

SOUTH AFRICA / JUDGMENT

Burger and Another v Piognant Progress BK and Others (2473/2009) [2010] ZAWCHC 379 (19 April 2010) [2010] ZAWCHC 379

COURT

Western Cape High Court, Cape Town

BEFORE

S J Koen

CASE / FILE NUMBER

2473/2009

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IN

THE HIGH COURT OF SOUTH AFRICA (WESTERN CAPE HIGH COURT, CAPE TOWN)

Case

No.: 2473/2009

In

the matter between:

ANDRE
BURGER
.....1st
Respondent/1st
Applicant
MARIA
ELIZABETH BURGER2nd
Respondent/2nd
Applicant
and
POIGNANT
PROGRESS BKApplicant/1st
Respondent
REGISTRATEUR
VAN AKTES2nd
Respondent
ABSA
BANK BPK
.....3rd
Respondent
NEDBANK
BPK
.....4th

Respondent
OASIS
REGSPERSON
.....5th
Respondent

JUDGMENT

DELIVERED THIS 19th DAY OF APRIL 2010 KOEN AJ. [1] This is an application brought by the first Respondent for leave to appeal the judgment handed down in this matter on 26 February 2010. The Applicants' oppose the application. The third Respondent was represented by counsel at this application, but the third Respondent made no submissions watching brief only. For the sake of convenience I propose to refer to the parties by their titles in the main application.

JUDGMENT

DELIVERED THIS 19th DAY OF APRIL 2010

KOEN AJ.

- [1] This is an application brought by the first Respondent for leave to appeal the judgment handed down in this matter on 26 February 2010. The Applicants' oppose the application. The third Respondent was represented by counsel at this application, but the third Respondent made no submissions watching brief only. For the sake of convenience I propose to refer to the parties by their titles in the main application.
- [2] The ground upon which it is contended that leave to appeal should be granted is a narrow one, namely that there is a reasonable prospect that an appeal court would find that the exclusion from the evidence of Du Toit's hearsay statements concerning the agreement Ms Barry told him she had concluded with the Applicants' was incorrect. It is common cause that this evidence was hearsay evidence and I propose in what follows to refer to it as the "hearsay evidence". [3] The Applicants' had applied successfully during the proceedings to strike out the evidence on the ground that such evidence was hearsay, and not confirmed on affidavit (or at all) by Ms Barry. In spite of the importance of this point to the opposition presented by the first Respondent the question whether the hearsay evidence was admissible under the provisions of section 3 of the Law of Evidence Amendment Act ("the Act") was an issue, it must be said, which was not addressed at all in written heads of argument submitted by the First Respondent's counsel. Furthermore, the question was only diffidently pursued in oral argument before me at the main hearing with no reasons being advanced by counsel during such argument why the interests of justice would be served by the admission of the admittedly hearsay evidence under section 3 of the Act [4] In support of the application for leave to appeal Mr Joubert SC, who appeared together with Mr Spamer for the first respondent (at the hearing only Mr Spamer represented the first Respondent), submitted that the hearsay evidence had been incorrectly excluded and that it should have been admitted in terms of section 3 (1) (c) of the Act, the provisions of which had not been

considered, or had not properly been considered by the Court in the judgment which is the subject of this application for leave to appeal. [5] Notwithstanding that the Applicants', in the replying affidavits, had notified the first Respondent of their intention to take the point that the hearsay evidence was inadmissible, and notwithstanding that an application to strike out the hearsay

evidence was brought, no attempt was made by the first Respondent to obtain an affidavit from Barry, or to explain why one could not be obtained. The first Respondent's papers were entirely silent on this score, a remarkable fact given the first Respondent's reliance upon Ms Barry's evidence. [6] This being said the question which requires consideration is whether the first Respondent enjoys a reasonable prospect of persuading an appeal court that the hearsay evidence should have been admitted. I am unconvinced that this is the case. In my view, in spite of having advance warning that the admissibility of the hearsay evidence was very much in issue, the failure on the part of the first Respondent to offer any reason or explanation why the evidence in question was not given by Ms Barry, a factor which must be considered in the exercise of the discretion granted to a Court by section 3 of the Act, puts its prospects of success on appeal beyond what that which could be thought to be reasonable. [7] It was also argued in support of the application for leave to appeal that the interests of justice referred to in section 3 of the Act dictate that a party should not be prevented from placing evidence relevant to the determination of a matter before the court, which, it was suggested, was the consequence of the hearsay evidence being excluded. I do not see any merit in this argument. On the facts the first Respondent was not prevented from placing the evidence before the Court. It simply did not do so. Why this occurred is a question which cannot be answered. Such an enquiry would involve nothing but speculation as no reason or explanation for not having presented the evidence were given by the first Respondent. [8] It was also submitted, further, in support of the granting of leave to appeal, that an application would be made to an Appeal Court to admit an affidavit from Ms Barry confirming the hearsay evidence and that such an application would probably succeed. This is not a matter, as I see it, which can have a bearing on the question I am asked to decide in this application. As I understand it, in general, an Appeal Court must determine the correctness of a judgment appealed against on the basis of the facts which were extant at the time the judgment was given (see *Weber-Stephen Products Co v Alrite Engineering (Pty) Ltd* [1992] ZASCA 2; 1992

(2) SA 489 (AD) at 507 C). The power to receive further evidence under section 22 of the Supreme Court Act is one conferred only upon an Appeal Court only. It is in any event impossible for me to consider the probability of success of such an application in the absence of any facts to motivate it. [9] In the circumstances it follows that I must refuse the application.

[10] I therefore make the following order: The application for leave to appeal is dismissed with costs. S J KOEN, AJ

- [2] The ground upon which it is contended that leave to appeal should be granted is a narrow one, namely that there is a reasonable prospect that an appeal court would find that the exclusion from the evidence of Du Toit's hearsay statements concerning the agreement Ms Barry told him she had concluded with the Applicants' was incorrect. It is common cause that this evidence was hearsay evidence and I propose in what follows to refer to it as the "hearsay evidence".
- [3] The Applicants' had applied successfully during the proceedings to strike out the evidence on the ground that such evidence was hearsay, and not confirmed on affidavit (or at all) by Ms Barry. In spite of the importance of this point to the opposition presented by the first Respondent the question whether the hearsay evidence was admissible under the provisions of section 3 of the Law of Evidence Amendment Act ("the Act") was an issue, it must be said, which was not addressed at all in written heads of argument submitted by the First Respondent's counsel. Furthermore, the question was only diffidently pursued in oral argument before me at the main hearing with no reasons being advanced by counsel during such argument why the interests of justice would be served by the admission of the admittedly hearsay evidence under section 3 of the Act
- [4] In support of the application for leave to appeal Mr Joubert SC, who appeared together with Mr Spamer for the first respondent (at the hearing only Mr Spamer represented the first Respondent), submitted that the hearsay evidence had been incorrectly excluded and that it should have been admitted in terms of section 3 (1) (c) of the Act, the provisions of which had not been considered, or had not properly been considered by the Court in the judgment which is the subject of this application for leave to appeal.
- [5] Notwithstanding that the Applicants', in the replying affidavits, had notified the first Respondent of their intention to take the point that the hearsay evidence was inadmissible, and notwithstanding that an application to strike out the hearsay

evidence was brought, no attempt was made by the first Respondent to obtain an affidavit from Barry, or to explain why one could not be obtained. The first Respondent's papers were entirely silent on this score, a remarkable fact given the first Respondent's reliance upon Ms Barry's evidence.

- [6] This being said the question which requires consideration is whether the first Respondent enjoys a reasonable prospect of persuading an appeal court that the hearsay evidence should have been admitted. I am unconvinced that this is the case. In my view, in spite of having advance warning that the admissibility of the hearsay evidence was very much in issue, the failure on the part of the first Respondent to offer any reason or explanation why the evidence in question was not given by Ms Barry, a factor which must be considered in the exercise of the discretion granted to a Court by section 3 of the Act, puts its prospects of success on appeal beyond what that which could be thought to be reasonable.

- [7] It was also argued in support of the application for leave to appeal that the interests of justice referred to in section 3 of the Act dictate that a party should not be prevented from placing evidence relevant to the determination of a matter before the court, which, it was suggested, was the consequence of the hearsay evidence being excluded. I do not see any merit in this argument. On the facts the first Respondent was not prevented from placing the evidence before the Court. It simply did not do so. Why this occurred is a question which cannot be answered. Such an enquiry would involve nothing but speculation as no reason or explanation for not having presented the evidence were given by the first Respondent.
- [8] It was also submitted, further, in support of the granting of leave to appeal, that an application would be made to an Appeal Court to admit an affidavit from Ms Barry confirming the hearsay evidence and that such an application would probably succeed. This is not a matter, as I see it, which can have a bearing on the question I am asked to decide in this application. As I understand it, in general, an Appeal Court must determine the correctness of a judgment appealed against on the basis of the facts which were extant at the time the judgment was given (see *Weber-Stephen Products Co v Alrite Engineering (Pty) Ltd* [1992] ZASCA 2; 1992
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[9] In the circumstances it follows that I must refuse the application.

[10] I therefore make the following order:

The application for leave to appeal is dismissed with costs.

S J KOEN, AJ

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