

Reportable:	YES/NO
Circulate to Judges:	YES/NO
Circulate to Magistrates:	YES/NO
Circulate to Regional Magistrates	YES/NO



14 Dec 2023

**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG**

CASE NUMBER: M55/2022

In the matter between:-

**MURRAY AND DICKSON CONSTRUCTION
(PTY) LTD EIGENBAU JOINT VENTURE**

Applicant

and

**DR RUTH SEGOMOTSI MOMPATI
DISTRICT MUNICIPALITY**

Respondent

This judgment is handed down by electronic means via email to the legal representatives of the parties. The date and time of the handing down of the judgment is deemed to be 14 December 2023 at 10h00.

ORDER

I make the following order:

- i) The application for leave to appeal is dismissed.

- ii) The applicant is to pay the cost of the respondent.

JUDGMENT LEAVE TO APPEAL

FMM REID J

Introduction

[1] This is an application for leave to appeal against the judgment that stayed process of proceedings under an arbitration award, pending the outcome and finalisation of the review application against the arbitration award.

[2] The judgment against which leave to appeal is sought, reads as follows:

- “i) The application brought by Murray and Dickson Construction (Pty) Ltd Eigenbau Joint Venture against the Dr Ruth Segomotsi Mompoti District Municipality under case number M55/2022 is **stayed pending** the outcome of an arbitration referred on 25 April 2022 on disputes under the arbitration clauses of the agreement entered into by the parties on or about 10 March 2016.
- ii) The respondent in the counter application, namely Murray and Dickson Construction (Pty) Ltd Egenbau Joint Venture is ordered to pay the cost of the counter application.
- iii) The cost in the main application for specific performance of the decision of the Adjudication Board is reserved.”

[3] The following are the grounds of appeal (my own summary, and not all grounds are repeated):

- 3.1. The court erred in failing to give the correct legal status of the arbitration award which should be enforced pending the review of the arbitration award.
- 3.2. That the court erred in finding that the **Arbitration Act** 42 of 1965 (the Arbitration Act) is applicable. The applicant argues that the matter should not have been referred for arbitration from the onset.
- 3.3. The court erred in that the applicant is being prevented from exercising its rights that arose from the favourable arbitration award (the mutually destructive nature of the arguments between this ground and the previous ground does not escape me).
- 3.4. It would be in the interest of justice that leave to appeal be granted as it deals with the principle of a party to an arbitration process who is entitled to enforce its rights

derived from an arbitration award, pending a review application against the arbitration award.

[4] The application for leave to appeal is opposed on the following grounds:

4.1. That the relief granted in the arbitration award deals with the paying of a substantive amount of money, namely R17,497,433.30 (Seventeen Million Four Hundred and Ninety Seven Thousand Four Hundred and Thirty Three Rand and Thirty Cents) with interest. Should the arbitration award be executed prior to finalisation of the review application the money may not be recoverable and thereby irrevocably prejudice the respondent.

4.2. The arbitration agreement is specifically included in the contract (service level agreement) that was entered into between the applicant and respondent and should leave to appeal be granted, it would only delay the outcome of the litigation between the parties. The speedy and fair finalisation of the dispute between the

[6] After the enactment of section 17 of the Superior Courts Act, the test for the application for leave to appeal, has been set out as follows in **S v Kruger** 2014 (1) SACR 647 (SCA):

*"[2] Before dealing with the merits of the appeal, it is necessary at the outset to deal with the test applied by the high court in granting leave to appeal to this court. Despite dismissing the appellant's appeal, the high court concluded that it was 'possible' that another court might arrive at a different conclusion and that leave to appeal should not be 'lightly refused' where the person concerned is facing a lengthy sentence of imprisonment. This is an incorrect test. **What has to be considered in deciding whether leave to appeal should be granted is whether there is a reasonable prospect of success.** And in that regard more is required than the mere 'possibility' that another court might arrive at a different conclusion, no matter how severe the sentence that the applicant is facing. As was stressed by this court in **S v Smith** 2012 (1) SACR 567 (SCA) 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.'*

*[3] **The time of this court is valuable and should be used to hear appeals that are truly deserving of its attention. It is in the interests of the administration of justice that the test set out above should be scrupulously followed.** In the present*

case it was not, and this court has had to hear an appeal in respect of which there was no reasonable prospect of success.”
(own emphasis)

- [7] In **MEC for Health, Eastern Cape v Mkhita** 2016 JDR 2214 (SCA) the Supreme Court of Appeal emphasised the application of the correct test to be applied in an application for leave to appeal. In **Mkhita** the Supreme Court of Appeal found as follows in paragraphs [16] to [18] in relation to consideration to be given when dealing with an application for leave to appeal:

*“[16] Once again it is necessary to say that **leave to appeal, especially to this court, must not be granted unless there truly is a reasonable prospect of success.** Section 17(1)(a) of the Superior Courts Act 10 of 2013 makes it clear that 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**; or there is some other compelling reason why it should be heard.*

*[17] 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.***

*[18] In this case the requirements of 17(1)(a) of the Superior Courts Act were simply not met. The uncontradicted evidence is that the medical staff at BOH were negligent and caused the plaintiff to suffer harm. The special plea was plainly unmeritorious. **Leave to appeal should have been refused. In the result, scarce public resources were expended: a hopeless appeal was prosecuted at the expense of the***

Eastern Cape Department of Health and ultimately, taxpayers; and valuable court time and resources were taken up in the hearing of the appeal. Moreover, the issue for decision did not warrant the costs of two counsel."
(own emphasis)

- [8] This test whether to grant leave to appeal or not, was also aptly set out in **Cook v Morrisson and Another** 2019 (5) SA 51 (SCA) as follows:

*"[8] The existence of reasonable prospects of success is a necessary but insufficient precondition for the granting of special leave. Something more, by way of special circumstances, is needed. These may include that the appeal raises a substantial point of law; or that the prospects of success are so strong that a refusal of leave would result in a manifest denial of justice; or that the matter is of very great importance to the parties or to the public. This is not a closed list (**Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd** 1986 (2) SA 555 (A) at 564H – 565E; **Director of Public Prosecutions, Gauteng Division, Pretoria v Moabi** 2017 (2) SACR 384 (SCA) ([2017] ZASCA 85) para 21)."*
(own emphasis)

- [9] The above caselaw emphasise that a "reasonable prospect of success" is no longer sufficient to justify the granting of leave to appeal. As set out in **Cook v Morrisson** "something more" is required in considering whether leave to appeal should be granted. The concept of "something more" is described by the Supreme Court of Appeal to be something that would substitute special circumstances, such as a

substantial point of law or that refusal to grant leave to appeal would result in a manifest denial of justice.

- [10] As set out in **Mkhita** *supra*, the workload in the judiciary is ever increasing and a judge who considers any application for leave to appeal, and specifically an appeal to the Supreme Court of Appeal has a judicial duty to ensure that unmeritous appeals do not become an unnecessary part of the workload of the Supreme Court of Appeal. Appeals without merits should simply not be granted leave to appeal.

Consideration

- [11] In the service level agreement ("the contract") the parties specifically makes provision for determination of a dispute by arbitration.
- [12] The arbitration award is subject to an administrative review process. This review process has already commenced and is pending.
- [13] Should the review of the arbitration award be successful, the

applicant need not pay the substantive amount of money to the respondent. The amount of R17,497,433.30 (Seventeen Million Four Hundred and Ninety Seven Thousand Four Hundred and Thirty Three Rand and Thirty Cents) with interest is not a small amount by any means. The substantive amount mitigates against the execution of the arbitration award pending review of the arbitration award.

[14] The arbitration award is dated 25 April 2022 and it would be in the interest of justice that the review proceedings against the arbitration award be finalised as soon as possible.

[15] Having consideration of the aspects mentioned in paragraphs [11] to [14] above, I am of the view that the application for leave to appeal should not succeed.

Costs

[16] The normal principle is that the successful party should be awarded its costs. I find no reason to deviate from this principle.

[17] The applicant is to pay the costs of the respondent.

Order

[18] In the premise I make the following order:

- iii) The application for leave to appeal is dismissed.
- iv) The applicant is to pay the cost of the respondent.



**FMM REID
JUDGE OF THE HIGH COURT
NORTH WEST DIVISION MAHIKENG**

APPEARANCES:

DATE OF HEARING:	20 OCTOBER 2023
DATE OF DELIVERY OF JUDGMENT:	14 DECEMBER 2023
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