



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

- (1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED:

Date: **17th MAY 2022** Signature:

CASE NO: 24667/2020

DATE: 17TH MAY 2022

In the matter between:

MATATIELE LOCAL MUNICIPALITY

Applicant

and

LUBBE CONSTRUCTION (PTY) LIMITED

Respondent

Coram: Adams J

Heard: 17 May 2022 – The ‘virtual hearing’ of the application was conducted as a videoconference on *Microsoft Teams*.

Delivered: 17 May 2022 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 11:00 on 17 May 2022.

Summary: Application for leave to appeal – s 17(1)(a)(i) of the Superior Courts Act 10 of 2013 – an applicant now faces a higher and a more stringent threshold – leave to appeal granted

ORDER

- (1) The applicant's application for leave to appeal succeeds.
 - (2) The applicant is granted leave to appeal to the Full Court of this Division.
 - (3) The cost of this application for leave to appeal shall be costs in the appeal.
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JUDGMENT [APPLICATION FOR LEAVE TO APPEAL]

Adams J:

[1]. I shall refer to the parties as referred to in the original opposed application. The applicant is the applicant in this application for leave to appeal and the respondent herein was the respondent in the application. The applicant applies for leave to appeal against the judgment and the order, as well as the reasons therefor, which I granted on the 2nd of December 2021, in terms of which I had dismissed the applicant's application to make an Arbitrator's award an order of Court. I had also ordered the applicant to pay the costs of the opposed application.

[2]. The application for leave to appeal is mainly against my legal conclusion that the applicant is not entitled to the relief claimed as its claim against the respondent became prescribed prior to the application having been instituted against the respondent. This conclusion, so the applicant contends, was incorrect if regard is had to the fact that the arbitration award was the subject of a judicial review as well as a subsequent appeal of this Court's judgment relative the judicial review, which means that any prescription period would only have commenced running from the date of the outcome of such appeal proceedings. The simple answer to this contention is that there was nothing preventing the applicant from counter-applying for the Arbitrator's award to be

made an order of Court when the applicant applied to review and set aside the said award.

[3]. The applicant furthermore contends that the court *a quo* erred and misdirected itself 'as a matter of law by being inquisitorial and creating a new case not pleaded by the applicant nor the respondent'. The misdirection lies therein that the court held, so the applicant contends, that the debt became prescribed on the date of the termination of the contract and not after or on the date of the issued arbitration award. Moreover, so the argument on behalf of the applicant goes, the court *a quo* erroneously failed to deal with the applicant's case to have the arbitration award made an order of court and not one for judgment of a debt due.

[4]. I am of the view that the applicant misses the point made in the judgment *a quo*, based on the quoted authorities, that an arbitration award is not a judgment of a court of law. It is akin to a novation of the debt or an acknowledgment of debt, which results in the running anew of ordinary prescription, except that in the case of an arbitration award, the running of prescription is regulated by the provisions of s 13(1) of the Prescription Act 68 of 1969 (the Prescription Act). It bears emphasising that an arbitration award is not a judgment of a court of law.

[5]. Nothing new has been raised by the respondents in this application for leave to appeal. In my original judgment, I have dealt with most of the issues raised and it is not necessary to repeat those in full. Suffice to restate what I said in my judgment, namely that an Arbitrator's award does not create a new 'debt' as envisaged in the Prescription Act. It is simply an affirmation or a liquidation of an existing debt. Furthermore, an arbitration award is not a 'judgment debt' and that the thirty-year prescription period applicable to judgment debts in terms of s 11(a)(ii) of the Prescription Act, does not apply to it.

[6]. The traditional test in deciding whether leave to appeal should be granted was whether there is a reasonable prospect that another court may come to a different conclusion to that reached by me in my judgment. This

approach has now been codified in s 17(1)(a)(i) of the Superior Courts Act 10 of 2013, which came into operation on the 23rd of August 2013, and which provides that leave to appeal may only be given where the judges concerned are of the opinion that 'the appeal would have a reasonable prospect of success'.

[7]. In *Mont Chevaux Trust v Tina Goosen*¹, the Land Claims Court held (in an *obiter dictum*) that the wording of this subsection raised the bar of the test that now has to be applied to the merits of the proposed appeal before leave should be granted. I agree with that view, which has also now been endorsed by the SCA in an unreported judgment in *Notshokovu v S*². In that matter the SCA remarked that an appellant now faces a higher and a more stringent threshold, in terms of the Superior Court Act 10 of 2013 compared to that under the provisions of the repealed Supreme Court Act 59 of 1959. The applicable legal principle as enunciated in *Mont Chevaux* has also now been endorsed by the Full Court of the Gauteng Division of the High Court in Pretoria in *Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others*³.

[8]. All the same, I am persuaded that the issues raised by the applicant in its application for leave to appeal are issues in respect of which another court is likely to reach conclusions different to those reached by me. Those issues include my interpretation of the relevant provisions of the Prescription Act. Another court is likely to find that the one-year stay of the prescription period is effective until such time as all processes and proceedings relating to the arbitration had been finalised. I am therefore of the view that there are reasonable prospects of another court coming to a legal conclusion at variance with mine. The appeal therefore, in my view, has a reasonable prospect of success.

¹ *Mont Chevaux Trust v Tina Goosen*, LCC 14R/2014 (unreported).

² *Notshokovu v S*, case no: 157/2015 [2016] ZASCA 112 (7 September 2016).

³ *Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others* (19577/09) [2016] ZAGPPHC 489 (24 June 2016).

[9]. Leave to appeal should therefore be granted.

[10]. Having said that, this matter is not of such a complex nature that it should be referred to the Supreme Court of Appeal, as was submitted on behalf of the applicant. And I therefore intend granting leave to appeal to the Full Court of this Division.

Order

In the circumstances, the following order is made:

- (1) The applicant's application for leave to appeal succeeds.
- (2) The applicant is granted leave to appeal to the Full Court of this Division.
- (3) The costs of this application for leave to appeal shall be costs in the appeal.

L R ADAMS

Judge of the High Court

Gauteng Local Division, Johannesburg

HEARD ON: 17th May 2022 – in a ‘virtual hearing’ during a videoconference on *Microsoft Teams*.

JUDGMENT DATE: 17th May 2022 – judgment handed down electronically

FOR THE APPLICANT: Adv Sinethemba Isaac Vobi

INSTRUCTED BY: Matthew Francis Incorporated, Pietermaritzburg.

FOR THE RESPONDENT: No Appearance – respondent not opposing application and not conceding either as per Attorney Daniellé Giannico, who was in court.

INSTRUCTED BY: Roelf Nel Incorporated Attorneys, Pretoria.