



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST OF OTHER JUDGES: ~~YES~~/NO
(3) REVISED

DATE

SIGNATURE

Case No: 16427/22

In the matter between:

AZWINDINI ZELDA MALANGE

Applicant

and

**WANGA ENGINEERING AND CONSTRUCTION
SERVICES CC**

Respondent

In re:

WANGA ENGINEERING AND CONSTRUCTION

SERVICES CC

Applicant

and

AZWINDINI ZELDA MALANGE

Respondent

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

FRIEDMAN AJ:

- 1 This is an application for leave to appeal my judgment and order of 5 July 2023 (“**the merits judgment**”), in a dispute between the above-mentioned parties, in which I ordered the respondent to pay to the applicant the sum of R307 044.50 and gave ancillary relief. Although the respondent is now the applicant for leave, I shall below describe the parties as I did in the merits judgment – ie, when I refer to the respondent, I refer to the respondent in the initial proceedings before me.

- 2 Other than to note that the dispute related to a building contract, I do not intend to repeat anything in this judgment which I said in the merits judgment. I ask any reader sufficiently interested in this matter, to read the two together – the merits judgment is available at 2023 JDR 3727 (GJ) and [2023] JOL 61091 (GJ). What I saw below will be meaningless without reference to that judgment.

- 3 In her application for leave to appeal, the respondent relies on the following grounds:

- 3.1 I was wrong not to raise the arbitration clause of my own accord, and find that I lacked jurisdiction because the parties had, as reflected in that clause, agreed to arbitration.
 - 3.2 I misdirected myself by finding that the respondent did not raise a “recognisable defence” to the applicant’s claim. (I pause to note that the nature of the defence or defences which the respondent says I ought to have recognised are not identified in the application for leave to appeal. However, from the heads of argument filed the night before the hearing, it seems that the complaint is that I failed to recognise that the respondent had raised the defence of poor workmanship.)
 - 3.3 I misdirected myself by finding that the respondent did not deny that she failed to pay the applicant the R307 044.50 owed, because in fact the respondent did deny this in her answering affidavit (a reference is given to paragraph 9.5 of the answering affidavit). This is a reference to my statement in paragraph 8 of the merits judgment.
 - 3.4 I was wrong to find that there were no genuine disputes of fact on the papers.
 - 3.5 I was wrong to conclude that the respondent could not apply set-off to the applicant’s claim for the R307 044.50.
- 4 In paragraphs 16 and 17 of the merits judgment, I summed up the findings which I made which went to the heart of the matter. For completeness, and out of fairness to the respondent, I addressed her defences in some detail. But, really, no more is needed than to read paragraphs 16 and 17 of the merits judgment to see why I granted the relief

claimed by the applicant. Based on the reasoning in those paragraphs, I do not believe that there is a reasonable prospect of an appeal court making a different order to the one that I made.

5 My view in this regard is fortified when the grounds on which the application for leave to appeal is based are considered. When I read the heads of argument prepared by *Mr Zwane* (who appeared for the respondent), it seemed to me that the two most important ones, requiring proper consideration, were (a) the arbitration point and (b) the dispute-of-fact point. However, in oral argument *Mr Zwane* did not press the dispute-of-fact point at all. I address it for completeness below.

6 On the arbitration clause: the respondent clearly accepts that she did not object to this Court's jurisdiction at any stage in the initial proceedings. This is why she frames the issue, in the application for leave to appeal, as a criticism of my failure to raise the point *mero motu* – ie, of my own accord.

7 In the merits judgment (see paragraph 36 footnote 6) I gave authority for what is now a trite proposition that a claim of absence of jurisdiction, based on an arbitration clause, must be pleaded. I asked *Mr Zwane* in argument if he could point me to any authority for the view that a court could raise this point *mero motu*. He could not do so. This is unsurprising to me because there are, in my respectful view, important philosophical reasons for the principles which I highlighted in paragraphs 35 to 37 of the merits judgment. It is a fundamental principle of our law of contract that parties have an election as to whether to rely on contractual rights. This is entirely uncontroversial and requires no elaboration. Once it is accepted, then it cannot possibly be appropriate for a

court to raise an arbitration clause *mero motu*. An arbitration clause is no different to any other contractual right and therefore a party may elect not to exercise a right to arbitration just like any other contractual right. So for a court to raise the issue *mero motu* and, as suggested by the respondent, decline to exercise jurisdiction even where a respondent has elected not to rely on this right, would essentially be to bypass the respondent's choice. It should be self-evident that, having conveyed (by his or her conduct and silence) an intention to waive reliance on an arbitration clause by participating fully in High Court proceedings without objection, it would be inappropriate to allow a respondent to rely on an arbitration clause on appeal. Whether one frames this as waiver or voluntary submission to the Court's jurisdiction is immaterial.

8 On the supposed disputes of fact: there is, with respect, simply no basis for the submission which the respondent advanced – both in the initial proceedings and in the heads of argument filed now – that there were genuine disputes of fact on any issues which would have constituted a defence to the applicant's claim. I summarised (in paragraph 31 of the merits judgment) the facts which were the only disputed facts on the papers before me. I then explained in paragraphs 33 and 34 of the merits judgment why, even if the respondent's version of those facts was correct, they would not disclose a valid defence to the applicant's claim. If that is correct, then clearly the disputes were not material. It is, for this reason, unsurprising to me that *Mr Zwane* made no attempt to argue this point in the oral hearing.

9 Unlike the dispute-of-fact point, *Mr Zwane* pressed the set-off point in argument. However, the argument is not sustainable and has no prospects of success on appeal.

The reasoning in relation to this issue appears in paragraphs 20 to 24 of the merits judgment. It turns on the proper interpretation of the agreement. I do not believe that there is a reasonable prospect of an appeal Court interpreting the building contract differently to what is reflected in paragraphs 20 to 24 of the merits judgment.

10 I have addressed above the topic of disputes of fact. In paragraph 31 of the merits judgment, I summarised the factual disputes which the respondent sought to characterise as material and which she contended precluded the applicant from obtaining the relief which it sought. As may be seen there, the respondent did not ever suggest in the initial proceedings before me – or, indeed, even now – that there was any sort of factual dispute in relation to the proper interpretation of the agreement. Now that the Constitutional Court has made clear in *University of Johannesburg* that evidence on interpretive issues is generally admissible,¹ it has to be accepted that there may be cases where a court would be unable to resolve an interpretive issue on paper. But we should, in my respectful view, be careful not to interpret *University of Johannesburg* to mean that all, or even most, interpretive issues will turn on questions requiring evidence. By saying that such evidence is generally (but not always) admissible but may not be weighty,² the Constitutional Court has made that clear. So has the Supreme Court of Appeal in *Coral Lagoon*.³ It has never been suggested by the respondent that there could be any evidence which would disturb my conclusions in paragraphs 20 to 24 of the merits judgment and none occurs to me. In my view, if one leaves that question aside, there is no prospect of another court reaching a conclusion which contradicts what I have said in those paragraphs.

¹ See *University of Johannesburg v Auckland Park Theological Seminary* 2021 (6) SA 1 (CC) at paras 67-8

² See *University of Johannesburg* (supra) at para 68

³ See *Capitec Bank Holdings Ltd v Coral Lagoon Investments 194 (Pty) Ltd* 2022 (1) SA 100 (SCA) at paras 47 to 52

11 I should add, for completeness, that in her heads of argument in the application for leave to appeal, the respondent sought to rely on the decision of the SCA in *Blakes Maphanga Inc v Outsurance Insurance Co Ltd* 2010 (4) SA 232 (SCA) as authority for the proposition that “it is trite that where two persons are mutually indebted to each other their obligations may be extinguished by set-off”. The extract quoted in the respondent’s heads of argument appears in paragraph 14 of the SCA’s judgment. Regrettably, *Mr Zwane* (the author, as I have noted, of the heads of argument) did not read the rest of the judgment. There, the SCA reminds us of the equally trite propositions that (a) set-off may be excluded by agreement and (b) set-off applies only to cases where “both debts are liquidated in the sense that they are capable of speedy and easy proof”.⁴ Those two propositions, read with what I said in the merits judgment in the references given in paragraph 10 above, explain why set-off was not applicable here. When I raised this with *Mr Zwane* in oral argument, he could not point me to any authority or consideration arising from the papers which would serve to alter what I have said on this point in the merits judgment.

12 On the notion that I misdirected myself by holding that the respondent had not denied non-payment (see paragraph 3.3 above):

12.1 Again, *Mr Zwane*, although arguing this point in his heads of argument, did not press this point in oral argument. I address it, nevertheless, for completeness.

12.2 I have looked, again, at paragraph 9.5 of the answering affidavit. With respect to *Mr Zwane*, who drafted the application for leave to appeal and the heads of argument in which the point was repeated, he has misunderstood his client’s

⁴ See *Blakes Maphanga* (supra) at para 15

answering affidavit. She did not deny that she had not paid in paragraph 9.5 (or anywhere else, for that matter). Her whole defence was that she was justified in not paying, which is the reason why the respondent's complaint about set-off arises in the first place.

12.3 So, there is no reasonable prospect that any other court will conclude that there was a dispute regarding whether the outstanding money was not paid. That issue was clearly common cause, and there is simply no prospect of another court concluding that I was wrong about that.

13 It follows that the application for leave to appeal must be dismissed.

14 That, then, leaves the issue of costs.

14.1 It may emerge, in part, from what I have said above, but I do not think that I have done full justice to explaining the utter hopelessness of the application for leave to appeal. It was unsatisfactory in every respect. What stands out to me is the way in which *Mr Zwane* made no attempt to motivate for several of the grounds mentioned in the application itself and the heads of argument (choosing simply not to address them at all at the hearing) and quickly gave up any further attempts to justify those which were argued, as soon as I put my difficulties to him. The overall impression was created that *Mr Zwane* chose to float a series of unsustainable propositions in the hope that one of them might somehow stick.

- 14.2 *Mr Dube*, who appeared for the applicant, argued that the wholly unsustainable application for leave to appeal warranted a punitive costs order. In response, *Mr Zwane* said that there was no evidence of mala fides on the part of his client in pursuing the appeal. I raised with him the authorities which say that unreasonable litigation may warrant a punitive costs order and asked whether, objectively, the application for leave to appeal could be described as reasonable. He preferred to leave that issue for me to determine.
- 14.3 It seems to me that, if one considers the decision of the Constitutional Court in *Swartbooi v Brink* 2006 (1) SA 203 (CC) at para 27 and the SCA judgment of *Claase v Information Officer, South African Airways* 2007 (5) SA 469 (SCA) at para 11, there is an objective approach to the question of unreasonableness in the context of punitive costs orders. In other words, deliberate vexatiousness or mala fides might be self-standing bases for punitive costs orders. But, objectively unreasonable litigation might also, even in the absence of mala fides, warrant a punitive costs order in appropriate cases.
- 14.4 Although there seems to be acceptance in the case law that advancing a hopeless case might constitute unreasonable conduct, the scope of this principle troubles me somewhat. If one looks at *Swartbooi* and *Claase*, for instance, the unreasonableness could squarely be placed at the foot of the litigant concerned, rather than its legal practitioner. Punitive costs orders were made because of the objectively unreasonable stances taken by, in the case of *Claase*, South African Airways and in the case of *Swartbooi*, a municipality.
- 14.5 Of course, in most cases, the conduct of a properly instructed legal practitioner must be attributed to his or her client. But what troubles me about the present

case is this: the application for leave to appeal was clearly unsustainable in every respect. As I have explained, no proper basis was given for any of the criticisms made of the merits judgment, to the point that *Mr Zwane* abandoned some of his arguments from the outset, and pressed the remainder with no enthusiasm as soon as I put my difficulties to him. The authorities in the heads of argument were either self-evidently distinguishable or did not relate to the material issues. No attempt was made to demonstrate to me how any of the proposed appeal grounds could be justified on the papers. My point is that, without meaning any disrespect to him, *Mr Zwane's* prosecution of his client's case could reasonably be described as inept. However, the issue of what costs order to make triggers for me a concern about the interaction between punitive costs orders against litigants, on the one hand, and *de bonis* orders on the other. To put the concern bluntly: should the ineptitude of *Mr Zwane's* prosecution of the application for leave to appeal be attributed to the respondent?

- 14.6 Having agonised about this, and despite my immense sympathy for the applicant and the delay (and prejudice) which it has had to endure, I do not believe that I can make a punitive costs order in this matter. A *de bonis* order is out of the question, not least because *Mr Zwane* has not been heard on the topic. And because I have a residual concern about the extent to which the unreasonableness of this application can be attributed to the respondent, I do not believe that it would be appropriate for me to go as far as to make a punitive costs order in this case. I agree fully with *Mr Dube* when he submits that the application for leave to appeal was entirely baseless. However, in the circumstances of this case, I do not consider this to be quite enough to justify a punitive costs order.

14.7 In this regard, an additional consideration (which is directly relevant to the distinction between unreasonableness on the part of the legal practitioner, on the one hand, and unreasonableness of the litigant, on the other) is that, on the evidence before me, the respondent clearly believed herself to have a justifiable gripe. In other words, if one looks at the affidavits, there is no reason to doubt that the respondent genuinely believed that there had been poor workmanship. Whether this gave her a sustainable defence to the applicant's case has been addressed in the merits judgment. But it does seem to me that, in the circumstances of this case, it would be a stretch to say that the respondent's conduct in pressing her initial defence, and then this application, was unreasonable to the point of warranting additional censure.

THE ORDER

15 In the circumstances, I make the following order:

- 1. The application for leave to appeal is dismissed.**
- 2. The applicant in the application for leave to appeal (ie, the respondent in the application under case number 16427/22) is to pay the costs of the application for leave to appeal.**

**ADRIAN FRIEDMAN
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Delivered: This judgment was prepared and authored by the Judge whose name is reflected above and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand down is deemed to be 13 November 2023.

APPEARANCES:

Attorney for the applicant
(respondent in application for
leave to appeal): Dube Lesley Attorneys

Counsel for the applicant
(respondent in application for
leave to appeal): L Dube (Attorney with right of appearance)

Attorney for respondent (applicant in
application for leave to appeal): Peter Zwane Attorneys

Counsel for the respondent
(applicant in application for
leave to appeal): P Zwane (Attorney with right of appearance)

Date of hearing: 9 November 2023

Date of judgment: 13 November 2023