



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

CASE NO: 120617/2023

In the matter between:

PENTHOUSE HOLDINGS (PTY) LTD

Applicant

and

DELETE WHICHEVER IS NOT
APPLICABLE
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHERS JUDGES:
NO
(3) REVISED

**SANDIRAN
NAIDOO**

JASON
Respondent

JUDGMENT: LEAVE TO APPEAL

NGALWANA AJ

[1] In this application for leave to appeal against a judgment and order made by this court on 4 December 2023 the applicant contends, essentially, that this court misdirected itself on principles applicable in anti-spoliation applications by venturing beyond its remit in determining such applications. It also contends that in

striking the application for anti-spoliation order this court adopted a wrong view of the facts.

[2] The Respondent opposes the application. It says the mooted appeal has no prospects of success.

[3] I agree. The Applicant appears to misunderstand the thrust of the judgment made on 4 December 2023. The application was struck off the roll for lack of urgency. The Applicant failed in its papers and in argument to show that it would not be able to obtain substantial redress in due course. This court expressly declined to embark on a determination of the merits of the Applicant's case. It said: *"Counsel also addressed me on the merits of the case. I am grateful to them both for their able and scholarly address. However, it is unnecessary to engage with the merits of the Applicant's case for I am satisfied that its application falters at the first hurdle in urgent court: urgency"*.

How the Applicant arrives at a conclusion that its application was dismissed on the merits seems to be a result of a misunderstanding of the judgment.

[4] The grounds for striking the application off the roll for lack of urgency are clearly explained in the main judgment. The court will not repeat those here. There was no referral of disputes of fact to oral argument. This court expressly observed: *"That is not the stuff of which urgent court is made"*. There was no determination of the parties' rights *inter se*. The idea of a builder's lien as a basis for urgency was not of the court's creation. It was the Applicant that introduced it. So, the argument had to be considered. It was and was found wanting for reasons explained in the main judgment. This was not an exercise in the determination of the parties' rights *inter*

se. It was an exercise in the determination of the basis advanced by the Applicant for urgency.

[5] The Respondent asks for costs on a punitive attorney and client scale as it did in the main application. I declined the request on the first occasion for reasons given in the main judgment. Now the Respondent contends that this application for leave to appeal is an abuse of court process and is reckless. I am inclined to agree. The grounds of appeal bear no rational relation to the judgment and order granted in the main judgment. While the main application was struck off the roll for lack of urgency, the Applicant now approaches this court on the basis that its application was dismissed on its merits despite clear language in the main judgment to the contrary. It would be unfair and not in the interests of justice to call upon the Respondent to pay any portion of the costs occasioned by this patently meritless application.

[6] I should mention, in closing, that I invited the parties to submit heads of argument that would assist the court in assessing whether it would be necessary, having considered the written argument, to hear oral argument. In addition, and after receiving written argument from both parties, I requested short submissions on what specific value oral argument would add to the determination of this application which cannot be gained from the written argument, considering costs and the fact that this is not a re-argument of the main case but an application for leave to appeal. The Applicant took the view that oral argument would add value but did not explain what that value would be. It did not address the costs question. The Respondent took the opposite view. In the end, taking into account the cost factor to both parties, the full set of heads submitted by

both parties, and the nature of the issues before me, I determined that oral argument would not be necessary.

Order

In the result, I make the following order:

1. The application for leave to appeal is dismissed.
2. The Applicant is to pay the Respondent's costs on attorney and client scale, including costs consequent upon the appointment of Counsel.

V NGALWANA
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Delivered: This judgement was prepared and authored by the Judge whose name is reflected 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 03 April 2024.

Date of heads: 15 February 2024 (Applicant)

13 March 2024 (Respondent)

Date of judgment: 03 April 2024

Appearances:

Attorneys for the Applicant:

Machaba Attorneys

Counsel for the Applicant:

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LAZZARA LEICHER Inc

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