

SOUTH AFRICA / JUDGMENT

De Hart v Kelsey NO and Others (3921/2016) [2020] ZAFSHC 222 (9 October 2020)

[2020] ZAFSHC 222

COURT

Free State High Court, Bloemfontein

BEFORE

Mhlambi

CASE / FILE NUMBER

3921/2016

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IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Case number: 3921/2016

In the matter between:

CHARL DE HART Applicant

and

BRIGITTE KELSEY N.O. 1st Respondent

ELSIE JACOBA JACOMINA CAROLINA 2nd Respondent

DE HART N.O. 3rd Respondent

JUDGMENT BY: MHLAMBI J,

HEARD ON: Matter disposed of without oral hearing in terms of section 19 (a) of the Superior Court Act 10 of 2013

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APPLICATION FOR LEAVE TO APPEAL

MHLAMBI, J

[1] This is an opposed application for leave to appeal against the whole judgment and order of her Ladyship, Acting Justice Meintjies which was delivered on 23 January 2020 to be heard by a full bench of the Free State High Court and that costs be costs in the appeal.

[2] Section 17(1) of the Superior Courts Act 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.

[3] In the case of Acting National Director of Public Prosecutions and Others vs. Democratic Alliance in Re: Democratic Alliance vs. Acting National Director of Public Prosecutions and others[1], the full bench stated:

“The Superior Courts Act has raised the bar for granting leave to appeal. In Mont Chevaux Trust, Bertelsmann, J held as follows: ‘it is clear that the threshold for granting leave to appeal against the judgment of a higher court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion.....The use of the word ‘would’ in section 17(1) of the Superior Courts Act indicates a major of certainty that another court will differ from the court whose judgment is sought to be appealed against”.

[4] In MEC Health, Eastern Cape vs Mkhita[2] it was held that an applicant for leave to appeal must convince the court on proper grounds that there was 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 sound, rational basis to conclude that there is a reasonable prospect of success on appeal.

[5] There must be a strong reason for granting leave to appeal on the basis that there is a compelling reason why the appeal should be heard. The court should give careful and proper consideration to the reason advanced before categorising it as compelling. Section

17(1)(a)(ii) should therefore not be invoked for flimsy reasons.[3]

[6] The first and second respondents were the plaintiffs in the action they instituted against the applicant (the defendant in that action) for his ejectment from a farm he leased from the plaintiffs and damages for holding over for the period 1 September 2013 to 31 August

2016. In the alternative, the plaintiffs claimed damages representing the market rental value of the farm for the same period.

[7] The defendant opposed the action and filed a counterclaim and claimed that an oral agreement was concluded between the Trustees of the Trust and himself which entitled him to remain in occupation of the farm indefinitely or until such time as the water problem was resolved at the cost of the Trust without payment of remuneration to the Trust. The Trust created a fideicommissum and the Trustees, as fiduciaries, owed him, as both capital beneficiary and fideicommissary, a duty to maintain the farm and to resolve the water problem at the cost of the Trust. He was entitled to occupy the farm until it was economically viable, rentable and a new lease agreement was offered to him and negotiated.

[8] The order of the court reads as follows:

“1. Payment of damages representing the market related value of the farm as follows:

1.1. For the period 01 September 2013 to 31 August 2014: R 59 864.00;

1.2. For the period 01 September 2014 to 31 August 2015: R 63 719.00;

1.3. 01 September 2015 to 31 August 2016: R 66 779.95. The total amount: R 190 362.95 (excluding vat).

2. Ejectment of the defendant in respect of only his farming activities (not including the workers) on the farm Middelwater.

3. The defendant's claim in reconvention is dismissed.

4. The defendant to pay the costs.

The Notice of Application for Leave to Appeal

[9] The defendant relied on fourteen grounds in his notice of application for leave to appeal in which it is alleged that the court erred in the following respects:

a) That the plaintiffs proved the market rental value of the farm for the relevant period;

b) That the farm was leasable while Mr Beukes considered that it would be extremely difficult to rent out the farm Middelwater;

c) By failing, when determining the damages, to take into consideration that Mr Beukes used farms that did not have problems with water as parameters and that it would be difficult to farm on Middelwater in its current condition as a new tenant would require that water be transported to the dry dams to prevent them from deteriorating further;

d) By failing to take into account the evidence of Mr Riaan Van Der Walt that Middelwater was not an economical unit as the fixed costs were too high and that the figures provided by the defendant were realistic;

e) By failing to take into account that the plaintiffs had a duty to preserve the trust property and an obligation to take positive steps to address the water problem on the farm Middelwater;

- f) By not taking cognisance of the fact in the case of *Ex Parte Bellingan's Executors* 1936 CPD 515 and how a similar water problem was addressed;
 - g) By relying on the case of *Flemming vs Kommissaris van Binnelandse Inkomste* 1995(1) SA 574 (A) and finding that the drilling of new boreholes should be regarded as improvements as that case was distinguishable from the case at hand;
 - h) By not finding that the plaintiffs forsook their duty to preserve the trust property as they failed to address the water problems of Middelwater in a proper manner;
 - i) That the judgment and the order by the court a quo were unfair as it was not economically viable to farm on Middelwater in its current condition. The defendant had through-out tried to preserve the infrastructure of the farm;
 - j) By failing to have proper regard to the material contradictions during the evidence of Mrs Elsie De Hart on various aspects;
 - k) By not finding that it was probable that Ms Jackson would have reached the agreement along the lines as testified by the defendant that she was informed on 4 September 2013 of the circumstances on the farm;
 - l) By failing, when considering the probabilities of what happened at the meeting on 04 September 2013, to take into consideration Ms Jackson's evidence that, at that meeting, Mrs De Hart knew that there was an amount of R 500 000.00 available to address the borehole issue as well as the defendant's evidence that at the time he had in mind a time frame in which the borehole issue could be addressed;
 - m) By not making an adverse inference that Mrs Belinda Van Dyk was not called as a witness by the plaintiffs;
 - n) By not finding that Mrs Elsie De Hart's conduct created the impression that she had authorised Ms Jackson to represent the trust.
- [10] The centrepiece of the defendant's defence to the main action is the existence of the oral agreement allegedly concluded on 4 September 2013. The court found that the defendant bore the onus of proving such agreement on a balance of probabilities[4]. In this regard it was found that the defendant's version with regard to the agreement concluded on 4 September 2013, was highly improbable[5]. It was unthinkable that Ms Jackson, authorised by Mrs De Hart to get the new lease signed by the defendant on 4 September 2013, and on the defendant refusing to sign the agreement because of the water problem, would immediately volunteer the so-called agreement on the terms alleged and suggested by the defendant without Mrs De Hart's authority.
- [11] It was highly improbable that Jackson would have volunteered such an agreement with the effect that the defendant would be allowed to stay on the farm for no payment at all as the situation would continue indefinitely, leaving Mrs De Hart, whose only income was the rent, and the trust without any further income. The defendant's failure to have raised the

agreement in response to the letter from the trustees dated 13 September 2013, justified the inference that no such agreement was concluded[6]. The defendant did not convince the court to be a trustworthy and reliable witness. He contradicted himself and was evasive during

cross-examination. He changed his version and could not support all the terms of the agreement as pleaded. He could not explain why he did not react to correspondence received by him where it would have been reasonably expected of him to do so[7].

[12] On the other hand, the court found that Mrs De Hart testified in a satisfactory and forthright manner despite her advanced age and conspicuous hearing problem. Save for minor aspects which could not be seen as discrepancies in the real sense, there were no material contradictions in her evidence. She was an honest and reliable witness. So also was Ms Jackson who, despite lengthy

cross-examination, testified throughout in a clear and forthright manner. She had no reason to be dishonest about the meeting of 4 September 2013 as, at the time of her testimony, she was no longer employed at Standard Trust but at Absa Bank[8].

[13] The court made credibility findings in respect of the witnesses surrounding the conclusion of the agreement of 4 September

2013. The version of the plaintiffs was accepted and that of the defendant rejected. It is trite that the trial court that hears the evidence and has sight of the witnesses during testimony, is in the best position to gauge their demeanour and pronounce on their credibility. A court of appeal is reluctant to interfere with such credibility findings if the record of evidence speaks for itself[9]. It was correctly pointed out in the plaintiffs' heads of argument,[10] that the applicant did not seek to attack the court's findings of his credibility as a witness and no grounds were set out that the findings against the defendant were unjustified and would be reversed on appeal.

[14] I am satisfied with the court's assessment of the evidence and that it correctly found that the defendant had not acquitted himself of the onus of establishing the alleged agreement of 4 September

2013. Consequently, this disposes of the grounds of appeal contained in paragraphs j, k, l and m of the notice of motion.

[15] The grounds in paragraphs a, b, c, d and I will be grouped together as they refer to the same aspects of the evidence. The court's finding as to the fair and reasonable market-related rental for the three-year period was based on the expert evidence presented by both the plaintiffs and the defendant. The court correctly found, as the record shows, that the calculations of Mr Van der Walt (the expert witness for the defendant) of what the reasonable rental would be, calculated on the basis of rand per hectare, were not very different than those of Mr Beukes[11] (the plaintiffs' expert witness).

- [16] The court found that Mr Van der Walt's report, as admitted by himself, contained certain mistakes and shortcomings[12]. He himself, confirmed that his report regarding the water status of Springbok camp was not correct when he stated that it was dry and had no water, when indeed it had. He confused it with another camp which he could not remember. As regards the income and expenditure, he relied on the defendant for information[13]. Although it was difficult to farm on that farm, the court found that it was leasable and had a carrying capacity of stock. It was not in dispute that the defendant grazed stock on the farm during the periods alleged[14]. The arguments raised in these paragraphs are therefore without substance and stand to be rejected.
- [17] The court, in dismissing the defendant's claim based on fideicommissum and his entitlement to the provision of water, stated that it was incorrect to identify fideicommissum with trust or equate fiduciary with trust and the distinction was clear[15]. Some of the boreholes had already dried up prior to the conclusion of the lease agreement in 2008 and the establishment of the trust. It could not be found that the trustees had an obligation to effect new improvements, such as the drilling of new boreholes, as they constituted neither repairs nor maintenance. There was no duty on the trustees to effect these improvements on the farm[16].
- [18] The plaintiffs correctly pointed out in their heads of argument that the case of *Ex Parte Bellingan's Executors*[17] was different from the one at hand in that the executors in that case, were conducting farming operations on the estate farms, the fruits of which were to maintain the children of the deceased. They sought leave from the court for a mortgage bond to be passed over the estate property as security for a loan to pay for the cost of sinking boreholes and purchasing some more sheep for the continuation of farming operations and to increase the farming revenue to the estate. In the present case, the cash available in the trust was an asset for the capital beneficiaries and, as such, it could not be used to improve the farm.
- [19] The court was therefore correct to rely on *Flemming's* case and to hold that there was no duty on the trustees to address the water problem on the farm with the trust funds. Those funds were receivable by the capital beneficiaries on the conclusion of the trust. This disposes of the grounds in a, b, c, d and i of the notice of motion.
- [20] The ground of appeal contained in paragraph (n) of the notice, is thoroughly traversed in the judgment[18]. The court found that the defendant did not plead any representation having been made by Mrs De Hart and that the defendant presented no evidence that either Jackson or Mrs De Hart had made any representation to the defendant that Ms Jackson was authorised to conclude such agreement without Mrs De Hart. The requirements for estoppel were clearly lacking.
- [21] I am therefore satisfied that the court did not err in any of its findings or the orders that it made. The defendant has therefore

failed to show that there were reasonable prospects of success on appeal. The application for leave to appeal stood to be dismissed.

[22] The following order issues:

Order:

The application for leave to appeal is dismissed with costs.

JJ MHLAMBI, J

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[1] [2016] ZAGPPHC 489 at para 25

[2] 2016 ZASCA 176 at para 17

[3] The School Governing Body Grey Collage, Bloemfontein vs. Deon Scheepers and others (2612/2018) [2019] ZAFSHC 25 (17 January 2019) paragraph 6.

[4] Para 14 of the judgment of the court a quo

[5] Para 23 of the judgment of the court a quo

[6] Para 25: of the judgment of the court a quo

[7] Para 22 of the judgment

[8] Para 19 of the judgment

[9] Allie v Foodworld Stores Distribution Centre (Pty) 2004 (2) SA 433 (SCA)

[10] Paras 88 and 89

[11] Para 26 of the judgment of court a quo

- [12] Para 26:J of the judgment of court a quo
- [13] Para 13: of the judgment of court a quo
- [14] Para 45: of the judgment of court a quo
- [15] Para 37: of the judgment of court a quo
- [16] Para 42: of the judgment of court a quo
- [17] *supra*
- [18] Paras 31-35 of the judgment of court a quo
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