

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA



Case Number: 3234/15

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO.

(3) REVISED

28/3/17
DATE

SIGNATURE

28/3/2017

In the matter between:

SOUTH AFRICAN BREWERIES (PTY) LTD ("SAB")

APPLICANT
(Respondent in the
application for leave to
appeal)

and

THE COMMISSIONER OF THE SOUTH AFRICAN
REVENUE SERVICES ("SARS")

RESPONDENT
(Applicant in the
application for leave to
appeal)

Coram: HUGHES J

JUDGMENT

HUGHES J

[1] This is an application made by SARS for leave to appeal against my judgment of 15 December 2016. The application is duly opposed by SAB.

[2] What resonates from the grounds for leave to appeal both legal and factual is to a large extent that this court's reasoning was erroneous and that I failed to take into consideration or give sufficient weight to other factors. What I do not propose to do is to set out the exhaustive grounds of appeal again or repeat that which was set out in the judgment, in as much as that which was relevant was dealt with in the judgment.

[3] From the outset I must point out that it would be noted from the record of the application for leave to appeal sought by SARS that the argument of Adv. Meyer SC sought to, in my mind, rehash the entire case of SARS. There was even an attempt to re-introduce the abandoned alternative argument made out in their main papers. Be that as it may, Adv. Meyer SC pointed out that the nub of the appeal lies in paragraph 1.3 of their notice of application for leave to appeal.

[4] The section which deals with circumstances in which leave to appeal may be granted is section 17 (1) of the Superior Courts Act 10 of 2013 (the Superior Courts Act). What specifically relevant in this case, is section 17 (1) (a). For easy reference I set out section 17 (1) in its entirety below:

"(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;*
- (b) the decision sought on appeal does not fall within the ambit of section 16 (2) (a); and*
- (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties." [My emphasis]*

[5] The test which was applied previously in applications of this nature was whether there were reasonable prospects that another court may come to a different conclusion. See *Commissioner of Inland Revenue v Tuck* 1989 (4) SA 888 (T) at 890B. What emerges from section 17 (1) is that the threshold to grant a party leave to appeal has been raised. It is now only granted in the circumstances set out and is deduced from the words 'only' used in the said section. See *The Mont Chevaux Trust v Tina Goosen & 18 Others* 2014 JDR 2325 (LCC) at para [6], Bertelsmann J held as follow:

"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, see *Van Heerden v Cronwright & Others* 1985 (2) SA 342 (T) at 343H. 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." [My emphasis]

[6] The entire argument of SARS is centred upon the first ground which leave could be granted as set out above, section 17(1) (a) (i), that the appeal *would* have a reasonable prospect of success. They relied upon the fact that the matter was one of interpretation and the court's interpretation was wrong, thus another court would interpret in the manner contended by SARS.

[7] SARS contends that a novel point has been raised in this case in that the case involves an 'irreconcilable conflict' between the headings and the explanatory notes and a 'peremptive injunction' as was contemplated in *Custom Excise v Thomas Barlow and Sons Limited* 1970 (2) SA 660 AD. They contend that the court did not have due regard to the judgment of Miller AJA in *Thomas Barlow* which judgment their entire case was premised upon.

[8] Adv. Puckrin SC for SAB argued that there was no 'irreconcilable conflict' and in any event, even if there was a situation of 'irreconcilable conflict' the approach in dealing with same by SARS was incorrect, in that SARS adopted the approach of firstly going to the Explanatory Note, without first seeking to reconcile the products with the Tariff Heading. Adv. Puckrin SC argues further that the judgment of Miller AJA relied upon by SARS has not been followed by the SCA, rather the judgment of

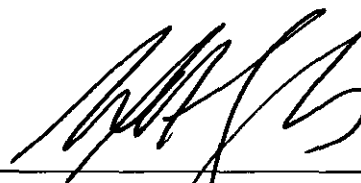
Trollip JA has been endorsed by the SCA in both the *Heritage Collection*, as cited in the judgment, and the recent judgment of *CSARS v Coltrade International CC* (54/2015) [2016] ZASCA 53 (1April 2016).

[9] From the argument advanced by both counsel I find that one of the requirements, that being section 17 (1) (a) (ii), has application in the circumstances of this particular case. If it is established that there are compelling reasons to do so this court has discretion to grant leave to appeal on the merits, even if this court is of the view that there are no prospects of success.

[10] The compelling reason, in my view, is the interpretation adopted by the court being the adaptation of Trollip JA dictum instead of Miller AJA as contended by SARS. The long and short of this is that there has been various judgments that have followed Trollip JA instead of Miller AJA, the question that I pose is that in the circumstances of this particular case was the correct interpretation adopted? In my view this would suffice to fall under conflicting judgments on the adoption of the method adopted of interpretation. This to my mind allows me to exercise my discretion and I do so to grant leave to appeal even though I am of the view that there are no prospects of success.

[11] Consequently the following order is made:

[a] The application for leave to appeal to the Supreme Court of Appeal thus succeeds and costs are to be costs in the appeal.



W. Hughes

Judge of the High Court Gauteng, Pretoria