IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No: 28250/2022

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

28 SEPTEMBER 2022

SIGNATURE **DATE**

In the matter between:

VRESTHENA (PTY) LTD	Applicant
And	
THE CITY OF TSHWANE METROPOLITAN MUNICIPALITY	First Respondent
THE BODY CORPORATE OF ZAMBEZI RETAIL PARK	Second Respondent
ZAMBEZI RETAIL PARK INVESTMENTS (PTY) LTD	Third Respondent
THUMOS PROPERTIES (PTY) LTD	Fourth Respondent
RJ PROPERTIES (PTY) LTD	Fifth Respondent

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

NDLOKOVANE AJ

INTRODUCTION

[1.] The First Respondent ("the City of Tshwane") 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 urgent basis on 20 June 2022, after certifying the matter as semi-urgent and *inter alia* compelling the first respondent, to restore the electricity supply to the properties leased out to businesses by the applicant within China Mall, situated in Pretoria North. 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). I directed that both these applications be heard on the same time and parties to file the respective heads of arguments in both. It is those two applications that arises for determination.

[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 20 June 2022, reasons for the order and judgment were sought and same were delivered on 1 August 2022, before the First Respondent could receive the reasons as sought, they proceeded and 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 has reasonable prospects of success in terms of the provisions of section 17(1)(a) of the Act.

[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.

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 –*
> *(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 section 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***,[1] 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***,[2] 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.[3] 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.[4]

[8.] In the present matter, I would have to determine whether another court would (my emphasis) come to a different decision.

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[1] 2014 JDR 2325 (LCC) para 6.
[2] [2016] ZASCA 112 para 7.
[3] S v Smith 2012 (1) SACR 567, 570 para 7.
[4] Supra.

[9.] The grounds where upon the appeal is based are set out in the notice of application for leave to appeal dated 06 July 2022 as 13 aspects and have been grouped into categories in the heads of arguments of the applicant. I intend not to repeat same in this judgement as they will form part of the record. Instead, I will summarise them and their respective responses as follows:

9.1 That I erred in disallowing the first respondent to fulfil the constitutional mandate as envisioned in section 152 and 153(a) of the Constitution of the RSA. Also, in ordering the reconnection of the electricity without ordering any payment of the arrears, I erred and did not pay cognisance of the provisions of the Electricity Supply By-laws and the Credit Control by-law of the first respondent, being the City of Tshwane. Therefore, the disconnection was within the constitutional framework, so the City of Tshwane's submissions goes. To the extent that the applicant has no constitional right to be provided with electricity.

9.2 In contrast, the applicant contends that the interpretation of the relevant legislation, the municipalities duties and residents' rights have been settled by numerous courts, including a Full Bench, Supreme Court of Appeal and the Constitutional Court. There is no reason, nor has any been provided, by the first respondent why an appeal court needs to entertain these issues again. The first respondent has not advanced any grounds in its leave to appeal in support of the existence of compelling reasons why the appeal should be heard by another Court in terms of section 17(1)(a)(ii) of the Superior Courts Act, so does the applicant's submissions and contentions goes as captured in their heads of arguments.

[10.] Adv N Erasmus as the record will reveal, made several submissions in relation to whether or not leave to appeal be granted to the SCA as there exist reasonable prospects that the SCA would come to a different conclusion, in the alternative, that the present matter is of sufficient public importance, which raises novel issues worthy of attention of the SCA.

[11.] Having considered the arguments presented by the parties and the reasons captured in my judgement handed down on the 01 August 2022 which forms part of this record in respect of the constitutionality and the right to electricity, 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.

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

The execution of the reinstatement order

[13.] 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.

[14.] 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.

[15.] In ***Incubeta Holdings (Pty) Ltd and Another v Ellis and Another***,[5] 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.*"

[16.] It is noteworthy that in the present case what the Applicant sought to articulate as exceptional is that a substantial amount of amount the City of Tshwane claims to be owed has since prescribed, and the latter would not reconcile its account to give

[5] 2014 (3) SA 189 (GJ) para 22.

effect to this amount and instead seeks payment for the entire debt from the applicant. This issue was also argued before me on the 20 June 2022, the order I granted catered for this, despite that, the issue remain unresolved. To the extent that, if the status *quo* remains unresolved the economic livelihood of the businesses leasing the properties as tenants together with about 150of its employees remains affected.

[17.] In my view the irreparable harm (if any) to be suffered by the parties should be viewed in the light of the period when the appeal is still pending and not at any period after that. 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 that, the harm that it will suffer, will not be as that suffered by the applicant.

[18.] In the circumstances after considering the papers and hearing of all addresses and submissions by parties, I am of the view that the balance of probabilities favours the Applicant in the circumstances, that the order that should be granted is that, the electricity to the premises should be restored immediately failing which that the applicant be authorised to reconnect same, again.

Costs

[19.] That then brings me to the aspect of 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.

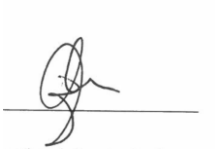
[20.] Consequently, the following orders will issue:

(a) The First Respondent is granted leave to appeal the judgment delivered on 20 June 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 20 June 2022, 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 this matter on Caselines. The date for handing down is deemed to be 28 September 2022.

APPEARANCES:

FOR THE APPLICANT:	ADV. M LOUW
FOR THE FIRST RESPONDENT:	ADV. N ERASMUS
DATE HEARD:	06 SEPTEMBER 2022
DATE DELIVERED:	28 SEPTEMBER 2022.