



**IN THE HIGH COURT OF SOUTH' AFRICA  
(North Gauteng High Court, Pretoria)**

**Not reportable**

**Case number: 47512/2008**

**Date heard: 6 April 2009**

**Date delivered: 08 May 2009**

**In the matter between:**

**XON INFRASTRUCTURE (PTY) LTD**

**Respondent**

**And**

**ACCESSLAN KZLN (PTY) LTD t/a**

**ACCESLAN RICHARDS BAY**

**Applicant**

**Coram.: Mabuse, AJ**

**JUDGMENT ON APPLICATION FOR. LEAVE TO APPEAL**

**MABUSE, AJ**

[1] This is an application by the applicant, Xon infrastructure (Pty) Ltd, for leave to appeal against the summary judgment granted against It by this Court on November 2008. On the said date, the Court, in granting summary judgment in favour of the respondent, ordered the applicant to pay the respondent, then the

plaintiff, a sum of R746,669.86 interest on the said amount at the rate of 15,5% per annum, *a tempore morae* reckoned from 31 January 2008 to date of final payment; and costs on attorney-and-client scale, In accordance with clause 18.1 of annexure 'A' to the respondent's summons.

[2] The applicant now seeks, on several grounds fully expounded in the notice of appeal, leave of this court to launch an appeal against the decision of this court to grant the aforementioned summary judgment. The respondent opposes the applicant's application for leave to appeal, in view of the fact that the applicant has fully set out the grounds on which it seeks leave to appeal and the respondent has also done likewise. In respect of its opposition, there is in my view, no need to repeat them in my judgment. Suffice to mention that the applicant's grounds enjoyed the support, not only by its counsel's heads of argument, but also its argument. I am satisfied that the applicant's heads of argument related materially to the subject matter of appeal as raised in the applicant's notice of application for leave to appeal.

[3] It is true that the test at this stage is, whether or not another court, seized with the same set of facts, would have decided differently, or, whether or not the applicant has reasonable prospects of success on appeal. This principle applies in equal measures to both civil and criminal matters, in *R v Baloi* 1949 (1) SA 523 AD at pp. 523-4 the court stated as follows:-

*" The legislature has not granted an appeal as if right but has empowered*

*the trial judge to give leave to appeal. That power must obviously be exercised judicially, in applications for special leave to appeal under section 1 of the South Africa Act and section 1 of Act 1 of 1911, this court said down the line that Leave to appeal should not be granted unless the application will have reasonable prospects of success in appeal."*

[4] In *R v Baloi* (supra) the court emphasised that the test to be applied had been set out in *R v. Ngubane & others* 1945 AD 185 at p. 167, the case in which Davis AJ (as he then was), speaking for the entire court, stated as follows:-

*"In all the cases, no matter what form of words was used, the same thing was, in my opinion, intended to be conveyed, namely that it is for the applicant for special leave to satisfy the court that if that leave be granted, he has a reasonable prospect of success on appeal.*

*That was the test applied, for instance, in 'Bezuidenhout v Opperman (1943 AD at p. 193 and it is, in my view, the correct one".*

[5] At the commencement of his argument counsel for the applicant referred this court to the nature of summary judgment proceedings and reminded it of the provisions of Rule 32 of the Uniform Rules of this Court. He explicated that rule 32(2) (b) provided that the defendant must satisfy the court by affidavit and "not prove" that it has a bona fide defence against the respondent's claim. He argued further that the applicant did not have to formulate its grounds of opposition to the respondent's application for summary judgment with such precision, as would be

required of a plea.

[6] After a concise reference to the two versions, that is, the respondent's and applicant's versions and arguing vehemently that the applicant's version and arguing should prevail, he referred to specific findings which In his view would have been sufficient to persuade another court to come to a different. Referring to the credit application which was annexed to the respondent's summons, he argued that signing a credit application did not result in the granting of the application nor should It be construed as the necessary consensus to c-otAyoLu.de an agreement, (n developing his argument, he stated furthermore that the applicant never received from the respondent any notification of the fact that Its application for credit facility had been a-p-proved. He is of the view that under those circumstances no agreement has come into place.

[7] On the other hand, the counsel for the respondent argued that what was of paramount Importance was that there was a written agreement which the parties had signed. Relying on the said written agreement, she referred the Court to clause 2.1 thereof which stated that:-

*"This agreement only becomes -final and binding on receipt and acceptance of the offer by Accesslan at its business address in Irene."*

[8] It would appear that, no matter what the parties preferred to call it, the

document attached to the respondent's summons appeared to be containing all the terms that the applicant had agreed to be bound by. These terms had been framed by the respondent, it is in fact for that particular reason that the respondent referred to the document as an agreement while the applicant referred to it as an application for credit facilities. The applicant contends, that the document did not constitute any agreement but was merely an application for credit facilities.

[9] On the other hand the respondent, and it was so submitted by counsel for the respondent, contends that the said document constitutes an agreement by which the parties have agreed to be bound. The battlefield between the parties therefore is whether or not the said application constituted an agreement.

[10] The applicant's further ground on which it seeks to challenge the judgment is whether or not the orders copies of which were attached to the respondent's summons as annexures 'B1' to 'B.14' were authorised by the applicant. The applicant's counsel argued that the said orders, were not authorised by the applicant whereas the respondent's counsel was unwavering in her argument that there was no merit in the applicant's counsel's argument in view of the fact that the said orders were made on the applicant's letterheads. Accordingly there exists a dispute between the parties on this point and several other grounds which have been fully set out and to which I have not specifically referred, on which the applicant intends relying on.

[11] I am satisfied that there is merit in the applicant's application and am moved to

grant the application for leave to appeal. I accept the applicant's contention that another court, seized with the same set of facts, may decide differently.

"Now, It is not suggested that the respondent is not bona fide in advancing the case as he does, and the only question is whether he has put forward a triable and arguable issue; In other words, whether the defence can possibly succeed, if there is a possibility of its succeeding I am not required to consider whether success is likely or unlikely", see Davis v. Terry 1957 SA 98 (SR) at p. 102

Accordingly I make the following order:-

1. The Applicant's application for leave to appeal to the full bench of the Northern Gauteng High Court against the summary judgment of 26 November 2002 is hereby granted.
2. Costs of the application, for leave to appeal shall be costs in the cause.

**MABUSE, AJ**

Applicant's Attorneys: VAN DER MERWE DU TOIT INC;

Applicant counsel: adv. Erasmus FJ

Respondent's Attorney: Jan Ehlers Attorneys

Respondent's counsel: Adv. M.S. Janse van Rensburg