

SOUTH AFRICA / JUDGMENT

Bester and Others v Schmidt Bou Ontwikkelings (1689/2010) [2011] ZAWCHC 475 (21 September 2011) [2011] ZAWCHC 475

COURT

Western Cape High Court, Cape Town

BEFORE

Louw

CASE / FILE NUMBER

1689/2010

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JUDGMENT

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: 1689/2010

DATE: 21 SEPTEMBER 2011

In the matter between:

L VON W BESTER NO1st Applicant

E M DORFLING NO2nd Applicant

P Q NAIDOO NO3rd Applicant

C P VAN ZYL NO4th Applicant

ABSA BANK LIMITED5th Applicant

REGISTRAR OF DEEDS, WESTERN CAPE6th Applicant

and

SCHMIDT BOU ONTWIKKELINGSRespondent

JUDGMENT

(Application for leave to appeal) LOUW, J: This is an application brought by the 1st to 4th respondents, the liquidators of Innova Holdings (Pty) Ltd and in a separate application by the 5th Respondent, Absa Bank Limited, for leave to appeal against the judgment and orders handed down by me on 17 August 2011. The liquidators seek leave to appeal only against the part of the judgment wherein their defence of prescription was dismissed with costs. Absa Bank seeks leave to appeal against the whole of the judgment on the basis that I erred in holding that Absa Bank had failed to establish that the applicant was estopped from denying that the immovable property in question had been validly transferred to and had been validly registered in the name of Innova Holdings. Leave is sought to appeal also against the orders, namely, the declarator and rectification of the Deeds. These orders also affect the position of Absa Bank, who claims to be a registered bond holder over the property in question. Mr Newdigate, who appeared on behalf of the first to fourth applicants/respondents in this application submitted that there is no reasonable prospect that another court may come to a different conclusion in respect of either of the two applications. The liquidators' application turns on the question whether the applicant's claim for a declarator and for rectification of the Deed of Transfer and the records of the Deed's Registry, is a debt, as meant in the Prescription Act of 1969. I held that these claims do not relate to a debt and that extinctive prescription was consequently not a defence to these claims. These are important questions of law in respect of which there is, in my view, a reasonable prospect that another court may come to a different

conclusion.

Absa's application turns on the requirements for estoppel and on the application of the law to the facts of this case. I held that the conduct of the applicant did not legally cause Absa Bank to act to its detriment. I am of the view that on both the requirements for estoppel in this kind of case and on the application of the law to the facts of this case, there is a reasonable prospect that another court may come to a different

conclusion.

It follows that leave to appeal should be granted in respect of both applications on the grounds set out in the respective applications for leave to appeal. Mr Sievers on behalf of Absa and Mr Olivier on behalf of the liquidators suggested that if leave to appeal should be granted, the matter should go to the Supreme Court of Appeal. Mr Newdigate on behalf of the applicant has left that part in the Court's discretion. I agree with counsel for the applicants that this is a case which should go to the Supreme Court of Appeal and it is consequently ordered as follows: Leave is GRANTED to the applicants to appeal to the Supreme Court of Appeal on the bases set out in their respective applications for leave to appeal. Costs of the application will be costs in the Appeal. LOUW, J

(Application for leave to appeal)

LOUW, J:

This is an application brought by the 1st to 4th respondents, the liquidators of Innova Holdings (Pty) Ltd and in a separate application by the 5th Respondent, Absa Bank Limited, for leave to appeal against the judgment and orders handed down by me on 17 August 2011.

The liquidators seek leave to appeal only against the part of the judgment wherein their defence of prescription was dismissed with costs.

Absa Bank seeks leave to appeal against the whole of the judgment on the basis that I erred in holding that Absa Bank had failed to establish that the applicant was estopped from denying that the immovable property in question had been validly transferred to and had been validly registered in the name of Innova Holdings.

Leave is sought to appeal also against the orders, namely, the declarator and rectification of the Deeds. These orders also affect the position of Absa Bank, who claims to be a registered bond holder over the property in question.

Mr Newdigate, who appeared on behalf of the first to fourth applicants/respondents in this application submitted that there is no reasonable prospect that another court may come to a different conclusion in respect of either of the two applications.

The liquidators' application turns on the question whether the applicant's claim for a declarator and for rectification of the

Deed of Transfer and the records of the Deed's Registry, is a debt, as meant in the Prescription Act of 1969.

I held that these claims do not relate to a debt and that extinctive prescription was consequently not a defence to these claims.

These are important questions of law in respect of which there is, in my view, a reasonable prospect that another court may come to a different

conclusion.

Absa's application turns on the requirements for estoppel and on the application of the law to the facts of this case. I held that the conduct of the applicant did not legally cause Absa Bank to act to its detriment.

I am of the view that on both the requirements for estoppel in this kind of case and on the application of the law to the facts of this case, there is a reasonable prospect that another court may come to a different

conclusion.

It follows that leave to appeal should be granted in respect of both applications on the grounds set out in the respective applications for leave to appeal. Mr Sievers on behalf of Absa and Mr Olivier on behalf of the liquidators suggested that if leave to appeal should be granted, the matter should go to the Supreme Court of Appeal.

Mr Newdigate on behalf of the applicant has left that part in the Court's discretion.

I agree with counsel for the applicants that this is a case which should go to the Supreme Court of Appeal and it is consequently ordered as follows:

Leave is GRANTED to the applicants to appeal to the Supreme Court of Appeal on the bases set out in their respective applications for leave to appeal. Costs of the application will be costs in the Appeal.

LOUW, J

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