

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2022/3434

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

.....
S. MSIBI

16 November 2023

In the matter between:

JOHANNESBURG WATER SOC LTD

Applicant

and

BOSCH PROJECTS PTY LTD

First

Respondent

EDDIE OTTE

Second Respondent

CONSTRUCTION INDUSTRY DEVELOPMENT BOARD

Third Respondent

**JUDGMENT
(LEAVE TO APPEAL)**

MSIBI AJ

Background

[1] On 30 November 2022, during opposed application proceedings, I granted an order which read as follows:

[1] The applicant's strike out application is dismissed in respect of paragraph number 7 with costs.

[2] The applicant's strike out application is granted in respect of paragraph number 8 – 29 and 48-48.26 with costs.

[3] The applicant's main application to make the adjudication decision an order of court and for money payment against the first respondent, is dismissed with costs.

[2] Counsel for the applicant subsequently requested reasons for the order. On 4 April 2023 I furnished reasons for the said order. On 16 May 2023 the applicant filed a notice of application for leave to appeal, setting out the grounds upon which leave is sought.

[3] The applicant seeks leave to appeal against the judgment and the last order. The first respondent opposes the application for leave to appeal.

Grounds of appeal

[4] The applicant raised several grounds of appeal which are stated as follows:

4.1 The court erred in finding that the revised final fee Invoice No 26 issued by the first respondent for a total amount of R671 409.35 constituted a liquid document without taking into consideration the fact that the invoice was for services rendered, it was not admitted by the applicant and that there was a dispute in respect of the amount reflected on the invoice;

4.2 The court erred in finding that the revised claim amount based on invoice No 26 was a set-off agreement between the parties and that the invoice became final in terms of the contractual agreement on the 12th December 2020;

4.3 The court erred in finding that all the set-off principles have been met and that the first respondent succeeded in proving that there was a set-off in respect of the two debts from the applicant and the respondent; and

4.4 The court erred in finding that the total amount appearing on the invoice debt is due and payable to the first respondent.

[5] Regard being had to the grounds set out above, the pertinent issue raised by the applicant, is that the final fee amount claimed by the first respondent is not a liquid amount, and therefore capable of being set off against the first respondent's debt owed to the applicant.

[6] Counsel for the first respondent argued that invoice No 26 was due and payable by December 2020. An initial fee was disputed by the applicant. The revised fee was

never disputed. It is based on a liquid claim that is capable of speedy and prompt ascertainment, as a result this court's order cannot be faulted.

The applicable test

[7] In determining whether leave to appeal is granted, section 17(1)(a) of the Superior Courts Act 10 of 2013 provides as follows:

“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.”

[8] This is not a case where there is some other compelling reason why the appeal should be heard as contemplated in section 17(1)(a)(ii). The legislated test set out in section 17 (1) (a)(i) has been held to be a higher test than the test previously applied. See the matter in **Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting Director of Public Prosecutions and Others [2016] ZAGPPHC489** at para 25.

[9] The Superior Courts Act has raised the bar for granting leave to appeal. In **The Mont Chevaux Trust (IT2012/28) v Tina Goosen and 18 Others** Bertelsmann J held as follows:

“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 and Others 1985 (3) SA 342(T)** at 343 H. 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”

[10] **In MEC for Health, Eastern Cape v Mkhitha and Another [2016] ZASCA 176** (25 November 2016) para16 -18

“[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 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 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, tax payers, 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”

The merits

- [11] The reasoning in my judgment is detailed. I will refrain as far as possible from repeating same. However, I will make some remarks on the particular issues raised.
- [12] It is common cause that on 7 October 2013 the applicant and the first respondent concluded a contract, wherein the first respondent was awarded a tender to render civil structural engineering services. Based on the services rendered the applicant was expected to pay as invoiced by the first respondent. A dispute arose between the parties in the course of this contract which was referred to adjudication. The adjudicator directed the first respondent to pay applicant an amount of R1 610 425 55. The first respondent paid R1 007 866 20.
- [13] As established in my judgment, on 28 May 2021 the applicant indicated that the outstanding claim amounted to R671 409 35, however interest was charged on this amount as a result of which the amount stood at R758 167 26. The first respondent was also owed the amount of R683 501 63 excluding vat, for services rendered and not paid for by the applicant. At the direction of the applicant a revised calculation was made by the first respondent to the amount of R671 409 35 on 14 August 2020. This amount was never disputed within the contractual time frames as indicated in my judgment.
- [14] As I discussed and illustrated in my judgment the parties were mutually indebted to each other, both debts were of the same nature, both debts were liquidated and had become due and payable. As stated in **Wille’s Principles of South African Law at page 833** a debt is liquidated for purposes of set-off if.

“...its exact money value is certain or when the amount is admitted by the debtor, or even if the claim can be disputed by the debtor, it is of such a nature that the accuracy of the amount can be clearly and promptly established by proof in court, e.g. an amount due under a judgment, a taxed bill of costs, or a liquid document signed by

the debtor, or a claim for goods sold and delivered, or for salary, or for commission of an agreed amount...”

I am still of the considered view that set off is applicable in respect of the two debts.

[15] Having had regard to the grounds upon which leave to appeal is sought, and further having reflected on the judgment and orders of this Court, I find that the requirements of section 17(1)(a)(i) have not been met.

[16] In the premises, I make the following order:

1. Application for leave to appeal is dismissed with costs.

S. MSIBI
Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard: 06 November 2023
Judgment: 16 November 2023

Appearances:

For Applicant: JVM Malema
Instructed by: Padi Incorporated

For First Respondent: H Drake
Instructed by: Cox Yeats Attorneys