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

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

SIGNATURE DATE: 31 January 2022

Case No: 11521 / 2020

In the matter between:

HYKUE SUPPLY COMPANY (PTY) LTD	First Applicant
BERMAT PROPERTY INVESTMENTS CC	Second Applicant
and	
KHULIO (PTY) LTD	First Respondent
HAWKER SIDDLELEY SWITCHGEAR (PTY) LTD	Second Respondent
MALCOLM DAVITT	Third Respondent

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

WILSON AJ:

1 The first respondent, Khulio, seeks leave to appeal against my order of 8 November 2021. That order directed Khulio to pay R804 761,89 to the applicants, Hykue and Bermat. I made the order having found that Khulio

had not disputed that it was in fact indebted to Hykue and Bermat for that amount.

2 Mr. Mvubu, who appeared for Khulio, advanced the application for leave to appeal on two broad fronts. It was first submitted that I had erroneously decided a point that was not raised or ventilated in written and oral argument. Secondly, it was contended that I had been mistaken about the true issue between the parties, as defined in the pleadings. That issue, Mr. Mvubu contended, was whether a comprehensive settlement agreement had been entered into between the parties. It was not simply whether Khulio owed Hykue and Bermant money. Having found that the settlement agreement had not, at least on Khulio's version, been entered into, I was, Mr. Mvubu submitted, bound to dismiss Hykue's and Bermat's application altogether.

3 In my view, neither of these arguments has merit, and the application for leave to appeal falls to be dismissed. These are my reasons.

The point not raised in argument

4 The parties' written and oral argument was preoccupied with whether an unsigned settlement agreement had been entered into between them. In my judgment, I concluded that this was not the real issue between the parties. Hykue and Bermat did not claim the enforcement of the settlement agreement. They asked only for an order directing the payment of what they said was an outstanding debt.

5 The real issue between the parties was whether Khulio had assumed debts owed to Hykue and Bermat by the second and third respondents, Hawker and Davitt, and whether Khulio had agreed to pay those debts in a definite and liquid amount. On any analysis of the pleadings, I concluded, Khulio had assumed Hawker's and Davitt's debts, and it had undertaken to pay them in the amount of R1 057 761,89. By the time the matter came before me, R804 761,89 of that amount was outstanding. Because Hykue and Bermat claimed no more than payment of the outstanding debt – and not the enforcement of any other terms of the settlement agreement they alleged – I concluded that the claim for payment had to succeed to that extent.

6 It is true that the point on which I decided the application was not ventilated in written or oral argument. But that does not in itself mean that Khulio has prospects of success on appeal. A court's duty is to analyse the parties' pleadings and evidence fully and fairly. The mere fact that the conclusion ultimately reached after that analysis was not put to the parties during oral argument does not make the conclusion wrong. Nor does it render the proceedings unfair.

7 For the purposes of determining whether leave to appeal should be granted, the question is whether there is a reasonable prospect that another court might find that an order was erroneous. If the order was right, then there can be no prospect of success on appeal, whether or not the basis for it was fully ventilated in argument. Leave to appeal must be refused. If there is a reasonable prospect that the order was wrong then the fact the reasons

given for it were all extensively debated in argument cannot preclude leave to appeal being granted.

8 It is, of course, generally desirable for conclusions that will later become the material parts of a court's judgment to be put to the parties in argument. The more complex the case, the more important that general rule is. But this is a simple claim for payment. If I am convinced that the point on which I decided the claim is right, it would not be proper to burden a court of appeal with the rehearing of a strighforward, correctly decided case, simply because argument on the case was not as full as it could have been.

Whether the claim for payment was disputed

9 The application therefore boils down to whether Khulio actually disputed on the papers that it owes Hykue and Bermat the amount I directed it to pay. Here, despite some spirited argument from Mr. Mvubu, the case for Hykue and Bermat is overwhelming. In particular, Mr. Mvubu was unable to say what Khulio could have argued at the hearing of the main case that would have ruled-out the conclusions I ultimately reached.

10 In its answering affidavit, Khulio did not dispute that it tendered a "payment plan" which encompassed the assumption R1 057 761,89 of Hawker's and Davitt's debts to Hykue and Bermat. On any analysis of the pleadings and evidence, Khulio paid Hykue and Bermat R253 000 of that amount, but the rest remains outstanding.

11 Mr. Mvubu argued trenchantly that Khulio could only be held liable for the amounts included in a schedule to the written sale agreement everybody

accepts was entered into between Khulio and Davitt for the purchase of Hawker.

12 Even if that were true, Khulio would still owe Hykue and Bermat a considerable amount of money.

13 But it is not contested that, after the sale agreement was entered into, Khulio agreed, with Hykue and Bermat, to assume more of Hawker's and Davitt's debts than those delinated in the sale agreement Khulio concluded with Hawker and Davitt. That undertaking, styled as a "payment plan", is flatly admitted in Khulio's answering affidavit. It is also embodied in two emails that passed between the parties on 10 June 2019. These emails are annexed at "CC9" and "CC10" to Hykue's and Bermat's founding papers. Khulio's managing director, Mr. Khumalo, himself refers to these e-mails as an "agreement" in a letter annexed to Hykue's and Bermat's founding papers and marked "CC17". It is from the agreement that arose in those e-mails, and not the settlement agreement Hykue and Bermat originally relied upon, that Khulio's obligation to pay R804 761,89 to Hykue and Bermat flows.

14 In argument, Hykue and Bermat relied on the e-mails as evidence that the written settlement agreement was entered into. In my judgment, I found that the e-mails did not demonstrate that Khulio had acceded to the terms recorded in the settlement agreement, but that the e-mails themselves nevertheless constituted an undertaking to pay almost all of the amount Hykue and Bermat claimed.

15 It was accordingly unnecessary to conclude that the settlement agreement had been entered into. The e-mails themselves, amplified by Khulio's

answering affidavit – in which Khulio admitted a “payment plan” on the terms set out in the e-mails, and alleged that it had part-performed under that plan – were sufficient to conclude that Hykue and Bermat was entitled to the relief I granted.

16 None of this is challenged in the application for leave to appeal. That being so, the application has to fail.

17 The application for leave to appeal is dismissed with costs.

S D J WILSON
Acting Judge of the High Court

This judgment was prepared and authored by Acting Judge Wilson. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 31 January 2022.

HEARD ON:	28 January 2022
DECIDED ON:	31 January 2022
For the Applicants:	B Joseph Instructed by Wright Rose Innes Incorporated
For the First Respondent:	K Mvubu Instructed by Siphaphelo Buthelezi Attorneys