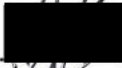


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2018/45610

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
	
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A. FRIEDMAN	17 OCTOBER 2024

In the matter between:

**BAPHALABORWA 72 CONSTRUCTION & CIVIL
ENGINEERING CC**

Applicant

and

T & L CIVIL ELECTRICAL CONTRACTORS CC

Respondent

In re:

T & L CIVIL ELECTRICAL CONTRACTORS CC

Applicant

and

**BAPHALABORWA 72 CONSTRUCTION & CIVIL
ENGINEERING CC**

Respondent

JUDGMENT: LEAVE TO APPEAL

FRIEDMAN AJ:

- 1 In this matter, I handed down my judgment and order on the merits ("**the merits judgment**") on 30 June 2023. I granted the applicant ("**T&L Civil**") the relief sought in its notice of motion. The respondent ("**Baphalaborwa CC**") appears to have filed an application for leave to appeal timeously. But, for reasons which remain unclear to me, the application for leave to appeal was only set down for argument on 11 October 2024. This would have been regrettable at the best of times. But it is especially unfortunate in this case, because there appears to have been urgent litigation in the intervening period about the execution of my order, when perhaps efforts would have been better spent expediting the hearing of this application. To make matters worse, a series of disconcerting further developments led to another delay in the hearing of the application, with its postponement to yesterday – ie 16 October 2024. It is unnecessary to dwell on those any further.
- 2 I do not want to delay the finalisation of this application any longer, so have issued this judgment and order by prioritising speed over thoroughness (in the old days, this would have been an *ex tempore* judgment, but with the advent of Microsoft Teams hearings, I find it more appropriate to issue short reasons in writing). I accordingly do not spend any time rehearsing what is already in the merits judgment and ask that any person with an interest in this matter read this judgment together with that one. The simple issues in this application are whether I was wrong to hold in the merits judgment that (a) an Adjudicator's determination made under the Master Builders South Africa Domestic Subcontract Agreement is binding on the parties, and (b) the appropriate remedy for a party disputing an Adjudicator's determination is to refer the matter to arbitration, and not to dispute the correctness of the award in an answering affidavit in the High Court in response to enforcement proceedings (in what is akin to a collateral attack).
- 3 Of course, it is human nature to cling to the correctness of one's views. But if rational humans could not be persuaded by argument, the whole system of litigation would be pointless. It is a duty of a judge (or acting judge) when deciding whether to grant leave to appeal to have the humility to realise when his or her findings are subject to reasonable disagreement, and to approach the matter as objectively as possible. Good judges, in a sensible legal system, should easily be able to identify which points are arguable and which are not. Just as, I dare say, good people, in a sensible society, should be able to take a position while recognising the reasonableness (or unreasonableness) of the differing views of others.
- 4 In this case, I took the view that Baphalaborwa CC's case (in the merits proceedings) was indisputably lacking in merit – ie, it was not even arguable (and which, for present purposes, carries the implication that the application for leave

to appeal should be dismissed). Therefore, and in the spirit of what I have said above, I wanted to use the argument in the application for leave to appeal to allow counsel for Baphalaborwa CC to draw to my attention any aspects of the record, or arguments, which I may have overlooked, and which may have been relevant to the correctness of my order. Both *Mr Nkosi*, who appeared for Baphalaborwa CC and *Ms Rakhadani*, who appeared for T&L Civil, filed written heads of argument, which I read before the hearing.

- 5 Unfortunately, the stance taken by *Mr Nkosi* in argument in the application for leave to appeal displays an unfortunate feature of this case, present from the outset. Baphalaborwa CC and/or its legal representatives have never seemed to grasp the fundamental basis of T&L Civil's case – as accepted by me as correct in law, in the merits judgment. The single principle which serves to explain my finding on the merits is this: if Baphalaborwa CC disputed the finding of the adjudicator, it had the contractual right to refer the matter to arbitration. It failed to assert that right. Instead, it waited until T&L Civil brought the application which I granted – ie essentially to make the adjudication award an order of court and to compel compliance with it – and then sought to raise a series of arguments, almost certainly lacking in merit, attacking the underlying rationale of the adjudication determination.

- 6 This approach was again followed in the application for leave to appeal, in which *Mr Nkosi* now sought to emphasise my apparent error in failing to appreciate that the adjudication determination only related to interim statements of account. As it happens, *Mr Nkosi's* argument appears to be based on an inexplicable misunderstanding of the nature of interim payments in a building contract. In his heads of argument, *Mr Nkosi* says that I failed to understand that the adjudication award was based on statements which were not final "and subject to change". In making this argument, he referred me to paragraph 46 of the adjudicator's determination. But any reasonable person who reads paragraphs 46 and 48 of the Adjudicator's Determination would appreciate that they are dead against Baphalaborwa CC. They confirm the status of interim certificates as giving rise to enforceable debts. This is not a controversial issue, and there is a wide variety of material (judgments, textbooks, LAWSA etc) available to legal practitioners to enable them to understand the legal position easily.

- 7 But the bigger issue is this. What is the underlying premise of *Mr Nkosi's* submissions? He says that there is a reasonable prospect of an appeal court varying my order. But how? If one considers both his heads of argument and his oral address, his overall contention is that, to "avoid grave injustice", an appeal court would be willing to undertake something which I declined to do – consider the detailed submissions and evidence presented by Baphalaborwa CC in the papers about the various apparent shortcomings in the Adjudicator's determination. And, presumably, to entertain the ill-conceived argument that the Adjudicator's determination was not binding on Baphalaborwa CC because it related to interim payments.

- 8 In fairness to *Mr Nkosi*, there is one development which only happened after I heard the matter on the merits. If I understand him correctly, he says that, in subsequent litigation, T&L Civil "conceded" in an affidavit that the payments on which the Adjudicator's determination was based were only interim. But, since this "concession" was only made after my merits judgment, Mr Nkosi submitted that I should reopen the case by granting leave, thus allowing the appeal court to use its wide discretion to admit further evidence on these developments.
- 9 It is self-evident why this is not a sustainable argument. It suffers the same defect that Baphalaborwa CC's case suffered before me on the merits – it is premised on the same misunderstanding of the nature of determinations in relation to interim payments. Put differently, the argument is once again premised on the flawed notion that any court (let alone an appeal court) could now revisit the correctness of the sums claimed by T&L Civil in the proceedings before the Adjudicator.
- 10 For these reasons, the application for leave to appeal has to be dismissed.
- 11 *Ms Rakhadani* filed heads of argument before the hearing which were clear and of assistance – for which I am grateful. She argued, along the lines of what I have already said above, that Baphalaborwa CC has never grasped the defects in its case. It is, at she put it, intent on arguing the merits already subject to the Adjudicator's determination, rather than grappling with the flaws addressed at length in the merits judgment and more briefly above. The inference that regrettably must be drawn from the quality of the application for leave to appeal and argument before me, is that the application for leave to appeal was a mechanism to achieve delay. In the circumstances, I agree with *Ms Rakhadani* that a punitive costs order is justified.
- 12 I accordingly make the following order:
1. The application for leave to appeal is dismissed.
 2. Baphalaborwa CC (the applicant for leave to appeal) is ordered to pay the respondent's costs, on the attorney-client scale.


A. FRIEDMAN
Acting Judge of the High Court
Gauteng 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. The date for hand down is deemed to be **17 October 2024**.

Heard:

16 October 2024

Judgment:

17 October 2024

Appearances:

For Applicant (respondent a quo):
Attorneys for the Applicant:

J Nkosi
FC Nwanezi Agbugba Attorneys Inc

For Respondent (applicant a quo):
Attorneys for Respondent:

I Rakhadani
Myburgh Ralenala Attorneys