IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case No: **22632/2022**

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

[redacted] 16 MAY 2025

SIGNATURE DATE

In the matter between:

HOUSING DEVELOPMENT AGENCY Applicant

and

KHAVHAKONE CONSTRUCTION GROUP (PTY) LTD Respondent
(Registration No.2014/178409/07)

In *re*:

KHAVHAKONE CONSTRUCTION GROUP (PTY) LTD Plaintiff
(Registration No.2014/178409/07)

and

HOUSING DEVELOPMENT AGENCY First Defendant

THE MINISTER OF HUMAN SETTLEMENTS N.O. Second Defendant
(In her official capacity as the responsible Minister for the
Department of Human Settlements)

This judgment is prepared and authored by the Judge whose name is reflected as such 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 on CaseLines. The date for handing down is deemed to be 16 May 2025.

JUDGMENT

RETIEF J

[1] The applicant applies for leave to appeal to the Full Bench of this Division. This must be a typographical error and should read to the Full Court of this Division, alternatively to the Supreme Court of Appeal [SCA] against the whole of the judgment and order delivered on the 5 December 2024 in which the applicant was ordered to pay the respondent an amount of R 1,246,811.53 in respect of two interim payment certificates IPC25 and IPC26 arising from a Service Level Agreement [agreement].

[2] The nub of the applicant's leave to appeal and argument centred around a perceived error the Court acted under when adjudicating the dispute before it. This error was the disregard of one of the applicant's pleaded defences, in its amended plea at paragraph 52.2. Paragraph 52.2 alleged that the interim certificates IPC25 and IPC26 were invalid for the fact that their valuation was based contrary to the contract. The trigger of the Court's error it argued was apparent in paragraph 3 of the judgment in which the Court found, as referred to in the respondent's replication, that it did not have to deal with the applicant's defence as raised at paragraph 52 of its amended plea, in that, the same would be dealt with by the Arbitrator in an interim award (ostensibly still to be awarded at that time). This error it argued appeared to

permeate into the remainder of the reasoning. The applicant misunderstands the Court's reasoning as at the time, the Arbitrator's interim award had been furnished.

[3] In short, the applicant's defence at paragraph 52.2 of arose from the fact that the contract it referred to was a lump sum contract and not a measurable contract and thus the dissatisfactions raised by it with regard to IPC25 and IPC26 inadvertently implicated the correct manner of the valuation of the IPCs' because some line items had already exceeded 100% of their allocated value, a feature that is a contravention of a lump sum contract strategy. This the nub of invalidity based on valuation to ward off paying the respondent.

[4] The Arbitrator's interim award was handed down in January 2024, a date after the respondent' filed its replication and after the applicant filed its amended plea. Both parties did not amend their pleadings in so far as they deemed fit. The pre warning that an interim arbitration award for consideration, as raised as a point in limine, would become available had materialised. By agreement the interim award formed part of the Trial bundle. The parties too, as per the directive, agreed on the triable issues in a joint minute. Be that as it may, notwithstanding the pleadings the Court was actually aware of the common cause facts recorded by the Arbitrator in the interim award that pertained to the contract whilst having regard to paragraph 52.2 of the applicant's amended plea namely, that:

> *"X.* ***THE BILL OF QUANTITIES***
>
> *50. By the end of the hearing, it was common cause that:*
>
> *50.1 The second contract (the contract before the Court at the time – own emphasis) was a lump sum contract, and the issue of the bill of quantities for the valuing interim payment certificates (including IPC25 and IPC26) did not alter the second contract from a lump sum to a measurable contract;*

50.2 The level of precision required for the final account was greater than the precision of the interim payment certificates, which could be adjusted, if necessary, in the next interim payment certificate;

50.3 The amount due to the claimant (the respondent – own emphasis) when the contract was terminated was the portion of the lump sum;

50.4 -

50.5 - "

[5] Furthermore, at the hearing before the Arbitrator, the parties also agreed that the portion of the lump sum due to the respondent as a recorded at 50.3 above, would be calculated on a particular basis. The discrepancy of value in the interim certificates would have an impact when the final account was to be rendered. The final account required a level of precision .The level of precision required for the final account was greater than the precision of the interim payment certificates, which could be adjusted, if necessary, in the next interim payment certificate. The termination date being the date of determination. The arbitrator therefore did not make a validity determination of the interim certificates. The Court at paragraph 3 merely emphasised that, in the event the Court found that the agreement was lawfully terminated, the prospect of further adjustments after February 2022, if necessary, to recoup inaccuracies, as agreed, with the next interim payment appeared uncertain. Therefore, at paragraph 3 the Court warned, "*Of significance the first defendant (the applicant-own emphasis) was aware of the possible consequence of a lumpsum SLA when Cato dealt with the prospect and consequences in his witness statement in October 2023. The first defendant's failure to do the precision work (as at final account stager-own emphasis) before and now after notice to terminate the SLA has been received has consequences.*" This was stated absent the final account. The respondent's claim related to the payment of interim payment certificates; no final account was before the Court.

[6] The Court put necessary weight to the common cause facts and agreements between the parties, as invited when it considered the pleaded case before it. The narrow issue before the Court was whether the respondent was entitled to the payment of the interim certificates IPC25 and IPC26, absent a final account and whether it was entitled to terminate the SLA on the evidence presented. The applicant does not raise issue with the Court's finding of the termination of the agreement, nor does it raise any other ground of error or misdirection of fact or law relating to the identified triable issues or reasoning thereof.

[7] Reconsidering the reasoned judgment and the argument this Court is of the opinion that the appeal as raised and argued would not have a reasonable prospect of success and as such, the applicant has failed to meet the threshold of section 17 of the Superior Courts Act, 10 of 2013. The application must fail.

[8] The following order:

1. The application for leave to appeal is dismissed with costs, taxed on scale B.

[redacted]

L.A. RETIEF
Judge of the High Court
Gauteng Division

Appearances:

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Date of hearing:	12 May 2025
Date of judgment:	16 May 2025