



IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case no: 6319/2022P

In the matter between:

MILLING TECHNIKS (PTY) LTD

APPLICANT

and

THE MEC FOR THE KWAZULU-NATAL

DEPARTMENT OF TRANSPORT

FIRST RESPONDENT

TONY SMITH N.O.

SECOND RESPONDENT

ORDER

The following order is granted:

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

JUDGMENT

E Bezuidenhout J

[1] The first respondent applies for leave to appeal against my judgment handed down on 10 November 2023. The application was filed on 1 December 2023. Due to the unavailability of counsel during the recess period, the application was only heard on 9 February 2024. The grounds of appeal were set out in the application and read as follows:

'1. Her Ladyship placed a restrictive interpretation on clause 10.2 of the GCC's, in that she held expressly, or by necessary implication, that:

1.1 the provision applies only in relation to payment disputes and, accordingly,

1.2 the provision had no application in relation to the dispute that was articulated in the parties' correspondence during June 2019 (annexures A and B to the answering affidavit, pages 241 to 244).

2. For the following reasons, it is respectfully submitted that there is a reasonable prospect that an appeal court will interpret the clause differently:

2.1 It is not expressly stated that the clause is intended to apply only in respect of payment claims.

2.2 To the contrary, the clause is couched in inclusive language which indicates that it is intended to apply "in respect of any matter arising out of or in connection with the contract".

2.3 The purposes of the clause and, more particularly the time barring provision, is to ensure that disputes are promptly raised and addressed, to avoid lingering uncertainty.

2.4 An inclusive interpretation would, therefore, give effect to such an intended purpose. For example, in a case such as the present, the parties would be required to address and resolve their dispute as soon as it arose.

2.5 An appeal court is, furthermore, likely to interpret and apply the provision in a manner than is consistent with contractual principles. Such a court is, therefore, likely to favour an interpretation that is in accordance with doctrine of election, in terms of which Applicant was required to make an election when, in June 2019, Applicant was pertinently informed of the manner in which First Respondent intended to perform the contract.

2.6 It is respectfully submitted that an appeal court will likely find that First Respondent, in its letter dated 28 June 2019, stated, unequivocally, its intentions in relation to the contract. There was no room for debate. Therefore, insofar as Applicant considered that First Respondent's stated intentions were inconsistent with the parties' agreement. The letter would, on Applicant's version, have constituted a repudiation.

2.7 Consequently, if Applicant considered this to constitute a repudiation or an anticipatory breach, then that is when Applicant's cause of action arose. This, based on the ordinary meaning of words, is when there was a "cause of dissatisfaction".'

[2] Both counsels for the applicant as well as counsel for the first respondent submitted detailed written submissions in respect of the application for leave to appeal, which I have carefully considered.

[3] Before I deal with the merits of the application, it is perhaps appropriate to say something about the test to be applied in applications of this nature. In terms of section 17(1)(a)(i) of the Superior Courts Act 10 of 2013, leave to appeal may only be given where the judge is of the opinion that 'the appeal would have a reasonable prospect of success', or in terms of section 17(1)(a)(ii), if there is 'some other compelling reason why the appeal should be heard'.

[4] In *The Mont Chevaux Trust v Goosen and others*,¹ Bertelsmann J (in an obiter dictum) held that:

'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.'

[5] The test was also considered in *S v Smith*² where the court held:

'What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. 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 chance of succeeding. 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 categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.' (Footnotes omitted.)

[6] In *Four Wheel Drive v Rattan NO*,³ Schippers JA, with reference to *S v Smith* supra, referred to the principle that leave to appeal should only be granted where 'a sound, rational basis [exists] for the conclusion that there are prospects of success on appeal'. The court is

¹ *The Mont Chevaux Trust v Goosen and others* [2014] ZALCC 20; 2014 JDR 2325 (LCC) para 6.

² *S v Smith* [2011] ZASCA 15; 2012 (1) SACR 567 (SCA) para 7.

³ *Four Wheel Drive Accessory Distributors CC v Rattan NO* [2018] ZASCA 124, 2019 (3) SA 451 (SCA) para 34.

required to test the grounds on which leave to appeal is sought against the facts of the case and the applicable legal principles. The court a quo was also criticised for granting leave to appeal when there were no reasonable prospects of success, which resulted in the parties being put through the inconvenience and expense of an appeal without any merit.

[7] It is furthermore always important when considering applications of this nature to keep in mind what was held in *R v Dhlumayo*⁴:

‘No judgment can ever be perfect and all-embracing, and it does not necessarily follow that, because something has not been mentioned, therefore it has not been considered.’

[8] It was submitted by Mr Pillay, appearing for the applicant, with reliance on *Democratic Alliance v President of the Republic of South Africa*⁵ that

‘A balance between the rights of the party which was successful before the court a quo and the rights of the losing party seeking leave to appeal need to be established so that the absence of a realistic chance of succeeding on appeal dictates that the balance must be struck in favour of the party which was initially successful.’

It was submitted that there should be a basis in fact or in law to sustain a realistic chance, not just a hope.

[9] Returning to the present application, I must say that I struggled to understand the basis of the ground raised in para 1 of the application. I did not anywhere in my judgment find that clause 10.2 of the GCC only applied to payment disputes and that the provision had no application to the alleged ‘dispute’ that was articulated in Mrs Lazarova’s letter of 28 June 2019. I dealt with her letter in para 39 of my judgment.

[10] Mr Crampton, appearing for the first respondent, in a roundabout way eventually arrived at a submission to the effect that I erred in not finding that Mrs Lazarova’s letter, and its conclusion in itself, amounted to a cause of dissatisfaction as envisaged in clause 10.2.2 and that the letter would have constituted a repudiation of the contract. This was in line with what was submitted in para 2.6 of the first respondent’s application for leave to appeal, as the first respondent ‘stated unequivocally, its intensions in relation to the contract’ in the letter of 28 June 2019. Clause 10.2.2, which I summarised in para 6 of my judgment, reads as follows in its entirety:

⁴ *R v Dhlumayo and another* 1948 (2) SA 677 (A) at 706.

⁵ *Democratic Alliance v President of the Republic of South Africa and others* [2020] ZAGPPHC 326 para 5.

'If, in respect of any matter arising out of or in connection with the Contract, which is not required to be dealt with in terms of clause 10.1, the Contractor or the Employer fails to submit a claim within 28 days after the cause of dissatisfaction, he shall have no further right to raise any dissatisfaction on such matter.'

[11] In essence, it was submitted that the letter of 28 June 2019 should have been regarded as a cause of dissatisfaction. The applicant should then have taken the prescribed steps, as referred to in my judgment in respect of a dissatisfaction claim, some two years before it was going to submit its payment certificate, which it did not do, creating the impression that it accepted the content of the letter. It was submitted that this would have been the prudent, businesslike thing to do.

[12] Mrs Lazarova, in her answering affidavit, stated that the applicant did not contest the 'advice' she gave in her letter of 28 June 2019. It was likewise submitted in argument on behalf of the first respondent during the hearing of the initial application, that the applicant did not contest Mrs Lazarova's 'advice' and that the first respondent understood from the applicant's conduct that the applicant accepted the 'advice' stated in the letter of 28 June 2019. This advice, the first respondent submitted, established a cause of dissatisfaction and would have given the applicant a right to go to court. I have dealt with the letter and the issues surrounding it in para 39 of my judgment, as mentioned above. I had found that the dissatisfaction claim (meaning, this particular claim, and not in general) could only be submitted once the management fee had been excluded and by implication, that was when the dissatisfaction arose.

[13] It was submitted on behalf of the applicant that to hold that the dissatisfaction claim arose when advice was given and when the parties were debating the issue, would in fact lead to an unbusinesslike interpretation. At best, it gave rise to a cause of disagreement and nothing more and it certainly could not be elevated to a cause of dissatisfaction. It was further submitted that the applicant was dissatisfied when the payment certificate was issued and, as a result, became entitled to raise a dissatisfaction in respect of the payment certificate once it was formally issued. I agree with these submissions.

[14] It was also submitted by the applicant that my judgment was not fully dispositive of the parties' rights as the first respondent may, and is required, to place its case before the adjudicator who is appointed to determine the dispute between the parties and it will suffer no prejudice in pursuing adjudication. I dealt with the adjudicator's entitlement to consider the issue of time-barring raised by the first respondent in para 36 of my judgment. It was further submitted that the further prosecution of an appeal on what is an in limine or interlocutory

matter relating to the adjudication proceedings, would only serve to delay matters which should really be before the adjudicator. The State was using its might and resources emanating from public funds to pursue a technical matter to avoid the determination and hearing of the real dispute between the parties. Whilst I fully appreciate the first respondent's rights to litigate its matters in court, I must agree with the applicant's submissions and concerns in this regard. In my view this matter clearly needs to run its course in front of the adjudicator.

[15] I have carefully considered all the submissions as well as the grounds of appeal. I am of the view that there is no sound, rational basis to conclude that there are reasonable prospects of success on appeal, bearing in mind the grounds raised by the first respondent.

[16] As far as the issue of costs for this leave to appeal are concerned, the applicant sought costs on the punitive scale, which were to include the costs of two counsel. It was submitted that punitive costs are warranted as a measure of displeasure with the waste of time and public resources. A similar order was sought in the initial application. I was, in essence, accused by the applicant of being too lenient towards the first respondent when I only ordered it to pay the costs of the application, due to public funds being involved. I am, however, still mindful of the implications on the public purse and am further unconvinced that costs on a punitive scale are justified. I will, however, allow costs of two counsel as requested.

[17] I accordingly grant the following order:

1. The first respondent's application for leave to appeal is dismissed with costs, such costs to include the costs of two counsel.

E BEZUIDENHOUT J

Date of hearing: 9 February 2024

Date of judgment: 6 March 2024

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