



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)
REPUBLIC OF SOUTH AFRICA

CASE NO: 4627/21

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

DATE: 17 MAY 2022

SIGNATURE: *N. JANSE VAN NIEUWENHUIZEN*

In the matter between:

DIS-CHEM PHARMACIES LIMITED

Applicant

and

DAINFERN SQUARE (PTY) LTD

First Respondent

MPILO WINSTON DLAMINI

Second Respondent

NOBLE SPECTATUS FUNDS (PTY) LTD

Third Respondent

IN RE:

DAINFERN SQUARE (PTY) LTD

Applicant

and

MPILO WINSTON DLAMINI

First Respondent

DIS-CHEM PHARMACIES LIMITED

Second Respondent

NOBLE SPECTATUS FUNDS (PTY) LTD

Third Respondent

JUDGMENT
(LEAVE TO APPEAL APPLICATION)

JANSE VAN NIEUWENHUIZEN J:

1. This is an application for leave to against the judgment handed down by this court on 8 November 2021.

GROUND FOR LEAVE TO APPEAL

First ground

2. The applicant contends that the court erred in granting a declaratory order, whereas the first respondent sought an order for the *reviewing and setting aside the ruling of the first respondent.*
3. In relying on this ground, the applicant has lost sight of the second prayer in the notice of motion, to wit:

"2. Declaring that the dispute between the second respondent and the applicant does not fall within the provisions of clause 33 of the lease agreement between the parties, annexure "SOC1" to annexure "DBG1" to the founding affidavit and was accordingly incorrectly referred to arbitration by the second respondent:" The order granted pause to mention that the first defendant has been placed under provisional liquidation on 8 February

2022 and the summary judgment application only proceeded in respect of the claim against the remainder of the defendants.

4. The order granted by this court was accordingly in terms of prayer 2 of the notice of motion and as a result, this ground of appeal has no merit.

Second ground

5. The applicant submits that, because the parties have referred the issue of jurisdiction to the arbitrator, the parties consented that the arbitrator may make such a determination and thus the first respondent could not thereafter challenge the decision by the arbitrator on the basis that it was “wrong”.
6. The applicant, for the first time in its application for leave to appeal, referred to the authority in *Amalgamated Clothing and Textile Workers Union of South Africa v Veldspun (Pty) Ltd* 1994(1) SA 162 A at 169 E in support of its contention *supra*.
7. The point is somewhat different from the issue that crystallised during the hearing of the matter, to wit whether it is possible to issue a declarator in respect of a jurisdiction point whilst the arbitration proceedings are still alive. This court considered the Supreme Court of Appeal authorities relied upon by the applicant and found that, in line with the reasoning of Van Zyl AJ in the *Tzaneng* matter, it is possible.
8. Having studied the *Amalgamated* judgment in respect of the agreement point, I am of the view that there is a reasonable possibility that another court would come to a different conclusion in respect of the declarator order issued by this court.

9. In the result, leave to appeal should be granted and it is not necessary to consider the remaining grounds for leave to appeal.
10. The parties agreed that leave to appeal should be granted to the Supreme Court of Appeal. I agree.

ORDER

The following order is made:

1. Leave to appeal to the Supreme Court of Appeal is granted.
2. Costs to be costs in the appeal.



N. JANSE VAN NIEUWENHUIZEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DATE APPLICATION FOR LEAVE TO APPEAL HEARD/HEARD PER COVID19 DIRECTIVES:

24 March 2022

DATE DELIVERED PER COVID19 DIRECTIVES:

17 May 2022

APPEARANCES

Counsel for the applicant

Advocate J Daniels SC

Instructed by:

Saltzman Attorneys

Counsel for the first respondents:

Advocate S Mathiba

Instructed by:

GVS Law