



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

CASE NO: 12729/2021

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

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SIGNATURE	DATE

In the matter between:

MURRAY & ROBERTS LIMITED

Plaintiff

And

ENERGY FABRICATION (PTY) LTD

(In business rescue)

First Defendant

HARVEY SICELO BUTHELEZI

Second Defendant

MICHAEL MATTHEW FYNN

Third Defendant

ULRICO MARCELLUS DAVIDS

Fourth Defendant

NONKULULEKO MKHIZE	Fifth Defendant
PRAGASEN DEVAKARAN PILLAY	Sixth Defendant
SOUTHERN PALACE	Seventh Defendant
GROUP OF COMPANIES (PTY) LTD	
POULOS SELLO MAHLANGU	Eighth Defendant
LUCAS LEFU TSEKI	Ninth Defendant
MATJANYANA GLADYS MAHLANGU	Tenth Defendant
LEBOGANG GRACE MPAKATI N.O.	Eleventh Defendant
TEBOGO CHRISTOPHER	Twelfth Defendant
PHAHLANI LINCOLN MKHOBHO N.O.	Thirteenth Defendant

JUDGMENT

(Leave to Appeal Application)

SENYATSI J:

[1] This is an application to appeal the order I granted on the 9 October 2023 in terms of which I directed as follows:-

- (a) that the issue of whether the temporary moratorium on the rights of the claimants against the first defendant in terms of section 133(1) (a) and (b) of the Act ought to be upheld pursuant to the plaintiff's failure

to act in accordance with such provision was separated in the matter contemplated in terms of Rule 33(4) of the Uniform Rules;

(b) that the issue of whether the Court holds the necessary jurisdiction, to entertain the plaintiff's claim premised upon certain contractual provisions of the parties in so far as the provisions provide for the mandatory mediation or arbitration of disputes in terms of clause 35 of annexure "POC2" and clause 14 of annexure "POC4" to the particulars of claims was separated in the matter as contemplated in terms of Rule 33(4) of the Uniform Rules;

(c) The separated issues shall be determined first, with outstanding issues to stand over for a later determination, if required;

(d) The legal proceedings in this matter are hereby stayed until such time the separated issues have been determined; and

(e) The plaintiff is ordered to pay the costs of the application including costs occasioned by the employment of counsel.

[2] The contestation against the judgment has been laid bare in terms of the notice of application for leave to appeal and will not be repeated in this judgment. In a nutshell, the applicant quibbles about the fact that the judgment does not fully set forth the parameters of separation.

[3] The requirement and the test for granting leave to appeal are regulated by section 17(1)(a) of the Superior Courts Act No. 10 of 2013 which states 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.”

[4] In Mont Chevaux Trust v Goosen and Others¹ Bertelsman J interpreted the test as follows:

“It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion...The use of the word ‘would’ in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.”

¹ 2014 2325 (LCC)

[5] In Acting National Director of Public Prosecutions and Others v Democratic Alliance: In re: Democratic Alliance v Acting National Director of Public Prosecutions² the court acknowledged the test by Bestertsman J.

[6] In Mothule Inc Attorneys v The Law Society of the Northern Provinces and Another³, the Supreme Court of Appeal stated as follows regarding the trial court's liberal approach on granting leave to appeal:

“It is important to mention my dissatisfaction with the court a quo’s granting of leave to appeal to this court. The test is simply whether there are any reasonably prospects of success in an appeal. It is not whether a litigant has an arguable case or mere possible of success.”

[7] Having considered the grounds of appeal and the heads of arguments by both counsel, I am not persuaded that the requirements of section 17(1) (a) of the Act have been met. I am also not convinced that there is a compelling reason to grant the application for leave to appeal. There is therefore no prospect that the appeal would succeed.

ORDER

[8] The following order is issued:

² (Case no: 19577/09) ZAGPPHC 489 at para 25

³ (213/16) [2017] ZASCA 17 (22 March 2017)

- (a) The application for leave to appeal is dismissed with costs.

SENYATSI M L
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION

Delivered: This judgment and order was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the order is deemed to be the 2 February 2024.

Appearances:

For the Plaintiff: Adv JPV Mc Nally SC
Adv SL Mohapi
Instructed by: Webber Wentzel

For the First Defendant: Adv FJ Nalane SC
Adv S Magxaki
Instructed by: Crafford Attorneys

For the fifth Defendant: Mr D Reid
Instructed by: Dinana Reid Incorporated

For the sixth Defendant: Adv J Rebello
Instructed by: Smith Attorneys

Date Judgment Reserved: 21 November 2023

Date of Judgment: 2 February 2024