



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**  
**JUDGMENT**

**Not Reportable**

Case no: 743/2018

In the matter between:

**MTEC RUSTENBURG CC**

**N T TSEBE**

**DIKGWETLO TRADING CC**

**FIRST APPLICANT**

**SECOND APPLICANT**

**THIRD APPLICANT**

and

**CAPRICORN DISTRICT MUNICIPALITY**

**RESPONDENT**

**Neutral citation:** *MTEC Rustenburg and Others v Capricorn District Municipality*  
(Case no 743/2018) [2020] ZASCA 36 (06 April 2020)

**Coram:** Ponnann, Saldulker and Mokgohloa JJA and Gorven and Eksteen  
AJJA

**Heard:** 28 February 2020

**Delivered:** 06 April 2020

**Summary:** Reconsideration of an order refusing special leave to appeal by two judges of the Supreme Court of Appeal (SCA) in terms of s 17(2)(f) of the Superior Courts Act 10 of 2013.

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## **ORDER**

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The application for reconsideration is dismissed with costs, such costs to be paid jointly and severally by the first and second applicants, the one paying the other to be absolved.

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## **JUDGMENT**

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**Mokgohloa JA (Ponnan and Saldulker JJA and Gorven and Eksteen AJJA concurring)**

[1] This is an application for the reconsideration of an application for special leave to appeal, brought in terms of s 17(2)(f) of the Superior Courts Act 10 of 2013 (the Act).

[2] The application falls to be considered against the backdrop of the following facts: On 22 February 2008, Dikgwetlo Trading CC (Dikgwetlo), the third applicant, and an entity known as MTEC Holdings (Pty) Ltd (Holdings) entered into a joint venture agreement. The purpose of the joint venture was to bid for a tender issued by the respondent, the Capricorn District Municipality, under project number:

CON – EO219/2008 for the construction of the Blouberg Landfill. On 30 April 2008 the tender was successfully awarded to the joint venture. On 15 September 2008, Dikgwetlo withdrew from the joint venture, at which point the respondent instructed Holdings not to continue with the work.

[3] On 29 July 2011 the first applicant, MTEC Rustenburg CC (the CC) issued summons against the respondent out of the Gauteng Division of the High Court, Pretoria, claiming payment of monies due for work done and services rendered, ostensibly in terms of the tender. The claims were based on the respondent's alleged breach of its obligation in terms of the tender agreement.

[4] The respondent defended the action and pleaded, amongst other things, that the CC did not have locus standi to sue and that the summons was issued without timeously serving a notice in terms of s 3 of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002. On 19 September 2011 the CC and the second appellant, Naomi Tracey Tsebe (Ms Tsebe), who described herself as 'the only member of the [CC]', launched an application for condonation in terms of s 3(4) of that Act.

[5] On 1 February 2013, and on the application of the CC and Ms Tsebe, Dikgwetlo was joined by the high court as the second plaintiff in the action and the third applicant in the condonation application. Dikgwetlo, however, took no part in the proceedings either before the high court or this court. The condonation application was heard by Pretorius J, who, on 26 January 2018, dismissed the application inter alia on the grounds that the applicants failed to: (i) establish adequate prospects of success in the main action; (ii) give a reasonable explanation for the delay in giving the notice; (iii) satisfy the court that the debt has not been

extinguished by prescription; and (iv) satisfy the court that the organ of state will not be unreasonably prejudiced. An application for leave to appeal against the high court's decision was subsequently refused by Pretorius J.

[6] The applicants then applied to this court in terms of s 16(1)(b) of the Act for leave to appeal the decision of the high court. The two judges of this court, who considered the petition in chambers, dismissed it on the grounds that there were no reasonable prospects of success on appeal and that there was no other compelling reason why the appeal should be heard. The applicants thereupon applied to the President of this court, in term of s 17(2)(f) of the Act, for a reconsideration of the refusal of leave by the two judges of this court. The President made an order referring the reconsideration application for the hearing of oral argument. It is this application which now serves before us.

[7] We are thus required to consider whether there are circumstances which warrant the reconsideration or variation of the earlier order of the two judges of this court dismissing the application for leave to appeal.

[8] Section 3 of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002 provides:

‘3 Notice of intended legal proceedings to be given to organ of state

(1) No legal proceedings for the recovery of a debt may be instituted against an organ of state unless—

(a) the creditor has given the organ of state in question notice in writing of his or her or its intention to institute the legal proceedings in question; or

(b) the organ of state in question has consented in writing to the institution of that legal proceedings—

(i) without such notice; or

(ii) upon receipt of a notice which does not comply with all the requirements set out in subsection (2).

...

(4)(a) If an organ of state relies on a creditor's failure to serve a notice in terms of subsection (2)(a), the creditor may apply to a court having jurisdiction for condonation of such failure.

(b) The court may grant an application referred to in paragraph (a) if it is satisfied that—

- (i) the debt has not been extinguished by prescription;
- (ii) good cause exists for the failure by the creditor; and
- (iii) the organ of state was not unreasonably prejudiced by the failure.'

[9] The requirement of good cause contained in s 3(4)(b)(ii) involves an examination of all the factors which bear on the fairness of granting the application of condonation and the proper administration of justice. These may include prospects of success in the proposed action, the reasons for the delay in giving notice, the sufficiency of the explanation proffered, the bona fides of the applicant, and any contribution by other persons or parties to the delay and the applicants' responsibility therefor.<sup>1</sup>

[10] I shall for present purposes restrict myself to a consideration of the prospects of success in the contemplated action. The CC sought to persuade us that it was a party to the contract with the respondent and thus entitled to sue on it. In that regard reliance was sought to be placed on a letter dated 16 September 2008, which reads:

'It is therefore, imperative to record *inter alia* the following; for all intents and record purposes:

1. M-TEC Holdings was and is still the appointed representative of the JV as per provisions of the JV agreement and such powers as vested upon M-TEC still subsist.
2. According to the provisions of the JV agreement, M-TEC will further take the lead in the administrative and operational matters of the JV.

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<sup>1</sup> See *Madinda v Minister of Safety and Security* [2008] ZASCA 34; [2008] 3 All SA 143 (SCA); 2008 (4) SA 312 (SCA) para 10.

3. The withdrawal of Dikgwetlo Trading from the JV, therefore causes no reasonable/irreparable damage nor prejudice to the Capricorn District Municipality, hence work as provided for in the service agreement/tender specifications is being carried forward as reasonably expected.'

[11] Accordingly, so the contention went, the reference to M-TEC was a reference to the CC. Several difficulties stand in the way of this contention. First, that letter emanated from Ms Tsebe, not the respondent. Second, paragraph one of the letter refers to M-TEC Holdings. One would have thought that the subsequent references to M-TEC would be a reference to Holdings, not some other entity such as the CC. Third, there is no reference at all to the CC in any of the documents on which reliance is sought to be placed for the claim, which is founded in contract. The only joint venture agreement appearing on the papers is the one between Holdings and Dikgwetlo. This was concluded on 22 February 2008 for the express purpose of submitting a tender for the project. It was signed on behalf of Holdings by Ms Tsebe. The tender was awarded to the joint venture. The CC is not a party to the joint venture. Nor is it a party to the tender that was awarded by the respondent to the joint venture. It is a stranger to those agreements.

[12] It follows that any claim by the CC based on those agreements cannot succeed. Pretorius J can thus not be faulted for dismissing the CC's application for condonation. The CC's envisaged action against the respondent is plainly a non-starter. The learned judge was accordingly correct to have dismissed the application for leave to appeal. The same holds true for the two judges of this court, who also dismissed with costs the further application to this court for leave to appeal.

[13] In the result:

The application for reconsideration is dismissed with costs, such costs to be paid jointly and severally by the first and second applicants, the one paying the other to be absolved.

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FE Mokgohloa  
Judge of Appeal

## Appearances

For Applicants: C D Pienaar

Instructed by: Seokane Lesomo Inc., Midrand  
Honey Attorneys, Bloemfontein

For Respondent: E C Labuschagne SC

Instructed by: Matabene Incorporated, Pretoria  
EG Cooper Majiedt, Bloemfontein.