



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

(1) REPORTABLE: YES/NO (2) OF INTEREST OF OTHER JUDGES: YES/NO (3) REVISED <u>23/02/2022</u>	_____ SIGNATURE
_____ DATE	

Case no: 35714/2020

In the matter between:

ABRINA 3765 (PTY) LTD T/A BMW SANDTON

Applicant

and

ZASCOTIME (PTY) LTD

Respondent

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

FRIEDMAN AJ:

- 1 On 2 December 2021, I delivered my judgment and order in this matter (“the merits judgment”). I granted the relief sought by the applicant (“BMW Sandton”) in its notice of motion. The respondent (“Zascotime”) now seeks leave to appeal to a Full Bench of this Court, alternatively the Supreme Court of Appeal (“the SCA”), against my order. I do not want to take up unnecessary space setting out the details of, and background to, this matter. It all appears from the merits judgment.
- 2 It is trite that an appeal lies against the order made at first instance, and not against the reasoning in the judgment explaining the order. The order which I made on the merits was to grant the relief sought in the notice of motion with costs. So, section 17 of the Superior Courts Act 10 of 2013 requires me to ask two questions. First, whether Zascotime has reasonable prospects of success on appeal – ie, reasonable prospects of persuading an appeal court that the application ought to have been dismissed. Secondly, even if it does not, whether there is some other compelling reason to grant leave to appeal. In this case, it has not been argued that there is some compelling reason, independent of the prospects of success, justifying the granting of leave to appeal. The focus, therefore, is squarely on the prospects of success.

- 3 I have given consideration to the grounds set out in the application for leave to appeal. I am not convinced that the bulk of them have good prospects of success. *Mr Hollander* who appeared for BMW Sandton, in his usual persuasive way, argued forcefully that leave should be refused. *Mr Hollander* referred to the fact that Zascotime relies, in its application for leave to appeal, on certain clauses of the agreement between the parties to suggest that BMW Sandton was adequately protected in terms of the contract. He argued that Zascotime's interpretation of these clauses does not assist it, because the question of material non-disclosure engages the prior question of whether the agreement is valid in the first place. In other words, if knowledge of the City's stance that the sign was illegal would have dissuaded BMW Sandton from concluding the agreement (independent of any perceived protections in the agreement), the proper meaning of clauses within the agreement is irrelevant. I agree with him.
- 4 However, the question whether a material non-disclosure vitiates a contract is not simple, especially when decided in motion court and without the benefit of oral evidence. Zascotime places heavy reliance on the so-called moratorium on enforcement of the by-laws as a basis for its assumption that it did not have to disclose the City's attitude to BMW Sandton. I agree with *Mr Hollander* that the question whether this stance was reasonable is an objective question. Also, as appears from the merits judgment, I do not believe that it was reasonable for Zascotime to rely on the moratorium. However, I take the view that there is a reasonable prospect that an appeal court might take a different view; on this, and on my overall conclusion in this case. In the circumstances, I take the view that leave to appeal should be granted.

5 This is not a case which should detain the SCA and *Mr Stevens*, who appeared for Zascotime, agreed when I asked him his view. I accordingly make the following order:

1. Leave to appeal to a Full Bench of this Division against the judgment and order made on 2 December 2021 in case number 35714/2020 is granted.

2. The costs of this application for leave to appeal are to be costs in the appeal.

A handwritten signature in black ink, consisting of a large, stylized 'A' followed by a series of loops and a long, sweeping horizontal stroke extending to the right.

**ADRIAN FRIEDMAN
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Delivered: This judgment was prepared and authored by the Judge whose name is reflected above 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 23 February 2022.

APPEARANCES:

Attorney for the applicant

(respondent in leave to appeal): Hirschowitz Flionis Attorneys

Counsel for the applicant: L Hollander

Attorney for the respondent

(applicant in leave to appeal): Jurgens Bekker Attorneys

Counsel for the respondent: B Stevens

Date of hearing: 22 February 2022

Date of judgment: 23 February 2022