



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT: CAPE TOWN
(EASTERN CIRCUIT LOCAL DIVISION: GEORGE)**

**CASE NO: 16624/11
(K) 31/11**

In the matter between:

KEVIN FREDERICK DAVIDSON

Applicant

And

RICHARD ANDREWS SOHN

Respondent

**APPLICATION FOR LEAVE TO APPEAL:
JUDGMENT DELIVERED ON 6 FEBRUARY 2012**

YEKISO, J

[1] For the sake of convenience, the parties in this application for leave to appeal will be referred to as in the judgment proposed to appeal against. Hence, the applicant in the application for leave to appeal will be referred to as the respondent, whilst the respondent in the application for leave to appeal will be referred to as the applicant.

[2] On 18 November 2011, whilst doing duty in the Eastern Circuit Local Division: George I granted judgment in favour of the applicant in terms of which the respondent was ordered to pay the applicant an amount of R1,879,227-00, together with interest thereon at the rate of 15,5% per annum reckoned from 3 August 2010 plus costs, on a party and party scale. The applicant, in whose favour I found in the judgment, instituted the proceeding on motion.

[3] On 25 November 2011 the respondent gave its notice of intention to apply for leave to appeal against the whole of my judgment handed down on 18 November 2011. The application for leave to appeal was argued before me on Wednesday, 1 February 2012. After hearing argument I reserved judgment and indicated to the parties that my judgment in the matter would be delivered within seven ordinary days and, in any event, by no later than the week commencing 6 February 2012. In the paragraphs which follow is my judgment in the application for leave to appeal in which is included reasons for the order I give.

[4] The crux of the dispute between the parties in this matter is the basis on which the amount of R1,879,227-00 was paid by the applicant to the respondent, the applicant contending that the amount so paid was paid in anticipation of a conclusion of a contract whilst the respondent, on the other hand, contends that the amount so paid was paid in consideration of an option which would be kept open for the benefit of the applicant in a proposed development scheme in respect of which the parties had anticipated to reach an agreement and that the amount so paid would be forfeited to the respondent in the event the parties failing to reach an agreement.

[5] The evaluation of the evidence presented at the hearing of the matter and the determinations made arising therefrom was made within limited resources available and within the constraints of circuit duties. As regards the matter itself, there clearly is a dispute between the parties as regards the nature and form of the agreement between the parties prior to reaching the anticipated agreement. In the evaluation of the versions of the evidence of the parties I determined that the respondent's version

implausible that it fell to be rejected and upheld the applicant's version. However, in retrospect, I am of the view that the correct approach would have been to refer the matter for trial in order that the disputes be resolved by way of oral evidence or, at worst, dismissal of the applicant's claim on the basis of there being a material dispute of facts and that the proceedings ought not to have been instituted by way of motion.

[6] Consequently, I am of the view that another court, faced with the same facts as were presented to me at the hearing of the matter, might well reach a different conclusion to the one I have. Consequently, this is a matter in which, in my view, leave to appeal ought to be granted on all those grounds set out in the respondent's notice of application for leave to appeal.

[7] In the result I make the following order:

[7.1.] Leave to appeal is hereby granted to the Full Court of this division against the whole of my judgment handed down in the Eastern Circuit Local Division on 18 November 2011.

[7.2.] The costs of the application for leave to appeal shall be costs in the proposed appeal.

A handwritten signature in black ink, consisting of a large, stylized 'S' or 'Y' shape with a horizontal line through it, enclosed within an oval. The signature is written over a horizontal line.

N J Yekiso, J