

SOUTH AFRICA / JUDGMENT

Cuningham and Another v First Ready Development 249 (9988/2006) [2008] ZAWCHC 186 (25 April 2008) [2008] ZAWCHC 186

COURT

Western Cape High Court, Cape Town

BEFORE

Rose-Innes

CASE / FILE NUMBER

9988/2006

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IN

THE HIGH COURT OF SOUTH AFRICA

(CAPE

OF GOOD HOPE PROVINCIAL DIVISIONS

DATE: 25

APRIL 2008

CASE

NUMBER: 9988/2006

In

the matter between:

CUNINGHAME

AND ANOTHER Applicants

and

FIRST

READY DEVELOPMENT 249 Respondent

JUDGMENT

(Application for Leave to Appeal) ROSE-INNES, AJ: The applicants seek leave to appeal against the dismissal of an application for the winding-up of the respondent. Leave is sought to appeal to the Supreme Court of Appeal. The parties are agreed that if leave to appeal is granted it should lie to that court. The applicants brought an application for the winding-up of the respondent on the grounds that it was just and equitable to do so. They relied in support of that application on various contentions. These included the allegation that the substratum of the company had disappeared, the contention that its business was being conducted unlawfully and a complaint

that the affairs of the company were being mismanaged by those who were effectively in control of it. I concluded that the substratum has not disappeared and that the company is still capable of pursuing its objects. The contention

that its business has been conducted unlawfully involves an interpretation of section 21(2)(a) of the Companies Act 61 of 1973

and an application of those provisions to the facts as they appear from the affidavits. I came to the view that the company had not acted unlawfully. As far as the alleged mismanagement of the company's affairs is concerned I held that either the facts did not justify such a conclusion or that there were material disputes of fact which could not be resolved on the affidavits. The applicants assail each of these finding on the grounds set out in the application for leave to appeal. The matter raises factual and legal issues. After considering the grounds upon which leave is sought and the argument addressed to me this morning, I am of the view that the applicants have, at least in relation to certain of the grounds of appeal, reasonable prospects of success on appeal. In argument this morning, Mr Pincus, for the respondent resisted the application for leave to appeal. Whife contending that there was no prospect that an appeal court would interfere with the judgment he submitted that I did err in one respect, which would be relevant to a determination by the court hearing the appeal. This relates to the approach that was taken in regard to the legal argument advanced that the company was acting contrary to provisions of section 21 (2)(a) of the Companies Act. As appears from the judgment, while this point had not been expressly taken on the affidavits, I concluded that the applicants should be permitted to rely on it as the facts on which it is based are dealt with in the affidavits. Mr Pincus submitted that the course that I adopted was prejudicial to the respondent, because it deprived it of the opportunity of putting further facts before the court. I took the view, applying the recognised principles which are to be found in *Academy of Learning (Pty) Ltd v Hancock and others* 2001 (1) SA 941 (C) at 955J - 956B to which I was referred, that such an approach was a permissible one in the circumstances. I should perhaps add that the legal argument in relation to the alleged unlawfulness was fully canvassed in the course of written

and oral argument at the hearing of the application. At no stage did either of the parties seek an opportunity, in the light of that argument, to place additional facts before me. As I am satisfied that leave to appeal should be granted, the question arises as to which court the appeal should lie in terms of section 20(2)(a) of the Supreme Court Act 59 of 1959. In terms thereof the appeal should be heard by a full bench of this court unless I am satisfied that the questions of law and of fact and the other considerations involved in the appeal are of such a nature that the appeal requires the attention of the appellate division. The parties are agreed that the appeal should be heard by the Supreme Court of Appeal. As the matter involves not only questions of fact, but also questions of law, I take the view that It would be the appropriate court to hear the appeal. There are questions of interpretation relating to section 21(2)(a) of the Companies Act which to some extent are *res nova*. The matter is also of considerable importance, not only to the parties, but to others who have interest in the Harbours Edge Hotel and the operation of the rental scheme.

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISIONS)

DATE: 25 APRIL 2008

CASE NUMBER: 9988/2006

In the matter between:

CUNINGHAME AND ANOTHER Applicants

and

FIRST READY DEVELOPMENT 249 Respondent

JUDGMENT

(Application for Leave to Appeal)

ROSE-INNES, AJ:

The applicants seek leave to appeal against the dismissal of an application for the winding-up of the respondent. Leave is sought to appeal to the Supreme Court of Appeal. The parties are agreed that if leave to appeal is granted it should lie to that court.

The applicants brought an application for the winding-up of the respondent on the grounds that it was just and equitable to do so. They relied in support of that application on various contentions. These included the allegation that the substratum of the company had disappeared, the contention that its business was being conducted unlawfully and a complaint that the affairs of the company were being mismanaged by those who were effectively in control of it.

I concluded that the substratum has not disappeared and that the company is still capable of pursuing its objects. The contention

that its business has been conducted unlawfully involves an interpretation of section 21(2)(a) of the Companies Act 61 of 1973

and an application of those provisions to the facts as they appear from the affidavits. I came to the view that the company had not acted unlawfully. As far as the alleged mismanagement of the company's affairs is concerned I held that either the facts did not justify such a conclusion or that there were material disputes of fact which could not be resolved on the affidavits.

The applicants assail each of these findings on the grounds set out in the application for leave to appeal. The matter raises factual and legal issues. After considering the grounds upon which leave is sought and the argument addressed to me this morning, I am of the view that the applicants have, at least in relation to certain of the grounds of appeal, reasonable prospects of success on appeal.

In argument this morning, Mr Pincus, for the respondent resisted the application for leave to appeal. While contending that there was no prospect that an appeal court would interfere with the judgment he submitted that I did err in one respect, which would be relevant to a determination by the court hearing the appeal. This relates to the approach that was taken in regard to the legal argument advanced that the company was acting contrary to provisions of section 21 (2)(a) of the Companies Act.

As appears from the judgment, while this point had not been expressly taken on the affidavits, I concluded that the applicants should be permitted to rely on it as the facts on which it is based are dealt with in the affidavits. Mr Pincus submitted that the course that I adopted was prejudicial to the respondent, because it deprived it of the opportunity of putting further facts before the court. I took the view, applying the recognised principles which are to be found in *Academy of Learning (Pty) Ltd v Hancock and others* 2001 (1) SA 941 (C) at 955J - 956B to which I was referred, that such an approach was a permissible one in the circumstances.

I should perhaps add that the legal argument in relation to the alleged unlawfulness was fully canvassed in the course of written

and oral argument at the hearing of the application. At no stage did either of the parties seek an opportunity, in the light of that argument, to place additional facts before me.

As I am satisfied that leave to appeal should be granted, the question arises as to which court the appeal should lie in terms of section 20(2)(a) of the Supreme Court Act 59 of 1959. In terms thereof the appeal should be heard by a full bench of this court unless I am satisfied that the questions of law and of fact and the other considerations involved in the appeal are of such a nature that the appeal requires the attention of the appellate division.

The parties are agreed that the appeal should be heard by the Supreme Court of Appeal. As the matter involves not only questions of fact, but also questions of law, I take the view that it would be the appropriate court to hear the appeal. There are questions of interpretation relating to section 21(2)(a) of the Companies Act which to some extent are *res nova*. The matter is also of considerable importance, not only to the parties, but to others who have interest in the Harbours Edge Hotel and the operation of the rental scheme.

In my view, it would in the circumstances, be appropriate for the appeal to be heard by the Supreme Court of Appeal. I therefore make the following order: THE APPLICANTS ARE GRANTED LEAVE TO APPEAL TO THE SUPREME COURT OF APPEAL. The costs of the application for leave to appeal are to be costs in the appeal. ROSE-INNES, AJ

In my view, it would in the circumstances, be appropriate for the appeal to be heard by the Supreme Court of Appeal.

I therefore make the following order:

THE APPLICANTS ARE GRANTED LEAVE TO APPEAL TO THE SUPREME COURT OF APPEAL. The costs of the application for leave to appeal are to be costs in the appeal.

ROSE-INNES, AJ

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Prepared on 12 October 2026 · Esheria