IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE LOCAL DIVISION: MTHATHA]

NOT REPORTABLE

CASE NO: 1195A/19

Heard on: 18/09/19

Delivered on: 25/09/19

In the matter between:

JOINT VENTURE BETWEEN AVENG AFRICA

(PTY) LTD AND STRABAG INTERNATIONAL GmbH Applicant

And

SOUTH AFRICAN NATIONAL ROADS AGENCY Respondent

JUDGMENT ON LEAVE TO APPEAL

NHLANGULELA DJP

[1] This judgment concerns an application for leave to appeal the judgment granted on 02 July 2019 that the applicant for leave must return certain assets to the respondent that it had removed from the possession of the respondent

without the consent or any legally recognized right. The costs aspect of the judgment, which were also granted in favour of the respondent, forms part of the application for leave.

[2] For present purposes it is essential to state upfront that leave is not so much anchored on a misinterpretation of any of the legal principles that govern the remedy of spoliation. Instead, the application for leave is predicated on the main ground that the court *a quo* failed to analyse or evaluate the facts stated on affidavits with a consequence that the judgment is wrong. I make these remarks not being oblivious of the fact that the court *a quo* is neither being called upon to re-adjudicate the main application nor deal with the appeal but only to determine the issue whether a reasonable prospect(s) of the appeal being decided in favour of the applicant does exist. The Supreme Court of Appeal in *S v Smith* 2012 (1) SACR 567 (SCA) at para [7] stated that the test applicable in an application for leave to appeal is the following:

> *"What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court 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 categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal."*

[3] The main facts that the court *a quo* is said to have not decided correctly are that the applicant removed assets listed in Appendix B; a distinction was not made as to who between the applicant and the suppliers/subcontractors was the owner of the assets listed in Appendix B; the respondent had not per letter dated 2 April 2019 consented to the removal of assets from the site; that the applicant was still in possession of the assets that were removed from the respondent; and that the applicant was the spoliator of the assets.

[4] In this Court, *Mr Tshikila* stated, correctly so, that the respondent was only saddled with *onus* to prove that it was in possession of the assets at the time when they were removed by the applicant forcibly or wrongfully against the consent of the respondent. By contrast, the respondent was not obliged to prove

ownership of the assets. Neither was it obliged to prove that the applicant was entitled to remove the assets in terms of the contract that the parties had with regard to the construction of Mtentu River Bridge. A further submission made by *Mr Tshikila* that the defences that the applicant had relied upon to resist the remedy of spoliation, which were considered by the court *a quo*, reveal that the application for leave does not have a reasonable prospect of success on appeal.

[5] There is no need to re-count the facts of the case in this judgment. Suffice it to state that the evidence proved that the applicant did remove the assets from the possession of the respondent. At the time when doing so, the applicant had not co-ordinated his action with the sub-contractors, suppliers and the Engineer. It had not yet given a four days plan for the removal of the assets and the Engineer was not caused to supervise the removal of the assets. It was, therefore, plain that the removal of assets took place at the whims, not consent, of the respondent. Simply put, the conditional consent given by the respondent per letter dated 2 April 2019 was not complied with. That said, the defences relating to the applicant's right to remove the applicant's right to remove the assets in terms of the employer-contractor written agreement would not have disturbed a decision based solely on the spoliation remedy. Neither was it competent of the court *a quo* to ignore the proved act of spoliation on the incorrect basis that the applicant was merely facilitating the removal of assets belonging to the supplier and sub-contractors when it actually took part in the removal of assets. Consequently, there can be no basis to the ground of appeal that the applicant was no longer in possession of the assets irrespective of ownership thereof. On the consideration of these facts, it did not lie on the say-so of the applicant that the assets proved to have been removed by it were in possession of the suppliers and sub-contractors because they were the owners thereof.

[6] Coming back to the test of reasonable prospect(s) of success I remain not persuaded that the grounds of appeal are sound and a rational basis for the conclusion that there are prospects of success on appeal. That finding does affect the appeal against the costs order.

[7] In the result the following order shall issue:

1. The application for leave to appeal be and is hereby refused.

2. The applicant for leave to pay costs of the application.

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Z. M. NHLANGULELA

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

MTHATHA

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