HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 134443/2023

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
DATE: 18 SEPTEEMBER 2024

SIGNATURE [redacted]

In the matter between:

UNEMPLOYMENT INSURANCE FUND	First Applicant
PUBLIC INVESTMENT CORPORATION SOC LTD	Second Applicant

and

PATRICIA CATHERINE JOHNSON	First Respondent
HOMII LIFESTYLE (PTY) LIMITED	Second Respondent
URBAN LIFESTYLE INVESTMENT HOLDINGS (PTY) LIMITED	Third Respondent

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J U D G M E N T

(In the application for leave to appeal)

This matter has been heard in open court and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically with the effective date thereof being 18 September 2024.

DAVIS, J

Introduction

[1] This is the judgment in an application for leave to appeal launched by two of the respondents in the main application. For the sake of consistency and ease of reference, I shall refer to the parties as in the judgment in the main application.

[2] On 30 July 2024 this court declared that the UIF was entitled to exercise all voting rights attached to shares held by Urban in its subsidiary, Homii. This was declared pursuant to Homii defaulting on its payment and other obligations to the UIF, who had lent and advanced some R410 million of public funds to Homii.

[3] Urban and Homii now seek leave to appeal the above declaration and ancillary relief to the Supreme Court of Appeal.

Reasonable prospects of success?

[4] The grounds raised in the notice of application for leave to appeal and in the heads of argument delivered on behalf of Urban and Homii, left the factual matrix undisturbed.

[5] The factual matrix, as set out in the judgment in respect of the main application, is that the UIF had lent and advanced some R410 million to Urban's subsidiary, Homii. Although the capital was not yet repayable, interest payments

had become due and had not been paid. In addition, Homii had certain disclosure obligations regarding its business and the utilization of the funds, which obligations had also not been complied with. Urban had effected a cession and pledge in favour of the UIF as security in the event of Homii's default.

[6] The UIF had become entitled to perfect its security and has since instituted action in this court (as disclosed by counsel for Urban and Homii at the hearing of this matter) in case no 2024/066287 for the recovery of an amount which is now in excess of R655 million.

[7] Against this factual background, the question is now whether there is a reasonable prospect that a court of appeal would find that the UIF should have been non-suited.

[8] During argument Adv De Beer SC, who still appeared for Urban and Homii (together with his learned junior), strenuously argued that the UIF had impermissibly been granted a proverbial third bite at the cherry and that a court of appeal would find that this should not have been allowed.

[9] The three "bites" were the proceedings before Strijdom J, before Collis J and before myself.

[10] Adv De Beer SC argued that once Strijdom J had ruled on the point *in limine* in respect of jurisdiction, that was the end of the matter and no further "bites" should have been allowed. He could not, however, get away from the fact that, subsequent to Strijdom J having found that the grounds of jurisdiction on which the UIF had relied had not sufficiently been "pleaded" in the founding papers, those papers have thereafter been supplemented. This resulted in a new case or at least a case with newly new pleaded facts becoming eligible for a "bite".

[11] In respect of the alleged second "bite", Adv De Beer SC argued that Collis J had "confirmed" the abscence of jurisdiction and that she had done so while the supplemented papers had been before her.

[12] Urban and Homii had produced its own transcript of the proceedings before Collis J and this transcript indicates that the above submission is not supported by the facts. While Collis J referred to the findings of Strijdom J, that was not the basis upon which she struck the matter from her urgent court roll and neither had she considered the supplementary papers.

[13] As this aspect was not as fully canvassed during the main hearing as it was during the application for leave to appeal, I deem it apposite to quote the relevant part of the transcript of the proceedings before Collis J produced by Urban and Homii in this regards: "*Now having regard to the order given by my brother Strijdom J, it follows that is was not permissible for the applicant to have once again enrolled this application before the urgent court. Consequently the application falls to be struck off from this roll and should rather be enrolled on the opposed roll. As to costs ... the order of the court reads as follows: The application is struck off from the urgent roll with costs on a party and party scale, including the costs of two counsel in respect of the second and third respondents. The applicant will be at liberty to approach the Office of the Deputy Judge President for an expedited date on the opposed roll*". (my underlining)

[14] It is clear that, despite the UIF having attempted to secure an urgent hearing of the supplemented application, they were denied a "bite" thereof and no hearing nor a consideration of the matter had taken place before Collis J.

[15] The first and only time the supplemented application was heard and considered by this court, was during the hearing of 16 May 2024 before me. There were therefore no "three bites" as contended by Urban and Homii.

[16] Adv De Beer SC also argued that, despite the matter having been enrolled in this court's third court by direction of the Deputy Judge President of this Division, another court would find on appeal that the orders granted could not have been made without this court having found that the application was urgent. Although there was still some urgency inherent in the nature of the relief claimed to obtain interim security, the matter was no longer heard as one with abridged time-periods or by way of enrolment in an urgent court and this point is moot.

[17] There are two final arguments which I have to dispose of before concluding this judgment. The first is the proposition that the issue of determination of jurisdiction is final and appealable only. In a general sense this proposition is correct. For reliance on this point, reference was made to *TWK Agricultural holdings (Pty) Ltd v Hoogveld Boerderybeleggings (Pty) Ltd*[1] *(TWK)*. The reliance is however, misplaced. In casu, the UIF did not seek to overturn or appeal the order of Strijdom J, who dealt with the point on the papers "as pleaded"[2]. The UIF proceeded before this court instead on an amended set of "pleadings", being the supplementary founding affidavits. This is also why Strijdom J's order could not be *res judicata* on the issue of jurisdiction once the papers that had served before him had been supplemented. The determination made by Strijdom J was therefore only in relation to pleadings and not as to the actual absence of jurisdiction as in *TWK*.

[18] The second point is the argument that this court should not have allowed the UIF to supplement its papers. It was argued that there were no exceptional circumstances to justify this. Adv De Beer SC readily conceded that the allowance of further papers is discretionary, taking all the circumstances of the case into account. Despite being unable to argue that this court's discretion had

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[1] 2023 (5) SA 163 (SCA).
[2] As also referred to by Unterhalter AJA op cit par [7].

been exercised in an arbitrary or capricious fashion, Adv De beer SC contended that the UIF should have been required to re-launch a fresh application, rather than have been permitted to supplement an existing application.

[19] Apart from the fact that additional costs, time and judicial resources would have been expended by the approach espoused by Urban and Homii, they suffered no prejudice by the allowance of the supplementary affidavits. They had sufficient time to consider the supplementary affidavits, had delivered supplementary answering affidavits of their own, had considered the replying affidavits, had prepared and delivered practice notes as well as heads of argument and bundles of authority and had sufficiently and ably been represented at the hearing of a properly set-down opposed motion. There is therefore no scope to argue that the supplementary papers should not have been allowed.

Conclusion

[20] Having considered the arguments presented by Urban and Homii, I find that there is no "*sound, rational basis to conclude that there is a reasonable prospect of success on appeal*".[3]

[21] Accordingly, the application should fail. I find no reason why costs should not follow this event.

Order

[22] Consequently, the following order is made:

> The application for leave to appeal is dismissed with costs, such costs to include that of both senior and junior counsel.

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[3] *MEC (Health) Eastern Case v Mkhitha* (1221/2015) [2016] ZASCA 176 (25 November 2016) par [17].

[redacted]

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 12 September 2024

Judgment delivered: 18 September 2024

APPEARANCES:

For the Applicants:	Advocate J Wasserman SC together with Adv M Msomi
Attorney for the Applicants:	Lusenga Attorneys Inc., Pretoria.
For the 2nd & 3rd Respondents:	Adv J de Beer SC together with Adv Z T Mahabma
Attorney for the 2nd & 3rd Respondents:	Mooney Ford Attorneys, Umhlanga c/o Damelin Menlyn, Pretoria