REPUBLIC OF SOUTH AFRICA

IN THE SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NO: 27254/2009

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

15 MARCH 2013 FHD VAN OOSTEN

In the matter between

WOLFSBERG ARCH INVESTMENTS (PTY) LTD **PLAINTIFF**

and

PENTAD QUANTITY SURVEYORS (PTY) LTD **DEFENDANT**

Appeal-application for leave to appeal-consideration s arising-reasonable prospects of a successful appeal-absence of-leave to appeal refused.

JUDGMENT
(LEAVE TO APPEAL)

VAN OOSTEN J:

[1] The unsuccessful plaintiff now seeks leave to appeal against that part of my judgment dealing with the proof of damages arising from the defendant's breach of the consultancy agreement and the order non-suiting the plaintiff on its claim for contractual

damages. The grounds in support of the application for leave to appeal as set out in the notice of application for leave to appeal are anything but a model of clarity or precision. Counsel for the plaintiff (who did not appear at the trial), however, confined his argument to two contentions, which I now proceed to deal with.

[2] The first contention relies solely on the evidence of McKenzie, the managing director of the plaintiff, that he would have taken steps to manage the overrun, had he known of it at an earlier stage, which of course is the time the defendant in terms of the consultancy agreement, should have informed the plaintiff of the overrun. Counsel for the plaintiff emphasised the fact that his evidence on this score was not challenged and submitted that it indeed was sufficient to sustain the plaintiff's damages. In the notice of application for leave to appeal the contention, in a somewhat diluted form, is articulated thus:

'5. The court ought to have found that the applicant's patrimonial loss, both on the reasoning of the court in the Tswelena case and on the evidence adduced before it, had been satisfactorily proven and that the applicant, by the time the loss sustained by it had come to its attention, had little if indeed any "space" within which to manoeuvre, that is, no effective means of avoiding the overrun and the loss sustained by it."

The contention is flawed in its premise: the evidence relied on was nothing more than a vague unsupported proposition, or as counsel for the plaintiff preferred to refer to it, flimsy evidence, advanced by McKenzie. Seemingly absent from his evidence is firstly, any indication as to the nature of the "steps" the plaintiff would have taken, secondly, when that would have happened and, thirdly, and most importantly, how those "steps" would have impacted not only on the budget but also on the costs of the project as a whole. The mere suggestion made by McKenzie, in the absence of causality as to the damages allegedly suffered by the plaintiff, in my view, cannot be considered sufficient to prove damages.

[3] The second contention raised by counsel for the plaintiff concerned the applicability and relevance of the *Tswelena* judgment referred to in para [12] and [13] of my judgment. The comparison is nothing more than of academic interest. As stated in my judgment *Tswelena* was decided on exception and merely concerned the plaintiff's case as pleaded where significantly different considerations apply. Furthermore, the plaintiff's

case in this matter, in any event, was not based on the loss of a "bargain". The damages claimed is for the amount of the costs of the overrun on the basis of "had the defendant not breached the consultancy agreement and properly performed its obligations in terms of the consultancy agreement, the development could and would have been completed within the budgeted estimate", as I have dealt with in paragraphs 10 and 11 of the judgment. The amount of the costs of the overrun cannot, on its own, constitute damages as the plaintiff has received corresponding value in the changes that were of necessity effected to the demising walls. In the absence of any factual support the notion of damages simply falls away.

[4] I am not persuaded that another court will reasonably come to a different conclusion concerning proof of damages. In the absence of reasonable prospects of a successful appeal, leave to appeal ought to be refused.

[5] In the result leave to appeal is refused with costs including the costs of senior counsel.

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

COUNSEL FOR PLAINTIFF	***ADV AJ DANIELS***
PLAINTIFF' ATTORNEYS	***ANDREW MILLER & ASS***
COUNSEL FOR DEFENDANT	***ADV P ELLIS SC***
DEFENDANT'S ATTORNEYS	***GILDENHUYS MALATJI INC***
DATE OF HEARING	***14 MARCH 2013***
DATE OF JUDGMENT	***15 MARCH 2013***