



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

Case No: **1953/2020**
Heard: **07/09/2021**
Delivered: **10/09/2021**

In the matter between:

**SCARLIWEB (PTY) LTD t/a COOLING SOLUTION
PROJECTS
ROBURN CONSTRUCTION CC**

1st Applicant
2nd Applicant

and

**SEDTRADE (PTY) LIMITED
SOL PLAATJE MUNICIPALITY
AECOM SOUTH AFRICA
STANDARD BANK OF SOUTH AFRICA LTD**

1st Respondent
2nd Respondent
3rd Respondent
4th Respondent

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

Mamosebo J

- [1] This is an opposed application for leave to appeal to the Full Bench of this Division against the whole of my judgment and orders granted on 30 July 2021. For convenience, the applicant will be referred to as "Sedtrade" while "Scarliweb" and "Roburn" will jointly be referred to as the respondents.

- [2] Despite the fact that Sedtrade has listed 8 paragraphs, some of which have subparagraphs, as appearing in the Notice of Application for Leave to Appeal, in substantiation of its submission that the Court erred in its findings, the main argument relied on essentially involves whether I was correct in confirming para 2.4 of the rule *nisi* and further ordering payment of “the amounts due” when there was no quantification of the said amounts. The rest of the grounds are, in my view, intertwined with the mentioned grounds and form part of Sedtrade’s argument.
- [3] The test for an application for leave to appeal is governed by section 17(1) of the Superior Courts Act¹, which has raised the threshold of the test for leave to appeal. The applicant must demonstrate to the Court that there are reasonable prospects that the appeal would succeed. Our courts have already interpreted the phrase “would”, found in section 17(1)(a)(i) of the Act, as indicative of some form of certainty or realistic chance of success². The applicant brought this application in terms of s 17(1)(a)(i) alleging reasonable prospects of success.
- [4] The reason why the respondents approached this court on an *ex parte* and urgent basis, seeking a rule *nisi*, was to secure their payment. The matter was first before Williams J who granted the rule and later Tlaletsi JP who, by agreement between the parties, modified the rule by discharging clause 3 thereof and ordering the parties to report on the extent of the resolution of the dispute on the return date. Meanwhile, the parties obtained the adjudicator’s award which assertively found against Sedtrade for penalising the respondents for their 11 day delayed completion of work concluding

¹ 10 of 2013

² The Mont Chevaux Trust v Tina Goosen & 18 Others 2014 JDR 2325 (LCC) at para 6; MEC for Health, Eastern Cape v Mkhitha and Another[2016] ZASCA 176 (25 November 2016) at paras 16-17 and Notshokovu v S [2016] ZASCA 112 (7 September 2016) at para 2

that the Subcontract should prevail and the quantum of the penalty should be zero. To argue, as Sedtrade does, that there was no quantification of the amounts and because the papers were not amplified, is in my view, putting form over substance. I found the adjudicator's award to be adequate in complying with Tlaletsi JP's clause 4 of the order. Couched differently, the adjudicator's report was sufficient to address the underlying dispute, having regard to the relevant certificates already issued in favour of the respondents.

- [5] The main judgment has, in my view, effectively dealt with para 2.4 taking into consideration the submissions by both counsel from para 14 of the judgment. Of more importance, which seems to be overlooked by Sedtrade, is that once the adjudicator's award was noted, the parties are bound by it. I mentioned in my judgment, para 19 that the actual figures can be found in the parties' records and certificates. The reason why I delved into the figures, without determining what the actual quantities were, was to respond to the submissions made by Mr Grobler and to clarify my reasoning as recorded at paras 15, 16, 17, 18 and 19. What the applicant is doing now by bringing the same argument is nothing less than obfuscating.
- [6] Mr Grobler, invoked *Kernsia* 17³ in trying to persuade me that the applicants' application served as both the pleadings and the evidence upon which they relied. The *Kernsia* case, more particularly the paragraph relied on in this argument, does not help Mr Grobler's case. In the *Kernsia* case the court was faced with a determination whether a loan agreement involving a company contravened s 38(1) of the Companies Act⁴ or not. The SCA held that s 38 is fact-based and it could not make a finding without the

³ Absa Bank v Kernsia 17 (Pty) Ltd 2011 (4) All SA 113 (SCA) at para 23

⁴ 61 of 1973

facts. The facts are distinguishable from the facts in the case before me. As stated in my main judgment, once the adjudicator's award was before court, the dispute pertaining to whether the respondents were entitled to payment, was resolved. As to the rands and cents, that was an exercise I said can be entertained by the parties. There was and still is, in my view, no need for the respondents to have amplified their papers or to amend their notice of motion. I reject such a claim as unsubstantiated.

- [7] Mr Grobler has essentially attacked the reasons for my decision as a basis for the application for leave to appeal while Ms Bester, counsel for the respondents, stated that she agreed with the judgment and orders of the Court. Leach JA, in *Khumalo*⁵ made the following remarks, which were endorsed by the Constitutional Court in *Baliso*⁶:

"[4] An appeal lies against an order that is made by a court and not against its reasons for making the order."

- [8] Having dispassionately considered each ground raised by the applicant in an effort to determine whether there are reasonable prospects that another court would come to a different finding than this court whose judgment is sought to be appealed against, I have not found any. In the result, the application for leave to appeal stands to fail.

- [9] The following order is made:

The application for leave to appeal is dismissed with costs.

⁵ South African Reserve Bank v Khumalo 2010 (5) SA 449 (SCA) at 451 para 4

⁶ Baliso v Firststrand Bank Ltd t/a Wesbank 2017 (1) SA 292 (CC) at 296 E



M.C. MAMOSEBO

**JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION**

For the Applicant:
Instructed by:

Adv. S Grobler SC
Haarhoffs Inc

For the Respondents:
Instructed by:

Adv. R Bester
Engelsman Magabane Inc