

SOUTH AFRICA / JUDGMENT

Afrifert (Pty) Ltd v TWK Agri (Pty) Ltd - Leave to Appeal (6813/2020) [2023] ZALMPPHC 65 (7 August 2023)

[2023] ZALMPPHC 65

COURT

Limpopo High Court, Polokwane

BEFORE

Pillay

CASE / FILE NUMBER

6813/2020

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO

DIVISION, POLOKWANE)

CASE NO: 6813/2020

REPORTABLE: YES/NO

OF

INTEREST TO OTHER JUDGES: YES/NO

REVISED

Date:

7 August 2023

In

the matter between:

AFRIFERT
(PTY) LTD
APPLICANT
(Registration
No: 2005[...])
and
TWK
AGRI (PTY) LTD
RESPONDENT
(Registration
No: 1999[...])
In

Re:

TWK
AGRI (PTY) LTD
APPLICANT
(Registration
No: 1999[...])
and
NULANE
INVESTMENTS 106(PTY)LTD
FIRST
RESPONDENT
PHILLIP
HOWELL MARITZ
SECOND
RESPONDENT
(Identity
No: 7[...])
AFRIFERT
(PTY) LTD
THIRD
RESPONDENT
(Registration
No: 2005[...])
LEAVE
TO APPEAL JUDGMENT
PILLAY AJ

[1]

The Applicant (Third Respondent in the main matter) seeks leave to Appeal the whole of the Judgment and Order delivered by this Court on 14 November 2022.

[2]

The grounds of Appeal are set out in the application for leave to Appeal and were amplified in both the written heads of argument and oral submissions made by the Parties.

[3]

In brief the Applicant raises the following grounds in support of the said application for leave

to Appeal;

3.1.

The Honourable Court erred in not finding that the Applicant in the main matter consented to the payment of R2,500,000.00 to M Wentzel Attorneys.

3.2.

The Honourable Court erred in finding that the consent of the Applicant was required to be in writing, based on the provision of Cession Agreement concluded between the Applicant and the First Respondent

3.3.

The Honourable Court erred in not finding that written consent was not required as a result of the fact that the Third Respondent was not a contracting party to the Cession Agreement.

3.4.

The Honourable Court erred in not finding in the alternative to dismissing the application that a dispute existed between the Applicant and the Third Respondent regarding consent to the aforesaid payment, that could not be resolved in motion proceedings. As a consequence, the Honourable Court ought to have referred the matter to trial, alternatively for the hearing of oral evidence.

3.5.

The Honourable Court erred in dismissing the Third Respondent's counterclaim on the basis that the invoice for the Third Respondent was marginally higher than the written order placed by the Applicant and that such an invoice constituted a counter offer by the Third Respondent.

Brief Background

[4]

The Applicant sought by way of motion judgement against the three Respondents in respect of a money debt. In respect of the First Respondent it was an acknowledgement of debt. The Second Respondent being the surety and the Third Respondent as a result of the cession of the First Respondent's claim against it to the Applicant as security for the debt owed.

[5]

Judgment was already granted to the Applicant against the First and Second Respondent jointly and severally the one paying the other to

be absolved. The matter to be determined before me was concerning the Third Respondents liability.

[6]

The terms of the Cession were that the Third Respondent would pay over to the Applicant, either partially or fully, what was to be paid to the First Respondent. It was part of the terms of the agreement that for the Third Respondent to pay any other party, funds due to the Applicant that was owed by the First Respondent, consent in writing from the Applicant for such payment to the Third Party was required. This was further stipulated in writing by the First Respondent to both the Applicant and the Third Respondent.

[7]

The Third Respondent made payment of an amount of R2 500 000.00 to M Wentzel without the written consent of the Applicant, resulting in the aforesaid Application.

[8]

The Third Respondent opposed the said application on the basis that the Applicant was aware of the payment to M Wentzel and had consented to same. The Third Respondent was acting in good faith when such payment was made. The Third Respondent also submitted a counter claim in respect of a purchase order which was placed by the Applicant for cotton seed and thus contractually liable to pay the amount as contained in the purchase order of the Applicant.

[9]

Both parties argued the matter and Judgment was granted to the Applicant as per the Court Order and the Third Respondent's counter claim was dismissed. It is flowing from the aforesaid Orders that leave to Appeal is sought.

Legal Principles

[10]

Section 17 of the Superior Courts Act[1] regulates

applications for leave to Appeal from a decision of a High Court. It

provides as follows:

‘(1)

Leave to appeal may only be given where the judge or judges concerned are of the opinion that –

(a)

(i)

The appeal would have a reasonable prospect of success; or

(ii)

There is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

(b)

The decision sought on appeal does not fall within the ambit of section 16(2)(a); and

(c)

Where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.’

[11]

In Ramakatsa and

Others v African National Congress and Another[2]

Dlodlo JA placed the earlier authorities in perspective. He said:

“[10]

... I am mindful of the decisions at high court level debating whether the use of the word ‘would’ as opposed to ‘could’

possibly means that the threshold for granting the appeal has been raised. If a reasonable prospect of success is established, leave to

appeal should be granted. Similarly, if there are some other compelling reasons why the appeal should be heard, leave to appeal

should be granted. The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law

that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In

other words, the appellants

in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success

must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist.”

[12]

Regard

was had to what was indicated

by

Schippers JA in MEC

for Health, Eastern Cape v Mkhitha and Another:[3]

‘An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough.

There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.’

[13]

When considering this application, I took note of the respective arguments, authorities and submissions of both Counsel in proposing and resisting the Applicant’s application for leave

to Appeal, and took great care to revisit the authorities referred to by Counsel with a view to establish if indeed there is a reasonable prospect of success on Appeal.

[14] It

is common cause that the Cession required the payments to be made to the Respondent. For there to be payment

to any other party, the terms of that Cession agreement would change and that would require that all the parties must agree. It

was further stipulated that the agreement must be in writing, thus consent in writing was required for this payment to M Wenzel

Attorneys. This consent in writing was not provided.

[15]

The Respondent’s argument that the Applicant only raised the defence of having been given consent, at the time of being confronted with the initial application has merit. The many email communications requesting payment is supportive

of this view. Surely if consent had been given as alleged, there would have been no reason why these emails went unanswered. There

was no mention of this payment being effected to M Wenzel Attorneys at the time of said payment being executed, especially in light

of this consent which was supposed to have been given by the Respondent, as alleged by the Applicant.

[16]

The other grounds as raised by the Applicant in respect of the application for leave to Appeal in respect of the main claim have

been addressed in my Judgment and as highlighted by the Respondent are without merit. There was no material bona fide dispute of

fact on the papers to warrant the need to hear evidence or refer the matter to trial.

[17] In respect of the fifth ground of Appeal, the counter claim, it is as indicated by the Respondent that there was no Replying Affidavit filed by the Applicant. Moreover, I align myself to the arguments raised by the Respondent concerning this aspect and as such am of the view that this too is without merit and doomed for failure.

[18] Having considered the submissions and the authorities relied upon, I am not persuaded that the Applicant met the threshold required for the granting of leave to Appeal, namely that the Appeal would have a reasonable prospect of success.

[19] Consequently the application for leave to Appeal is dismissed with costs.

Pillay AJ
Acting Judge of the
High Court
Limpopo Division,
Polokwane

APPEARANCES:

HEARD
ON: 29
May 2023

JUDGMENT

DELIVERED ON: 7 August 2023. This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down of the judgment is deemed to be 7 August 2023 at 10:00

FOR THE APPLICANT: Adv A P J Els INSTRUCTED BY: J W Botes Incorporated FOR THE RESPONDENT: Adv. L Meintjies INSTRUCTED BY: RWL INC.

[1] Act 10 of 2013

[2] (Case No. 724/2019) [2021]ZASCA 31(31 March2021) paragraph 10

[3] MEC for Health, Eastern Cape v Mkhitha and Another [2016] ZASCA 176 para 17.

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Prepared on 11 October 2026 · Esheria