REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No: 21725/2018

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

11/06/2020
SIGNATURE DATE

In the matter between:

METROPOL CONSULTING (PTY) LTD Plaintiff/Applicant

and

CITY OF JHB METROPOLITAN MUNICIPALITY First Defendant/Respondent

MATHIPANE TSEBANE INC ATTORNEYS Second Defendant/Respondent

JUDGMENT - LEAVE TO APPEAL

INGRID OPPERMAN J

[1] This is an application for leave to appeal against a judgment handed down by this court on 24 April 2020. Leave to appeal is sought against the whole of the judgment. The parties are referred to as in the action. To be clear, it is the applicant

for leave to appeal, which is the plaintiff in the action. The plaintiff had sought leave to amend its declaration. This application was opposed and for reasons set out in my judgment, this Court refused it. The plaintiff now seeks leave to appeal against my judgment refusing it leave to amend.

[2] In the decision of *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and Others*[1], Wallis JA observed that a court should not grant leave to appeal, and indeed is under a duty not to do so, where the threshold which warrants such leave, has not been cleared by an applicant in an application for leave to appeal. In paragraph [24] he held as follows:

> "[24] For those reasons the court below was correct to dismiss the challenge to the arbitrator's award and the appeal must fail. I should however mention that the learned acting judge did not give any reasons for granting leave to appeal. This is unfortunate as it left us in the dark as to her reasons for thinking that enjoyed reasonable prospects of success. Clearly it did not. Although points of some interest in arbitration law have been canvassed in this judgment, they would have arisen on some other occasion and, as has been demonstrated, the appeal was bound to fail on the facts. **The need to obtain leave to appeal is a valuable tool in ensuring that scarce judicial resources are not spent on appeals that lack merit**. It should in this case have been deployed by refusing leave to appeal." (emphasis added)

[3] It has been suggested that the legislature has deemed it appropriate to raise the bar by providing in section 17 of the Superior Courts Act 10 of 2013 that what an applicant in an application for leave to appeal should show is that the appeal '*would* ' have reasonable prospects of success not '*might* '. It has also been suggested that the legislature did no such thing and in fact simply restated the test which had application prior to the amendment. I will assume for purposes of this application, and in favour of the plaintiff, that the lower test has application.

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[1] 2013 (6) SA 520 (SCA)

[4] The plaintiff's declaration (in its original unamended form) contends for 'contractual privity' rather than an agreement *per se*. The first defendant challenged the declaration as failing to disclose a contractual cause of action. The plaintiff proposed to substitute its declaration for one in which a tacit agreement is alleged and sought to be enforced. The first defendant objected on the basis that the tacit agreement as pleaded is illegal and incapable of enforcement. In heads of argument the plaintiff's senior counsel speculated that the tacit agreement could be saved by a supply chain management policy and/or the plaintiff could be entitled to just and equitable relief in the event of a finding of illegality. Neither possibility forms part of the proposed pleaded case.

[5] At the hearing, counsel for the plaintiff declined invitations to show that, *ex facie* the proposed declaration, the alleged agreement is legal.

[6] The dismissal of the amendment leaves the original declaration in place and the plaintiff free to pursue an alternative pleaded case perhaps based on the proposed tacit agreement supplemented by the policy which may save it from its illegality as suggested by its counsel in heads of argument or supplemented by allegations entitling it to just and equitable relief. It could also conceivably pursue an alternative pleaded case based on unjustified enrichment. I express no view on the prospects of success of any such amendments, but make the point that the refusal of the amendment does not close the doors of the Court to the plaintiff to plead a better case.

[7] In dismissing the amendment this court exercised a discretion rather than made a definitive finding of law. The dismissal does not satisfy the *Zweni*[2] test for

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[2] *Zweni v Minister of Law and Order*, 1993 (1) SA 523 (A) at 536 A-C

appealability as it leaves the existing declaration in place and the plaintiff free to pursue the alternative cases not part of its proposed amendment i.e:

7.1. Reliance on the alleged tacit agreement supplemented by the policy considerations; or

7.2. Reliance on the alleged tacit agreement supplemented by allegations entitling it to just and equitable relief; or

7.3. The alleged unjustified enrichment.

[8] This proposed appeal offends the *Zweni* caveat[3] i.e. that a piecemeal consideration of the case would be far from convenient given that even a successful appeal would leave the plaintiff without any pleaded reliance on a policy or entitlement to just and equitable relief. The very same disputes would resurface at the trial and potentially in a second appeal.

[9] The pragmatic considerations[4] do not avail the plaintiff at this time. In my view, it is neither appropriate nor just that the plaintiff be allowed to pursue a preliminary appeal when it makes no attempt to show that, *ex facie* the proposed declaration, the agreement is not illegal and pleads no reliance on a policy or entitlement to just and equitable relief. Further, the plaintiff specifically sought case management contending that it needed to expedite the hearing of the matter due to the ill-health of the plaintiff's director. Instead of moving a further amendment relying on allegations which could save the tacit agreement from its illegality or entitle it to relief despite thereof, it pursues an appeal.

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[3] at 531 D - E

[4] *Health Professions Council of SA v Emergency Medical Supplies and Training CC t/a EMS* [2010] 4 ALL SA 175 (SCA) paras 13-16 and *Government of the RSA & others v Von Abo*, [2011] 3 ALL SA 261 (SCA)

[10] In my view, on the facts of this case, the dismissal of the plaintiff's application for leave to amend is not appealable since it fails the *Zweni* test, falls foul of the *Zweni* caveat and is not saved by the pragmatic considerations.

[11] Assuming the judgment is appealable, I would dismiss the application as in my view, there are no reasonable prospects of another court finding in favour of the plaintiff.

[12] I have considered the grounds of appeal and the arguments advanced in the heads of argument filed in the application for leave to appeal.

[13] Whether illegality appeared *ex facie* the proposed declaration was the principal issue raised by the first defendant's objection to the plaintiff's amendment. The plaintiff during the hearing, did not contend for an alternative construction of the proposed declaration either in its written or oral argument. It did not offer an alternative interpretation that would explain how the tacit agreement complied with the constitutional standard and somehow saved it from being, on the face of it, illegal.

[14] The repeated criticism in the application for leave to appeal is that this court could not have made a factual finding of invalidity premised solely on the allegations in the proposed declaration. This court did not. The relevant principle is that, on exception (here taken in the context of an objection to an amendment), the pleaded allegations are taken at face value on the assumption that they would be established at trial.[5] The implication of that principle is that illegality may be determined from the proposed declaration alone.

[15] Because the illegality appears *ex facie* the proposed declaration, the court need not wait for the first defendant to raise the illegality before refusing to enforce

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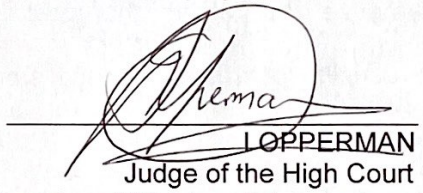
[5] *Stewart and Another v Botha and Another*, 2008 (6) SA 310 (SCA) at para 4

the agreement. A court is duty bound to raise illegality *mero motu* and refuse enforcement even if a defendant does not plead it. As Mthiyane JA said in *Madzivhandila and Others v Madzivhandila and Another*[6]:

"The approach to be followed where a question of illegality is raised was laid down in Yannakou v Apollo Club. Trollip JA writing for the majority said:.'...it is the duty of the court to take the point of illegality mero motu, even if the defendant does not plead or raise it; but it can and will only do so if the illegality appears ex facie the transaction..."

[16] That being the case here, I am driven to conclude that the plaintiff has failed to show reasonable prospects of success and accordingly grant the following order:

The application for leave to appeal is refused with costs including the costs consequent upon the employment of two counsel where so employed.



LOPPERMAN
Judge of the High Court
Gauteng Local Division, Johannesburg

Counsel for the plaintiff: Adv S Pincus SC
Instructed by: Howard S Woolf
Counsel for the first defendant: Adv R Pearse SC, Adv M Seape, Adv J Chanza
Instructed by: Moodie & Robertson
Counsel for the second defendant: No opposition
Date of hearing: Application decided on written submissions by agreement
Date of receipt of final heads of argument in respect of leave to appeal: 22 May 2020
Date of receipt of final heads of argument in respect of appealability: 28 May 2020
Date of request for judgment by plaintiff's attorney: 9 June 2020
Date of Judgment: 11 June 2020

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[6] (584/2002) [2004] ZASCA 12