REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 58654/2012

Not Reportable

Not of interest to other judges

In the matter between:

DEPARTMENT OF PUBLIC WORKS
PLAINTIFF(Applicant)

and

MVELA PHANDA CONSTRUCTION (PTY) LTD **FIRST DEFENDANT**

(First Respond

NCHUAPE SOLOMON MALEBYE **SECOND**

MPELO CONSTRUCTION CC

TEBOGO ORIGINEOUS MOLOISANE

JUDGMENT IN THE APPLICATION FOR LEAVE TO APPEAL

PETERSEN AJ:

[1] The applicant applies for leave to appeal to the Full Court of this Division against judgment granting absolution from the instance at the close of the case for the plaintiff on 20 October 2017.

[2] I do not intend repeating the reasons for the conclusions arrived at in the judgment or the grounds of appeal. The main ground of appeal essentially assails the court's judgment on the basis of a failure to apply the test for absolution from the instance correctly, against inferences which could have been drawn from the evidence relied upon by the plaintiff.

[3] Section 17(1) of the Superior Courts Act, Act 10 of 2013 ("the Superior Courts Act"), regulates applications for leave to appeal and provides:

'(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) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and
(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.'

[4] The test in an application for leave to appeal prior to the Superior Courts Act was whether there were reasonable prospects that another court may come to a different conclusion.[1] Section 17(1) has raised the test, as Bertelsmann J, correctly pointed out in *The Mont Chevaux Trust v Tina Goosen & 18 Others* 2014 JDR 2325 (LCC) 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 Cornwright & 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."

[1] *Commissioner of Inland Revenue v Tuck* 1989 (4) SA 888 (T) at 890

[5] 'Subject to section 15(1), the Constitution and any other law—

a) an appeal against any decision of a Division as a court of first instance lies, upon leave having been granted—

(i) if the court consisted of a single judge, either to the Supreme Court of Appeal or to a full court of that Division, depending on the direction issued in terms of section 17(6); or

..."

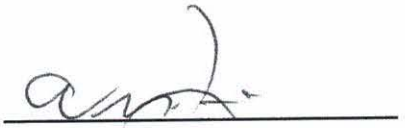
The applicant and respondents are in agreement on one aspect in this application; in the event of leave to appeal being granted, that such leave be granted to a full court of this Division. I accept that would be the correct course.

[6] I have had regard to the arguments of counsel for the applicant and the respondents and whilst I do not repeat them in this judgment, it should not be construed that they have not been carefully considered. In granting absolution from the instance at the close of the case for the plaintiff, I found, amongst others, that the applicant adduced no objective facts of the meeting of the 5 October 2009 and that its case was purely circumstantial. A point is taken that the applicant had not raised the fact of the meeting in its particulars of claim; that same had been raised by the respondents and the plaintiff thus bore no onus in this regard. It is accepted that the calculation of the cancellation fee was the result of this meeting and the central issue of the dispute between the applicant and the respondents'. Another court could reasonably find, in my view that I erred in this regard and that it may call for an answer from the respondents. The remainder of the grounds of appeal are inextricably linked to this ground in that the evidence of the plaintiff is essentially based on what followed on the said meeting.

[7] On the issue of the punitive cost order, which entails a discretion being exercised on the part of a judicial officer, another could reasonably find that the discretion was not exercised judiciously. In any event the cost order is premised on the conduct of the plaintiff's case and if successful on the merits would call for an alternative order as to costs.

[8] In the result, it is ordered that:

1. Leave to appeal be granted to a full court of the Gauteng Division of the High Court.
2. Costs shall be costs in the appeal.



AH PETERSEN

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Appearances:

For the Applicant : Adv. D. Berger SC with him Adv. A. Laher

Instructed by: Haffejee, Roskam and Savage Attorneys

For the First Respondent: Adv. Mcaslin SC

Instructed by: Frese Moll and Partners

For the Second Respondent: Adv. D. Van Zyl

Instructed by: Markram Inc.

DATE HEARD: 02 February 2018

DATE OF JUDGMENT: 12 February 2018