REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

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

Date: ***30th March 2023*** Signature:

CASE NO: 13311/2020

DATE: 30th MARCH 2023

In the matter between:

WHITE OAK TRADE & SPECIALTY FINANCE CAYMAN LLC Plaintiff

and

SANTAM STRUCTURED INSURANCE LIMITED First Defendant

CREDIT INNOVATION (PTY) LIMITED Second Defendant

HARPER, JANSEN Third Defendant

Coram: Adams J

Heard: 27 and 30 March 2023 – The 'virtual hearing' of the Application for Leave to Appeal was conducted as a videoconference on *Microsoft Teams*

Delivered: 30 March 2023 – This judgment was handed down electronically by circulation to the parties' representatives by email, being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 15:00 on 30 March 2023.

Summary: Application – appealability – to be decided on the basis of the interest of justice –

Section 17(1)(a)(i) of the Superior Courts Act 10 of 2013 – an appellant now faces a higher and a more stringent threshold – application for leave to appeal granted in part –

ORDER

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(1) The first and second defendants are granted leave to appeal against that portion of the judgment and order – paragraphs [57](1)(a), (b) and (c), [57](2) and [57](3) – dated 22 February 2023, which relates to plaintiff's application to compel further and better discovery in terms of Uniform Rule of Court 35(7).

(2) Leave to appeal is granted to the Full Court of this Division.

(3) The costs of this application for leave to appeal shall be costs in the appeal.

(4) The first and second defendants' application for leave to appeal against that portion of the judgment and the order – paragraph [57](4) – dated 22 February 2023, which relates to their (first and second applicants') application to compel further and better discovery in terms of Uniform Rule of Court 35(7), is dismissed with costs.

JUDGMENT [APPLICATION FOR LEAVE TO APPEAL]

Adams J:

[1]. I shall refer to the parties as referred to in the main action. The first and second defendants are the first and second applicants in this application for leave to appeal and the respondent herein is the plaintiff in the action. The first and second defendants apply for leave to appeal against the whole of the judgment and the order, as well as the reasons therefor, which I granted on 22

February 2023, in terms of which I had granted the plaintiff's application to compel further and better discovery and simultaneously dismissed a similar application by the first and second defendants' against the plaintiff to compel further and better discovery. I also granted costs orders in both applications against the first and second defendants in favour of the plaintiff.

[2]. The application for leave to appeal is mainly against by factual findings and legal conclusions that, as regards the plaintiff's application to compel, there exist no valid reason for the first and second defendants not to discover the listed documents and that such documents are not privileged and/or relevant. In certain instances, so the defendants contend, the orders granted by me are too wide, in addition to the court having disregarded reasonable explanations given by the defendants for why the documents cannot and should not be produced. Moreover, so the contention on behalf of the defendants go, as regards the so-called 'insurance documentation', the ambit of the order went further than the original rule 35(3) notice in that it included correspondence between the defendants' present attorneys of record and Marsh with the principal insurers, which was not foreshadowed in the papers and was raised for the first time in the draft order handed up on the morning of the second day of the hearing of the applications to compel.

[3]. The point iterated on behalf of the defendants was that, as regards the insurance documents, litigation was contemplated by the defendants by about 20 August 2019, which means that all documents after that date should be regarded as privileged.

[4]. As regards the 'FAIS documents', the contention by the defendants is that the court *a quo* erred in not accepting their explanation that all the relevant documents have been produced. I should not have gone behind the affidavits on behalf of the defendants and I should not have compelled them, so the defendants argued, to deliver any additional documentation. The same arguments are raised relative the balance of the documents which the defendants were compelled to produce.

[5]. As for the first and second defendants' application to compel further and better discovery, they contend that I erred in not compelling the plaintiff to produce the listed documents, in particular the original 'Guarantee Policy'. I should have compelled the plaintiff, so the defendants submitted, to give better responses to the request to discover the listed documentations than the equivocal ones provided in the replying affidavits. Also, so the defendants contend, the Court erred in accepting the plaintiff's explanation that it is not is possession of the original policy.

[6]. Nothing new has been raised by the first and second defendants 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, as regards plaintiff's application to compel further and better discovery, a proper case was made out on behalf of the plaintiff for the relief claimed and not so as regards the first and second defendants' application to compel. I remain of that view. However, that is not the criterion to be applied in whether to grant leave to appeal.

[7]. 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 judge concerned is of the opinion that 'the appeal would have a reasonable prospect of success'.

[8]. In *Mont Chevaux Trust v Tina Goosen,* LCC 14R/2014 (unreported), 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,* case no: 157/2015 [2016] ZASCA 112 (7 September 2016). 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* (19577/09) [2016] ZAGPPHC 489 (24 June 2016).

[9]. As far as the order relating to the plaintiff's application to compel goes, I am persuaded that the issues raised by the first and second defendants in their application for leave to appeal are issues in respect of which another court is likely to reach conclusions different to those reached by me. I am therefore of the view that there are reasonable prospects of another court coming to a different conclusion to the one reached by me. The appeal against that portion of my judgment does, in my view, have a reasonable prospect of success and should therefore succeed.

[10]. Not so, as far as the first and second defendants' application to compel is concerned. The point about that application is that the plaintiff, in my view, has responded more than adequately to the request for further and better discovery. I was not at liberty to go behind the affidavits of the plaintiff in which it was averred *inter alia* that plaintiff is not is possession of any documents other than those already discovered. I am of the view that the appeal against that portion of my judgment, which relates to the defendants' application to compel, does not have a reasonable prospect of success and should therefore be refused.

[11]. There was a preliminary point raised on behalf of the plaintiff in opposition to the application for leave to appeal and that relates to the appealability of my previous order. Relying on a number of case authorities, Mr De Oliveira, who appeared on behalf of the plaintiff, contended that the order, being of an interlocutory nature, is not appealable. I disagree. As was held by the Full Court of this Division (per Nichols AJ) in *Baard v Allem*[1], it is now trite that the test for appealability has been widened since *Zweni* and the critical consideration now is whether the granting leave to appeal would be in the interests of justice. Appealability no longer depends largely on whether the

[1] *Baard v Allem* 2021 JDR 2521 (GJ);

interim order appealed against has final effect or is dispositive of a substantial portion of the relief claimed in the main application[2]. What is decisive in deciding the issue of appealability is the interest of justice. *In casu*, the interest of justice dictates that my orders are appealable. If not, the case may ultimately be adjudicated on the basis of documents and other evidentiary material which should not have been considered in deciding the dispute between the parties.

[12]. For all of these reasons, I intend granting leave to appeal in respect of the one application and not in respect of the other.

Order

In the circumstances the following order is made:

(1) The first and second defendants are granted leave to appeal against that portion of the judgment and order – paragraphs [57](1)(a), (b) and (c), [57](2) and [57](3) – dated 22 February 2023, which relates to plaintiff's application to compel further and better discovery in terms of Uniform Rule of Court 35(7).

(2) Leave to appeal is granted to the Full Court of this Division.

(3) The costs of this application for leave to appeal shall be costs in the appeal.

(4) The first and second defendants' application for leave to appeal against that portion of the judgment and the order – paragraph [57](4) – dated 22 February 2023, which relates to their (first and second applicants') application to compel further and better discovery in terms of Uniform Rule of Court 35(7), is dismissed with costs.

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L R ADAMS
Judge of the High Court
Gauteng Division, Johannesburg

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[2] *Tshwane City v Afriforum* 2016 (6) SA 279 CC para 40;

HEARD ON:	27th and 30th March 2023
JUDGMENT DATE:	30th March 2023 – handed down electronically
FOR THE PLAINTIFF:	Advocate M De Oliviera
INSTRUCTED BY:	Baker & McKenzie, Sandton
FOR THE FIRST AND SECOND DEFENDANTS:	Adv C Loxton SC
INSTRUCTED BY:	ENS Africa, Sandton
FOR THE THIRD DEFENDANT:	No appearance
INSTRUCTED BY:	No appearance