

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 09441/2019

(1)	REPORTABLE: YES /NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED: YES/NO
18 June 2019	

In the matter between:

ORION REAL ESTATE LIMITED

Applicant

And

ZEPHAN PROPERTIES PROPRIETARY LIMITED

Respondent

JUDGMENT IN RESPECT OF APPLICATION FOR LEAVE TO APPEAL

WANLESS, AJ

- [1] This is an application by ORION REAL ESTATE LIMITED (hereafter referred to as "the Applicant") for leave to appeal to the full court of this Division against the judgment granted by this court on the 25th of April 2019. The application is opposed by ZEPHAN PROPERTIES PROPRIETARY LIMITED (hereafter referred to as "the Respondent").

[2] The aforesaid judgment was in respect of an application instituted by the Applicant, on an urgent basis, heard by this court on the 26th of March 2019. In its judgment this court found that the Applicant had not discharged the onus incumbent upon it to entitle it to the relief sought. In the premises, the application was dismissed, with the Applicant to pay the costs of the application, such to include the costs of Senior Counsel and the costs of two Counsel. Insofar as the history of the matter and the relief sought are concerned, these are clearly set out in the judgment of this court and will not be repeated herein.

[3] Before dealing with the merits of the present application it is necessary, regrettably, for this court to deal with the alleged failure of the Applicant to serve and file its Notice of Application for Leave to Appeal timeously in terms of Rule 49(1)(b). The “procedural steps” which took place between the 28th of March 2019, when this court delivered judgment *ex tempore* and the 5th of June 2019 when the present application was heard, are set out in the Applicant’s Condonation Application which was placed before the court on the 5th of June 2019. The material facts set out therein are not seriously disputed by the Respondent (who elected not to serve and file an Answering Affidavit in the condonation application) and may be relied upon when deciding this issue. In order not to burden this judgment unnecessarily, these facts will not be repeated herein.

[4] Further, the grounds upon which the Respondent based its point *in limine* that the Appeal should be dismissed in light of the alleged failure of the Applicant to serve and file its Notice of Application for Leave to Appeal timeously in terms of Rule 49(1)(b) are contained in the Heads of Argument filed on behalf of the Respondent in the present application. Hence, these grounds will also not be repeated herein.

[5] Upon a proper consideration of the aforesaid grounds relied upon by the Respondent together with the facts pertaining to the filing of the Applicant's Notice of Application for Leave to Appeal, this court finds that the said notice was filed within the time limits as prescribed by Rule 49(1)(b). This must be so since the Applicant was clearly entitled to request reasons to the *ex tempore* judgment handed down by the court. These reasons (in the form of the transcribed judgment) were provided to the parties on the 29th of April 2019. The Applicant's Notice of Application for Leave to Appeal was filed on 15 May 2019 within the time limits as prescribed by Rule 49(1)(b). In the premises, it is unnecessary for this court to grant condonation for the alleged late filing of the Applicant's Notice of Application for Leave to Appeal (which condonation, based on the same facts, would have, in the exercise of its discretion and in terms of the provisions of Rule 49 (1)(b) read with Rule 27(3), been granted by this court, particularly in light of the fact that the Applicant was not in wilful default and the Respondent had not suffered any real prejudice). To avoid any confusion arising herefrom, this court declines to make any order in terms of the Applicant's Condonation Application. Rather, the point *in limine*, as raised by the Respondent and argued on behalf of the Respondent at the

commencement of the hearing of this application, is dismissed, with costs, such costs to include (at the discretion of the Taxing Master) the costs of the Respondent's application for the Applicant's leave to appeal to be set aside as an irregular step and the costs of the Applicant's Condonation Application.

- [6] Turning now to the merits of the application for leave to appeal the principal argument on behalf of the Applicant, as set out in the Applicant's Application for Leave to Appeal, is that this court erred in relying on the matter of *Pangbourne Properties Limited v Basinview Properties (Pty) Limited (2011) ZASCA (judgment delivered on 17 March 2011)* since this decision was distinguishable, having regard to the "factual matrix" of the application instituted by the Applicant in this court and, hence, the proper application of the legal principles as set out therein. In the premises, it is submitted, on behalf of the Applicant, that the appeal would have a reasonable prospect of success in that another court may well find merit in the arguments advanced that the fourth addendum either revived the main agreement or constituted a new agreement between the parties. Of course, whilst this was the main issue argued before this court at the application for leave to appeal there were a myriad of ancillary issues dealt with at the hearing of the application (including whether or not the Applicant had, in motion proceedings, satisfied the requirements of a final interdict).

- [7] Whilst all of these "ancillary issues" will not be dealt with in this judgment, there is one such issue which does require this court's attention, in that it affects the

order of the court made at the hearing of the application and which should be varied when this court makes an order in respect of the present application for leave to appeal. It is this. Despite not forming part of the Applicant's Notice of Application for Leave to Appeal, at the hearing of the application (as it was entitled to do) the Applicant raised the point that by making a cost order which included the costs of Senior Counsel the court was incorrect in that it had "usurped" the discretion of the Taxing Master (*City of Johannesburg Metropolitan Municipality v Chairman of the Valuation Appeal Board for the City of Johannesburg and Another 2014 (2) All SA 363 (SCA)*). So, it was argued, this error constituted another ground upon which a court of appeal would arrive at a different decision.

- [8] In response thereto, Counsel for the Respondent (correctly in this court's view) advised the court that the court had erred in making such an Order in that neither of the two Counsel representing the Respondent held the status of Senior Counsel. Following thereon the Respondent specifically abandoned the costs order made by this court in respect thereof. It was further submitted that this court could correct such an error by making an appropriate order in terms of Rule 42(1) (b). This submission must be correct. In the premises and in light of the order which this court intends to make, this ground for leave to appeal may safely be dismissed.
- [9] Returning to the principal ground upon which this application for leave to appeal is based (as set out above), any decision in respect thereof must involve not only

an interpretation of the relevant decisions pertaining to the legal principles involved but, in addition thereto, an application of those principles to the correct facts. In the premises, even taking into account the more “onerous” test for leave to appeal in terms of subsection 17(1)(a)(i) of the Superior Courts Act, 10 of 2013, there is sufficient to support a finding that there is a reasonable prospect of success and that another court may well find merit in the arguments advanced by the Applicant (*Valley of the Kings Thaba Motswere (Pty) Ltd v Al Mayya International (EL926/2016,2226/2016) [2016] ZAECGHC 137 at paragraph 4) as set out in paragraph [6] above).*

[10] In light of the foregoing, this court makes the following order:-

1. The point *in limine* raised by the Respondent is dismissed with costs, such costs to include the costs of the application by the Respondent that the application for leave to appeal be declared to be an irregular proceeding and dismissed, together with the costs of the Applicant’s application for condonation;
2. The Applicant is granted leave to appeal to the full court of the Gauteng Local Division against the judgment delivered on the 28th of March 2019 under case number 09441/2019;
3. The costs of this application for leave to appeal are to be costs of the appeal;
4. The judgment delivered on the 28th of March 2019 under case number 09441/2019 is varied in terms of Rule 42(1)(b) by the deletion of the words “the costs of Senior Counsel” from paragraph 2 of the order.



B WANLESS

ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of hearing: 05 June 2019

Date of judgment: 18 June 2019

Appearances:

Counsel for the Appellant: Adv MJ Cooke

Instructing Attorneys: Adams Attorneys

Counsel for the Respondent: Adv. JL Myburg (with him Adv BH Steyn)

Instructing Attorneys: Kyriacou Incorporated