

REPUBLIC OF SOUTH AFRICA



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

CASE NUMBER: 2021/15418

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: NO

2.OF INTEREST TO OTHER JUDGES: NO

3.REVISED: NO


Judge Dippenaar

In the matter between:

MOMBEEG (PTY) LIMITED

APPLICANT

AND

ESKOM ROTTEK INDUSTRIES SOC LIMITED

RESPONDENT

JUDGMENT: LEAVE TO APPEAL

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 27th of March 2023.

DIPPENAAR J:

[1] For ease of reference, the parties will be referred to as in the main application proceedings. The applicant applies for leave to appeal against the whole of the judgment and order granted by me on 15 December 2022. In terms of the order, I dismissed the applicants' review application for together with a punitive costs order. The respondent seeks the dismissal of the application with costs.

[2] The application for leave to appeal was launched on 24 January 2023. As the correct procedures were not followed, the application only came to my notice during March 2023 whereafter a date for hearing was allocated.

[3] I have considered the papers filed of record and the grounds set out in the application for leave to appeal as well as the parties' extensive arguments for and against the granting of leave to appeal. I have further considered the submissions made and the authorities referred to by the respective parties.

[4] In its application for leave to appeal, the applicant raised various grounds for leave to appeal in support of the contention that there are reasonable prospects of success that another court would grant a different order as envisaged by s 17(1)(a)(i) of the Superior Courts Act¹. It is further contended that it is in the interests of justice to grant leave to appeal as envisaged in s 17(1)(a)(ii) of the Act on the ground that this court did not apply the principles in *Pangbourne Properties Ltd v Pulse Moving CC and Another*² and *Anglo*

¹ 10 of 2013

² 2013 (3) SA 140 (GSJ)

*Operations Ltd v Sandhurst Estates (Pty) Ltd*³, that there was no need for an application for condonation in the absence of prejudice.

[5] The grounds for leave to appeal advanced is that the court erred in ruling that an application for condonation was required, absent allegations of prejudice or the utilisation of r 30 to set aside irregular proceedings. The applicant contends that in those circumstances, no condonation application was required. (“the condonation issue”).

[6] It was further contended that insofar as this court held that the applicant’s “new case *“had no prospects of success, the applicant’s case, albeit contrary to its previous case, was not pleaded as an alternative and the applicant abandoned its first case, resulting in there not being any mutually destructive versions on the pleadings”*. It was contended that the applicant’s new case was premised upon the correct asserted conclusions from the facts emanating after delivery of the record. (“the new case issue”).

[7] It was argued that whether or not a contract was awarded was correctly found to be a factual dispute and that, as requested at the outset of the hearing, the matter ought to have been referred to oral evidence or trial, rather than being dismissed (“the referral issue”).

[8] It was further contended that this court erred in distinguishing *Invectiva Power Minerals (Pty) Ltd and Another v Eskom Holdings SOC Ltd and Another*⁴. Lastly, it was further contended that this court erred in awarding a punitive costs order against the applicant in circumstances where the respondent had not even filed any answering papers to the applicant’s latest subsequent affidavit pursuant to the notice in terms of r 53(4) (“the punitive costs issue”).

³ 2007 (2) SA 363 (SCA) para [32]

⁴ (16202/19) [2020] ZAGPPHC 180 (25 May 2020)

[9] Leave to appeal may only be granted where a court is of the opinion that the appeal would have a reasonable prospect of success, which prospects are not too remote⁵. An applicant for leave to appeal faces a higher threshold⁶ than under the repealed Supreme Court Act.⁷ A sound rational basis for the conclusion that there are prospects of success must be shown to exist⁸.

[10] The referral issue is dispositive of the application. On considering the record of the hearing of the main application, it became apparent that I made an error in paragraph 2 of the judgment in stating that neither party sought the referral of the application to oral evidence. The applicant had in fact, after I raised certain issues with the parties and the matter stood down so that the parties could obtain instructions, orally sought a referral to oral evidence from the bar.

[11] Such referral was opposed by the respondent, who referred to it as a belated and opportunistic request, made only after the court raised certain issues with the parties. The respondent pointed out that it had raised the existence of factual disputes in its heads of argument delivered on 25 February 2022 already and the applicant had not sought to seek a referral until the matter stood down for the parties to take instructions on the hearing date. To avoid a piecemeal determination of the matter, the application was fully argued by the parties and judgment was reserved.

[12] In applying the relevant principles to the grounds advanced by the applicant, I conclude that the appeal would have a reasonable prospect of success as contemplated in s17(1)(a)(i) of the Act, given that my judgment did not deal with the arguments advanced by the parties on the referral issue and contained a patent error.

⁵ Ramakatsa and Others v African National Congress and Another [2021] JOL 49993 (SCA) para [10]

⁶ S v Notshokovu 2016 JDR 1647 (SCA) para [2]

⁷ 59 of 1959

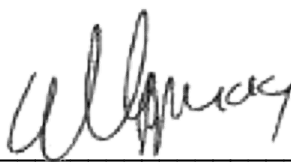
⁸ Smith v S [2011] ZASCA 15; MEC for Health, Eastern Cape v Mkhitha [2016] ZASCA 176, para [17]

[13] Given this conclusion, it is not necessary to deal with the remaining grounds raised, which are best left for the appeal court to determine.

[14] I grant the following order:

[1] Leave to appeal is granted to the Full Court.

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



**EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG**

APPEARANCES

DATE OF HEARING	: 23 March 2023
DATE OF JUDGMENT	: 27 March 2023
APPLICANT'S COUNSEL	: Adv. H.P. Van Nieuwenhuizen Adv NS Nxumalo
APPLICANT'S ATTORNEYS	: Tshabalala Attorneys, Notaries & Conveyancers Mr TR Tshabalala
RESPONDENT'S COUNSEL	: Adv. PL Uys
RESPONDENT'S ATTORNEYS	: Gildenhuys Malatji Inc. Mr R Venter