IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No: 54865/2020

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHERS JUDGES: NO
(3) REVISED

15 SEPTEMBER 2022

SIGNATURE **DATE**

In the matter between:

TSHWANE ECONOMIC DEVELOPMENT AGENCY (TEDA) SOC LTD — **APPLICANT**

and

SOLLY DANIEL MOGALADI — **FIRST RESPONDENT**

CITY OF TSHWANE METROPOLITAN MUNICIPALITY — **SECOND RESPONDENT**

HEAD ADMINISTRATOR — **THIRD RESPONDENT**

JUDGEMENT IN APPLICATION FOR LEAVE TO APPEAL AND S 18(3) APPLICATION

NDLOKOVANE AJ

INTRODUCTION

[1.] The first respondent in the main application applies for leave to appeal to the Supreme Court of Appeal, against the whole judgment and order I handed down on 14 July 2022.[1] The application for leave to appeal is opposed by the applicant (in the main application), who has also instituted an application in terms of s 18(3) of the Superior Courts Act 10 of 2013 as amended (the Act).[2]

[2.] For the sake of convenience, I will refer to the parties as they are cited in the main judgment. After delivery of the judgment on 14 July 2022, the first respondent filed a detailed notice of application for leave to appeal which contained the grounds of appeal.

[3.] The first respondent submitted that the application is based on the contention that the appeal have reasonable prospects of success and that the appeal will dispose of all the issues in the case between the parties.[3]

[4.] The applicant on the other hand contends that the application for leave to appeal has no prospects of success and amounts to an abuse of court processes.[4]

The test in an application for leave to appeal

[5.] Applications for leave to appeal are governed by sections 16 and 17 of the Act. Section 17(1) of the Act provides:

> "*(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that –*

[1] Preamble to the Notice of Application for Leave to Appeal at para 1, First Respondent's Heads of Argument (Application for Leave to Appeal) at para 2, Founding Affidavit to the Applicant's Urgent Application at para 10.

[2] Preamble to the Applicant's Opposition to the Application for Leave to Appeal, Founding Affidavit to the Applicant's Urgent Application at paras 9 & 10.

[3] Preamble to the Notice of Application for Leave to Appeal at para 2.

[4] Preamble to the Applicant's Opposition to the Application for Leave to Appeal at para 3.

(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."

[6.] With the enactment of s 17 of the Act, the test has now obtained statutory force and is to be applied using the word "*would"* in deciding whether to grant leave. In other words, the test is would another court come to a different decision. In the unreported decision of the ***Mont Chevaux Trust v Goosen & 18 others,***[5] the Land Claims Court held, *albeit obiter*, that the wording of the subsection raised the bar for the test that now has to be applied to any application for leave to appeal. In ***S v Notshokovu,***[6] it was held that an appellant faces a higher and stringent threshold in terms of the Act comparted to the repealed Supreme Court Act 59 of 1969.

[7.] It is noteworthy that the phrase "*reasonable prospects of success*" in s 17(1) of the Act presupposes a measure of certainty that the court of appeal would reach a different outcome. What the test reasonable prospects of success postulates is a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court.[7] In order to succeed, the appellant must convince the court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding.[8]

[8.] In the present matter, I would have to determine whether another court would (my emphasis) come to a different decision. I have considered the application for leave to appeal and the oral submissions of the parties.

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[5] 2014 JDR 2325 (LCC) para 6.
[6] [2016] ZASCA 112 para 7.
[7] *S v Smith* 2012 (1) SACR 567, 570 para 7.
[8] Supra.

[9.] Mr. Pretorius as the record will reveal, made several submissions in relation to whether or not I correctly found amongst others that the applicant was appointed CEO by the Board of the first respondent. For the appointment of the applicant as CEO to have taken place, there ought to have been a written agreement with all the relevant signatures appended to it, in the present case ,no such written agreement exist, instead the City of Tshwane's concurrence is sought and by virtue of that request, same excludes any appointment, so his submissions goes. Therefore, I should have dismissed the application with costs ,including the costs in respect of part A of the application.

[10.] During the course of argument Mr. Molotsi in contrast on behalf of the applicant, as would be expected, submitted that the grounds for leave to appeal advanced by the first respondent do not meet the stringent test set out in s 17(1) of the Act.[9] Mr. Molotsi further submitted that the grounds for leave to appeal do not introduce anything new which was not argued by the first respondent during the hearing of the main application.[10]

[11.] Mr. Molotsi also submitted that the first respondent's grounds for leave to appeal do not postulate a dispassionate decision based on law and facts that the appeal court could come to a different decision.[11] He further submitted that there are no proper grounds that the first respondent has shown to prove prospects of success on appeal.[12]

[12.] Mr. Molotsi also submitted that the grounds for application for leave to appeal are purely an attack on the reasoning of the court in reaching the order pronounced and that it is trite that an appeal lies against an order that is made by a court and not against its reasons for making the order. Therefore, first respondent (TEDA) acted *ultra vires* and contrary to the principles of the case referred to by both parties of Endimeni. I was therefore correct in re-asserting the right of the applicant that he was appointed.

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[9] Applicant's Heads of Argument (Opposition to Application for Leave to Appeal) at para 10.
[10] Supra.
[11] Applicant's Heads of Argument (Opposition to Application for Leave to Appeal) at para 12.
[12] Supra.

[13.] Having considered the arguments presented by the first respondent, I am of the view that there is a reasonable prospect that another court would differ with me. Consequently, leave to appeal ought to be granted to the Supreme Court of Appeal and the costs of the application for leave to appeal, be costs in the appeal.

[14.] That brings me to the application in terms of s 18(3).

The execution of the reinstatement order

[15.] Section 18(1) of the Act provides that the execution of a decision which is the subject of an application for leave to appeal, is suspended pending the decision of that application or the appeal, unless the court under exceptional circumstances orders otherwise. In terms of s 18(3), the party who applies for execution of the decision must in addition prove that it will suffer irreparable harm if the court does not make an execution order, and that the other party will not suffer irreparable harm if it does. An applicant must therefore prove both exceptional circumstances and the requisites of irreparable harm.

[16.] It is impossible to lay down precise rules as to what constitutes exceptional circumstances. Each case must be decided on its own facts. The prospect of success in the pending appeal is a relevant consideration and if it is doubtful, a court deciding an application under s 18(3) would be less inclined to grant it.

[17.] In ***Incubeta Holdings (Pty) Ltd and Another v Ellis and Another***[13], Sutherland J had the following to say about exceptional circumstances:

> "*Necessarily in my view exceptionality must be fact-specific. The circumstances which are or may be 'exceptional' must be derived from the actual predicaments in which the given litigants find themselves.*"

[18.] It is noteworthy that in the present case what the applicant sought to articulate as exceptional circumstances is in the main the legislative framework under which the

[13] 2014 (3) SA 189 (GJ) para 22.

first respondent was created and in terms of which the first respondent operates, in that TEDA being an organ of state, certain measure of exercise for organ of states performing certain functions is expected. TEDA as a private entity created by the legislation for the benefit and usage of the City of Tshwane and the latter having effective control over TEDA. This means TEDA cannot perform functions outside the function of the City of Tshwane, especially considering TEDA's the foremost role and function of economic development.[14] The applicant contended that the first respondent's role and the role of the applicant as CEO, the unlawful conduct of the first respondent, the continuous chopping and changing of the acting CEOs, all cumulatively creates the exceptional circumstances referred to in s 18 of the Act. Most importantly, that since, the applicant left office, there has been instability in the City of Tshwane with almost 5 acting CEO in a short space of time. I hasten to mention that this is disputed by the first respondent.

[19.] Regard to the requirement of irreparable harm, the applicant presented his dire financial situation since 30 December 2020 to date as an indication of irreparable harm that will ensue if the order sought in this regard is not granted. In that he has taken up a part time job where he only earns an amount of R10 000.00 per month and having to support his family and being a bread winner who used to live at a salary of R116 000.00 per month. This has caused him irreparable as opposed to the first respondent in the event its leave to appeal does not succeed, so his submissions goes.

[20.] It is inconceivable as to why the first respondent would not be liable to appoint the Applicant as CEO with back-pay, including the loss of interest and any such interest expended on borrowing from friends for living expenses if necessary, should its appeal fail.[15]

[21.] On the other hand it is doubtful whether the applicant would not be able to reimburse the first respondent in the event that the order being put into operation and the first respondent being successful in this appeal.As he would have been earning

[14] Applicant's Heads of Argument (Opposition to Application for Leave to Appeal) at paras 41-51.
[15] See *Incubeta Holdings (Pty) Ltd & Another v Ellis & Another* 2014 (3) SA 189 (GJ) para 25.6.

his monthly salary pending appeal and the first respondent in the event it is successful in the appeal can set off from the monthly income and related benefits it is due to pay him, if necessary.

[22.] However, should the order be put into operation, the first respondent would continue to operate as normal and therefore would not suffer any irreparable harm by virtue of the operation of the order and will find stability while the appeal is pending. Even if I am wrong on this, I am of the view the harm it will suffer will not be likened to that of the applicant.

[24.] In the circumstances I am of the view that the balance of probabilities favours the Applicant in the circumstances.

Costs

[25.] That then brings me to the aspect of costs. Mr. Pretorius on behalf of the first respondent submitted that the application be dismissed with costs. It seems to me that there is no reason to depart from the usual rule in relation to costs. The rules make provision for the applicant to bring such an application, he has done so. The first respondent did oppose the application, consequently the costs ought to follow the result.

[26.] Consequently, the following orders will issue:

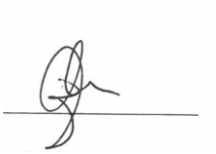
(a) The first respondent is granted leave to appeal the judgment delivered on 14 July 2022 to the Supreme Court of Appeal.

(b) The costs of the application for leave to appeal will form part of the costs in the appeal.

(c) It is hereby ordered and directed that in terms of the provisions of s 18(3) of the Superior Court Act 10 of 2013 as amended, this court's orders granted on 14 July 2022 under Case No. 54865/2020, shall operate and

be implemented with immediate effect pending the outcome of the appeal instituted by the first respondent.

(d) The first respondent shall pay the applicant's costs of the s. 18(3) application.



N NDLOKOVANE AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Delivered: this judgment was prepared and authored by the judge whose name is reflected and is handed down electronically and by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of his matter on Caselines. The date for handing down is deemed to be 15 September 2022.

APPEARANCES:

FOR THE APPLICANT:	ADV. JAL PRETORIUS SC
FOR THE FIRST RESPONDENT:	ADV. H MOLOTSI SC
DATE HEARD:	30 AUGUST 2022
DATE DELIVERED:	15 SEPTEMBER 2022