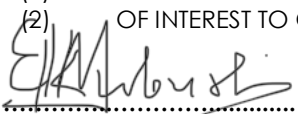




**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case Number: 71333/2018

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
	
E.M. KUBUSHI	
DATE: 13 October 2022	

In the matter between:

EMPIRE CROSSING DEVELOPMENT (PTY) LTD	First Applicant
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TEXICAM INVESTMENTS (PTY) LTD	Second Applicant
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and

THE MINISTER OF ENERGY	First Respondent
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THE CONTROLLER OF PETROLEUM PRODUCTS	Second Respondent
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TOM CAMPHER MOTORS	Third Respondent
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ENGEN EMPIRE CROSSING	Fourth Respondent
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JUDGMENT: LEAVE TO APPEAL

KUBUSHI J

[1] The First and Second Applicants (“the Applicants”) seek leave to appeal the whole judgment and order of this Court dated 21 July 2022 and handed down electronically on the same date, refusing the relief they sought in the main application.

[2] A judgment in respect of the application for leave to appeal was handed down electronically on 13 September 2022. On 14 September 2022, in a letter from the attorneys of record of the Third Respondent, this Court was made aware of what was alleged to be some material errors of fact emanating from the said judgment.

2.1 In paragraph 3 of the said judgment, it was stated that “*As in the hearing of the main application, the Third and Fourth Respondents are not taking part in these proceedings.*” The statement that the Third and Fourth Respondents did not take part in the main proceedings is actually an obvious mistake, as only the Fourth Respondent did not take part in the main proceedings.

2.2 Labouring under the impression that the Third Respondent was not a party to the leave to appeal proceedings, this Court did not consider the Third Respondent’s heads of argument which had been filed as arranged with the Court’s clerk by uploading on Caselines on 17 August 2022. Thus, at the time of considering the application for leave to appeal, this Court erroneously failed

to take the Third Respondent's heads of argument into consideration.

[3] The letter was caused to be circulated amongst the other parties, that is, the Applicants' and the First and Second Respondents' attorneys' of record, for their respective comments. The First and Second Respondents' attorneys responded to the Third Respondent's letter by indicating that they have noted the various correspondence between the parties and do not wish to respond to any of the correspondence, nor did they wish to make any further submissions.

[4] The Applicants responded to the said letter and contended that they were not served with the Third Respondent's heads of argument and were, as such not aware that the Third Respondent had filed heads of argument. They, further, argued that this Court has become *functus officio* after giving judgment, and cannot entertain the application afresh. The Applicants having argued as such, proceeded to file their appeal.

[5] In response to the Applicants' answer to the attorneys of the Third Respondent's letter, it was commented that the fact remains that the Third Respondent did not take part in the proceedings of the application for leave to appeal, even though the Third Respondent had timeously filed its heads of argument by uploading same on Caselines. It was, further, contended on behalf of the Third Respondent that, the Third Respondent will be prejudiced should the Applicants not succeed in their appeal, because the Third Respondent will not be able to claim costs against them for the application for

leave to appeal, due to its, alleged, none appearance. This Court was, in that regard, urged to *mero motu*, reconsider the application for leave to appeal since it is evident that a material error of fact did occur.

[6] Based on the aforementioned errors of fact, which are indeed material, this Court hereby *mero motu* in terms of Uniform Rule 42(1)(a) varies the judgment and order of this Court handed down on 13 September 2022. The judgment and order shall, as such, read as follows:

[7] The matter is to be determined on the papers without oral hearing. The Applicants, together with the First and Second Respondents did not file new heads of argument. Only the Third Respondent filed heads of argument. As in the hearing of the main application, the Fourth Respondent is not taking part in the current proceedings.

[8] In support of the application for leave to appeal, the Applicants relied on their heads of argument previously filed, dated 4 March 2022, their supplementary heads of argument dated 6 May 2022, as well as the grounds of appeal stated in the application for leave to appeal. They furthermore, augmented their heads of argument in a letter dated 12 August 2022 addressed to the Court.

[9] The First and Second Respondents in opposing the application for leave to appeal, relied on the heads of argument filed during the hearing of the main application.

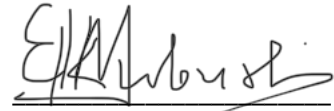
[10] Applications for leave to appeal are ordinarily brought in terms of section 17 (1) (a) (i) of the Superior Courts Act 10 of 2013. The sub-section provides that leave to appeal may only be given where the judge or judges concerned are of the opinion that the appeal would have a reasonable prospect of success.

[11] The Applicants' grounds for leave to appeal are succinctly stated in the notice of application for leave to appeal, and need not be repeated in this judgment. The said grounds of appeal have been fully covered and considered in the judgment the Applicants seek to appeal.

[12] Having considered the grounds of appeal raised by the Applicants and the arguments for and against such application raised by the parties in their respective heads of argument, this Court is of the opinion that there are reasonable prospects of success on appeal and that leave to appeal ought to be granted. This Court has not been persuaded otherwise by the arguments raised in the Third Respondent's heads of argument.

[13] Consequently, the following order is made:

1. Leave to appeal the whole judgment and order of this Court dated 21 July 2022 to the Full Court of this Division, is granted to the First and Second Applicants.
2. Costs of this application are costs in the appeal.



E.M KUBUSHI

**JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on 13 October 2022.

APPEARANCES:

APPLICANTS' ATTORNEYS: GERHARD WAGENAAR ATTORNEY

APPLICANTS' COUNSEL: ADV S D WAGENER SC

FIRST & SECOND RESPONDENTS' ATTORNEYS: STATE ATTORNEY

FIRST & SECOND RESPONDENT COUNSEL: ADV MMW VAN ZYL SC

THIRD RESPONDENT'S ATTORNEYS: A KOCK & ASSOCIATES INC

THIRD RESPONDENT'S COUNSEL ADV E VAN AS SC