

Introduction

- [1] On the 24th of October 2022 this Court handed down judgment and granted an order consisting of 7 paragraphs. Paragraphs 3 to 7 pertain to, *inter alia*, an interlocutory application; various payments to be made by the Respondent to the Applicant; interest on those amounts and various cost orders. The Applicant seeks leave to appeal against the whole of the judgment of this Court to the Supreme Court of Appeal (“*the SCA*”), *alternatively*, the full court of the Gauteng Division (Johannesburg) and in respect of paragraphs 1 and 2 of the order whereby this Court dismissed the Applicant’s application and ordered that the Applicant pay the Respondent’s costs, such to include the costs of two Counsel. There is no application for leave to cross-appeal by the Respondent. The Respondent opposes the application for leave to appeal by the Applicant.
- [2] The central issue in the matter (a Special Opposed Application) was whether the Respondent was liable to pay to the Applicant the outstanding balance in respect of the supply, installation and commissioning of a metering system at the Respondent’s Saldanha Terminal. In opposition thereto the Respondent relied on no less than five grounds as to why it was not obliged to pay to the Applicant the outstanding balance of the amount agreed upon between the parties.
- [3] Whilst this Court did examine, in detail, each of those grounds the judgment of the Court dealt with only one thereof, namely whether the Applicant was barred from advancing a cause of action based on the enforcement of an arbitral award. This ground of opposition was effectively a point of law raised by the Respondent *in limine* which, if upheld, would be fatal to the main relief (set out above) as sought by the Applicant in the application. In this Court’s judgment the point as raised by the Respondent was a valid one. In the premises, it was unnecessary (even improper as the matter could well be referred back to arbitration) for this Court to deal with the remaining grounds of opposition as raised by the Respondent and the application (subject to the orders as set out in paragraphs 3 to 7 of the order) was dismissed, with costs (as per paragraphs 1 and 2 of the order).

The law

- [4] The test for the granting of leave to appeal pertinent to the present matter is set out in subsection 17(1) of the Superior Courts Act 10 of 2013 (“*the Act*”) as follows:
- (1) *Leave to appeal may only be given where the judge or judges concerned are of the opinion that-*
- (a) (i) *the appeal would have a reasonable prospect of success; or*

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

[5] Subsection 17(6) of the Act reads as follows:

(6)(a) *If leave is granted under subsection (2) (a) or (b) to appeal against a decision of a Division as a court of first instance consisting of a single judge, the judge or judges granting leave must direct that the appeal be heard by a full court of that Division, unless they consider-*

- (i) *that the decision to be appealed involves a question of law of importance, whether because of its general application or otherwise, or in respect of which a decision of the Supreme Court of Appeal is required to resolve differences of opinion; or*
- (ii) *that the administration of justice, either generally or in the particular case, requires consideration by the Supreme Court of Appeal of the decision,*

in which case they must direct that the appeal be heard by the Supreme Court of Appeal.

- (b) *Any direction by the court of a Division in terms of paragraph (a), may be set aside by the Supreme Court of Appeal of its own accord, or on application by any interested party filed with the registrar within one month after the direction was given, or such longer period as may on good cause be allowed, and may be replaced by another direction in terms of paragraph (a).*

The grounds of appeal

[6] Whilst applications of this nature are extremely important and require serious consideration (hence, in addition to the onerous workload facing both acting and permanent Judges in the Gauteng Division the time between hearing the application and the delivery of this judgment) it is not customary to deliver extensive judgments dealing with the grounds relied upon by the parties or their respective arguments in respect of same. These are all, to one extent or another, contained in the notice seeking leave to appeal, together with the Heads of Argument prepared by Counsel. In the premises, this judgment will not be burdened unnecessarily by dealing in detail therewith, save for the single exception as set out below.

[7] The Applicant is correct that this Court erred in its judgment when it stated (at paragraph [20] thereof) that the Applicant did not deal specifically with the point of law raised by the Respondent in either the Applicant's Heads of Argument or the

Applicant's Supplementary Heads of Argument. It was in fact dealt with in the Applicant's Supplementary Heads of Argument. When doing so, it is also correct that this Court was referred to the decision of *Bidoli v Bidoli and Another 2011 (5) SA 247 (SCA)*.

- [8] Whilst this Court is of the opinion that the failure to deal specifically with *Bidoli* in its judgment is not fatal to the decision reached, it must also take cognisance of the argument put forward on behalf of the Applicant at the application for leave to appeal that there is a reasonable prospect that another court could find that *Bidoli* is applicable to the facts of the present matter and, on that basis, this Court should not have dismissed the application on this point alone but decided the matter on the remaining grounds of opposition raised by the Applicant.
- [9] In this regard the Applicant relies on subsection 17(1)(a)(ii) of the Act for this Court to grant leave to appeal to the SCA on the basis that there is a compelling reason why the appeal should be heard in that, on the Applicant's argument, there is a reasonable prospect that the SCA would hold that the decision by this Court and that of the SCA in *Bidoli* are conflicting (or at least seemingly conflicting) judgments and it is a matter of public importance; in the public interest that legal certainty should be obtained.
- [10] Moreover, the Applicant avers that this Court erred in upholding the point of law when applied to the facts of the matter. On behalf of the Respondent, it was essentially submitted that the real issue was ultimately one of interpretation of the "Interim Award" and based thereon there is no reasonable prospect of another court reaching a different conclusion in this matter.

Conclusion

- [11] This Court, having carefully considered the various grounds relied upon by the parties and the submissions made in support thereof (with particular reference to the fact that it is in agreement with the Respondent's submissions that this matter is largely one of interpretation, together with the application of the correct principles of law) is of the opinion that the Applicant should be granted leave to appeal to the SCA. In granting leave to the Applicant to appeal to the SCA rather than to a full court of the Gauteng Division, this Court is acutely aware of the provisions of subsections 17(6)(a)(i) and (ii) of the Act (as set out above). It follows that this Court has applied same. Moreover, this Court is also well aware of earlier decisions by the SCA whereby the High Courts have been cautioned not to burden the roll of the SCA unnecessarily by granting leave to appeal to that court in respect of matters which do not require the attention of the SCA to the detriment of those matters which do. In this particular matter, this Court is satisfied that the Applicant should be granted leave to appeal to the SCA.

[12] In the event of the SCA upholding the appeal then the SCA will elect either to deal with the other grounds of opposition as raised by the Respondent (referred to earlier in this brief judgment) or refer same back to this Court for decision.

Order

[13] In the premises, this Court makes the following order:

1. The Applicant is granted leave to appeal to the Supreme Court of Appeal.
2. The costs of the application for leave to appeal will be costs in the appeal.

B.C. WANLESS
Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard: 27 February 2023
Judgment: 28 April 2023

Appearances

For Applicant: Adv AG Sawma SC (with AL Williamson)
Instructed by: Alan Jacobs and Associates (formerly Mendelow-Jacobs Attorneys)

For Respondent: Adv I Jamie SC (with L Stanfield)
Instructed by: Webber Wentzel (Cape Town)