IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG, PRETORIA

CASE NUMBER: 57882/2019

In the matter between:

NKOSANA KENNETH MAKATE Applicant

And

SHAMEEL JOOSUB N.O. First Respondent

VODACOM (PTY) LTD Second Respondent

LEAVE TO APPEAL JUDGMENT

HUGHES J

[1] On 7 February 2022 the judgment in this matter was electronically handed down and uploaded on Caselines. This is an application for leave to appeal, by the second respondent, against orders 2-5 and 7 made in my judgment.

[2] I deem it necessary to make mention that this leave to appeal application was heard on 1 April 2022. This was a period of some 10 months after my elevation to the Supreme Court Appeal. After hearing the application for leave to appeal, on 5 April 2022, I invited all the counsel concerned in this matter to submit short written submissions on the competence of my presiding over the application for leave to

appeal as I was no longer a judge of the Gauteng High Court, Pretoria. I have not been graced with any submissions from the parties having been given the opportunity to do so. That being the case, in the interest of justice and finality for the parties, I pen my reasons and order in this application for the leave to appeal.

[3] It is convenient to set out the relevant rule and legislation regarding who is authorised to preside over an application for leave to appeal:
Rule 49(1)(*e*) of the Uniform Rules of Court states:
'Such application shall be heard by the judge who presided at the trial or, if he is not available, by another judge of the division of which the said judge, when he so presided, was a member.'

In addition section 2(*a*) of the Superior Courts Act of 2013 states the following:
'Leave to appeal may be granted by the judge or judges against whose decision an appeal is to be made or, if not readily available, by any other judge or judges of the same court or Division.'

[4] In light of the above, I was the judge who presided over the review application and I was available to preside over the application for leave to appeal, I am therefore competent to adjudicate this application.

[5] I now turn to the business at hand. It is trite that an application for leave to appeal must be sought in terms of section 17(1) of the Superior Courts Act 10 of 2013 (the Superior Courts Act). For easy reference I set out section 17 (1) in its entirety:
'Section 17(1)

(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-

(a) (i) the appeal would have a reasonable prospect of success; or
(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
(b) the decision sought on appeal does not fall within the ambit of section 16 (2) (a); and
(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.'

In this application Vodacom seeks leave to appeal in terms of section 17 (*a*) (i) and (ii).

[6] Previously, the test applied in an application for leave to appeal was whether there were reasonable prospects that another court may come to a different conclusion. To this end I refer to *Commissioner of Inland Revenue v Tuck*.[1] It was then enunciated that it was now in fact stringent as this was evident from the use of the word '*only'* in the relevant section 17. In *The Mont Chevaux Trust v Tina Goosen & 18 Others* Bertelsmann J discussed the stringent test and essentially laid out the basis for the said elevation of the bar. He stated 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.'[2]

[7] More recently, in *Ramakatsa and others v African National Congress and Another*, Dlodlo JA alluded to the fact that he was aware of the debate at the high court level that the threshold has been raised, however, he promoted the view that section 17 (1)(*a*)(i) and (ii) merely reiterates, that if reasonable prospects of success are established, leave should be granted, likewise if, there are compelling reasons, leave should be granted. The learned Justice explained as follows:

'[10] Turning the focus to the relevant provisions of the Superior Courts Act (the SC Act), leave to appeal may only be granted where the judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there are compelling reasons which exist why the appeal should be heard such as the interests of justice.[6] This Court in *Caratco* [7]*,* concerning the provisions of s 17(1)*(a)*(ii) of the SC Act pointed out that if the court is unpersuaded that there are prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal. Compelling reason would of course include an important question of law or a discreet issue of public importance that will have an effect on future disputes. However, this Court correctly added that 'but here too the merits remain vitally important and are often decisive'. [8] I am mindful of the decisions at high court level debating

[1] *Commissioner of Inland Revenue v Tuck* 1989 (4) SA 888 (T) at 890B.
[2] *The Mont Chevaux Trust v Tina Goosen & 18 Others* 2014 JDR 2325 (LCC) at para 6.

whether the use of the word 'would' as opposed to 'could' possibly means that the threshold for granting the appeal has been raised. If a reasonable prospect of success is established, leave to appeal should be granted. Similarly, if there are some other compelling reasons why the appeal should be heard, leave to appeal should be granted. The test of reasonable prospects of success postulates 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 other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist. [9]'[3]

[8] The grounds advanced by Vodacom are fashioned such that there are reasonable prospects to succeed and that there are compelling reasons and in the interest of justice; 'in that the judgment departs from successive precedent of the Supreme Court of Appeal on the standard of review with respect to an *"expert valuer"*, thus creating uncertainty in the law' for leave to be granted.

[9] Vodacom submits that the only test to be applied in review proceedings where that involves the determination of an expert valuer, is that of the *Bekker test*.[4] Vodacom contends that I erred in my judgment as I, in addition to the *Bekker* test, employed administrative review rules during my evaluation, thus incorrectly applying the *Bekker test*. An evaluation of the valuer's determination that also includes the employment of any administrative review rules, is not permitted, so Vodacom's argument goes, and on this ground alone leave to appeal ought to be granted.

[10] In this application I do not propose to traverse all the grounds for leave to appeal advanced by Vodacom. In my view, the application of the *Bekker test* is a seminal ground which in effect embraces all the grounds set out by Vodacom. To determine whether the test was applied correctly involves all the other grounds collectively.

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[3] *Ramakatsa and others v African National Congress and Another* (724/2019) [2021] ZASCA 31 (31 March 2021); ft (6) *Nova Property Holdings Ltd v Cobbert &Others* [2016] ZASCA 63 :2016 (4) SA 317 (SCA) para 8; ft (7) *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* [2020] ZASCA 17; 2020 (5) SA 35 (SCA); ft (8) *Ibid*, para 2; ft (9) *Smith v S* [2011] ZASCA 15;2012 (1) SACR 567 (SCA); *MEC Health, Eastern Cape v Mkhitha* [2016] ZASCA 176 para 17.

[4] *Bekker v RSA Factors* 1983 (4) SA 568 (T) state *Bekker test*: an expert valuer's determination can be reviewed if he or she did not exercise the judgment of a reasonable man and that such was exercised unreasonably, irregularly or wrongly so as to lead to a patently inequitable result.

[11] Vodacom fears that there will be confusion as the SCA, according to Vodacom, made a pronouncement on the very same issue just before my judgment was delivered. Incidentally I was part of that *corum* of the matter *Tahilran v Trustees of the Lukamber Trust*. Vodacom made reference to paragraphs 27 and 15 thereof. Notably paragraph 27 states:

'I conclude, therefore, that subject to the above-mentioned exceptions, and in the absence of a contractual provision to the contrary or agreement or waiver by the parties, whenever parties agree to refer a matter to a valuer, then so long as the valuer arrives at his or her decision honestly and in good faith, the decision is final and binding on them and they are bound by it once communicated to them. The valuer is then *functus officio* insofar as the valuation and matters pertaining thereto are concerned. That being so, the valuer is then not permitted to unilaterally withdraw or cancel the valuation in order to alter or amend it. Only a court has the power to interfere with the valuer's decision in review proceedings. The judicial ambit of the court's power to interfere is severely circumscribed, and limited to the narrow grounds as enunciated in this court's jurisprudence to which I have referred.[5]

I must point out that *Tahilram's* case dealt with a situation where a valuer self-corrected the determination and it was emphasised that by then the valuer was *funtus officio* and that only a court was permitted to do so by review proceedings, though severely circumscribed.

[12] Vodacom contends that I failed to determine 'whether the R47m awarded to Mr Makate was patently inequitable' and as such I failed to apply the *Bekker* test. Vodacom goes on to argue, '[b]ut it was fatal nonetheless because the Bekker Test only permits the court to interfere with the CEO's determination if its outcome is patently inequitable'.

[13] On the other hand, the cornerstone of Mr Makate's argument, on this aspect, was that 'the CEO's determination did not satisfy the test of reasonableness and led to a patently inequitable result.' Mr Makate contended that the parties, as this court affirmed in the judgment, agreed on the contractual terms and duties that the CEO had to employ in reaching the determination. As such, Mr Makate argued, that the classification of the role of the CEO was not the be all and end all as the agreement

[5] *Tahilran v Trustees of the Lukamber Trust* [2021] ZASCA 173 (9 December 2021) at para 27.

between the parties had to also be taken into account and 'by virtue of contractual terms, [the CEO would] have duties beyond the requirements to act honestly and in good faith'.[6] This is especially so as the general requirements of valid arbitral awards is equally applicable to an expert determination.[7]

[14] It is not correct that I did not consider whether Mr Makate's award was patently inequitable, as contended by Vodacom. This consideration is clearly evident in my judgment from paragraph 69 onwards. The equitability of the determination and the consequence thereof was dealt with in great detail. However, in light of the submissions from both parties, I am persuaded that a compelling reason exists to grant leave to appeal. This reason being, whether the manner in which my judgment deals with the establishment of a patently inequitable result goes against the *Bekker* test so as to lead to uncertainty and confusion in the law.

[15] The expert valuer, being the first respondent, sought clarity in respect of item 7 of the costs order. He was of the view that it was not clear that he was not liable for costs. It was contended that from the outset he sought to abide the court's decision and was not a litigant. It is clear from my judgment that the first respondent, Shameel Joosub N.O., was declared an expert valuer.[8] As such, it stands to reason and follows logically, the as an expert valuer he could not be liable for costs as a litigant would. It is therefore plain to see that it is unnecessary to 'identify the person or persons against whom the costs order of 7 February 2022 was made', as logically it is Vodacom.

[16] Consequently, the following order is made:

(a) Leave to appeal is granted to the Supreme Court of Appeal.
(b) The costs of the application for leave to appeal, including the costs of two counsel, are to be costs in the appeal.

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[6] *De Lange v ABSA Makelaars (Edms) Bpk* [2010] 3 All SA 403 (SCA) at para 19.
[7] *S A Breweries Ltd. v Shoprite Holdings Ltd.* 2008 (1) SA 203 (SCA) at para 22.
[8] Judgment para 53.

Judge W Hughes

Virtually Heard: 1 April 2022
Electronically Delivered: 11 April 2022

Appearances:
For the Applicant: Adv. C. Puckrin SC
Adv. R. Michau SC
Adv. G. Lubbe
Adv. S. Scott

For the First Respondent: Adv. M. Kuper SC
Adv. G. Badela

For the Second Respondent: Adv. W. Trengove SC
Adv. R.A. Solomon SC
Adv. M. Gumbi
Adv. A. Raw