



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 59545/2018

DELETE WHICHEVER IS NOT APPLICABLE

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

29/10/24.....

[REDACTED]

In the matter between: -

ALTO MANAGEMENT CC

Applicant/Respondent in leave to appeal

(Registration No: 2002/097938/23)

and

WINGTIPCROSSING SHOPPING

CENTRE (PTY) LTD

Respondent/Applicant in leave to appeal

(Registration No: 2013/048828/07)

This judgment was handed down electronically by circulation to the parties' legal representatives via email and by uploading it to the electronic file of this matter on Caselines. The date of judgment is deemed to be 29 October 2024.

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

MOGAGABE AJ

INTRODUCTION

[1] The applicant herein (respondent in the main application) seeks leave to appeal against my judgment and order so delivered on 12 August 2024, premised on the grounds set out in the application for leave to appeal.¹ Leave to appeal is sought to the Full Court of this division.

[2] The respondent herein (applicant in the main application) is resisting the application for leave to appeal based on the grounds outlined in its head of argument filed in this regard.²

¹ CaseLines 028-3 to 028-27 Application for Leave to Appeal.

² CaseLines 028-29 to 028-46 Alto's Heads of Argument.

- [3] For convenience, the applicant will be referred to as “Wingtip” and the respondent as “Alto Management”.
- [4] Prior to the enactment of the Superior Courts Act 10 of 2013 (the Act), applications for leave to appeal were regulated by the Supreme Court Act of 1959, in terms of which an application for leave to appeal was granted if the court was of the opinion that exists reasonable prospects that another court might reach a different conclusion on the judgment appealed against i.e. on the basis of a mere possibility of success or an arguable case. However, since the commencement of the Act on 23 August 2013, an application for leave to appeal will only be granted when the Judge or Judges concerned is/are of the opinion that the appeal would have a reasonable prospect of success or there exists other compelling reason(s) why the appeal should be heard by an appellate court.³ This entails that in terms of sec 17(1)(a) the test in determining applications for leave to appeal is now stringent, requiring a measure of certainty that an appellate court would reach a different conclusion on the facts and the law on the judgment and order so appealed against. In other words, leave to appeal should be granted only where an applicant has demonstrated and the court is convinced that there exists a sound and rational basis for the conclusion that there are prospects of success on appeal. For reasons set out

³ In terms of sec 17(1)(a)(i) and(ii) of the Act, governing applications for leave to appeal.

hereafter, I am not convinced that another court would come to a different conclusion on the grounds raised by Wingtip.

- [5] The grounds of appeal on which Wingtip relies for the application for leave to appeal are a rehash of the grounds raised or relied upon by Wingtip in the main application, which grounds are covered or dealt with in my comprehensive judgment. The reliance by Wingtip on the cases of **Thomas Construction (Pty) Ltd (in liquidation) v Grafton Everest Manufacturers (Pty) Ltd**⁴ and **Intec Instruments v Transnet Ltd t/a South African Port Operations**,⁵ is misguided and misplaced, mainly or principally in that in these cases, the agreement forming the subject matter of the litigation *inter alia* (i) contained a clause to the effect that the entire performance by the contractor was a condition precedent for the employer's liability, entailing that the contractor's right to payment was dependent upon full performance of the contract on its part and partial performance by the contractor did not render the employer liable for partial payment, whereas *in casu* the agreement in question (the JBCC Agreement) did not contain such a clause. The legal effect thereof being that where a contractor lawfully terminates a construction contract (as was the case in this matter), in instances where there is incomplete performance by a contractor, the interim payment certificates on which such contractor relied for payment of retention monies and unpaid invoices, cease to be of any force and

⁴ 1988 (2) SA 546 (A) p563F-G.

⁵ [2019] ZASCA 79 (31 May 2019); [2019] 3 All SA 357 (SCA).

effect and cannot sustain a basis for payment, where in view of the cancellation of the contract, there is no further expectation of the completion of the works.⁶

[6] This contract was one of performance specification (without containing a bill of quantities quantifying the works in detail), often referred to as a “lump sum” contract based on performance specification, requiring complete performance by the contractor of the entire works as a condition precedent for the employer’s liability.⁷ Counsel for Wingtip conceded and correctly so, that the agreement (the JBCC Agreement) forming the subject matter of the present litigation does not contain a clause similar to the one contained in the agreement forming the subject matter of the litigation in these two cases.

[7] Having given due and proper consideration to all the submissions made by the parties, I am of the considered view that there exists no prospects let alone reasonable prospects or other compelling reasons, why leave to appeal should be granted in the present matter.⁸ Nor can it be contended that the matter is of substantial importance to Wingtip, simply because this is a contractual matter relating to failure by Wingtip to make payment based on payment certificates.

⁶ Intech para 47

⁷ Intech para 45

⁸ *Mont Cheveaux Trust v Goosen* 2014 JDR 2325 (LCC) para6; *MEC for Health, Eastern Cape v Mkhitha* [2016] ZASCA 176 para 17; *S v Smith* 2012 (1) SACR 597 (SCA) para 7; *National Director of Public Prosecution v Democratic Alliance* para 24.

Overall, the applicant has failed to show that there exists a sound and rational basis for the conclusion that there are prospects of success on appeal.⁹

[8] In **Fusion Properties 233 CC v Stellenbosch Municipality**,¹⁰ the Supreme Court of Appeal held that:

"It is manifest from the text of s 17(1)(a) that an applicant seeking leave to appeal must demonstrate that an envisaged appeal would either have a reasonable prospect of success, or alternatively, that 'there is some compelling reason why an appeal should be heard'. Accordingly, if neither of these discrete requirements is met, there would be no basis to grant leave..."

ORDER

[9] In the result, the following order is made:

9.1. the application for leave to appeal is dismissed;

9.2. the applicant to pay the costs thereof on scale B.


S J R MOGAGABE AJ

Acting Judge of the High Court

⁹ *Secona Freight Logistics CC v Samie and Others* [2023] ZASCA 183 (22 December 2023) para [28]

¹⁰ [2021] ZASCA 10 (29 January 2021)

Gauteng Division, Pretoria

F KRIEL

Counsel for the applicant:

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E MALHERBE

Counsel for the respondent

Instructed by Roelf Nel Inc

Date of hearing: 28 October 2024

Date of Judgement: 29 October 2024