REPUBLIC OF SOUTH AFRICA

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

Case No: 2019/17400

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

SIGNATURE 11/02/2021 DATE

ENGEN PETROLEUM LIMITED (1989/3754/6) Applicant

And

MFOZA SERVICE STATION (PTY) LIMITED First Respondent

ADVOCATE VINCENT MALEKA SC Second Respondent

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 10h00 on 11 February 2021.

JUDGMENT i.r.o. APPLICATION FOR LEAVE TO APPEAL

INGRID OPPERMAN J

Introduction

[1] This is an application for leave to appeal against the whole of the judgment handed down by this court on 5 October 2020. This judgment should be read with the 5 October 2020 one ('*the judgment*'). All abbreviated descriptions used herein and not defined, are defined in the judgment. The parties are referred to as in the judgment.

[2] Until recently, Mfoza was not legally represented in these proceedings. The current attorneys came on record on 5 November 2020 and substituted the notice of application for leave to appeal dated 14 October 2020 with the amended notice of application for leave to appeal dated 19 November 2020. At the commencement of the application for leave to appeal, Mr Quixley representing Mfoza, clarified that no reliance was placed on the grounds formulated in the 14 October 2020 notice and that Mfoza was relying exclusively on the grounds set out in the 19 November 2020 notice.

The Test

[3] 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

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

> 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)

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

The Grounds of Appeal

[5] The substance of the grounds of appeal has been dealt with in paras [23] to [41] of the judgment. A new twist sought to be introduced during the application for leave to appeal was that the arbitrator was wrong when he proceeded from the premise, as did this court, that an award of damages is not competent in terms of section 12B(4)(a) in the circumstances of this case. If that is so, it was for Mfoza to have taken the finding of the arbitrator on review as the arbitrator has effectively found that Mfoza's claim, if any, is limited to monetary compensation only and may not include damages. However, the new point ie the one on which both I and the arbitrator apparently erred and as formulated in the 19 November 2020 notice of application for leave to appeal, turns on cancellation of the agreement. It was common cause before the arbitrator that the agreement had been cancelled – see

para [30] of the judgment – the only issue being when it was cancelled ie whether this occurred during August of 2016 or February of 2017. The cancellation of the agreement has now been endorsed as being lawful by the court order of Keightley J on 19 December 2019.

[6] This court found at para [41] of the judgment that:

> 'Although the arbitrator has expressed a view that monetary compensation is, in principle, a competent corrective remedial remedy (whatever content is to be given to the concept in the fullness of time), Mfoza still needs to plead a case falling within the limits of the statutory framework as interpreted by the highest Courts. Engen will have ample opportunity to deal with such new case as may be made out by Mfoza and both parties should have their cases fully and fairly determined.'

[7] Nothing argued has persuaded me that another court might (old test) or would (new test), find differently. In my view the case to be argued and upon which the arbitrator is to adjudicate, should be pleaded out so as to afford all an opportunity to deal with it fully and fairly.

Order

[8] I accordingly make the following order:

The application for leave to appeal is refused with costs.

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

Counsel for the applicant: Adv M Desai
Instructed by: Govender Patel Dladla Incorporated
For the first respondent: Adv Quixley
Instructed by: Seton Smith &Associates
For the second respondent: No appearance
Date of hearing: 29 January 2021
Date of Judgment: 11 February 2021