

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2021/30068

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

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B.C. WANLESS

06 June 2023

In the matter between:

STRATEGIC PARTNERS GROUP CONCESSIONS (PTY) LTD

Applicant

and

BOMBELA OPERATING COMPANY (PTY) LTD

First

Respondent

RATP DEVELOPMENT SA

Second Respondent

RETIRED JUSTICE N V HURT

Third Respondent

THE ARBITRATION FOUNDATION OF SOUTH AFRICA

Fourth Respondent

Neutral Citation: *Strategic Partners Group Concessions (Pty) Ltd v Bombela Operating Company (Pty) Ltd and Others* (Case No: 2021/30068) [2023] ZAGPJHC 646 (06 June 2023).

**JUDGMENT
(LEAVE TO APPEAL)**

WANLESS AJ

Introduction

- [1] This is an application by the Applicant (“SPGC”) for leave to appeal against the judgment of this Court delivered on the 17th of January 2023. In that judgment this Court dismissed SPGC’s application for a review to set aside an award made by the Third Respondent (“*the Arbitrator*”) in terms of subsection 33(1)(b) of the *Arbitration Act 42 of 1965*. The First Respondent (“BOC”) opposes the application for leave to appeal.
- [2] The application for leave to appeal either to the Supreme Court of Appeal (“*the SCA*”), *alternatively*, to the Full Bench of this Court, is based squarely upon the provisions of subsection 17(1)(a)(i) and not subsection 17(1)(a)(ii) of the Superior Courts Act 10 of 2013, since it is not suggested by SPGC that this is a matter where there are compelling reasons why leave to appeal should be granted. In the premises, the test as to whether this Court should grant leave to appeal is trite and this brief judgment will not be burdened with dealing in any detail therewith. Suffice it to say, the Applicant must show that there is a reasonable possibility that another Court would come to a different finding for this Court to grant it leave to appeal.

The merits

- [3] This Court was greatly assisted in this matter by the Heads of Argument filed by both parties prior to the hearing of this application and the well prepared argument of Senior Counsel presented at the hearing itself. It is not the practice of this Court to deliver lengthy judgments in applications of this nature. In the premises, this Court does not intend to deal with either the written or oral arguments placed before it in any great detail. Of course, that does not mean that this Court has failed to take cognisance thereof.
- [4] In essence, SPGC’s complaint (if understood correctly) seems to be that this Court has essentially committed the same “error” as that of the Arbitrator by conflating the interpretation of the tacit or implied term relied upon by SPGC with the interpretation of the various agreements and/or documents and/or the award. In addition, remains the important fact (from SPGC’s perspective) that the Arbitrator fails to mention and/or deal with the tacit or implied term specifically in his award and this Court has not held that this is good grounds for review. This, of course, is just a very brief summary of the argument put forward on behalf of SPGC for leave to appeal.
- [5] On the other hand, it is contended by BOC that (a) SPGC advances arguments on the merits and not grounds for review; (b) the grounds advanced by SPGC for review are bad in law and fact; (c) SPGC’s interpretative approach to the award is legally flawed and (d) SPGC’s argument loses sight of what was before the Arbitrator. All of these points raised by BOC at the hearing of this present application once again support a holistic approach to the interpretation of the award and that the Arbitrator, in coming to the decision that he did, clearly considered and applied the tacit or

implied term as pleaded by SPGC. This was the finding of this Court which would not be disturbed by another Court on appeal.

Conclusion

[6] Having carefully considered all of the arguments presented before this Court and having had regard to the authorities referred to therein, this Court is not satisfied that there is a reasonable possibility that another court would come to a different finding. In the opinion of this Court there is simply no room for another interpretation of the award other than that given to it by this Court and the finding that the Arbitrator did indeed consider and apply the tacit or implied term in question. In the premises, the application for leave to appeal must be dismissed.

Order

[7] This Court makes the following order:

1. The application for leave to appeal is dismissed.
2. The Applicant is to pay the costs of the application, such to include the costs of two Counsel.

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

Heard: 30 May 2023
Judgment: 06 June 2023

Appearances

For Applicant: A Subel SC (with JL Kaplan)
Instructed by: Ian Levitt Attorneys

For First Respondent: NJ Graves SC (with KD Iles)
Instructed by: Pinsent Masons South Africa Inc.