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

Reportable: YES/NO
Of Interest to other Judges: YES/NO
Circulate to Magistrates: YES/NO

Case no: 5560/2022

In the matter between:

KHUSELANI SECURITY AND RISK MANAGEMENT (PTY) LTD Applicant

and

MANGAUNG METROPOLITAN MUNICIPALITY Respondent

CORAM: VAN ZYL, J

HEARD ON: 23 FEBRUARY 2024

DELIVERED ON: 31 MAY 2024; 3 JUNE 2024

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[1] On 31 May 2024 I made the following order:

"1. Leave to appeal against the whole of the judgment and order of Berry, AJ, dated 16 November 2023, is granted to the Full Court of this Division.

2. The costs of the application for leave to appeal are costs in the appeal."

[2] I undertook that the reasons for the order will be made available on 3 June 2024. What follows are those reasons:

[3] This is an application for leave to appeal against the whole of the judgment and order of Berry, AJ (as he then was), delivered on 15 November 2023.

[4] This application was allocated to me on the basis of the provisions of Section 17(2)(a) of the Superior Courts Act, 10 of 2013 ("the Act"), in terms whereof an application for leave to appeal may be heard by any other judge of the Division when the judge against whose decision the appeal is sought to be made is not readily available. Berry's acting stint had been concluded at the time of the hearing of this application.

[5] The applicant in this application for leave to appeal was also the applicant in the application in the court *a quo* and the current respondent was *mutatis mutandis* the respondent in the application in the court *a quo*.

[6] Section 17(1)(a) of the Act determines 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;

(b) ...."

[7] It is by now settled law that the word "would" in Section 17(1)(a)(i) has raised the bar for granting leave to appeal. See **Acting National Director of Public Prosecutions v Democratic Alliance *In Re* Democratic Alliance v Acting National Director of Public Prosecutions** (19577/09) [2016] ZAGPPHZ 489 (24 June 2016) at para [25]. In the judgment of **The Mont Chevaux Trust (IT 2012/28) v Tina Goosen and 18 Others** 2014 JDR 2325 (LCC), the court held as follows at para [6]:

"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."

Background:

[8] During or about February 2019 the applicant and the respondent concluded a security service level agreement in terms whereof the applicant was to deliver security services to the respondent.

[9] It is common cause between the parties that the following were, *inter alia,* material express, alternatively tacit, alternatively implied terms of the agreement:

> "10.3 The provision of security services was to endure for a period of 24 months commencing on 1 March 2019 and ending on 28 February 2021;
>
> 10.4 The Applicant undertook to submit invoices on a monthly basis in accordance with the agreement;
>
> 10.5 The Respondent undertook to effect payment to the Applicant promptly but no later than thirty (30) days after submission of an invoice."

[10] After the applicant made certain adjustments to the amounts of its claims in the replying affidavit, the applicant is seeking judgment as follows:

1. Payment of the unpaid capital debt in the sum of R2 053 162.31, together with interest thereon up to 31 October 2022 in the amount of R444 551.47.

2. Alternatively, and should it be found by the court that invoice numbers 145178 (annexure "PR2" to the founding affidavit) and 145179 (the balance of annexure "PR3" to the founding

affidavit) have become prescribed, then payment of the capital debt in the amount of R1 933 449.17, together with interest thereon as at 31 October 2022 in the amount of R439 060.79.

3. Mora interest on the aforesaid amounts set out in (1) or (2) from 1 November 2022 to date of payment.

4. That the respondent be directed to pay the costs of the application on an attorney and client scale.

[11] The respondent raised three points *in liminé*, being:

1. Prescription;
2. Arbitration;
3. Non-compliance with the Institution of Legal Proceedings Against Certain Organs of State Act, 40 of 2002.

[12] On the merits as such the respondent raised the defence that there are material disputes of facts which cannot be resolved on the papers and which the applicant ought to have anticipated before instituting the application.

Findings by the court *a quo*:

[13] The court *a quo* found that in view of the findings it was about to make, it was unnecessary to deal with the applicability of Act 40 of 2002.

[14] Although the court *a quo* referred to the respondent's reliance on the arbitration clause as well as its alleged entitlement to deduct penalties in terms of paragraph 9.4 of the agreement, the court did not deal with it any further.

[15] The court furthermore found as follows:

> "[32] A real *bona fide* and genuine dispute of facts arose. The Respondent disputes the amount claimed; whether prescription of the two invoices occurred; and whether penalties may be levied in terms of the contract exist.
>
> [33] This brings this Application into the realm of **Plascon-Evans Paints v Van Riebeeck Paints**.
>
> [34] It must be decided on the Respondent's version, together with those facts that are undisputed and common cause where the factual disputes exist.
>
> [35] The Respondent's version should be rejected if it is untenable and far-fetched.
>
> [36] I find that there is a genuine dispute of facts, and that Plascon-Evans is applicable under the circumstances of this case.
>
> [37] ... The Application is dismissed with costs."

Notice of leave to appeal:

[16] The grounds stated for the application for leave to appeal are in essence the following:

1. The court *a quo* erred in concluding there existed a genuine dispute of facts between the parties and that accordingly application proceedings were inappropriate.

2. The respondent did not identify what facts were in dispute that it could genuinely rely upon to make the claim that there was a genuine dispute of facts. The court *a quo* itself did not identify what dispute of facts were revealed in the papers that prompted it to make such finding and thereafter to have dismissed the applicant's application.

3. There is no engagement in the judgment of the court *a quo* to why the alleged dispute of facts could not be resolved on the papers.

4. The tenure of the judgment of the court *a quo* suggests that it accepted that the applicant genuinely believed that there was no *bona fide* dispute of facts at the time of launching the application.

5. The judgment did not engage the other grounds on which the applicant sought payment of the respective capital amounts.

6. Had the court not dismissed the application on the sole basis of a finding that there is a genuine dispute of facts, then the court ought to have found further that:

   (a) no part of the debt claimed had prescribed.

(b) the respondent's reliance on the applicant's apparent non-compliance with Act 40 of 2002 was unsustainable.

(c) the applicant was not obliged to refer the non-payment of the debt to arbitration.

(d) the totality of the circumstances under which the parties engaged with each other reveal overwhelming that:

(i) the applicant performed the services contracted for and

(ii) the respondent at no stage prior to filing its answering affidavit, disputed that the services were performed, especially in circumstances that dictated recording such denial.

<u>Consideration of the merits:</u>

[17] Mr Reddy, on behalf of the applicant, relied on the unreported judgment of **<u>African National Congress v Ezulweni Investments</u>** (Pty) Ltd (979/2022) [2023] ZASCA 159 (24 November 2023), which judgment contains a very valuable exposition of the principles regarding factual disputes, especially against a factual background similar to the present matter.

[18] It is evident that the court *a quo* made the finding about the alleged existence of a *bona fide* and genuine dispute of fact without having identified and/or grappled with those facts.

[19] After the court *a quo* referred to the well-known **Plascon-Evans** judgment and the principles enunciated therein, the court merely concluded that the application should be dismissed with costs.

[20] In my view, had the court *a quo* thoroughly dealt with the facts of the matter, the court may very well have found that it is evident that the applicant delivered the required services, that the respondent at no stage disputed its indebtedness to the applicant and that it was a matter of mere non-payment of its indebtedness to the applicant.

[21] Had the court *a quo* properly considered the contents of annexure "A1" to the answering affidavit against the background of the totality of facts and circumstances, it would probably have found that the said letter does not correspond with the alleged version of the respondent.

[22] In my view there are reasonable prospects of success in that a different court would come to a different conclusion and would conclude in favour of the applicant in accordance with the grounds for the application for leave to appeal.

[23] With regard to the costs of this application, there is no reason why the usual order that the costs of the application for leave to appeal be costs in the appeal, should not be granted.

Order:

[24] For the aforesaid reasons I issued the order cited at the beginning of this judgment.

[redacted]

C. VAN ZYL, J

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