

**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Case number: **2870/2013**

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/ NO

In the matter between:

NKETOANE LOCAL MUNICIPALITY

Applicant

and

RUDNAT PROJECTS CC

1st RESPONDENT

PHUMELELE LOCAL MUNICIPALITY

2nd RESPONDENT

SETSOTO LOCAL MUNICIPALITY

3rd RESPONDENT

DIHLABENG LOCAL MUNICIPALITY

4th RESPONDENT

CORAM: NAIDOO, J

HEARD ON: 25 FEBRUARY 2022 (Virtually)

DELIVERED ON: 9 MAY 2022

JUDGMENT – APPLICATION FOR LEAVE TO APPEAL

[1] This is an application for Leave to Appeal against the whole of the judgment granted against the applicant in this matter, which was delivered on 22 October 2021. The hearing of the application was held virtually on 25 February 2022. Adv R Shepstone appeared for the applicant and Adv P S Grobler SC for the first respondent. For convenience, I will refer to the applicant as Nketoane and the first respondent as Rudnat.

[2] The judgment was assailed on a number of grounds, which in essence are that the court erred in:

2.1 finding that Nketoane conducted itself in a manner that points to the conclusion of a (tacit) agreement, for the implementation of the Implementation Readiness Report (IRR), whereas Rudnat did not plead facts or conduct to found a tacit agreement, nor did it lead evidence to this effect. In addition the court erred in not applying the test enunciated in the matter of Buffalo City Municipality v Nurcha Development Finance (Pty) Ltd and Others 2019(3) 379 (SCA);

2.2 drawing the inference from the conduct of the parties that there was consensus between them as this was directly contradicted by the Rudnat's witness, Mr Wagenaar. The test in Buffalo City Municipality should have been applied;

2.3 not finding that Rudnat failed to allege and prove a tacit contract between the parties, as Rudnat had pleaded that the parties concluded a written contract and failed to prove such a contract;

2.4 relying on the Funding Agreement "purportedly" concluded between Nketoane and the Department of Water Affairs, as this agreement was not referred to in the pleadings nor proven in evidence;

2.5 finding that Rudnat had proved the quantum of its claim, instead of finding that Rudnat had failed to prove the terms of the contract purportedly concluded between it and Nketoane.

[3] The judgment in this matter deals with the aspect that a tacit agreement was pleaded in Rudnat's Particulars of Claim, and, flowing from that, the conduct of Nketoane which led to the finding that Rudnat had proved that a tacit agreement had come into existence between the parties. I should perhaps deal with the allegation that the court did not apply the test set out in *Buffalo City Metropolitan Municipality v Nurcha Development Finance (Pty) Ltd 2019(3) SA 379 (SCA)* to determine if a tacit agreement had come into existence. The SCA said at para [16] that "The test for establishing the intention of the parties to conclude a tacit contract is now settled" and cited with approval the case of *Butters v Mncora 2012 (4) SA 1 (SCA) ([2012] ZASCA 29* where the court had this to say: "This appeal is about an alleged tacit agreement. As in all such cases, the court searches the evidence for manifestations of conduct by the parties that are unequivocally consistent with consensus on the issue that is the crux of the agreement and, per

contram, any indication which cannot be reconciled with it. At the end of the exercise, if the party placing reliance on such an agreement is to succeed, the court must be satisfied, on a conspectus of all the evidence, that it is more probable than not that the parties were in agreement, and that a contract between them came into being in consequence of their agreement." (my underlining)

[4] In para [20], the SCA succinctly stated the test as follows:

"There appears to me to be no reason why the onus of proof should be more burdensome for the party alleging a tacit contract than in other civil matters. I do not see why, as a matter of legal policy, the onus should be greater. And in *Butters*, the court was unanimous in finding that the party alleging a tacit contract need prove unequivocal conduct giving rise to an inference of consensus on a balance of probabilities."

[5] The judgment in this matter sets out in detail the manner in which Rudnat became involved in the matter, the work that was done by it for Nketoane, and the conduct of Nketoane for several years, which indicated that it had intended to contract the services of Rudnat and acted in accordance with such intention. This was set out extensively by Ms Crawley and also confirmed by Mr Wagenaar. The latter's opinion on the legal position is not binding on this court, which is obliged to decide the matter by applying the law to the facts as they appear from the papers and the evidence. Therefore, Mr Wagenaar's opinion that the absence of a written contract or letter of appointment, resulting in Nketoane not being liable for payment of services rendered by Rudnat, is not correct. His evidence was clear that he requested the letter of appointment from Nketoane on several occasions but none was forthcoming, but continued rendering services, in the belief that the requested letter would be provided. Nketoane continued to engage with and accept the services of Rudnat.

[6] In detailing the above position in the judgment, as corroborated by the papers, the court was satisfied that Rudnat had proved, on a balance of probabilities, that Nketoane's unequivocal conduct gave rise to the inference that there was consensus on its part to contract with Rudnat. Nketoane continued to use the services of Rudnat, consulted with it for technical assistance and paid Rudnat for such services, after the IRR prepared by Rudnat was accepted. Nketoane failed to lead any evidence to gainsay the evidence of Rudnat or its version in respect of the documentation filed and which it relied upon.

[7] With regard to the legal position relating to an application for leave to appeal, both parties correctly pointed out that Section 17 of the Superior Courts Act 10 of 2013 (the Act), now regulates the test to be applied in an application for leave to appeal. The relevant provisions of section 17(1) provide as follows:

“(1) Leave to appeal may **only** be given where the judge or judges concerned are of the opinion that

(a) (i) the appeal **would** have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;" (my emphasis and underlining).

[8] Previously, an applicant was merely required to show that there is a reasonable possibility that another court, differently constituted, would find differently to the court against whose judgment leave to appeal is sought. It is clear from section 17(l), set out above, that the situation is now somewhat different, and an applicant for leave to appeal is required to convince the court that there is a reasonable prospect of success and not merely a possibility of success. In the matter of *The Mont Chevaux Trust v Tina Goosen + 18 2014 JDR LCC*, Bertelsmann J held that:

"It is clear that the threshold for granting leave to appeal against a judgment of a high court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion....The use of the word 'would' in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against."

Mont Chevaux has been followed in a number of decisions. See *Matoto v Free State Gambling and Liquor Authority (4629/2015) [2017] ZAFSHC 80 (8 June 2017)*, The Full Court in *Acting National Director of Public Prosecutions and Others v Democratic Alliance (19577/2009) [2016] ZAGPPHC 489 (24 June 2016)* also cited Mont Cheveau with approval.

[9] As I indicated the reasons for the order of the court in this matter are fully set out in the judgment. It is my view that based on those reasons and what I have said above, another would not come to another conclusion. It is, therefore, my view that the respondent does not enjoy a reasonable prospect of success on appeal.

[10] In the circumstances the following order is made:

The application for leave to appeal is dismissed with costs

S NAIDOO J

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