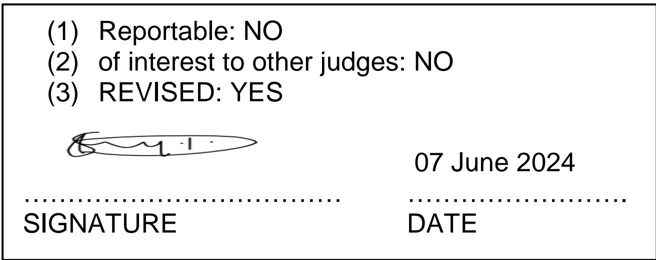
IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No:128147/2023



(1) Reportable: NO
(2) of interest to other judges: NO
(3) REVISED: YES

07 June 2024

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SIGNATURE DATE

In the matter between:

GAUTENG PROVINCIAL GOVERNMENT DEPARTMENT OF SOCIAL DEVELOPMENT **Applicant**

And

KITSO LESEDI COMMUNITY DEVELOPMENT **First Respondent**

CITY OF TSHWANE MUNICIPALITY **Second Respondent**

JUDGMENT- LEAVE TO APPEAL

LESO AJ.

INTRODUCTION

1. This is an opposed application for leave to appeal the order of the court including the order as to costs made by the court on 20 December 2023 as follows:

1.1 Declaring that the Department has breached the Service Level Agreement (SLA) by failing to pay the first respondent ("Kitso Lesedi") the full amount of the third quarter tranche as per the signed SLA.

1.2 Directing the Department to make payment of the full amount of the third quarter tranche, not later than 20 December 2023 at 18:00.

1.3 Directing the Department to honour the SLA on all outstanding contractual and statutory obligations to Kitso Lesedi mentioned in Annexure A1 of the letter of demand sent on 2 November 2023.

1.4 Directing that the costs of this application be paid by the Department.

2. In the above application, the Department sought condonation for non-compliance with the Uniform Rules of the Court in terms of Rule 6(12).

BACKGROUND

3. On 20 December 2023 the matter was heard in an urgent court where the Gauteng Provincial Government Department of Social Development(the respondent in the main action) was represented by M M Maelane and Kitso Lesedi Community Development applicant was represented by Z T Mahamba as the application was opposed.

4. On 02 April 2024 the Department filed an amendment of its notice of application for leave to appeal wherein he abandoned ground on urgency and expanded its ground of appeal that the court erred in the following respects:

4.1 Declaring that the Department was in breach of the SLA.

4.2 Ordering specific performance in relation to payment; alternatively ordering specific performance in the manner that it was done.

4.3 Ordering the Department to pay costs despite Kitso Lesedi having failed to comply with Uniform Rule 41A.

5. The applicant did not request the reasons for the *ex tempore judgment handed* by the court on 20 December 2023 and relied on the transcribed record. Kitso Lesedi opposed the application.

First Ground: declaring that the Department was in breach of the SLA

6. On the first ground counsel for the Department argued that the court merely acted as a rubber stamp of the parties' submissions and failed to satisfy itself of the alleged breach even if the Department conceded to the breach. To the extent that there was any concession of breach on behalf of the Department, such was wrong, and the court was not bound by it because a breach of a contract is a legal conclusion.

7. During the application of leave for appeal the Department stated that the court should have found that Kitso Lesedi was in breach of the SLA in that it failed to submit a progress report and to maintain the premises at 2 Struben as such the Department was excused from performing as long as the breach persisted because when a party is in breach of an agreement the innocent party is entitled to withhold performance of its obligations until the defaulting party has remedied the breach where the principle of reciprocity applies.

8. The following additional facts emerged during the application for leave for appeal:

8.1 Kitso Lesedi is currently under investigation by the Department for misusing funds allocated to it to feed beneficiaries. The investigation involved serious allegations and the allegations were so serious that the Department decided not to make further payments to Kitso Lesedi as a result thereof. This breach was material in the context of the serious allegations leveled

against Kitso Lesedi and the ongoing investigations. The delay in submitting the progress report was not explained.

8.2 Kitso Lesedi has not complied with the Norms and Standards of Annexure B and the SLA in general to the satisfaction of the Department. There was another clear breach by Kitso Lesedi that entitled the Department to withhold payment, Kitso Lesedi was required to submit bi-annual progress reports on 30 September 2023 and 31 March 2024 respectively.19 The report that was due on 30 September 2023 – before the third tranche had to be paid on 1 October 2023 - was not submitted by 30 September 2023. This report was attached to the founding affidavit as Annexure A6. It is clearly stated in this report that it was submitted on 16 October 2023. This means that when the third tranche was due on 1 October 2023, Kitso Lesedi was in clear breach of the SLA, and thus not entitled to the third tranche, per the provisions of the SLA.

8.3 Kitso Lesedi is allocated an amount of over R400 000 quarterly for cleaners, cleaning materials, and security, but the shelter from which the applicant feeds beneficiaries is unbelievably filthy and significantly undermines the beneficiaries' dignity.

8.4 There was a complaint laid with the Department against Kitso Lesedi by one of the beneficiaries regarding the conditions of the shelter from which Kitso Lesedi provides services. The problems with the premises include "garbage not being collected", "sanitation", and "unavailability of electricity".

8.5 The Department specifically informed Kitso Lesedi, in response to a letter of demand from Kitso Lesedi's lawyers for the third tranche that there was a sensitive ongoing investigation against Kitso Lesedi.

9. I pause here to emphasize that these are new information or facts that were provided to the court in the urgent application.

Second Ground: Ordering specific performance in relation to payment

10. The Department argued that the court erred by making an order that Kitso Lesedi had not asked for in terms of its notice of motion as the Department was ordered at 15h45 on 20 December 2023 to pay Kitso Lesedi an amount of R2 974 146 in 2 hours 15 minutes during the festive season. Even in its letter of demand, it asked for an undertaking that payment would be made within 5 days. The Department was entitled to ignore the defective notice, which was effectively a repudiation of the SLA.

11. The court erred in granting an order that was simply impractical to implement and erred in not making an ancillary order relating to the service of the order on the Department to ensure that it is immediately brought to the attention of the relevant officials. Consequently, the Department was effectively made to be in breach of the Order before the Order was even duly signed, stamped, and made available to it. The Department was not afforded the opportunity to explain why it would practically be impossible to make payment within an hour as this was not what Kitso Lesedi asked for.

12. The court committed another error in relation to the order for specific performance because not only did Kitso Lesedi not perform as required by the SLA, but it also specifically made it plain that it will not maintain the premises because it is not responsible for such, despite the specific provision of the SLA requiring it to do so. Even if one accepts that the Department was in breach of the SLA (which is denied), Kitso Lesedi was not entitled to specific performance because it had failed to comply with a precondition for its entitlement to specific performance in terms of the breach clause in the SLA).

13. The court erred when an order for specific performance was granted despite the fact that Kitso Lesedi had not strictly complied with the provisions of clause 12 of the SLA, which compliance was a precondition for its entitlement to specific performance.

Third ground: Ordering the Department to pay costs despite Kitso Lesedi having failed to comply with Uniform Rule 41A.

14. The Department argued that the court should have found that Kitso Lesedi failed to comply with Rule 41A and should have at least ordered each party is to pay their costs particularly considering that over a month passed after the letter of demand was issued by Kitso Lesedi and that period could have been used for mediation in terms of Rule 41A. That the court failed to exercise judicial discretion by not considering non-compliance with Rule 41A at least for purposes of the costs award having regard to all the relevant considerations. In the circumstances, the court ought to have ordered each party to pay its own costs. There were no Points in *limine* raised in the main application therefore the court cannot be blamed for not dealing with the issues not raised.

DISCUSSION AND THE LAW

15. The procedure for applications for leave to appeal in the Supreme Court is regulated by Rule 49 of the uniform rules as follows:

(b) *'When leave to appeal is required and it has not been requested at the time of the judgment or order, application for such leave shall be made and the grounds therefor shall be furnished within 15 days after the date of the order appealed against provided that when the reasons or the full reasons for the court's order are given on a later date than the date of the order, such application may be made within 15 days after such later date: Provided further that the court may, upon good cause shown, extend the aforementioned periods of 15 days.'*

16. The Department did not apply for reasons of an *ex tempore* judgment and it relied on the transcribed records. The court was not requested to provide reasons for the order made despite the fact that the application for leave of appeal was not lodged immediately after the judgment. Consequently, the Department's arguments that the court's reasoning for the order made on 20 December was based on the fact that the court commented that the beneficiaries must be fed is incorrect. On this issue , the court simply expressed a view that is entitled to do

when engaging parties regarding the issues in dispute. The comment by the court that the beneficiaries are starving cannot be the reason for judgment and remains exactly that, a comment. There was not a single provision in the SLA to the effect that the Department was obliged to make payment to Kitso Lesedi just because the beneficiaries 'were not being fed'.

17. The principles relating to the grounds of appeal are set out in *Songona v Minister of Law and Order*[1] that the provisions of Rule 49 (3) and Rule 49(1) (b) of the Uniform Rules of the Court and therefore s 316(4)(a) of Act 51 of 1977 with regards to the requirements that the notice of appeal should specify the <u>finding of facts</u> and <u>ruling of law</u> (my emphasis) appealed against and the grounds upon which the appeal is founded are peremptory[2].

18. From the above stated grounds for leave to appeal the first inquiry is accordingly whether the notice for leave to appeal clearly and succinctly set out in clear and unambiguous terms the incorrect findings of law or fact, or the basis upon which it is contended that the court did not act judicially. This principle has been affirmed in *Songona and Media Workers Association of South Africa and Others v Press Corporation of South Africa Limited*[3]. Counsel representing the Department rightfully argued that the Department is entitled to raise legal points including the interpretation or misinterpretation of the SLA by the court and the subsequent finding of breach. I wish to state outright that the Department did not deal with this point instead they argued a new case. During the application none of the parties raised any issue regarding the wording of any clause in the SLA or had an issue with the intention of the parties at the conclusion of the SLA.

19. In opposition Kitso Lesedi pointed out that it is impermissible for the Department to make out a new case in the current application. Reference was made to the

[1] Songona v Minister of Law and Order 1996 (4) SA 348
[2] See Commentary on the Criminal Procedure Act by Du Toit, Dr Jager, Paizes, Skeen and Van Der Merwe
[3] Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd ('Perskor') [1992] 2 All SA 453

Minister of Land Affairs and Agriculture v D & F Wevell Trust[4], where the court held that '*the other party may well be prejudiced because evidence may have been available to it to refute the new case on the facts. The position is worse where the arguments are advanced for the first time on appeal*[5].' Without dealing with the merits of this application or the main application, it is common cause that the Department the Department relied mostly on the case made by Kitso Lesedi in its founding papers including the supporting evidence produced by Kitso Lesedi to demonstrate that it was Kitso Lesedi who was in breach. Basically, the Department relies mainly on new facts and new evidence which I will later discuss. Kitso Lesedi is correct when it argued that the Department to make out a new case in the current application.

20. In the main application the court was called on to determine whether the Department was in breach of the SLA when it withheld payment of the third tranche and the question was purely a contractual dispute. Additional new facts as stated in paragraph 8 emerged from the Department's heads of argument and during oral submissions in this application for leave for appeal to the extent that during the application the Department argued that Kitso Lesedi failed to submit a progress report and to maintain the premises as such the Department was excused from performing as long as the breach persisted whereas in the urgent application, the issue of the alleged breach by Kitso Lesedi was that it extended their scope by feeding additional beneficiaries which affected the services in 2 Struben which led to the complaint by the officials of the Department. This was denied by Kitso Lesedi to the extent that a submission was made that it had to use the reserves to provide for the services until a certain period.

21. Other issues raised by the Department in this current application were that the application was not proper before the court because Kitso Lesedi did not comply with Section 3 of the State Liability Act[6] it failed to comply with Rule 41A (notice

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[4] Minister of Land Affairs and Agriculture v D & F Wevell Trust [2007] ZASCA 153 and Transnet Ltd v Rubenstein 2006 (1) SA 591 (SCA) at para 28 the court said that it is further trite that in motion proceedings, the affidavits constitute both pleadings and evidence

[5] See Media Workers Association of South Africa and Others v Press Corporation of South Africa Limited [1992] 2 All SA 453 (A) at pages 457 – 459.

[6] Section 3 of the State Liability Act 20 of 1957("the Act") dealing with service of notice to commence proceedings against.

of agreement or opposition to mediation). The Department also raised an issue about the short notice to comply given to the Department by Kitso Lesedi when it issued the letter of demand in 2023. These are legal points that should have been raised before the merits were considered and nothing was raised by the Department on the grounds of appeal. Certainly these points are not arguable on appeal. No law permits an applicant in the application for leave to appeal to raise points *in limine* that were not raised in the main application.

22. In *D & F Wevell Trust* the court held that '*the parties concerned could have made the necessary allegations, but failed to do so. They sought to supplement the allegations made by a referral to evidence. That is not permissible. But the cases do not provide an answer to the problem faced by a respondent who is unable to produce an affidavit in support of its defence which contains sufficient allegations for the relief sought by the applicant to be refused, in the absence of a reference to evidence or trial at the applicant's request but who is able to show that there are reasonable grounds for believing that its defence will be established if the matter is referred for oral evidence or to trial at its instance'*. The court cannot be expected to make a case for the applicant or formulate a defence for the respondent. The Department has made an impressive case but at an inopportune moment and in the wrong manner. All these issues should have been raised and dealt with in the main application alternatively, in the notice of appeal or the form of an affidavit so that Kitso Lesedi could have an opportunity to respond but the Department failed to do so.

23. Other considerations regarding an application for leave to appeal as found in section 17(1)(a) of the Superior Courts Act[7] are that:

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'.

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[7] See section 17(1)(a) of the Superior Courts Act 10 of 2013("The Act").

24. Similarly, in the hearing of the application for leave to appeal in *M.S.H v J.S.H*[8] the applicant's counsel referred the Court to *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others [2021] ZACC 28* relying on this judgment Counsel argued that the Court erred in imposing a sanction of periodic imprisonment and/or sanction without affording the applicant an opportunity to make submissions as regards an appropriate sanction or sanctions. In paragraphs 25 to 26 of the judgment the court said the following: "*that the new ground raised is entirely novel and no basis at all was laid in the notice for application for leave to appeal for this ground of appeal.* The court further said that *'both the Court and counsel for the respondent were taken by surprise in fact, it should be pointed out that not only was nothing contained in the notice of application for leave to appeal to forewarn that the point would be raised, but it was not even hinted at or alluded to in any manner or form*. Here the Department did not lay any basis for the new grounds in their notice of appeal while most of their grounds were advanced in their heads and oral argument.

25. In this application, the Department attached a report marked as Annexure 3 which contains information regarding 2 Struben Street and Pretoria West. According to a report produced by the Chief Inspector of the Special Law Enforcement Unit, the shelter from which Kitso Lesedi feeds beneficiaries is plagued by amongst other things, poor sanitation, prostitution, drug-related activities, and the operation of illegal liquor. The law in adducing further evidence which is applicable in criminal appeals is also applicable in civil appeals. The Department is empowered by section 316(5)[9] to adduce further evidence in this application however such application empowers the court hearing an application for leave to appeal to hear further evidence, section 316(5)(b)(iii) requires a reasonably acceptable explanation for the failure to produce the evidence timeously. In this application, there has not been a proper application to lead further evidence as envisaged by section 316(5)(b)(i)[10] and the report or the annexures relied upon cannot be regarded as further evidence because it was previously presented to the court in the main application.

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[8] M.S.H v J.S.H[2023] ZAWCHC 345

[9] See section 316(5) of the Criminal Procedure Act 51 of 1977 ("the Act").

[10] See footnote 8.

26. I have no idea what is the relevance of this report at this stage neither did the appellant make an effort to explain why this report is relevant to this application except the court must consider the illegal activities at 2 Struben because of the respondent non-compliance. The Department answering affidavit which the court is accused of not having considered did not assist the Department in the main application because the Department mostly raised bare denial of allegations and admissions of the fact that the contract is in relation to 2 Struben and 430 Madiba Beneficiaries for feeding beneficiaries three meals a day seven days a week and the contract is a non- residential one.

27. The Department's prospect of success lies in the recycled evidence and facts none of which formed part of the proceedings at the hearing of the main application. The court had thought of the implications and made an order that was just and equitable as called upon by the Constitution. Here the specific performance was in the form of money, third trench. The order is akin to a claim or order sought by Kitso Lesedi. The Department is incorrect when it stated that the declaration of breach by the Department and the finding or Order for specific performance was based on the reliance on the concession by the Department.

28. The appellant is absolutely correct that the third tranche to Kitso Lesedi was payable in terms of the SLA and not the Constitution of South Africa or other public law considerations. The court relied on the facts presented by the parties through their papers and in oral and written arguments and none of those facts formed part of this application of leave to appeal instead the Department has argued new facts under the pretense that those are the points of law. The order for specific performance on the finding of law, the facts before the court and the interpretation of the SLA. I have no doubt that leave to appeal on the finding of facts or ruling of law refers to the fact presented at the hearing before this application or not the facts which were not before the court.

29. The Department had every opportunity to make any submissions and adduce any evidence in order to address the question of breach of SLA by Kitso Lesedi but it chose to simply depose an answering affidavit denying and avoid

allegations made by Kitso Lesedi. In *Dodo v Dodo*[11] the court held that 'the respondent's case stands or falls on his own averment. I think the respondent's request for oral evidence fails in this regard. The respondent may not seek to lead oral evidence to make out a defence for the first time, by way of such oral evidence, where his defence is not already made out by him on the papers.' I cannot accept that the court erred in considering the Department's concessions as evident on record as well as in the answering affidavit deposed by the official of the Department before the court as the counsel for the Department suggested. It is trite the applicants are bound by their papers so are their submissions.

30. Without giving reasons for my judgment, I wish to highlight the fact that the court did not deal with section 3 and rule 41A notices because it was not brought to the attention of the court and the court's consideration of costs was based on many considerations including the fact that the Kitso Lesedi was successful in the application. There is no justification for requiring the court not to exercise its discretion on the issue of costs.

31. Nothing prevented the Department from reaching out to Kitso Lesedi in the event the payment on the terms as per the court order was impossible as the Department now alleges. The meaning of 'a reasonable prospect of success was explained in *S v Smith* 2012 (1) SACR 567 (SCA) at para 7 as follows: "*What the test of a 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, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that these prospects are not remote but have a realistic chance of succeeding. More is required to be established that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.*" There is no rationale for granting the appeal based on the new evidence and facts presented in this application. The issues now raised by the Department about the impracticality of implementing the Court Order because of the internal processes is not exceptional and no appeal court can come to a different

[11] Dodo v Dodo 1990 (2) SA 77 and *to* Carr v Uzent 1948 (4) SA 383 the respondent sought to supplement their affidavits by a reference to oral evidence.

conclusion. There is nothing exceptional in the above points now raised by the Department.

32. The order was for a specific performance as sought by the Kitso Lesedi based on the terms and conditions set by the court having applied judicial discretion. The order was also made on the basis that the applicant sought an alternative order which the court granted. There is no chance that the applicant will succeed on appeal. I do not doubt that the appeal will fail.

33. No other court can come to a conclusion that the Department was entitled to withhold payment because Kitso Lesedi was in breach of the SLA in that it failed to submit a progress report and to maintain the premises at 2 Struben. After all, no such terms exist in the SLA or Annexure B which forms part of the contract.

COSTS

34. I take judicial notice of the efforts by Kitso Lesedi to enforce the court order by filing an urgent application to compel the appellant to comply with the court order on 12 January 2024 notice was served on 15 January 2024. I also noted that the Department filed an application for leave to appeal on the same day of service of the application by Kitso Lesedi. During the hearing for leave to appeal, I voiced my concerns about the manner this application has been dealt with. My view is that this proceeding was an abuse of the court processes and a waste of public funds was confirmed by the department's failure to submit the supplementary heads on the issue of costs. The Counsel representing the Department undertook to present evidence showing that the application was finally set down before the court at the instance of the Department however only Kitso Lesedi presented heads with a full explanation of the history of this application until it was set down. Here the Department must be penalised for their conduct by an Order on punitive scale.

THEREFORE, I MAKE THE ORDER AS FOLLOWS:

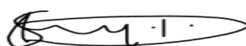
ORDER

1. Application for leave to appeal is dismissed.

2. The Department to pay the costs on attorney and client scale.

The judgment was handed down electronically and by circulation to the parties/ legal representatives by e-mail and by uploading to Caseline

. The date of hand-down is the date when the judgment was signed.



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J.T LESO

ACTING JUDGE OF THE HIGH COURT,

SOUTH AFRICA, GAUTENG DIVISION, PRETORIA

Date of Hearing: 20 May 2024

Date of Judgment: 07 June 2024

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