REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

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

26/02/2025..... [redacted]

DATE SIGNATURE

Case No: 2023/1880

In the matter between:

MARU SPACES CONSORTIUM Applicant

and

GAUTENG PROVINCIAL GOVERNMENT:
DEPARTMENT OF INFRASTRUCTURE DEVELOPMENT Respondent

JUDGMENT

BARNES AJ

Introduction

[1] This is an application for leave to appeal against my judgment handed down on

25 June 2024 in which I upheld the Applicant's claim against the Respondent for payment of the sum of R14 808 636.80 for professional services rendered in terms of a Service Level Agreement concluded between the parties.

[2] I will refer to the parties as they were referred to in the original application.

[3] Leave to appeal is sought by the Respondent on the following grounds:

a. First, that I erred in dismissing the Respondent's special plea of arbitration on the basis that the pre-conditions required for the arbitration in terms of the Service Level Agreement had not been complied with.

b. Second, that I erred in having regard to the allegations contained in the Applicant's supplementary affidavit, in circumstances in which leave to file the supplementary affidavit had not been granted.

c. Third, that I failed to apply the *Plascon-Evans* test correctly or at all to the factual disputes between the parties.

d. Fourth, that my reliance on the judgment of *KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu Natal and Others*[1] was misplaced.

<u>The First Ground of Appeal</u>

[4] In raising its special plea of arbitration, the Respondent did not plead that the pre-conditions for arbitration stipulated in clause 26.1.1 of the Service Level Agreement had been complied with. During oral argument, I questioned counsel for both parties about this and both confirmed that no attempt had been made to comply with the pre-conditions set out in the Service Level Agreement.

[1] 2013 (4) SA 262 (CC).

[5] It is well established that the onus is on the party applying to stay a matter by reason of an arbitration clause to show:

a. the existence of the arbitration agreement or clause;

b. the existence of a dispute between the parties;

c. that the dispute between the parties is covered by the arbitration agreement or clause; and

d. that all pre-conditions in the agreement for the arbitration have been complied with.

[6] There having been no compliance with the fourth and final requirement, the Respondent failed to discharge the onus resting upon it.

[7] *Richtown Construction Co (Pty) Ltd v Witbank Town Council 1983 (2) SA 409 (T)* is authority for the proposition that an order referring a matter to arbitration stands to be refused for want of compliance with the necessary pre-conditions stipulated in the arbitration agreement.

[8] I am accordingly of the view that the Respondent's special plea of arbitration was correctly dismissed and that there is no merit in the first ground of appeal.

<u>The Second Ground of Appeal</u>

[9] It is correct that I had regard to the contents of the Applicant's supplementary affidavit for purposes of my ruling. It is also correct that I did not grant leave for the admission of the supplementary affidavit. This was an oversight on my part which occurred in the circumstances set out below:

a. While the Applicant alluded in the supplementary affidavit to the fact that "leave to supplement the founding affidavit" was sought, no formal

application for such leave was ever made by the Applicant.

b. The Respondent, for its part, did not, at any stage:

(i) raise the fact that leave to admit the supplementary affidavit had not been granted;

(ii) object to regard being had to the supplementary affidavit in the circumstances; or

(iii) seek an opportunity to answer to the supplementary affidavit in the event that it was admitted.

c. Neither the practice notes nor heads of argument filed by the parties made any reference to the need to obtain leave for the admission of the supplementary affidavit.

d. Both parties conducted their cases and argued the matter on the basis that the supplementary affidavit was “in”. Notably, the Applicant relied, in oral argument, quite significantly on facts which were pleaded in the supplementary affidavit. At no point in its oral argument did the Respondent object to this on the basis that the supplementary affidavit had not been admitted. On the contrary, as I have stated, the Respondent conducted its case and presented its argument as if the supplementary affidavit had been admitted.

[10] In these circumstances, my failure to admit the supplementary affidavit was an oversight. Had my attention been pertinently drawn to it, or had I considered the issue more explicitly, I would have done so. My intention, which, as consequence of my oversight, was not properly given effect to in the judgment, was to admit the supplementary affidavit, particularly given that no objection had been raised to it and the case was being conducted on the basis that it was

already in. My oversight in failing to admit the supplementary affidavit therefore constituted a patent error. In the circumstances, I intend to correct the patent error by amending the order I previously granted to admit the supplementary affidavit.

[11] This disposes of this ground of appeal.

The Third Ground of Appeal

[12] The Respondent did not explicitly identify the factual disputes it contends existed between the parties and ought to have been resolved in terms of the *Plascon-Evans* rule. I accept of course that factual disputes in application proceedings fall to be resolved with reference to the *Plascon-Evans* rule, but in the view that I take of the matter, there were no real factual disputes between the parties.

[13] As I stated in my judgment, the Respondent's sole defence to the Applicant's claim on the pleadings was that the professional services contracted for in the Service Level Agreement, had not been budgeted for.[2] Given however the manner in which this was pleaded, and the fact that the Respondent did not plead that the Service Level Agreement had been entered into without authority or that it fell to be set aside on any basis, this simply did not rise to the level of a legally cognisable defence. It was on this basis (and not on the basis of any factual dispute between the parties), that I ruled against the Respondent.

[14] There is accordingly no merit in this ground of appeal.

Fourth Ground of Appeal

[15] The Respondent, as noted above, criticised my reliance on the judgment of the Constitutional Court in *Kwa-Zulu Natal Joint Liaison Committee v MEC Department of Education, Kwa-Zulu Natal and Others* 2013 (4) SA 262 (CC).

[2] Judgment at para 20.

[16] In my view such criticism is misplaced. I cited the judgment as authority for the proposition that the Respondent cannot, where a binding contract has been concluded and payment has fallen due in terms thereof, seek to evade payment on the basis that it has not been properly budgeted for. Fundamentally however, as I have stated above, I ruled against the Respondent on the basis that it had not put up a legally cognisable defence to the Applicant's claim.

[17] This ground of appeal does therefore not assist the Respondent.

[18] Finally, the Respondent urged me to take cognisance of the fact that it intends to introduce new evidence on appeal (in the event that leave is granted) which according to it will demonstrate that the appointment of the Applicant was unlawful and therefore void *ab initio* and invalid and ought to be reviewed and set aside. While I take note of this, this cannot constitute a self standing ground permitting me to grant leave to appeal. In order to grant leave to appeal, I must be satisfied that there is a reasonable prospect that another Court would rule differently. As the Supreme Court of Appeal held in *MEC Health, Eastern Cape v Mkhita and Another* [2016] ZASCA 176:

> "An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless is not enough. There must be a sound rational basis to conclude that there is a reasonable prospect of success on appeal."[3]

[19] For the reasons given above, I am not so satisfied.

[20] I accordingly make the following order:

1. My order handed down on 25 June 2024 is amended by the insertion of the following paragraph:

[3] At para 17.

"1A The Applicant's supplementary affidavit is admitted."

2. The application for leave to appeal is dismissed with costs on scale B.

BARNES AJ
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

Heard: 25 September 2024

Judgment: 26 February 2025

Appearances:

Applicant:

Adv L Siyo

Instructed by Steven Maluleke Attorneys

Respondent:

Adv J Motepe SC, together with Adv N Motsepe and Adv L Segeels-Ncube

Instructed by Malatji and Co