IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHERS JUDGES: NO
(3) REVISED

11 March 2024
DATE

SIGNATURE

CASE NUMBER: 25318/2017

In the matter between:

BRINANT SECURITY SERVICES (PTY) LTD Applicant

And

THE PRIVATE SECURITY SECTOR PROVIDENT FUND First Respondent

ML RACHOSHI Twenty Second Respondent

THE PENSION FUNDS ADJUDICATOR Twenty Nineth Respondent

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on CaseLines by the Judge or her Secretary. The date of this judgment is deemed to be 11 March 2024.

JUDGMENT

COLLIS J

1.This is an application for leave to appeal against the judgment and order made on 20 July 2023.

2.The application is premised on the grounds as listed in the Application for Leave to Appeal dated 27 July 2023. The said application albeit that same was filed last year already, was only brought to the attention of the Court this year. It appears that the said application was not filed with the correct Registrar. This is unfortunate as it delayed the finalization of this hearing of the application for leave to appeal.

3.In anticipation of the hearing of the application for leave to appeal, the parties were requested to file short heads of argument. They both acceded to this request so directed by the Court.

LEGAL PRINCIPLES

4. Section 17 of the Superior Court's Act provides as follows:[1]

"(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;

(b) the decision sought to appeal does not fall within the ambit of section 16(2)(a);

and

(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties."

5.In *casu* the applicant relies on both grounds of appeal mentioned in section 17(1)(a) of the Superior Courts Act 10 of 2013, namely, that the appeal would have reasonable prospects of success and that there are compelling reasons justifying the appeal.

[1] Act 10 of 2013

6.The crisp issues on appeal is the finding made by the court a quo that the relevant matter has prescribed as provided for in Section 2 of the Pension Fuds Act, Act 24 of 1956 ("the Act') read with Section 12(3) of the Prescription Act, Act 68 of 1969. In addition, the applicant wishes to challenge the finding made by the court a quo that the procedural requirements provided for in Section 3A of the Act have been met in circumstances, where it was common cause that the Twenty-Second Respondent did not comply with any procedural requirements for filing a complaint and where it was common cause that the Pension Funds Adjudicator failed to comply with the jurisdictional requirements prescribed by the Act.

7.In addition the applicant also wishes to challenge the failure on the part of the court a quo to make a finding, that the matter between the Applicant and Twenty-Second Respondent became settled under circumstances where it was common cause that:

7.1 There was a settlement agreement entered into on behalf of *inter alia* the Twenty-Second Respondent and the Applicant.

7.2 The Twenty-Second Respondent received the benefits provided for in

the settlement agreement from the Applicant.

7.3 The Twenty-Second Respondent never tendered repayment of the benefits so received.

8. As to the test to be applied by a court in considering an application for leave to appeal, Bertelsmann J in The Mont Chevaux Trust v Tina Goosen & 18 Others 2014 JDR 2325 (LCC) at para 6 stated the following:
'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, see Van Heerden v Cronwright & Others 1985 (2) SA 342 (T) at 343H. 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.'

9.'In order to succeed, therefore, the applicant 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 chance of succeeding. The Court must test the grounds on which leave to appeal is sought against the facts of the case and the applicable legal principles to ascertain whether an appeal court would interfere in the decision against which leave to appeal is

sought. More is required to be established than 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.'[2]

10.In Fair-Trade Independent Tobacco Association v President of the Republic of South Africa and Another[3] the Full Court of this Division observed that:

"As such, in considering the application for leave to appeal it is crucial for this Court to remain cognizant of the higher threshold that needs to be met before leave to appeal may be granted. There must exist more than just a mere possibility that another court, the SCA in this instance, will, not might, find differently on both facts and law. It is against this background that we consider the most pivotal grounds of appeal."

COMPELLING REASONS: CONFLICTING JUDGMENTS:

11.In as far as the second leg upon which, the applicant contends leave to appeal the decision of this court should be granted, the applicant asserts

[2] MEC for Health, Eastern Cape v Mkhitha and Another (1221/2015) ZASCA 176 (25 November 2016) para 17
[3] Case no: 21688/2020 [2020] ZAGPPHC 311 (24 July 2020) at [6].

that it appears to be common cause and was indeed found by this Court in its judgment, that the application related to 27 Respondents.

12.On the 19th of July 2021 the Honourable Strijdom AJ (as he then was) heard the application relating to 25 of the Respondents mentioned in the notice of motion and granted an order setting aside the relevant Determinations by the PENSION FUNDS ADJUDICATOR.[4]

13.Pursuant thereto, and on the 4th of February 2022 this Court heard the application relating to the Twenty Fourth Respondent and granted an order in terms whereof the Determination by the PENSION FUNDS ADJUDICATOR was reviewed and set aside.[5]

14.In *casu*, this Court dismissed the present application. It is on this basis that counsel for the Applicant contends that in the same application and on the very same facts and legal principles, there are now three conflicting judgments. It was on this basis that it was argued, that leave to appeal the decision of this Court should be granted having regard to the provisions set out in Section 17(1)(a)(ii) of the Superior Courts Act, in that, there now exist conflicting decisions in the same Division.

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[4] Judgment: Para [2] to [4]: CaseLines: P. 000-4
[5] Judgment: Par [5]: CaseLines: P. 000-5

15.On behalf of the Twenty-Second Respondent the following submissions on point were made, namely:

15.1 It is common cause that in all the other previously decided cases that the Applicant relies on, all the Respondents (former and/or current employees of the Applicant) were not legally represented. All those judgments were further granted in the unopposed motions court;

15.2. Secondly, the courts that granted those judgments did not have the benefit of a fully ventilated argument on the real issues in those matters;

15.3 and thirdly, it is on this basis that counsel had argued that those previously decided cases are distinguishable from the present matter and for this reason no conflicting judgments exists in the same Division.

16.These arguments presented on behalf of the Twenty-Second Respondent this Court is in agreement with. It is for this reason, that I conclude, that there exist no conflicting judgments, emanating from the same facts, set out in the same application, as between the same parties.

REASONABLE PROSPECTS OF SUCCESS:

17. As to the first leg whether the appeal would have a reasonable prospect of success, the Applicant had argued that the PENSIONS FUNDS ADJUDICATOR dealt with a complaint in which the act or omission to which it relates occurred more than three years prior.

18. On this basis counsel for the Applicant had submitted, that the principles relating to prescription also apply to matters of this nature and that the Adjudicator dealt with an issue that had already prescribed. Support for this argument is found in the provisions of Section 30I of the Act.

19. In addition counsel had submitted that the relevant dispute between the parties, which included the Twenty-Second Respondent, had been settled on the 18th of October 2016. Further, that the Twenty-Second Respondent before Court indeed received two payments in terms of the settlement and never tendered restitution of the payments so received. As such the Applicant complied with all its obligations in terms of the settlement.[6]

20. The defense raised by the Twenty-Second Respondent was to the effect that he believed the payments that he received was part of the Applicant's compliance with the PENSION FUNDS ADJUDICATOR's Determination. This the Applicant contends was clearly not a reliable stance adopted by the

[6] Founding Affidavit: CaseLines: P. 004-0r, par 38.7

Twenty-Second Respondent, as the Determination was only made on the 24th of March 2017 whereas it appears to be common cause that the settlement payments were already received by him on the 6 June 2016 and 11 November 2016 respectively.[7] It is on this basis that counsel had argued that on the Twenty-Second Respondent's own version he could not have believed that these payments emanated from the Applicant's compliance with the PENSION FUNDS ADJUDICATOR's Determination.

21.In respect of the first leg of the appeal, counsel for the Twenty-Second Respondent had argued that this Court should refuse to grant the application on the basis that it has prospect of success on appeal. This is so, as counsel had argued, this Court was correct to find that the matter had not prescribed. In addition, the Twenty-Second Respondent averred that he only became aware of the debt during the year 2015, which averment the Applicant did not refute in its Replying Affidavit. Furthermore, the Twenty-Second Respondent disputed the authenticity and veracity of the letter which the Applicant claims was authored by him,[8] and in the absence of producing evidence in rebuttal thereto, the evidence of the Twenty-Second Respondent remains uncontested.

[7] Answering Affidavit: Par 18.6: CaseLines: P. 016-11 Replying Affidavit: Par 8.3: CaseLines: P. 017-7
[8] Respondent's Heads of Argument at paragraph 2.3.4 Caselines page 019-0

22.The failure by the Applicant to place rebuttal evidence before this Court, makes the Applicants prospect of success on appeal unrealistic. See Smith[9] and Mkhitha.[10]

23.At the hearing of the application before the Court a quo, there was still no endorsement of the settlement agreement by the Twenty-Ninth Respondent in terms of Section 30M of the Pension Fund Act. In fact, the impugned settlement agreement was rejected by the Twenty-Ninth Respondent. In rejecting the settlement agreement, the Twenty-Ninth Respondent mentioned that the agreement was rejected owing to non-compliance with Rule 4.1.21 read with Rule 4.1.2 of the Rules of the First Respondent.[11] In addition the Twenty-Ninth Respondent also rejected the impugned settlement agreement for its non-compliance with Section 13A(7) read with regulation 33(7).

24.That being said, it must follow, that no court would force the Twenty-Ninth Respondent to countenance any agreement which is non-compliant with the applicable prevailing rules and on this basis, counsel had argued

[9] Smith v S [2011] ZASCA 15; 2012 (1) SACR 567 (SCA)
[10] MEC Health, EC v Mkhitha 2016 ZASCA 176 para 17
[11] See annexure ALN8 at paragraph 5.12 case line pages 005-0bk to 005-0bl

that the settlement agreement has no legal force and is not binding on any of the parties to it and that this court should consider that rejected settlement agreement as pro non-scripto.

25. Having regard to what has been alluded to above, and in the absence of any rebuttal evidence, I cannot but conclude that there exist, no reasonable prospect of success, in respect of which leave should be granted.

ORDER

26. Consequently, the following order is made:

26.1. The application for leave to appeal is refused, with costs, such costs to include the costs of two counsel.

C.J. COLLIS

JUDGE OF THE HIGH COURT GAUTENG

DIVISION PRETORIA

APPEARANCES

Counsel for Applicant:	Adv. JG Cilliers (SC)
	Adv. T ELLERBECK
Instructed By:	Arthur Channon Attorneys
Counsel for 22nd Respondent:	Adv. D.F. Makhubele
	Adv F. Tugwana
Instructed By:	Raulinga, Netsianda and Khameli Inc
	Attorneys
Date of Hearing:	16 February 2024
Date of Judgment:	11 March 2024