

REPUBLIC OF SOUTH AFRICA

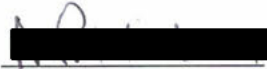


**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 10409/2022

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

9 October 2024



N V PROPERTIES (PTY) LIMITED

Applicant

and

GARY STEPHEN MYBURGH N.O

First Respondent

RADON PROJECTS (PTY) LIMITED

Second Respondent

EX TEMPORE JUDGMENT

Mdalana-Mayisela J

[1] The applicant (second respondent in the main application) seeks leave to appeal to the Full Bench of this Division alternatively to the Supreme Court of Appeal, a judgment handed down on 22 July 2024 reviewing and setting aside the arbitration award made by the first respondent and published on 2 February 2022, replacing the first respondent with another arbitrator and dismissing a counter application brought by the second respondent.

[2] The respondent (applicant in the main application) is opposing the application and has brought a conditional application for leave to cross appeal. The test for leave to appeal is stated in section 17 (1) (a) of the Superior Courts Act 10 of 2013, which provides that leave to appeal may only be given where the judge or judges concerned, are of the opinion that the appeal would have a reasonable prospect of success or there is other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.

[3] The grounds for leave to appeal are as follows: -

[3.1] There is no factual basis for the finding made by the court that the Arbitrator exceeded his powers in making an award sounding in money inconsistent with the August 2015 ruling.

[3.2] The 2015 ruling does not qualify as a valid arbitral award because all issues submitted in the arbitration proceedings were not resolved in the manner that achieved finality and certainty, it does not give rise to *res judicata* and did not render the Arbitrator *functus officio*.

[3.3] The Arbitrator had the right to be wrong on the facts and merits.

[3.4] It does not follow that reviewing and setting aside of arbitration award requires that a new Arbitrator be appointed in the absence of any pleaded dispute for the referral of award to the Arbitral tribunal.

[3.5] The court erred in dismissing a counter application.

[4] Considering that the main application concerned the legal interpretation of the 2015 ruling made by the Arbitrator and whether he exceeded his powers by making a final award inconsistent with that ruling, I am of the opinion that another court would give a different interpretation and come to a different conclusion in the main application. The appeal would have a reasonable prospect of success. Accordingly, I give leave to appeal a judgment to the Supreme Court of Appeal on the grounds stated in paragraphs 1,2,3 4,5 & 6 of the notice of application for leave appeal.

[5] I now deal with the conditional application for leave to cross appeal and condonation application brought by the respondent. In terms of Rule 49 (3) a notice for leave to cross appeal shall be delivered within 10 days after delivery of the notice for leave to appeal or within such a longer period as may upon, good cause shown be permitted. The notice for leave to cross appeal was delivered on 11 September 2024, and out of time by five (5) days. The respondent has brought an application for condonation for the late delivery. It explained that the reason for the delay was due to the unavailability of its senior counsel who was on brief in this matter for arbitration and review. It could not bring the notice for leave to appeal prior to receiving the applicant's notice for leave to appeal because at that stage it was content with the judgment.

[6] Considering that this is a conditional application, I accept that the respondent has shown good cause for the delay. I also must consider if the conditional cross appeal would have a prospect of success. A cross appeal is an appeal which is for convenience heard at the same time as the main appeal. The respondent has brought this application on condition that the applicant is given leave to appeal and succeeds in appeal. A cross appeal cannot be conditional upon success of appeal (*Blou v Lampert & Chipkin NNO 1970 (2) SA 185 (T) at 198D; Superior Court Practice Vol (2) Service 21, 2023 at D1-665*). On this basis alone the conditional application for leave to cross appeal must fail.

[7] Furthermore, I have considered the grounds for leave to cross appeal, and I have dealt with those grounds in para 19 to 30 and 38 to 39 of the main judgment. I do not deem it necessary to repeat same herein. I am of the opinion that the conditional cross appeal would have no reasonable prospects of success. There is no compelling reason why it should be heard.

Order

[8] The following order is made.

1. The application for leave to appeal to the Supreme Court of Appeal is granted.
2. The application for condonation for the late filing of the conditional application for leave to cross appeal is refused, with costs including the costs of two counsel taxed on table C.
3. The costs of the application for leave to appeal are costs in the appeal including the costs associated with the employment of senior and junior counsel.


MMP Mdalana-Mayisela J
Judge of the High Court
Gauteng Division,
Johannesburg

Appearances:

For the Applicant:

Adv C H J Badenhorst SC
Adv D J Joubert

Instructed by:

Klagsbrun Edelstein Bosman Du Plessis Inc

For the Respondent:

Adv M A Crowe SC

Instructed by:

Bax Kaplan Russell Inc