IN THE LAND COURT OF SOUTH AFRICA
HELD AT RANDBURG

CASE NO: 2025-128948

Before: Honourable Ncube J

Heard on: 02 May 2025

Delivered on: 17 June 2025

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED: ~~YES~~ / NO

17/06/2025
DATE

SIGNATURE

In the matter between:

THE CHURCH OF THE HOLLY GHOST Applicant

and

TIKOE ANTON MOKOENA Respondent

ORDER

In the result I make the following order:

1. Mr Mokoena's application to adduce further evidence in terms of section 19 of the Superior Courts Act is granted.

2. The Church's application for leave to appeal is refused.

3. Mr Mokoena's application in terms of Section 18 (1) and (3) of the Superior Court Acts 10 of 2013 is dismissed.

4. There is no order as to costs

JUDGMENT

NCUBE J

Introduction

[1] This is opposed application for leave to appeal. The respondent ('the Church") seeks leave to appeal against the whole judgment and order of this court granted in favour of the applicant ('Mr Mokoena") on 07 January 2025, including the costs order. In turn, Mr Mokoena has, in the meantime, brought an application for immediate enforcement of this Court's Order of 07 January 2025 in terms of Section 18 (3) of the Superior Courts Act[1] ("the Act"). That application is equally opposed by the Church. Apart from those two applications, Mr Mokoena has also filed an application to be allowed to adduce further evidence on appeal in terms of section 19 of the Act. That application was not opposed and was immediately granted by this court. I shall start with the application for leave to appeal.

[1] Act 10 of 2013

Application for leave to appeal

[2] The starting point of exercise will be section 17 of the Act. Section 17 provides:

> *"17 (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"*

[3] In the past, the test used by courts in the determination of an application for leave to appeal, was whether there was a reasonable prospect that another court may come to a different conclusion to the one reached by the court *a quo*[2]. With the coming into operation of section 17 above, the threshold, to grant leave to appeal has been raised. In *Mont Chevaux Trust v Tina Goosen and 18 Others*[3] the court held:

> " It is clear that the threshold for granting leave to appeal against a judgment of the High Court has been raised in the new Act. The former test whether leave to appeal should be granted was reasonable prospect that another court might come at a different conclusion see Van Heerden v Cron Wright and others 1985 (2) SA 342 (T) at 343H. The use of the word "would" in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against. This new standard is applied by section 37 (4) of the Restitution of the Land Rights Act 22 of 1994 to this court's duty to consider the prospects of an intended appeal"

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[2] *Commissioner of Inland Revenue v Tuck* 1989(4) SA 888(T) at 890B.
[3] (LCC14R/2024) [2014] ZALCC 20 (3 November 2014)

[4] In Notshokovu v S[4] it was confirmed that an appellant faces a "higher and stringent" threshold under the Superior Courts Act. Therfore in terms of section 17 of the Superior Courts Act, the enquiry is not whether another court 'may' come to a different conclusion but ' would' indeed come to a different conclusion. In *MEC Health Earstern Cape V Mkhitha*[5] Scheepers AJA (as he then was), expressed himself in the following terms :

> *" An applicant for leave to appeal must convince this court on proper grounds that there is a reasenable prospect or realistic chance of success on appeal. A mere possibility 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 reasonable prospect of success on appeal."*

[5] In Smith v S[6] Plasket JA said the following :

> "What the test of reasonable prospect 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. In order to succeed theefore, the appellant must convince this 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 succeding."

Grounds of appeal

(6) The church listed six (6) grounds upon which it bases it'sapplication for leave to appeal. Some grounds are based on the findings of fact and others are based on the finding of law. On the first ground the church complains about the finding that Mr and Mrs Ngwenya were Mr Mokoena's adoptive parents. As I said when this application was argued Mr Mokoena throughout his papers referred to Mr and Mrs Ngwenya as his adoptive parents. The church is not prejudiced in any way by Mr Mokoena referring to Mr and Mrs Ngwenya as his adoptive parents. The

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[4] (157/15) [2016] ZA SCA 112(7 September 2016)
[5] (1221/2015) (2016) ZASCA 176 (25 November 2026)
[6] 2012 (1) SACR 567 (SCA) para 7

second ground points to the errors in finding that the Reverends of the respondent church split into two groups when in fact the other group formed a new church. This ground also has no merit and this finding was not the reason for the order that was made. I shall now move to the third ground.

[7] The third ground laments the finding that Mr Mokoena's church membership was terminated but later in the judgment, this court found that the church failed to prove that Mr Mokoena was not a member of the church . The issue of expulsion of Mr Mokoena as a result of the disciplinary enquiry was an allegation by the church. That allegation had to be proved by the church by annexing copies of the disciplinary finding and the decision taken. A bald allegation which is not supported by documentary proof or confirmatory affidavit in motion proceedings does not carry weight.

[8] In any event should leave be granted, the church will be appealing the order and not the judgment. When you appeal, you appeal the order not the judgment. It is so, because no judgment is perfect and all-embracing and because something is not mentioned in the judgment, does not mean that it was not considered. See in this regard R v Dhlumayo[7]. There could be a dispute of fact as to whether Mr Mokoena was terminated as a member of the church. However, that dispute was of no significance to the real issue to be decided. The real issue to be decided was whether or not Mr Mokoena is an occupier in terms of ESTA, and not whether he was still the member of the church.

[9] In ground, 4 the church contends that this count erred in finding that section 6 (5) of ESTA does not require an element of "*established practice*" which is a requirement in terms of section 6 (2) (dA) of ESTA. As I mentioned in my orginal judgment, section 6 (2) (dA) does not find application where a person to be buried is an occupier himself, but it applies in cases of the burial of the occupier family member. Mr Temllet argued that section 6 (5) is ambiguous and will lead to absurd results unless it is read together with section 6 (2) (dA)of ESTA. I do not agree . Section 6 (5) is separate from section 6 (2) (dA) , it is not ambiguous and there is no

[7] 1948 (2) SA (AD) 677 at 702

absurdity in it's application. This ground also has no merit . The statute is clear in that regard and it cannot be interpreted otherwise.

[10] In ground 5, the church contends that the court ought to have found that Mr Mokoena had failed to prove that he satisfies all the requirements of the definition of the "*occupier*" since he submitted no proof that he earns less than the prescribed amount of income. The prescribed amount is R13,625.00 per month[8]. For this contention, the church relied on the Supreme Court of Appeal decision in *Frannero Property Investments 202 Pty Ltd. v Clement Phuti Selapa and Others*[9].

[11] This court, in its original judgment, in finding that Mr Mokoena is an occupier in terms of ESTA, relied on the Constitutional Court judgment in *Klaase v Van der Merve No and others*[10]. ("Klaase") is a 2016 Constitutional Court decision which the SCA did not refer to in its 2022 Frannero decision. In Klaase, the Constitutional Court held that "occupier" should be interpreted purposively by looking at the mischief which ESTA seeks to remedy. There is no reasonable prospect of another court giving interpretation which is contrary to the one employed by the Constitutional Court in Klaase. .

Costs

[12] It is not clear from the grounds of appeal on what basis the costs order is attacked. Ordinarily this court does not award costs unless there are exceptional circumstances which justify an award of costs. In *Casu,* there are no exceptional circumstances justifying an award of costs. Having considered all the grounds of appeal, I conclude that there are no reasonable prospects of success on appeal and there is no other reason why the appeal should be heard.

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[8] Amount prescribed by GN 72 dated 16 February 2018 and GN 84 dated 23 February 2018.
[9] 2022 (5) SA 361 (SCA) Para 24 and 28
[10] 2016 (6) SA 131 (CC) Para 50

Section 18(3) Application

[13] I now turn to Mr. Mokoena's application in terms of section 18(3) of the Act. Section 18 of the Act, provides for the suspension of the court's decision pending appeal, and it states:

> *"18 (1) Subject to subsection (2) and (3) and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is a subject of an appeal is suspended pending the decision of the application for leave to appeal or appeal.*
>
> *(2) Subject to subsection (3) unless the court is under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgement which is a subject of an application for leave to appeal or of an appeal is not suspended pending the decision of the application or appeal.*
>
> *(3) A court may only order otherwise as contemplated in subsection (1) and (2) if the party who applies to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.*
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> *(4) .....*
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> *(i).....*
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> *(ii).....*
>
> *(iii) .....*
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> *(iv) .....*
>
> *(5) ....."*

[14] If Mr. Mokoena wishes that the operation and execution of this court's order granted on 07 January 2025 should continue in operation pending the outcome of an appeal, if any, he must, on a balance of probabilities, show the existence of exceptional circumstances. In addition to exceptional circumstances, Mr. Mokoena must show that he will suffer irreparable harm if the court does not order otherwise and that the church will not suffer irreparable harm if the court orders otherwise.

Exceptional circumstances

[15] Commenting on exceptional circumstances in *Incubator Holding (Pty) Ltd. v Ellis and Another*[11] Sutherland J expressed himself in the following terms:

> *"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. I am not of the view that one can be sure that any true novelty has been invented by s18 by the use of the phrase. Although that phrase may not have been employed in the judgements, conceptually the practice as exemplified by the text of rule 49 (II) makes the notion of the putting into operation an order in the face of an appeal process a matter which requires particular ad hoc sanction from a court. It is expressly recognized, therefore as a deviation from the norm. ie an outcome warranted only "exceptionally"*

[11] 2014 (3) SA 189 (GJ) para 22

[16] In *University of the Free State v AfriForum*[12] Fourie AJA as he then was, said :

> "..... What is immediately discernible upon perusing s18(1) and (3) is that legislature has proceeded from the well-established premise of the common law that the granting of relief of this nature constitutes an extraordinary deviation from the norm that, pending an appeal the judgment and its attendant orders are suspended. Section 18 (1) thus states that an order implementing a judgment pending appeal shall only be granted under 'exceptional circumstances'. The exceptionality of the order to this effect is underscored by s18(4) which provides that the court granting the order must immediately record its reasons; that pending the aggrieved party has automatic right of appeal; that the appeal must be dealt with as a matter of urgency; and that pending the outcome of the appeal the order is automatically suspended.....Apart from the requirements of 'exceptional circumstances in s18(1), s18(3) requires the applicant 'in addition', to prove on a balance of probabilities that he or she will suffer irreparable harm if the order is not made; and that the other party 'will not' suffer irreparable harm if the order is made"

[17] According to Mr. Mokoena exceptionality lies in the fact that he is 98 years old and suffers from a heart condition which makes him reliant on chronic medication. Whilst I accept that this is an unusual case, I am not convinced that the facts put forward by Mr. Mokoena constitute exceptional circumstances in terms of the Act. The disturbing feature of this application is that Mr. Mokoena seeks an immediate enforcement of the declaratory order that he has a right, on his death, to be buried on the Church's farm. The fact remains that Mr. Mokoena is still alive. Should he pass on, before the appeal process is finalized, his family can approach this court on urgent basis for an order that he be buried on the Church's property. His age and medical condition do not constitute exceptional circumstances, at this stage. Having found that there are no exceptional circumstances proven, there is no need for me to deal with the other requirements for this kind of an application.

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[12] 2018 (3) SA 428 (SCA) para 9

Costs

[18] The practice in this court is not to award costs unless there are exceptional circumstances which warrant an award of costs. In this case there are no such exceptional circumstances.

Order

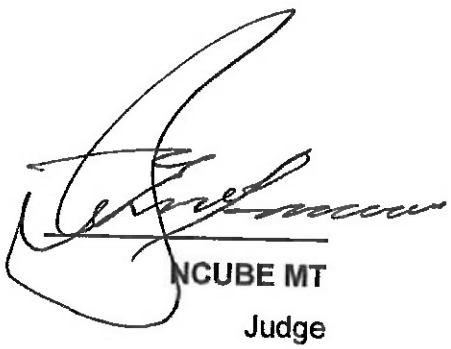
[19] In the result I make the following order:

1. Mr Mokoena's application to adduce further evidence in terms of section 19 of the Superior Courts Act 10 of 2013 is granted.

2. The Church's application for leave to appeal is refused.

3. Mr Mokoena's application in terms of Section 18(1) and (3) of the Superior Courts Act, 10 of 2013 is dismissed.

4. There is no order as to costs.



NCUBE MT
Judge
Land Court

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