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**

Application number: 2527/2020

In the application between:

MANTSOPA LOCAL MUNICIPALITY Applicant

and

EMS SOLUTIONS (PTY) LTD Respondent

CORAM: VAN ZYL, J

HEARD ON: 29 OCTOBER 2021

DELIVERED ON: 23 MARCH 2022

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[1] This is an application for leave to appeal by the applicant (the respondent in the main application) against the following order

which I granted in favour of the respondent (the applicant in the main application):

"1. The respondent is to pay the applicant an amount of R4 942 984.03.

2. The respondent is to pay the applicant interest on the respective arrear amounts a prime rate plus 2 (two) percent per annum, calculated daily and compounded monthly, calculated from the date on which the respective arrear amounts became due and payable, until date of final payment.

3. The respondent is ordered to pay the costs of the application."

[2] For the sake of efficacy I will refer to the parties as "*the Municipality*" and "*EMS*" respectively.

The test to be applied in an application for leave to appeal:

[3] In terms of section 17(1)(a)(i) of the Superior Courts Act, 10 of 2013 ("the Act"), leave to appeal may only be given where the judge concerned is of the opinion that "*the appeal would have a reasonable prospect of success*". In the unreported judgment of **The Mont Shevaux Trust (IT 2012/28) v Tina Goosen,** case no. LCC14R/2014, dated 3 November 2014, the court pronounced as follows regarding the test that now has to be applied before leave to appeal should be granted:

"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."

[4] Regarding the requirement of "*a reasonable prospect of success"* the Supreme Court of Appeal interpreted it as follows in **S v Smith** 2012 (1) SACR 567 (SCA) at para [7]:

"What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal."

See also **Four Wheel Drive Accessory Distributors CC v Rattan N.O.** 2019 (3) SA 451 (SCA); **S v Rohde** 2020 (1) SACR 329 (SCA).

***Ad* merits:**

[5] The grounds of the application for leave to appeal are stated to be the following:

"1. The Honourable Court erred when it found that the applicant did not deny existence of contract for the periods mentioned therein. (*sic*) [para 20]

2. The Honourable Court erred when it found that the affidavit of the respondent constitutes a bare denial. The answering affidavit lacked support of evidence. [para 23]

3. The Honourable Court erred when it deemed it unnecessary to deal with an unsigned acknowledgment of debt. The applicant in court *a quo* attached it as evidence although it was unsigned. [para 25]

4. The Honourable Court erred in awarding costs to the applicant. [para 27]

5. The Honourable Court erred in finding that the applicant failed to prove the amount owing due to insufficient evidence. (*sic*) [para 28]"

First ground:

[6] I have duly dealt with this aspect in paragraphs [19], [20] and [21] of my judgment in the main application.

Second ground:

[7] Mr Motloung, who appeared on behalf of the Municipality in the hearing of the application for leave to appeal, submitted that the Municipality was unable to provide any factual allegations in support of their denials in the answering affidavit, due to the

fact that EMS failed to provide factual allegations in support its case in the founding affidavit. I cannot agree with this contention. From a mere reading of the founding affidavit it is evident that EMS indeed provided factual allegations in its founding affidavit in support of its case. The Municipality, on the other hand, failed to provide any factual allegations in support of its denials.

[8] Mr Motloung's contention that the Municipality would have dealt with the evidence had the matter been referred for oral evidence, does clearly not hold water. A matter is referred for oral evidence in circumstances where there are *bona fide* and substantial factual disputes between the parties which cannot be adjudicated on the papers. However, such factual disputes can only exist on the papers when both parties advanced facts in their affidavits in support of their allegations. In *casu* the Municipality failed to do so. The Municipality`s failure to have done so, cannot be rectified by providing the Municipality an opportunity to, for the first time, present such facts/evidence by referring the matter for oral evidence.

Third ground:

[9] Although EMS attached the unsigned acknowledgment of debt to its founding affidavit, the fact remains that the said acknowledgment of debt does not constitute EMS`s cause of action. There was consequently no reason for me to have dealt with the unsigned acknowledgment of debt, as explained in paragraph [25] of my judgment in the main application.

Fourth ground:

[10] Considering the outcome of the main application, there was no reason why the costs were not to follow the success of the application.

Fifth ground:

[11] In support of this ground, it was on the one hand, argued on behalf of the Municipality that EMS failed to attach the invoices it relies on in support of its cause of action to the founding affidavit. However, when it was appointed out that EMS indeed attached a schedule of invoices to its founding affidavit, it was contended on behalf of the Municipality that the mere attachment of invoices does not constitute proof of indebtedness.

[12] The mere attachment of invoices to the founding affidavit does indeed not constitute proof of indebtedness. However, those invoices are to be considered in conjunction with the factual allegations made by EMS in the founding affidavit pertaining to its appointment by the Municipality as a Professional Service Provider for and in respect of the 2016/2017, 2017/2018 and 2018/2019 financial years, which was admitted by the Municipality. It is further to be read in conjunction with EMS 's allegation that it duly rendered the services and carried out all its other obligations under the agreements and rendered invoices in respect of the services. In addition to the aforesaid,

EMS also alleged as follows in paragraphs 4.4 and 4.5 of its founding affidavit:

> "4.4 The respondent accepted the services rendered by the applicant as being in accordance with the terms of the agreements in all respects, and accepted the invoices as per annexure 'D' without query or objection, but to date has made payment to the applicant only in part.
>
> 4.5 Also reflected in annexure 'D' are the payments made by and received from respondent, to date hereof.
>
> 4.6 The respondent has to date failed and/or refused to make payment to the applicant of the outstanding invoices."

[13] In response to the aforesaid factual allegations, the Municipality denied the allegations and merely alleged that the "*applicant had failed to render services as per the agreement*", that "*an invoice is not proof of indebtedness*" and that it is "*the submission of the respondent that partial payment would be an indication that the service was not carried out fully*". No facts allegations whatsoever were advanced by the respondent in support of its aforesaid denials.

CONCLUSION:

[14] In my view there is no basis upon which a reasonable prospect exists that another court would come to a different conclusion in the main application.

[15] The application for leave to appeal can consequently not succeed and there is no reason why costs should not follow the outcome of the application.

Order:

[16] The following order is made:

1. The application for leave to appeal is dismissed.

2. The applicant in the application for leave to appeal, Mantsopa Local Municipality, is to pay the costs of the application.

C. VAN ZYL, J

On behalf of the applicant: Adv. SE Motloung
Instructed by:
Seobe Attorneys
BLOEMFONTEIN

On behalf of the respondent: Mr. R. Green
Instructed by:
Green Attorneys
BLOEMFONTEIN