

SOUTH AFRICA / JUDGMENT

Albaraka Bank Limited v New Turn Investments (Pty) Ltd (D4030/2022)

[2023] ZAKZDHC 85 (13 November 2023)

[2023] ZAKZDHC 85

COURT
Kwazulu-Natal High Court, Durban

BEFORE
Mossop

CASE / FILE NUMBER
D4030/2022

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IN
THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL
LOCAL DIVISION, DURBAN
Case
no: D4030/2022
In

the matter between: ALBARAKA
 BANK
 LIMITED
 APPLICANT
 and
 NEW
 TURN INVESTMENTS (PTY)
 LTD
 RESPONDENT

Coram: Mossop J

Heard: 13 November 2023

Delivered: 13 November 2023
 ORDER
 The

following order is granted: 1.
 The application for leave to appeal is dismissed with costs.

JUDGMENT

Mossop J:

[1] This is an ex tempore judgment in which I shall refer to the parties as they were referred to in the opposed motion that I heard on Tuesday, 18 July 2023, while sitting in Durban. On that date, I delivered a judgment in which I granted the applicant an order in terms of paragraphs 1 to 7 of the notice of motion but directed that there would be no order in terms of sub-paragraph 3.3 of the notice of motion. The essence of that judgment was that I ordered that the

partnership, that until then existed between the applicant and the respondent, be terminated and ordered the appointment of a liquidator

to the partnership estate with certain defined powers.

[2] On Friday, 4 August 2023, the respondent delivered a notice of application for leave to appeal against my judgment. I am now, on Monday, 13 November 2023, finally hearing that application, not in Durban, but in Pietermaritzburg. The reason behind this inordinate delay is that the court file, mysteriously, was lost. The file was missing for several months and when I finally came to learn of this I ordered that a duplicate file be opened and that the original file be reconstructed. Faced with this task, perhaps even more mysteriously, the missing file suddenly was found. By then I had been reassigned to civil duties in Pietermaritzburg but with the consent of both counsel, I decided to hear the application for leave to appeal in Pietermaritzburg and not wait until the second term of next year when I am again scheduled to be in Durban. I am grateful to Ms Miranda, who appears for the applicant, and Mr Tucker, who appears for the respondent, for agreeing to come up to Pietermaritzburg.

[3] In its notice of application for leave to appeal, the respondent raises two principal grounds upon which its application is premised. The first is that I erred in concluding that the offer to settle made

by the applicant to the respondent had lapsed and the second is that I erred in concluding that the court was not obliged to exercise an oversight function relating to the sale of the immovable property (the property) acquired by the partnership. I shall consider each of those grounds shortly.

[4] The purpose behind requiring litigants to obtain leave to appeal was set out in the matter of *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd*,^[1] where Wallis JA said that:

‘The need to obtain leave to appeal is a valuable tool in ensuring that scarce judicial resources are not spent on appeals that lack merit.’

[5] Section 17(1) of the Superior Courts Act, 10 of 2013 (the Act) regulates applications for leave to appeal from a decision of a High Court. It provides as follows:

‘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.’

[6] Prior to the enactment of the Act, the applicable test in an application for leave to appeal was whether there were reasonable prospects that an appeal court may come to a different conclusion than that arrived at by the lower court. The enactment of the Act has changed that test and has significantly raised the threshold for the granting of leave to appeal.[2] The use of the word ‘would’ in the Act indicates that there must be a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.

[7] Leave to appeal may thus only be granted where a court is of the opinion that the appeal would have a reasonable prospect of success, and which prospects are not too remote.[3] As was stated by Schippers JA in *MEC for Health, Eastern Cape v Mkhitha and Another*[4]:

‘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.’

[8] The facts of this matter need to be briefly mentioned. The applicant is a bank that, inter alia, lends money in a Sharia-compliant way. The respondent is a private company whose guiding mind is an adherent

of the Islamic faith and which wished to borrow money in a manner that would not offend Sharia law in order to purchase the property.

The applicant was to be the source of those funds. The mechanism chosen to allow this to occur, inter alia, was a Musharaka, or joint venture, agreement, which led to the creation of a partnership between the parties.

[9] The applicant, on behalf of the partnership, would purchase the property identified by the respondent, which would then be registered in the name of the respondent as nominee for the partnership. The respondent would purchase the equity in the property from the applicant at an agreed rate over the duration of the agreement and

would eventually come to own the property in its own right. The price that the respondent would have to pay for the property would have been calculated to already include interest and thus, apparently, there would be no infringement of Sharia law.

- [10] The applicant contended, and the respondent did not seriously dispute, that the respondent had been an irregular payer of its monthly obligations. In due course, after several defaults by the respondent, the applicant decided that it no longer wished to continue with the scheme and gave the required notice to the respondent to terminate the partnership. The respondent did not remedy its breach and the agreement was cancelled. Almost a year later, the respondent paid its arrears to the applicant, who nonetheless pressed ahead with the application that I ultimately heard in Durban and determined in its favour.
- [11] As to the first ground upon which I am alleged to have erred, the agreements between the applicant and respondent were cancelled in writing in a letter dated 18 November 2021. The payment of the arrears relied upon by the respondent was made on 19 July 2022. By that date, the agreement no longer existed. The respondent has never alleged that a new agreement was brought into existence that led to the payment nor has it put up any documentary proof of such a further agreement. I accordingly am unpersuaded that there is any other way of viewing these facts other than the way in which I did.
- [12] As to the second ground raised by the respondent, the order granted by me was to permit the winding up of the partnership. The applicant, as a co-owner of the property, sought its order based upon the provisions of the *actio communi dividundo*. It established that it was entitled to that order. The realisation of partnership assets and the payment of partnership debts are the natural consequences of such an order. It is acknowledged that the property would be a partnership asset. The fact that the director of the respondent and her family lived at the property was not a defence to the applicant's application. As Ms Miranda points out in her heads of argument, the respondent appears to suggest that the provisions of Uniform Rule 46A should be applied to the dissolution of partnerships or that the *actio communi dividundo* is unconstitutional without specifically asking for such an order from this court.
- [13] There is, in any event, no certainty that the property would ultimately be sold to a third party to justify the need for judicial oversight. Indeed, the order granted specifically countenances the property being offered first to the partners to the partnership after its value had been appraised. That, in reality, would mean that the property would first be offered to the respondent to the exclusion of any other potential purchasers. There is thus a designed mechanism built in to the order that would permit the respondent to consider whether it wishes to acquire the property free of the involvement of

the applicant. In other words, the respondent remains insulated initially from the risk of the property being disposed of to a third party on unfavourable grounds. If the respondent after reflection chooses not to acquire the property for whatever reason, then it appears just and equitable that the property should be sold at a judicial auction to permit the applicant to exit the partnership to which it no longer wishes to be a party.

[14] After a thorough consideration of the grounds upon which leave to appeal is sought, I remain unpersuaded that there are reasonable prospects that another court would come to a different conclusion than the one to which I came, this being particularly so given the facts that I found to be established and given the increased threshold that applications for leave to appeal now face. There is no compelling reason why the appeal should otherwise be allowed. In short, in my opinion, this is the type of matter that Wallis JA considered in *Dexgroup*.

[15] Accordingly, the application for leave to appeal is dismissed with costs.

MOSSOP J

APPEARANCES

Counsel for the applicants: Ms J L Miranda Instructed by: Eversheds Sutherland (KZN)
Incorporated 1st Floor 29 Richefond Circle Ridgeside Umhlanga Counsel for the respondent: Mr M C Tucker Instructed by: Abdool, Gaffoor, Parasram and Associates 13 Bishop Road Windermere Durban Date of argument: 13 November 2023 Date of Judgment: 13 November 2023

[1] *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd* 2013 (6) SA 520 (SCA) para 24.

[2] *Public Protector of South Africa v Speaker of the National Assembly and Others*

[2022] ZAWCHC 222 para 14.

[3] *Ramakatsa and Others v African National Congress and Another* [2021] JOL 49993 (SCA) para [10]

[4] *MEC for Health, Eastern Cape v Mkhitha and Another*

[2016] ZASCA 176 para 17.

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