

REPUBLIC OF SOUTH AFRICA



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

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

CASE NO: 45747/2021

13 JULY 2022

FHD VAN OOSTEN

In the matter between

KING CIVIL CONTRACTORS (PTY LTD

APPLICANT

and

ENVIROSERV WASTE MANAGEMENT (PTY) LTD

RESPONDENT

J U D G M E N T
(LEAVE TO APPEAL)

VAN OOSTEN J:

[1] The unsuccessful respondent in the main application now seeks leave to appeal against the whole of my judgment and order granted on 10 June 2022. For the sake of ease of reference, I shall refer to the parties as in the main application.

[2] In support of the application for leave to appeal, the respondent relies on a number of grounds. These can conveniently be grouped into four categories, first, the statutory interpretation ground, second, the conflicting judgments ground, third,

the factual matrix ground and fourth, the costs ground. In argument before me, the conflicting judgments ground was extensively debated and in particular the crucial aspect relating to finality, which, in essence, constitutes the basis for my disagreement with the judgment in *Genet Mineral Processing (Pty) Ltd v Van der Merwe and Others* (unreported, GLD case no 24202/21). I have fully set out my reasons for the disagreement, in particular that the finality of the arbitral award was not compromised by the application of s 8 of the Act. Indeed, the finality of the award was accepted as a jurisdictional requirement, on the facts of this matter, for s 8 to apply.

[3] Mr *Bunn*, for the respondent, was unable to advance any grounds on which another court might differ from my finding concerning the finality of the award. It was merely submitted that two conflicting judgments exist, which ought to be finally decided on appeal by the Supreme Court of Appeal.

[4] Counsel for the applicant, once again, emphasised that an application in terms of s 8 of the Act, can only arise in instances where an applicant is indeed time-barred, with the result that s 8 must be considered separately and independently from both s 28 and s 33 of the Act. The time-bar finding of the arbitrator was not interfered with, to the contrary, it was, as I have repeatedly set out, accepted as a necessary step for invoking s 8.

[5] Mr *Bunn* was unable to advance any valid criticism relating to the legal sustainability of my findings and the argument in support of the finality aspect advanced by counsel for the applicant.

[6] The revised leave to appeal test is that leave to appeal may only be granted where there is a measure of certainty that there are reasonable prospects of success because another court is likely to come to a different conclusion. In *S v Smith* 2010 (1) SACR 576 (SCA), the Supreme Court of Appeal explained the test to encompass:

'What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that a court of appeal could reasonable arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of succeed on appeal and that those

prospects are not remote but have realistic chance of succeeding. More is required to be established than 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 an appeal.'

(See *Mahem Verhurings CC v Firstrand Bank Ltd* (91998/2015) [2017] ZAGPPHC 167 (8 February 2017))

[7] Section 17(1)(a)(ii) of the Superior Courts Act 10 of 2013, provides:

'Leave to appeal may only be given where the judge or judges concerned are of the opinion that -

...

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;'

Counsel for the applicant has referred me to the judgment in *Muhanelwa v Gcingca* (4713/2017) [2018] ZAGPJHC 718 (27 February 2018); [2019] JOL 43605 (GJ) para 15 -16, where De Villiers AJ stated:

'I am mindful that the test on appeal should not be applied so strictly that the important and necessary procedural safeguard against judicial error is not rendered nugatory. Striking the right balance where Parliament has used such an obligatory formulation to limit appeals, is not easy. I have not been addressed on case authority as to based on what factors, save for the stipulated "conflicting judgments on the matter under consideration", a court could find that "there is some other compelling reason why the appeal should be heard" in circumstances where the appeal lacks prospects of success. The clear intent in section 17 of the Superior Courts Act is to limit appeals. In my view a proper application of section 17(1) (a)(ii) would exclude leave to appeal (in the absence of some other compelling reason) where: the alleged conflicting judgments are distinguishable (and therefore are not "judgments on the matter under consideration"); and the alleged conflicting judgments are in conflict with authority binding on those courts. In my view such judgments by lower courts are not binding judgments and section 17(1)(a)(ii) must be interpreted to refer to binding judgments that have not been overruled or that failed to apply authority binding on those courts.'

[8] In *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* (867/15) [2016] ZASCA 17; 2016 (4) BCLR 487 (SCA); [2016] 2 All SA 365 (SCA); 2016 (3) SA 317 (SCA) (15 March 2016), the

Supreme Court of Appeal dealt with the basis upon which s 17(1)(a)(ii) of the Superior Courts Act finds application, as follows (paras 23, 24):

‘(T)he High Court... failed to consider the provisions of s 17(1)(a)(ii) of the Superior Courts Act which provide that leave to appeal may be granted, notwithstanding the Court’s view of the prospects of success, where there are nonetheless compelling reasons why an appeal should be heard...The usual ground for exercising that discretion in favour of dealing with it on the merits is that the case raises a discrete issue of public importance that will have an effect on future matters. That jurisprudence should have been considered as a guide to whether, notwithstanding the High Court’s view of an appeal’s prospects of success, leave to appeal should have been granted. In my view it clearly pointed in favour of leave to appeal being granted.

That is not to say that merely because the High Court determines an issue of public importance it must grant leave to appeal. The merits of the appeal remain vitally important and will often be decisive...’

[emphasis added]

[9] Applied to the present matter, the mere fact of two conflicting judgments does not provide sufficient ground for granting leave to appeal. The basis for my disagreement with *Genet* has not been challenged. The court in *Genet* did not deal with the arguments raised in the present matter. *Genet*, as I have dealt with, conflicts with *Samancor*. Lastly, the judgment in *Genet*, cannot be reconciled with my reasoning and for this reason, I declined to follow it.

[10] My interpretation of s 8 is based on the authorities quoted. The Supreme Court of Appeal has already pronounced on the proper interpretation of s 8 in *Murray & Roberts Construction (Cape) (Pty) Ltd v Upington Municipality* [1984] 1 All SA 499 (A) and *Samancor Chrome Holdings (Pty) Ltd and Another* [2021] 3 All SA 342 (SCA). Nothing has been advanced to show that another court may deviate from that interpretation of s 8.

[11] In my view, there are no compelling reasons for granting leave to appeal (See *South African Breweries (Pty) Ltd v Commissioner of the South African Revenue Services* (3234/15) [2017] ZAGPPHC 340 (28 March 2017); *Zuma v Democratic Alliance and Another* [2021] 3 All SA 149 (SCA); 2021 (5) SA 189 (SCA)).

[12] For all the above reasons, I am not satisfied that reasonable prospects of a successful appeal exist.

Order

[13] In the result the following order is made:

1. Leave to appeal is refused.
2. The respondent is to pay the costs of the application for leave to appeal.

**FHD VAN OOSTEN
JUDGE OF THE HIGH COURT**

COUNSEL FOR APPLICANT

ADV A GLENDINNING

APPLICANT'S ATTORNEYS

E TAYLOR ATTORNEYS

FOR RESPONDENT

MR S BUNN

RESPONDENT'S ATTORNEYS

HEWLETT BUNN INC

DATE OF HEARING

12 JULY 2022

DATE OF JUDGMENT

13 JULY 2022