IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/**NO**
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/**NO**
(3) REVISED: **NO**

DATE: **28 April 2023**

SIGNATURE:

Case No. 56241/2021

In the matter between:

KOMATILAND FOREST SOC LIMITED **Applicant**

And

JOHN WRIGHT VENEERS (PTY) LTD **1ST Respondent**

ADV. L MAITE N.O **2ND Respondent**

Coram: Millar J

Heard on: 21 April 2023

Delivered: 28 April 2023 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the Gauteng Division Pretoria and by release to SAFLII. The date and time for hand-down is deemed to be

09H30 on 28 April 2023

Summary: Application for leave to appeal dismissal of application for review and ancillary relief – no prospect that another court would come to a different conclusion or compelling other reason why leave should be granted as provided for in s17(1)(a)(i) and (ii) respectively – application dismissed with costs.

ORDER

It is ordered:

1. The application for leave to appeal is dismissed.

2. The applicant is ordered to pay the respondents costs of the application which costs include the costs consequent upon the employment of two counsel.

MILLAR J **JUDGMENT**

---

[1]. On 23 February 2023 an order was granted by this court dismissing the applicant's application for review and alternative ancillary relief together with costs. The applicant has applied for leave to appeal and it is opposed by the first respondent.

[2]. The test for the granting of leave to appeal pertinent to the present matter is set out in section 17(1) of the Superior Courts Act[1] as follows:

> *"(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that*

[1] 10 of 2013.

(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"

[3]. In applying the test, it was held in *S v Smit*[2] in which it was held "

> *"In order to succeed, therefore, the appellant must convince this Court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic change of succeeding. More is required to be established that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorized as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal."*

[4]. Turning now to the grounds of appeal. I do not intend to deal with each of the individual grounds of appeal raised by the applicant. Considered holistically, the nub of the application is that the Court mischaracterized the case for the applicant.

[5]. It was argued for the applicant that the arbitration clause and subsequent arbitration and award, reduced the commercial profitability of the contract for the applicant and so meant that the arbitration clause in the contract concluded between the parties, was subject to being set aside for this reason. The applicant contended that such a circumstance was offensive to the Constitution,[3] PPPFA[4] and PFMA[5] which bound it. It followed that the arbitration, notwithstanding that the applicant had agreed to it, should also be set aside.

[6]. The argument qualified the challenge to limit the impeachability of the arbitration clause to circumstances where only the commercial profitability of the applicant was affected. In other words, the arbitration clause was not *per*

---

2 2012 (1) SACR 567 (SCA) at para [7].
3 The Constitution of the Republic of South Africa 1996.
4 Preferential Procurement Policy Framework Act 5 of 2000.
5 Public Finance Management Act 1 of 1999.

se impeachable, but only when the applicant was unsuccessful in any arbitration and it could claim that the effect was a loss of profitability on its part.

[7]. It is the qualification which it seems to me is fatal to this application. Either the arbitration clause should stand, or it should not. The qualification in the challenge makes plain that the arbitration clause is in its terms neither *"offensive nor representative of any unacceptable excesses of freedom of contract".*[6] For this reason, it is in my view unimpeachable. For this reason, too I am of the view

[8]. I am not persuaded that another court would[7] find that either the arbitration clause or the subsequent arbitration was impeachable and that the review should have been granted or the arbitration set aside. Furthermore, I am of the view there is no other substantial or compelling reason[8] why leave to appeal should be granted in this matter.

[9]. On the question of costs, both parties engaged two counsel and were agreed that the order made by me should follow the result. Hence the costs order that follows.

[10]. In the circumstances it is ordered:

10.1 The application for leave to appeal is dismissed.

10.2 The applicant is ordered to pay the respondents costs of the application which costs are to include the costs consequent upon the employment of two counsel.

_____

6 *Beadica 231 CC and Others v Trustees, Oregon Trust and Others* 2020 (5) SA 247 (CC) at paras [38]; the decision in *Brisley v Drotsky* 2002 (4) SA 1 (SCA) was affirmed.

7 Section 17(1)(a)(i) of the Act.

8 Section 17(1)(a)(ii) of the Act.

A MILLAR

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

HEARD ON:	21 APRIL 2023
JUDGMENT DELIVERED ON:	28 APRIL 2023
FOR THE APPLICANT:	ADV I PILLAY SC
	ADV T MOSIKILI
INSTRUCTED BY:	MADIBA MATSAI MASITENYANE & GITHIRI ATTORNEYS INC.
REFERENCE:	MS. S MASITENYANE
FOR THE FIRST RESPONDENT:	ADV J DE BEER
	ADV A VAN DYK
INSTRUCTED BY:	KRUSE ATTORNEYS
REFERENCE:	MR R KRUSE

NO APPEARANCE FOR THE SECOND RESPONDENT