REPUBLIC OF SOUTH AFRICA

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

Case No: 25767/2006

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

SIGNATURE 16/02/2021 DATE

In the matter between:

RALPH WERNER KOSTER Plaintiff

and

INDUSTRIAL ZONE LIMITED First Defendant

SOUTH AFRICAN NATIONAL PARKS Second Defendant

MINISTER OF ENVIRONMENTAL AFFAIRS AND TOURISM Third Defendant

MINISTER OF PUBLIC WORKS Fourth Defendant

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 14h00 on 16 February 2021

JUDGMENT

INGRID OPPERMAN J

Introduction

[1] This is an application for leave to appeal against the whole of the judgment granted by this court on 30 December 2020. This judgment should be read with the 30 December 2020 one ('*the judgment*'). The parties are referred to as in the action. The applicant for leave to appeal is the plaintiff in the action.

The Test

[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 it 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**

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

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 ('*the Superior Courts Act*') 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.

[4] The test has been expressed by the SCA in *Four Wheel Drive Accessory Distributors CC v Rattan NO* as there having to be a *"sound, rational basis for the conclusion that there are prospects of success on appeal."*[2]

[5] I will assume for purposes of this application, and in favour of the plaintiff, that the lower test has application.

Plaintiff's argument in this application

[6] The plaintiff limited his argument in this application to the failure by this court to have *mero motu* raised the fact that clause 22.3 should be treated as *pro non scripto* by virtue of same being void for vagueness.

[7] In this regard he relied on two authorities referred to for the first time during this application. They are *Globe Electrical Transvaal (Pty) Ltd v Brunhuber and Others,*[3] and *Reymond v Abdulnabi and Others.*[4]

---

[2] 2019 (3) SA 451 (SCA) at [34]

[3] 1970 (3) SA 99 (E)

[4] 1985 (3) SA 348 (W)

[8] The first important distinction to be drawn between these cases and the current one is that neither of these cases were presented or argued on the basis of an initial acceptance by both parties that the clauses in question were clear and enforceable. In contrast, in the present matter, the plaintiff's case was always that the clause was capable of fulfilment, and the plaintiff closed his case on the basis that it had been fulfilled.[5]

[9] In *Globe,* the court did not find that any particular clause was inchoate. The court's finding in *Globe* was that the purchase price was not determined or readily ascertainable because of the inherent contradictions which arose between the option agreement and the main agreement, with particular reference to the expressed date set in the main agreement for valuation of the shares. The court found that these contradictions gave rise to a necessity for the parties to still agree the valuation date. No inherent contradiction arises with the clause in the present matter. Nor can it be said that the clause requires further agreement between the parties. The position in the present matter is that the court is not being asked to go outside the words used in the clause.

[10] *Reymond* also centred around ascertaining the purchase price for shares. In *Reymond* the contract provided for the purchase price to be determined by an "*independent auditor*", but neither identified the auditor by name nor by reference to being appointed by a named nominating body. Following authority that such a third party must be ascertainable in order for the agreement to be valid, the omission to identify such a person meant that the purchase price could only be ascertained if there was a further agreement in regard to the identity of that person. In arriving at its conclusion, the court did not find that *"independent auditor"* was vague and inchoate,

---

[5] This point is also dealt with in the judgment at [107] / p36

and in fact held that it was not.[6] Rather the court held that because there was no agreement on the identity of the independent auditor, and because it was that unidentified independent auditor who would set the price, there was no agreement on price. Lacking such essential term, the agreement was unenforceable. In essence the court held that the parties would have to conclude a further agreement as to the identity of the independent auditor, and that, at best, one was dealing with an agreement to agree. The clause in question does not suffer from the same deficiencies as identified in *Reymond.*

[11] Mr van Riet who represented the plaintiff was at pains to explain that the plaintiff was not relying on *Globe* and *Reymond* for purposes of arguing that the facts are similar. He referred to these authorities for the application of the principle that extrinsic evidence cannot be used to fabricate a contract where the language of the written instrument is inchoate.

[12] I accept that there are many cases wherein clauses in a contract have been held to be inchoate and void for vagueness based upon a pure interpretation of the contract.

[13] Mr van Riet in his heads of argument remarked:

> 'This finding was made in para [104] of the judgment. This, in respect to this amendment, implies that the court *a quo* held that, *ex facie* the contract, the clause in question is valid and enforceable as it would otherwise not be excipiable. However, the court, at pages 105 and 6, declined to inquire into the issue as to whether the clause was indeed void for vagueness.'

[14] It is correct that I declined to inquire into this issue *mero motu* not because I hold the view that a court may never do so – paragraph [108] clearly records that a court can deviate from the issues traversed in the pleadings under limited

---

[6] At 350C

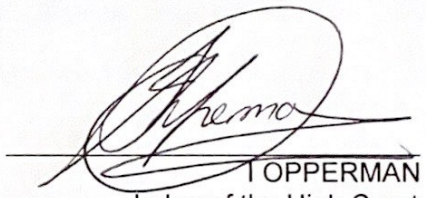
circumstances. This case is not one in which I should deviate. I enquired into the voidness issue in the context of the amendment. I found that it was choate and that the amendments sought to be introduced would render the particulars of claim excipiable for the reasons set out in paras [81] to [89]. Such reasons demonstrate why the condition is not inchoate or unenforceable.

Conclusion and Order

[15] I accordingly find that the plaintiff has failed to show reasonable prospects of success (on either construction of the test).

[16] I grant the following order:

The application for leave to appeal is refused with costs.



T OPPERMAN
Judge of the High Court
Gauteng Local Division, Johannesburg

Counsel for the plaintiff: Adv RS van Riet SC and Adv Newton
Instructed by: Kobus Boshoff Attorneys
Counsel for the first defendant: Adv T Ossin
Instructed by: Fairbridges Wertheim Becker
2nd to 4th Defendants: No appearances
Attorneys on record for 2nd to 4th Defendants: Mkhabela Huntley Adekeye Inc
Date of hearing: 11 February 2021
Date of Judgment: 16 February 2021