in line with the letter and spirit of the Constitution.
14. The learned judge erred in finding that one cannot off-hand determine the nature of the damages claimed or what the cause of action is for the damages claim.
15. The learned judge erred in this regard because Afrocentrics claims an order directing the Second Respondent to "compensate the Applicant with the revenue the Applicant would have derived had the Second Respondent not terminated the Fulfilment Agent Agreement and the Micro Focus Partner Agreement". That it is not a damages claim. It is a claim for compensation that is consequential upon an unlawful and unconstitutional termination.

Both counsel for the Applicant and Second Respondent provided the court with full and detailed heads of arguments for which the court is grateful. The said heads of arguments were studied and considered.

In essence the grounds of appeal and the issues raised in this application were canvassed and thoroughly dealt with in the main application which the judgment and order is now the subject of the application for leave to appeal.

It is therefore not necessary to deal with each and every ground and issues raised in this application as they were carefully considered in the main application.

APPLICATION OF RULE 17 (1) OF THE SUPERIOR COURTS ACT 10 OF 2013

The applications for leave to appeal are regulated by Section 17 (1) of the Superior Courts Act 10 of 2013.

Section 17 (1) of the Superior Court Act provides as follows: -

(1) Leave to appeal may only be given where the 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);

- (c) 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.

THRESHOLD APPLICABLE IN LEAVE TO APPEAL APPLICATION

- (d) The test in the application for leave to appeal prior to the Superior Courts Act 10 of 2013 was whether there is a reasonable prospect that another court may come to a different conclusion.

See **Commissioner of Inland Revenue.V. Tuck 1989 (4) SA 888 T at 890 B.**

The threshold for granting leave to appeal has been raised in the new Act. The approach is, (See Section 17 (1) (a) (i)) whether another court would come to another decision.

Leave to appeal will therefore **only** (own emphasis) be granted when the judge concerned is of the opinion that the appeal **would** (own emphasis) have a reasonable prospect of success.

The court in **MEC for Health Eastern Cape .V. Mkhita (221/15) (2016) ZASCA 176 (25 Nov 2016)** formulated the test as follows: -

"An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success, an arguable case or one that is not hopeless, is not enough.

There must be sound rational basis to conclude that there is a reasonable prospect of success on appeal”.

The word **would** imposes a more stringent threshold in terms of the Act.

See Mont Chenaux Trust .V. Goosen 2014 JDR 2325 (LCC) at [6]

For the Applicant to succeed, it must satisfy all the requirements of Section 17 (1) of the Act.

Section 17 (1) does not accord the judge concerned a discretion in its application of the provisions of Section 17 (1), piecemeal adherence to one or some of the requirements of Section 17 (1) is not enough and helpful to the applicant.

The Applicant contends that the order by this court in the main application has a final and definitive effect.

I do not think so. The relief sought by the Applicant in the main application was not dismissed. The Applicant may amend its notice of motion to cure the irregularities therein.

The order granted in the main application (interlocutory application) does not bring finality to the matter at hand and it is, in my view, not final and definitive of the rights of the parties.

It is open to the Applicant to remove the irregularities found to hinder the future conduct of this matter by supplementing its papers in the main action.

It is noteworthy to mention that the purpose of the appeal is directed at an order of a court and not comments and reasoning therein.

The comments made in the judgment of the main application have no final and definitive effect as they were made *obiter*. The fact that this court had a different view on the facts of this matter cannot be a reason that it erred in facts and law.

It is apparent from the Applicant's papers filed of record that all the requirements of Section 17 (1) were not fulfilled. I find non-compliance with 17 (1) to be of serious concern and such non-compliance cannot simply be ignored.

I am of the view that there are no compelling reasons to grant the Applicant leave to appeal. The real issues between the parties would not be promptly resolved by the hearing of the appeal, as the issues are subject to reconsideration when the final relief is to be determined by the court.

I find that it is not in the interest of justice that leave to appeal should be granted as stated above, as leave to appeal will not bring finality to the rights of the parties in this matter.

I accordingly dealt irrefutably and substantially with all issues pertaining to this matter in my judgment.

After careful consideration of the submissions made by all counsel I am not persuaded that leave to appeal should be granted.

I conclude that leave to appeal would not have a reasonable prospect of success and that the application for leave to appeal should be dismissed.

The leave to appeal has therefore no prospect of success deserving of neither the full court of this division nor the Superior Court of Appeal.

ORDER

In the result I make the following order: -

Accordingly, the application for leave to appeal is dismissed with costs including costs of two counsel.

GWINA ATTORNEYS INCORPORATED
Attorneys for the Applicant
135 Daisy Street
Suite 22, Second Floor
Sandown
Sandton, 2196
Ref. S Gwina/KM/MAT238
Tel: 011 666 7300
Mobile: 072 548 8745 – Mr Kase Mahlaku
E Mail: mahlakuk@gwinaattorneys.co.za
mthembun@gwinaattorneys.co.za
C/O GWEBU INC. ATTORNEYS
Block 1, Ground Floor, Corobay Corner
169 Corobay Avenue
Menlyn
Pretoria, 0181
Ref: MG/CORR/069
E mail: litigation2@gwebuinc.co.za

TO: THE REGISTRAR OF THE ABOVE HONOURABLE COURT
PRETORIA

**AND TO: NDOBELA AND LAMOLA ATTORNEYS
ATTORNEYS FOR FIRST RESPONDENT
972 JUSTICE MAHOMED STREET
BROOKLYN
PRETORIA
GAUTENG PROVINCE
0048
REF: Mr Mathebula/LIT169
MAT: 1493**

**AND TO: WERKSMANS ATTORNEYS
ATTORNEYS FOR SECOND RESPONDENT
THE CENTRAL
96 RIVONIA ROAD
SANDTON
JOHANNESBURG
GAUTENG PROVINCE
2196
REF: Jeremy Gobetz/ENTI41417.2
Tel: 011 535 8475
E mail: jgobetz@werksmans.com
jlizamore@werksmans.com
akeshav@werksmans.com
C/O BRAZINGTON AND MCCONNELL ATTORNEYS
424 HILDA STREET
HATFIELD MALL
NORTH TOWER
SECOND FLOOR
HATFIELD
PRETORIA
TEL: 012 430 4303
E MAIL: Andrew@bsmlaw.co.za**

**AND TO: AXIZ (PTY) LIMITED
THIRD RESPONDENT
INTERNATIONAL BUSINESS GATEWAY
CORNER NEW AND 6TH ROADS
HALFWAY HOUSE
MIDRAND
GAUTENG PROVINCE
1683**

**AND TO: XUMA TECHNOLOGIES
PROPRIETARY LIMITED T/A TELECOMS**

**FOURTH RESPONDENT
59 PLANET AVENUE
CROWN MINES JOHANNESBURG
GAUTENG PROVINCE
2196
E MAIL: khethi@xtel.co.za**

**AND TO: DEPUTY MINISTER OF
COMMUNICATIONS AND DIGITAL TECHNOLOGIES
FIFTH RESPONDENT
C/O THE STATE ATTORNEY
SALU BUILDING
316 THABO SEHUME STREET
PRETORIA
GAUTENG PROVINCE
0001
REF: 1244/2020/Z67/NT
TEL: 012 309 1569
E mail: DiMolepo@justice.gov.za**

**AND TO: MINISTER OF FINANCE
SIXTH RESPONDENT
C/O THE STATE ATTORNEY
SALU BUILDING
316 THABO SEHUME STREET
PRETORIA
GAUTENG PROVINCE
0001
REF: 5614/2019/232**

**AND TO: DIRECTOR-GENERAL
DEPARTMENT OF NATIONAL TREASURY
SEVENTH RESPONDENT
40 CHURCH SQUARE
OLD RESERVE BANK BUILDING
2ND FLOOR
PRETORIA
GAUTENG PROVINCE
0002**