

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATL DIVISION, PIETERMARITZBURG**

CASE NUMBER: 5302/2021P

In the matter between:

ARCHIWAYS SKYE (PTY) LTD

APPLICANT

And

**THE SOUTH AFRICAN NATIONAL ROADS AGENCY
SOC LIMITED**

RESPONDENT

CAMRY TRADING ENTERPRISES (PTY) LTD

THIRD PARTY

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

BEZUIDENHOUT J:

[1] Applicant has brought an application for leave to appeal against the whole of the judgment in the above matter. Heads of argument were filed by Respondent and the Third Part but a letter was received from Applicant that it would not be filing heads of argument as its grounds of appeal fully set out the reasons for the application. On the day of the hearing it presented notes to Respondent's heads of argument.

[2] At the commencement of the hearing Mr. Harpur SC on behalf of Applicant informed the Court that the decision of Premier Free State and Others v Firechem Free State (Pty) Ltd 2000 (4) SA 413 (SCA) has come to his attention and applying the judgment therein it is clear that the wrong contract was relied upon, it cannot be ignored and only the tender document should be considered. It was therefore submitted that the

wrong contract was at all times referred to by Respondent and accordingly also in the judgment and on that basis alone leave to appeal should be granted.

[3] The test in deciding to grant leave to appeal or not is set out in section 17(1) of the Superior Courts Act can be summarised as that there are reasonable prospects of success or some compelling reason for it to be heard or conflicting judgments. In this matter the test is whether there would be reasonable prospects on appeal. *Caracto (Pty) Ltd v Independent Advisory (Pty) 2020 (5) SA 35 (SCA)*, *Smith v S 2012 (1) SACR 567 (SCA)*.

[4] The prospects must not be remote but a reasonable chance of succeeding: Can a court of appeal reasonably arrive at a different conclusion? *Ramakatsa & Others v African National Congress & Another (2021) ZSCA 31*.

[5] In the *Firechem* judgment no draft contract accompanied the tender documents. It was set out therein that a contract had to be drawn up between the parties. A contract will then at a later stage be signed after the tender had been awarded. This was due to the fact that *Firechem* had previously negotiated with the province to supply it with cleaning materials but it was then decided that there had to be a tender before any contract could be given to *Firechem*. There were accordingly no precise terms which were fixed in the letter of acceptance. It was held therein that the requirement was that the offers made must be comparable with each other. The import of the tender must not be tucked away. In this case it was a fixed quantity contract and if it was known other tenders may have been submitted.

[6] In my view the portions of the tender document which was deleted in the lease agreement which was signed by Applicant as appears from pages 55 to 92 of annexure "DM2" do not affect the material portions of the said contract. The subject matter of the tender did not change. Clause 3 which was deleted refers to the occupation date and taking occupation of the premises. In my view therefore and for the reasons which follow I am of the view that the decision in *Firechem* does not assist Applicant.

[7] The main portion which Applicant criticises is the deletion of paragraph 3 of the lease agreement. This relates to when rental is payable if occupation could not be given. As set out in the judgment even if this was not deleted it would not assist Applicant as vacant possession of the property was given to Applicant for the reasons as set out in the judgment especially considering the judgment in the Tudor Hotels case.

[8] It was submitted by Applicant that I relied on 24 March 2020 as the commencement date of the lease. What was found as set out in paragraph 33 of the judgment was that the petroleum license was granted on 24 March 2020 and rental payable from that date if Respondents version is accepted.

[9] The further submissions set out in the application for leave to appeal and grounds to appeal has been dealt with in detail in my judgment and I am of the view that it does not require any further expansion.

[10] Having considered the submissions made by all the parties I am not convinced that there are reasonable prospects of another court coming to a different conclusion in this matter.

Order:

The application for leave to appeal is refused with costs such costs, to include the costs of senior counsel where applicable.

P C BEZUIDENHOUT J.

Date reserved: 2 December 2022

Date delivered: 26 January 2023

For applicant: Mr Harpur SC

Instructed by: De Villiers, Evans & Petit Attorneys
REF: Mr C Petit/oj/01R029015
Tel: 031 207 1515
Email: cpetit@dep.co.za
c/o Stowel & Co
REF: P Firmin/ Zelda

For respondent: Mr K Gounden

Instructed by: VENNS ATTORNEYS

REF: M H Motala/TH/13226738
Tel: 033 355 3100/3131
Email: mohammed@venns.co.za / trene@venns.co.za

For third party:

Mr Dickson SC
Instructed by: Mason Incorporated
REF: 015/C005/0000001
Tel: 033 345 4230 / 0726639397
Email: rob@masoninc.co.za