

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case Number: 15988/2020

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHERS JUDGES: NO

(3) REVISED: NO

DATE: 8 December 2023

Signature:

In the matter between:

GLENCORE OPERATIONS SA (PTY)LTD

First Applicant

ARM COAL (PTY) LIMITED

Second Applicant

GOEDGEVONDEN JOINT VENTURE

Third Applicant

And

THE COMMISSIONER FOR THE SOUTH
AFRICAN REVENUE SERVICE

First Respondent

ANAND KHELAWON N.O

Second Respondent

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on CaseLines by the Judge or her Secretary. The date of this judgment is deemed to be 8 December 2023.

JUDGMENT

COLLIS J

1. This is an application for leave to appeal against the judgment and order made on 17 July 2023.
2. The application is premised on the grounds as listed in the Application for Leave to Appeal dated 4 August 2023.
3. In anticipation for the hearing of the application for leave to appeal, the parties were requested to file short heads of argument, which they acceded to and the Court expresses its gratitude to the parties for the heads so filed.

LEGAL PRINCIPLES

4. Section 17 of the Superior Court's Act provides as follows:¹

“(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 to appeal does not fall within the ambit of section 16(2)(a);

and

¹ Act 10 of 2013

(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.”

5. The applicant contends that the appeal would have reasonable prospects of success and that there exists a compelling reason why the appeal should be heard, thus relying on both grounds of appeal set out in section 17(1)(a) of the Superior Courts Act 10 of 2013.

6. As to the test to be applied by a court in considering an application for leave to appeal, Bertelsmann J in *The Mont Chevaux Trust v Tina Goosen & 18 Others* 2014 JDR 2325 (LCC) at para 6 stated the following:

‘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.’

7. In order to succeed, therefore, the applicant must persuade 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 categorized as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.²

8. In *Fair-Trade Independent Tobacco Association v President of the Republic of South Africa and Another*³ the Full Court of this Division observed that:

² S v Smith 2012 (1) SACR 567 (SCA) at para 7.

³ Case no: 21688/2020 [2020] ZAGPPHC 311 (24 July 2020) at [6].

“As such, in considering the application for leave to appeal it is crucial for this Court to remain cognizant of the higher threshold that needs to be met before leave to appeal may be granted. There must exist more than just a mere possibility that another court, the SCA in this instance, will, not might, find differently on both facts and law. It is against this background that we consider the most pivotal grounds of appeal.”

9. On behalf of the applicants it was submitted that the current application for leave to appeal meets the more stringent test and that there is indeed a sound, rational basis for the conclusion that there are prospects of success on appeal.⁴

10. The applicants highlighted the following issues in respect of which they contend an appeal would indeed have reasonable prospects of success namely:

10.1 The issue whether the National Appeal Committee (“NAC”) had jurisdiction to consider and decide the internal appeal at all.

10.2 The issue whether the NAC had jurisdiction to consider and make a finding on the question whether the JV complied with Note 6(f)(ii)(cc) (which requires that the mining activities must be carried on by the holder or cessionary of the necessary authorisation granted or ceded in terms of the Mineral and Petroleum Resources Development Act (“MPRDA”)).

10.3 The issue whether the NAC had the power to raise the demand from approximately R5 million to approximately R83 million.

10.4 The issue whether the JV complied with Note 6(f)(ii)(cc); and

10.5 The issue regarding the Commissioner’s failure to exercise a discretion in favour of the JV in terms of Note 5(c).

11. In as far as the existence of other compelling reasons why the appeal should be

⁴ Four Wheel Drive v Rattan N.O. 2019 (3) SA 451 (SCA), par. [34].

heard, the applicants had argued that these include whether an important question of law is raised and whether the judgment is of substantial importance to the applicants or other taxpayers.⁵

12. In this regard counsel had submitted that the jurisdiction of the Internal Administrative Appeal Committee and the dispute concerning the mining right in relation to joint ventures raise important questions of law.

13. In addition, while the demand for R83 million *in casu* covers only the period June 2012 to September 2014, the judgment also affects subsequent periods in respect of which diesel refunds claimed by the applicants (for the relevant period and thereafter) is more than R800 million.

14. It is for these reasons that counsel had submitted that there are also other compelling reasons why the appeal should be heard.

15. In opposition the respondents submitted that there exist no other compelling reasons as to why the appeal should be heard, in that the quantum of an amount to be paid by a taxpayer and how this judgment will impact on other joint ventures is per se not sufficient to conclude that other compelling reasons exists for the appeal to be heard.

16. As to the alleged failure by the Commissioner to exercise its discretion in favour of the JV, this Court was clearly correct to rely on Graspan⁶ as the appeal in respect of this decision was withdrawn and it therefore stands.

17. Between the parties, it was common cause that the mining authorization was not issued to the JV but to Glencore and it is therefore of no consequence as to whether this Court relied on the Old Rules or the New Rules in its interpretation as the entity registered for diesel rebates was simply not the holder to qualify for such

⁵ Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd 2020 (5) SA 35 (SCA), par. [2]; Erasmus Superior Court Practice, Vol. 1, D-106.

⁶ Graspan Colliery SA (Pty) Ltd v Commissioner for the South African Revenue Service (8420/18) [2020] ZAGPPHC 560 (11 September 2020).

rebates. To expect the Commissioner to interrogate the terms of a mining right which has been registered in someone else' name will be placing too onerous responsibility on the Commissioner.

18. This Court is in agreement with the views so expressed by counsel for the respondent, that the above-mentioned grounds without more do not constitute a compelling reason why the appeal should be heard.

19. As regards the contention that the appeal would have a reasonable prospect of success; having read the papers and having carefully heard counsel I come to the conclusion that there is also no reasonable prospect that another court would come to a different conclusion than the order of this Court in the manner envisaged by section 17(1)(a)(i) of the Superior Courts Act 10 of 2013.

ORDER:

20. Consequently, the following order is made:

20.1. Leave to appeal is refused, including the costs of two counsel.

C.J. COLLIS
JUDGE OF THE HIGH COURT
GAUTENG DIVISION PRETORIA

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INSTRUCTED BY:

Ramushu Mashile Twala Inc.

DATE OF HEARING:

06th November 2023

DATE OF JUDGMENT:

08 December 2023