

SOUTH AFRICA / JUDGMENT

Burger N.O v Nel and Others (1744/2024)
[2024] ZANWHC 217 (28 August 2024)
[2024] ZANWHC 217

COURT
North West High Court, Mafikeng

BEFORE
FMM Reid

CASE / FILE NUMBER
1744/2024

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IN THE HIGH COURT OF
SOUTH AFRICA
NORTH WEST DIVISION,
MAHIKENG
CASE NUMBER: 1744/2024
Reportable: NO
Circulate to Judges: NO

Circulate to Magistrates: NO
Circulate to Regional
Magistrates: NO
In the matter between:-
PIETER
HENDRIK JACOBUS BURGER N.O
Applicant
and
DEON
NEL
1st
Respondent
FLUXMANS
INCORPORATED ATTORNEYS
2nd
Respondent
REGISTRAR
OF DEEDS, PRETORIA
3rd
Respondent
ACTING SHERIFF OF
THE HIGH COURT

FOR
OTTOSDAL, FELICIA DEVONIA LAING
4th
Respondent
MASTER
OF THE HIGH COURT MAHIKENG
5th
Respondent
BRENDA DE BEER
GAGIANO NO
(In
her representative capacity as duly authorised trustee of the
BRENDA DE BEER GAGIANO TRUST, IT 8175/01)
6th
Respondent
PIETER
HENDRIK JACOBUS BURGER N.O
7th
Respondent
This judgment is
handed down electronically by circulating it via e-mail to the
parties' legal representatives. The
date of the judgment
is 28 August 2024

JUDGMENT

LEAVE TO APPEAL

FMM REID J

Introduction:

- [1] This is an application for leave to appeal against the judgment and order granted on 28 May 2024 (the judgment). In the judgment this Court found that the applicant (Burger NO) did not make out a case for an interim interdict to prevent the 1st to 4th respondents (Deon Nel and others) from taking any further steps in effecting transfer of ownership of certain immovable properties which forms part of individually registered portions of a farm (the properties), to Deon Nel.
- [2] The interim interdict was sought pending the outcome and

determination

of an action instituted by Burger NO against Deon Nel under case number 991/2024. The relief claimed in that action is a declaratory order that Deon Nel has not complied with the order of the Supreme Court of Appeal dated 26 October 2022, to which judgment and order I will refer to hereunder.

[3] The primary grounds for the application for leave to appeal is directed at the findings in the judgment in relation to:

3.1. The absence of a prima facie right;

3.2. The lack of an apprehension of irreparable harm; and

3.3. The exercise of this Court's discretion to not grant interim

interdictory relief.

[4] The reasons for the judgment had been set out in the judgment and warrants no repetition.

[5] In summation, the dispute between the parties relate to the exercise of a right of pre-emption to purchase immovable property, which right of pre-emption was exercised by Deon Nel on 28 November 2011. This right of pre-emption is stipulated in express terms of two separate lease contracts that was entered into between Mr and Mrs de Beer (both now deceased) and Deon Nel on 20 November 2008 and on 22 September 2011, respectively.

[6] The executors of the deceased estate of the de Beers (Burger NO) argues that the right of pre-emption is subject to the seller's right to reciprocity. The claim of Deon Nel was dismissed by the

Gauteng Division of the High Court, Pretoria, but was unanimously reinstated and granted on appeal by the Supreme Court of Appeal (SCA) in the judgment reported as *Nel v De Beer and Another 2023 (2) SA 170 (SCA)*. The SCA judgment deals in detail with the history and dispute between the parties and determines that the order originating from the Pretoria High Court was issued in application of incorrect principles applicable to the rights of pre-emption and reciprocity applicable to the facts in casu.

[7] In drawing a conclusion, the SCA order reads as follows:

"[37] In Hirschowitz v Moolman 1985

(3) SA 739 (A) this court stated that:

'In principle the holder of a right of pre-emption is entitled (in addition to claiming an interdict or damages in appropriate circumstances) to seek the positive enforcement of his right.'

It is now well settled in our law that a right to specific performance exists subject to the court's discretion to grant or refuse it. There is no reason not to grant it in this matter. The appeal must succeed and the order of the High Court should be set aside.

[38] The following order is made:

1. The appeal is upheld with costs, including the costs of two counsel.
2. The order of the High Court is set aside and replaced with the following:

'(i) The plaintiff is directed to submit a duly signed deed of sale to the defendants in respect of Portions 6 and 11 of the farm Swarts Rust, which deed of sale shall contain all the terms and conditions of the Fanie Trust agreement, save for clause 2(d), within 14 days from the date of this order;

(ii) The defendants are ordered to sign the deed of sale submitted to them by the plaintiff within 14 days from date of receipt thereof;

(iii) Should the defendants fail and/or refuse to sign the deed of sale aforesaid, the Sheriff of the court (in which district the properties are situated) is authorised and ordered to sign the deed of sale on behalf of the defendants;

(iv) The defendants are ordered to pay the costs of the action, including the costs of two counsel."

(footnotes omitted)

[8] In my view the SCA has pronounced on the application and interpretation of the terms of the right of pre-emption and right of reciprocity in casu.

Appeal

[9] The test to be applied in an application for leave to appeal is set out in section 17(1)(a) of the Superior Courts Act 10 of 2013 which provides that:

"(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."

[10] In the judgment dated 28 May 2024, I came to the conclusion that Burger NO has not established a prima facie right to the relief sought in the main claim. My reasoning is set out in the judgment and warrants no repetition.

[11] I also found that Burger NO has not proven the requirement of a well-grounded apprehension of irreparable harm. Again, my reasoning is set out in the judgment and warrants no repetition.

[12] I also found that the principles of administrative justice in obtaining legal certainty militates against the granting of an interim order, having due regard thereto that:

12.1. The litigation has commenced on 4 July 2014 in the Pretoria High Court. The litigation over the same issues has now lasted more than a decade.

12.2. The litigation deals with one aspect, which is the interpretation of the rights of pre-emption and reciprocity. The SCA has dealt with these issues specifically and made pronouncements thereon.

[13] In *MEC for Health, Eastern Cape v Mkhita* 2016 JDR 2214 (SCA) the Supreme Court of Appeal emphasised the correct considerations in granting leave to appeal, as follows, in paragraphs [16] to [18]:

“[16] Once again it is necessary to say that leave to appeal, especially to this court, must not be granted unless there truly is a reasonable prospect of success. Section 17(1)(a) of the Superior Courts Act 10 of 2013 makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success; or there is some other compelling reason why it should be heard.

[17] 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.

[18] In this case the requirements of 17(1)(a) of the Superior Courts Act were simply not met. The uncontradicted evidence is that the medical staff at BOH were negligent and caused the plaintiff to suffer harm. The special plea was plainly unmeritorious. Leave to appeal should have been refused. In the result, scarce public resources were expended: a hopeless appeal was prosecuted at the expense of the Eastern Cape Department of Health and ultimately, taxpayers; and valuable court time and resources were taken up in the hearing of the appeal. Moreover, the issue for decision did not warrant the costs of two counsel.”

[14] The above quotation emphasise that the precious and limited judicial resources should not be taken up with matters that have no, or very limited, prospects of success. Leave to appeal should not be granted in unmeritorious matters.

Analysis

[15] In casu, the SCA had specific regard to the right of pre-emption and the right of reciprocity and applied the legal principles there-of to the facts before it.

[16] The facts have not changed.

[17] The application of the legal position on these specific facts has already been determined expressly by the SCA on 26 October 2023 in the matter of *Nel v De Beer and Another* 2023 (2) SA 170 (SCA). The De Beers are now represented by the executor of their deceased estate, Burger NO.

[18] Having regard to the above, I hold the view that there is no sound, rational basis to conclude that there is a reasonable prospect of success on appeal.

[19] No other reason has been advanced, and I find that there is no other compelling reason why the appeal should be heard.

[20] As such, the application for leave to appeal is to be dismissed.

Costs

[21] The general principle is that a successful party is entitled to the costs it incurred in the application.

[22] I find no reason to deviate from the general principle.

[23] The applicant is to pay the costs of the respondents.

Order:

[24] In the premise, I make the following order:

- i) The application for leave to appeal is dismissed.
- ii) The applicant is ordered to pay the respondents' costs in the application for leave to appeal, on Scale C, party and party basis.
- iii) The costs include the costs of two counsel, where so employed.

FMM REID

JUDGE OF THE HIGH COURT

NORTH WEST DIVISION MAHIKENG

DATE OF HEARING: 16 AUGUST 2024 DATE OF JUDGMENT: 28 AUGUST 2024 APPEARANCES:

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Prepared on 12 October 2026 · Esheria