REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 2021-21687

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

10 May 2024 ________________________

DATE SIGNATURE

In the matter between:

PHATISANI NDEBELE	First Applicant
EMVELO HOLDINGS (PTY) LTD	Second Applicant

and

INDUSTRIAL DEVELOPMENT CORPORATION OF SOUTH AFRICA	First Respondent
BUYELWA PATIENCE SONJICA	Second Respondent
ODIWEB (PTY) LTD	Third Respondent
THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	Fourth Respondent

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JUDGMENT ON LEAVE TO APPEAL

STRYDOM, J

[1] In this matter the applicants are seeking leave to appeal against the Court's judgment handed down in this matter on 25 July 2023. Leave to appeal is sought to the Supreme Court of Appeal pursuant to the terms of section 17(1)(a)(i) of the Supreme Courts Act, 2013 in that it is alleged that the appeal would have a reasonable prospect of success.

[2] The notice of leave to appeal contains many grounds of appeal but what crystallised in the applicants' heads of argument, and address at the hearing of this application, relates to the Court's finding that the IDC Call Option when exercised, was not *contra bonos mores* or contrary to *Ubuntu.*

[3] In my judgment I dealt with this aspect in detail, and I am of the view that the appeal would have no reasonable prospects of success on this finding which relates to the contractual regime entered into by the parties. I found that the implementation of the agreements on their terms was not inherently unfair to render the agreements *contra bonos mores* or contrary to *Ubuntu.*

[4] In the heads of argument, filed a few days before the hearing of the application for leave to appeal, the applicants however embarked on raising a new point of law, not even mentioned in the notice of application for leave to appeal to persuade this court to grant leave to appeal. This new ground is based on a submission that the written pledge of the Emvelo shares in favour of the IDC constitutes an invalid *pactum commissorium*. The applicants want to argue this law point on appeal.

[5] This new ground why leave to appeal should be granted was obviously not considered by this Court in the judgment against which this application for leave to appeal lies.

[6] The question arises whether this Court, as part of the application for leave to appeal, can now consider the alleged new ground raised?

[7] As stated, this new ground raised to obtain leave to appeal was only introduced by way of legal argument. The Court was told it raises a new legal argument

which could be decided on the facts as it stands. This was denied in argument by the first respondents.

[8] Section 17(a)(ii) provides that leave to appeal may only be given where the judge concerned is of the opinion that there is some other compelling reason why the appeal should be heard.

[9] The question arises whether an allegation of the existence of a new legal argument, which the applicants want to raise on appeal, provides for a compelling reason why leave to appeal should be granted?

[10] In my view, the existence of a new legal argument may, depending on the veracity of such new legal argument, constitute a compelling reason why leave to appeal should be granted. There maybe instances where a legal argument with merit has been overseen by a party whilst this argument could be made within the four corners of the facts already before court. The question would be whether the opposing party would be prejudice by the late introduction of this further legal argument. In this case the applicants are not only want to raise a legal argument not previously canvassed before, but want to introducing a new cause of action.

[11] In my view, a party who wants to introduce such new legal argument\cause of action should at least amend its notice of application for leave to appeal to introduce this new argument. This did not happen in this matter as this argument was only raised in heads of argument. Without deciding whether the non-introduction of the new argument/cause of action is fatal for placing reliance thereupon, the court will nevertheless consider this issue.

[12] Two further questions arise. First, is there a reasonable prospect that this new cause of action would be allowed to be introduced on appeal and second, if allowed, does this new cause of action render the implementation of the agreement of pledge, considered with the IDC Call Option, void and unenforceable.

[13] A new cause of action may only be introduced on appeal in limited circumstances.

[14] This Court was referred to the matter of *Moroka v Premier of the Free State Province and Others (295/20) [2022] ZASCA 34 (31 March 2022). (Maroka)*

[15] In *Maroka* the court referred to the test, with reference to other matters, which would apply to raise a new point of law on appeal as follows:

> *"[36] The law governing the raising of a new point of law on appeal is trite. In Provincial Commissioner, Gauteng South African Police Services and Another v Mnguni,[4] this court expressed itself as follows:*
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> > *'It is indeed open to a party to raise a new point of law on appeal for the first time, with the provision that it does not result in unfairness to the other party; that it does not raise new factual issues and does not cause prejudice. In Barkhuizen v Napier [2007] ZACC 5; 2007 (5) SA 323 (CC) Ngcobo J said the following (para 39):*
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> > *"The mere fact that a new point of law is raised on appeal is not itself sufficient reason for refusing to consider it. If the point is covered by the pleadings and its consideration on appeal involves no unfairness to the party against whom it is directed, this Court may in the exercise of its discretion consider the point. Unfairness may arise, where for example, a party would not have agreed on material facts, or on only those facts stated in the agreed statement of facts had the party been aware that there were other legal issues involved and that "[it] would similarly be unfair to the party if the law point and all its ramifications were not canvassed and investigated at trial.".' (Emphasis added.)*
>
> *[37] In developing the jurisprudence on this matter, the Constitutional Court has laid a further requirement that it must be in the interests of justice that the new point of law be entertained. The court in Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd and Another (Mighty Solutions),[5] per Van der Westhuizen J, expressed itself as follows in this regard:*
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> > *'It would hardly be in the interests of justice for an appeal court to overturn the judgment of a lower court on the basis that Court was never asked to decide. As lawyers always say, "on this basis alone" this Court should not entertain the enrichment argument.'*
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> *The enrichment argument had been raised for the first time in the Constitutional Court."*

[16] It was argued on behalf of the applicants that the introduction of the *pactum commissiorium* as a cause of action raises the issue of the fair value of the Odiweb shares, the subject matter of the IDC Call Option. Further, that sufficient facts were pleaded to make a determination on the value of the shares. On behalf of the respondents, it was argued that if the IDC was from the outset faced with this new cause of action, it would have introduced evidence concerning the value of the Call Option shares.

[17] Accepting for argument's sake that IDC Call Option, read with the pledge of the Odiweb shares, constitute an invalid *pactum commissiorium,* I am of the view that it would be unfair towards the IDC to allow the applicants to introduction

the new cause of action on appeal. It is not only a legal argument, but a legal argument pertaining to a new cause of action, not fully factually ventilated in the papers before court. The IDC, faced with this cause of action would have in all likelihood introduced evidence on the value of the shares.

[18] The question remains whether there exists a reasonable prospect that the appeal court would allow this new cause of action to be raised on appeal, and even if this is allowed, whether the new points raised on appeal would provide a different outcome or at least a reasonable prospect of success on appeal. I am of the view that there exist no reasonable prospect that the new cause of action would be allowed to be argued on appeal. But, even if it is allowed, I am of the view that there is no reasonable prospect that this cause of action would be established.

[19] In my view, on a proper consideration of clauses 7 and 8 of the shareholders agreement, read with the pledge of shares agreement, the applicants failed to show that the parties engaged into an invalid *pactum commissorium.*

[20] In *Graf v Buechel [2003] JOL 10799 (SCA)* a *pactum commissorium was described as follows:*

"[9] A pactum commissorium in the context of a pledge is an agreement that if the pledgor defaults, the pledgee may keep the security as his own property."

[21] In this case the delivery of the shares held by Emvelo was subject to the exercise by the IDC of its Call Option.

[22] Clause 7.1 and 7.5 of the shareholders agreement should be referred to:

"7.1 If the IDC Shareholder Loan has not been repaid by the IDC Shareholder Loan Repayment Date, IDC shall be entitled to exercise a call option on the entire 50.83% of the Issued Shares (consisting of 61 Shares) held by Emvelo in the Company (Emvelo Call Shares) for a call option price of R51 (IDC Call Option Price).

7.5 As security for its obligations under the IDC Call Option, Emvelo shall execute a pledge of the Emvelo Call Shares in favour of IDC in usual format, and deliver both the executed pledge of shares (Emvelo Share Pledge) and the share certificate evidencing Emvelo's ownership of 61 Shares to the IDC in satisfaction of this requirement. Upon exercise of the Emvelo Call Option and payment of the Emvelo Call Option Price, the Emvelo Share

Pledge shall thereupon be cancelled and the original pledge document and share certificate shall be returned to Emvelo."

[23] The Emvelo shares were pledged to the IDC in the event that the IDC exercised its Call Option. Prior to this Emvelo could have exercised its call option in terms of Clause 8.1 of the Shareholders Agreement. This Emvelo did not effectively do. If it did, then the shares pledged by Emvelo would have reverted back to Emvelo.

[24] This is not a situation where Emvelo (as pledgor) defaulted by not performing in terms of a contractual obligation. The purpose of the pledge was to create a situation whereby the IDC would already be placed in possession of the Emvelo shares should the IDC validly exercised their Call Option. If anything, the purpose of the pledge was to secured delivery of the Emvelo shares pursuant to the exercise of the IDC Call Option. The payment of fair value for the shares has no bearing on the matter. The price for the shares was contractually agreed between the parties to be a nominal amount. In these circumstances there is no default by the pledgor which allowed the pledgee to keep the security as its property whatever the value of the shares would have been. Emvelo did not default on any obligation by not being in the position to exercise its own Call Option.

[25] In my view, even if the new cause of action\new legal argument is allowed the reliance on a void *pactum commissorium* would not have a reasonable prospect of success on appeal.

[26] Consequently, in my view, there exists no reasonable prospect of success on appeal based on this new cause of action.

[27] The application for leave to appeal includes an attack against this Courts' findings to strike out certain allegations from the applicants' affidavit.

[28] In my view, the struck paragraphs were not determinative of any dispute or issue between the parties. Put differently, even if the paragraphs were not struck it would not have had a material effect on the outcome of the matter before this court. The applicants failed to establish a reasonable prospect of

success appeal pertaining this court’s order to strike certain paragraphs or portions thereof.

[29] Moreover, the struck paragraphs were not determinative of any of the prayers sought in the notice of motion. The strike orders are accordingly not finally definitive of the rights of the parties to the relief claimed. It follows that the strike out orders are not appealable.

[30] The application for leave to appeal on this ground should be dismissed.

[31] Considering all grounds raised the application for leave to appeal should be dismissed with costs.

[32] I am of the view that a punitive cost order, as was requested by the IDC, is not warranted.

[33] The following order is made:

1) The application for leave to appeal is dismissed.

2) The applicants should pay the party and party costs of this application. Pertaining to the first respondent on scale C, including the costs of senior counsel. Pertaining to second respondent’s counsel on scale A.

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R STRYDOM
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Date of hearing: 07 May 2023
Date of judgment: 10 May 2023

For the applicants: Mr. K.J. Van Huyssteen

Instructed by:	Fluxmans Inc.
For the first respondent:	Ms. M.S Baloyi SC
	With: Mr. T.L. Maroleng
Instructed by:	Cliffe Dekker Hofmeyer Inc
For the second & third respondent:	Mr. T.R. Seroto
Instructed by:	DM5 Inc.