



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case No: 6387/2019

- | |
|---|
| (1) REPORTABLE: NO
(2) OF INTEREST TO OTHERS JUDGES: NO
(3) REVISED |
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In the matter between:

AGRICULTURAL RESEARCH COUNCIL

APPLICANT

(In the application for leave to appeal)

and

NAP DESIGNS (PTY) LTD

FIRST RESPONDENT

(In the application for leave to appeal)

HILTON MACDONALD N.O.

SECOND RESPONDENT

ASSOCIATION OF ARBITRATORS (SA) NPC

THIRD RESPONDENT

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

BASSON J

Introduction

[1] This is an application for leave to appeal against this court's judgment dated 26 April 2021. The applicant's grounds for leave to appeal are set out in detail in its notice of application for leave to appeal and need not be restated here.

[2] In this application the applicant is submitting that this court erred in not reviewing and setting aside the second respondent's arbitration award on the grounds relied upon by the applicant in its founding affidavit. The arguments advanced during the hearing are largely repeated in argument in support of this application. I do not intend repeating the arguments advanced in support of this application for leave to appeal. I have considered all of the grounds as well as the submissions in support thereof. Suffice to state that the argument is repeated that the alternative claim was not pleaded and no evidence was led on behalf of the first respondent in respect thereof. It was also again submitted that the applicant was not granted a hearing on whether an order should be granted based on the quantity surveyor's draft final account.

Test for leave to appeal

[3] The merits of the application for leave to appeal must be considered against the background of the test for leave to appeal. It is now trite that section 17(1)(a)(i) of the Superior Courts Act¹ have raised the threshold for granting leave to appeal. Bertelsmann, J in *The Mont Chevaux Trust (IT2012/28) v Tina Goosen & 18 Others*² explains:

"[6] 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

¹ Act 10 of 2013.

² 2014 JDR 2325 (LCC).

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."

[4] The Supreme Court of Appeal in *S v Smith*³ also had occasion to consider what constituted reasonable prospects of success in terms of section 17(1)(a)(i):

"[7] 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."

[5] There must therefore exist more than just a mere possibility that another court will, not might, find differently on both facts and law.

Merits

[6] The applicant applied to set aside the arbitrator's award on the grounds as set out in section 33 of the Arbitration Act. At the commencement of the proceedings, the applicant abandoned the grounds of review requiring proof of *mala fides* on the part of the arbitrator. The court, even though the applicant now argues otherwise, did consider the other grounds of review (except for the ground provided for in section 33(a) of the Arbitration Act since the applicant has abandoned reliance on this ground).

[7] I have once again considered the submissions advanced on behalf of the applicant during the initial hearing of the application together with the submissions as set out in the heads of argument in support of the application for leave to appeal. I am

³ 2012 (1) SACR 567 (SCA).

not persuaded that another court will come to a different conclusion in regard to the fact that findings made by this court more in particular (but not limited to) the finding that the entitlement to payment for works performed was properly before the arbitrator and the fact that the arbitrator had wide powers to decide the issues placed before it, including the issue about the respondent's entitlement to payment in terms of the contract. I am also not persuaded that another court will come to a different conclusion regarding the finding that the applicant had sufficient opportunity to address the findings made by the quantity surveyor in its final account. I have lastly also taken into account the fact that a court will only set aside an arbitrator's award on very limited grounds and as set out in section 33 of the Arbitration Act.

[8] The application for leave to appeal therefore has no prospects of success. I should also point out that I have also considered that there are no conflicting judgments under consideration as contemplated by section 17(1)(a)(ii) of the Superior Courts Act and the fact that the applicant does not rely on "*some other compelling reason*" why the appeal should be heard.

Order

[9] The following order is made:

The application for leave to appeal is dismissed with costs.

AC BASSON
JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA
(electronically generated therefore unsigned)

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 28 June 2021.

APPEARANCES

For the Applicant
in the application for leave to appeal:
Instructed by:

KENNEDY TSATSWANE SC
GILDENHUYS MALATJI INC

For the Respondent
in the application for leave to appeal:
Instructed by:

ADV LF LAUGHLAND
MDA CONSULTANTS

Date of judgment:

28 June 2021