

SOUTH AFRICA / JUDGMENT

De Wet and Another v Gambeno and Another (434/2022) [2023] ZAECELLC 13 (30 May 2023)

[2023] ZAECELLC 13

COURT

Eastern Cape High Court, East London Local Court

BEFORE

Laing

CASE / FILE NUMBER

434/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, EAST LONDON CIRCUIT COURT)

CASE

NO. 434/2022

In

the matter between:

GREGORY

DE WET First

Applicant

ENRICO

BLIGNAUT Second

Applicant

and

PHILIP

GAMBENO First

Respondent

BISE

ENGINEERING Second

Respondent

JUDGMENT

LAING J

- [1] This is an application for leave to appeal. The matter concerns an application for an interdict against the first respondent in relation to a business that supplies flexographic labelling, trading as PEG Labels.

Background

- [2] Pending the finalisation of separate action proceedings, the applicants sought to interdict the first respondent from: instructing suppliers to suspend the operation of any accounts that PEG Labels held with such suppliers; preventing the applicants from using such accounts to place orders for stock and materials; and directing suppliers not to accept such orders and not to deliver any stock or materials in accordance therewith.
- [3] Furthermore, the applicants sought an order directing the first respondent to reinstate all accounts held by PEG Labels with the suppliers in question.
- [4] The court dismissed the application with costs. Subsequently, the applicants brought the present application for leave to appeal.

Basis of application

- [5] The applicants have listed several grounds. The main argument, however, rests on two clauses contained in the partnership agreement concluded by the parties on 23 March 2011. These provide as follows:

'8. Withdrawal / Death of a Partner

In event of a partner withdraws or retires from the partnership for any reason including death, the remaining partners may continue to operate the company using the same name. A partner withdrawing shall be obligated to sell his shares in the partnership with the remaining partners having the first option to buy his shares. No partner shall transfer his shares in the partnership to any other party without written consent from the remaining partners. In the event of death the shares of the deceased will be transfer to his next of kin along with any profits accrued. If the next of kin of the deceased want to sell the shares in the company the remaining partners will have the first option of sale.

9. Non-Compete Agreement

A partner who withdraws from the partnership shall not directly or indirectly enter to a partnership / starting of new company or running of a company which is or would be competitive with the existing or then anticipated business of the partnership for a period of 5 years, in the Eastern Cape where the company is currently doing or planning to do business.[1]

[6] The applicants contend, with reference to the principles set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality*,^[2] that the clauses in question permitted them to continue with the operation of the business of the partnership, notwithstanding the first respondent's later dissolution thereof on 7 March 2021. Mindful of the text, context, and purpose, of the partnership

agreement, the applicants argue that the relevant portion of clause 8 should be interpreted as follows:

'If one partner retires from the partnership, then the remaining partners have a right to continue operating the business of the partnership under the same name.'

[7] The above interpretation, say the applicants, would give rise to a sensible and business-like meaning. The partnership agreement was drafted by laypersons, not lawyers, and they had intended the continuation of the business of PEG Labels, notwithstanding the possible withdrawal or retirement of one of the partners at some stage in the future. The applicants assert that the restraint of trade encapsulated under clause 9 reinforces such an interpretation.

[8] The applicants do not dispute that the partnership was eventually dissolved, as the court found. They argue, nevertheless, that the rights and duties created in terms of clauses 8 and 9 survived.

[9] The example of an arbitration clause is apt. To that effect, the applicants referred to *Scriven Brothers v Rhodesian Hides & Produce Co Ltd and others*,^[3] where Tindall JA held as follows:

'...It is true that a repudiation of a contract by one party may relieve the other party of the obligation to carry out the other terms of the contract after the date of repudiation, but the repudiation does not destroy the efficacy of the arbitration clause. The real object of that clause is to provide suitable machinery for the settlement of disputes arising out of or in relation to the contract, and as that is the object it is reasonable to infer that both parties to the contract intended that the clause should operate even after the performance of the contract is at an end. If, for example, this contract had come to an end on a date stipulated for its termination, I do not think that it could have been contended successfully that the arbitration clause was no longer operative.'^[4]

[10] The applicants point out that the above principles were also followed in *De Goede v Venter*,^[5] where the court held that an arbitration clause had survived the cancellation of a commercial contract. There was no reason why the same principles did not apply in the present case, say the applicants, where the original partnership agreement had provided for the consequences of dissolution.

[11] Accordingly, the applicants argue that the provisions of clause 8 were triggered by the first respondent's instruction to his attorneys to 'terminate' the partnership. The provisions allowed them to continue with the operation of the business of PEG Labels, whether as

individuals or associates or otherwise. They indeed did so, until the conduct of the first respondent prompted the need for the relief sought in the main application. The provisions in question created the right relied upon by the applicants for an interdict against the first respondent.

Opposition to the application

[12] The respondents have opposed the application for leave to appeal. They argue, firstly, that the language of clauses 8 and 9 simply does not permit the sensible and business-like meaning advanced by the applicants and emphasise that Natal Joint Municipal Pension Fund warned against too liberal an interpretation of the text. The relevant portion of the judgment stated as follows:

‘...Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or business-like for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The “inevitable

point of departure is the language of the provision itself”, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.’[6]

[13] The language of clauses 8 and 9, assert the respondents, is too contradictory or ambiguous to allow the interpretation ascribed thereto by the applicants. The respondents argue, secondly, that the common law provides that the partnership agreement only constrains the conduct of the first respondent to the extent necessary for the proper liquidation and distribution of the assets of the erstwhile partnership. Any business carried out by the applicants, after the dissolution of the partnership, must be considered as the business of a new partnership unless the opposite was indicated in the original partnership agreement.

Discussion

[14] The usual position, in terms of the common law, is that no provision of a partnership agreement is binding after dissolution. There is an exception to this where the contrary appears from either the partnership agreement itself or the dissolution agreement.[7] Henning observes as follows:

‘Deeds of partnership often contain provisions which are intended to apply after dissolution, for instance, provisions restraining a former partner from trading, arbitration clauses relating to disputes arising from the dissolution and / or liquidation of the partnership, clauses regulating the manner of liquidation of the partnership and provisions concerning the continuation of the business and the succession to the rights and liabilities of the partnership on its dissolution. Provisions such as these will in general remain effective notwithstanding the termination of the partnership, but it has been suggested that it would be advisable to ensure that the partnership agreement contains an express provision to this effect.’[8]

[15] From the above, it can well be argued that clauses 8 and 9 of the partnership agreement constitute a set of provisions concerning the continuation of the business of PEG Labels upon its dissolution. The sensible and business-like meaning to be given thereto, as contended by the applicants, is not unreasonable. As laypersons, they would not have appreciated the niceties of the common law and had clearly intended the business to continue, notwithstanding the possible withdrawal or death of a partner. It cannot be said that the applicants' argument is entirely devoid of merit.

[16] The provisions of section 17(1)(a) of the Superior Courts Act 10 of 2013 stipulate 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 the appeal should be heard. In *Land and Agricultural Development Bank of South Africa and another v Van den Berg and others*, [9] Opperman J observed as follows:

‘...The interpretation of the Rules and the law has evolved in case law since 2013:

1. In numerous cases the view is held that the threshold for the granting of leave to appeal was raised with the inauguration of the 2013 legislation. The former assessment that authorisation for appeal should be granted if “there is a reasonable prospect that another court might come to a different conclusion” is no longer applicable.
2. The words in section 17(1) that: “Leave to appeal may only be given...” and section 17(1)(a)(i) that: “The appeal would have a reasonable prospect of success” are peremptory. “If there is a reasonable prospect of success” is now that: “May only be given if there would be a reasonable prospect of success.” A possibility and discretion were therefore, in the words of the legislation and consciously so, to a mandatory obligatory requirement that leave may not be granted if there is not a reasonable prospect that the appeal will succeed.
3. It must be a reasonable prospect of success; not that another court may hold another view. The court a quo may not allow for one party to be unnecessarily put through the trauma and costs and delay of an appeal...’[10]

[17] The test for the granting of leave to appeal, since the enactment of the Superior Courts Act 10 of 2013, has clearly become more stringent.

[18] The court previously found, in relation to the main application, that the partnership had conducted the business of PEG Labels until 7 March 2021, when it was dissolved by the first respondent. Consequently, the partnership agreement had been rendered non-binding. The business of PEG Labels could not simply have continued unabated. It appeared, moreover, that it was being conducted by the second respondent, trading as PEG Labelling. It was probable, so the court found, that the second respondent dealt with the applicants, in law, as employees and paid them accordingly.

[19] Having assessed, nevertheless, the arguments of the applicants in relation to the present application, the view of the court is that the interpretation contended for clauses 8 and 9 is not unreasonable. If the meaning to be given thereto is that indicated by the applicants, then the provisions thereof could well be held to have applied upon the withdrawal or death of a partner and to have survived the first respondent's dissolution of the partnership. This would have the implication, in turn, that the applicants have demonstrated that they have a protectable right. It would have the further implication that it could well be found that the first respondent has interfered with the applicants' right to continue the operation of the business of PEG Labels, whether as individuals or associates or otherwise, and that the applicants are entitled to interdictory relief upon a proper examination of the remaining requirements.[11] In relation to the second respondent, it could well be found that it conducts an entirely separate business altogether.[12]

Relief and order

[20] The above arguments and implications were not closely considered in the court's judgment in the main application. Consequently, the court is of the opinion that the applicants' appeal would have a reasonable prospect of success.

[21] In the circumstances, the following order is made:

- (a) leave to appeal is granted to the applicants; and
- (b) the costs of the present application are those in the appeal.

JGA LAING

JUDGE OF THE HIGH COURT

APPEARANCE

For the applicant: Adv Cole SC, instructed by Allams Attorneys,
East London.

For the respondents: Adv Miller, instructed by Bate Chubb & Dickson Inc.,

Date of hearing: 19 April 2023.

Date of delivery of judgment: 30 May 2023.

[1] Sic.

[2] 2012

(4) SA 593, at paragraph [18].

[3] 1943 AD 393.

[4] At 401.

[5] 1959

(3) SA 959 (O).

[6] Natal Joint Municipal Pension Fund, *supra*, n 2.

[7] JJ Henning, 'Partnership', in LAWSA (LexisNexis, vol 31, 3ed, February 2022), at paragraph 491. See, too, Rogers v Mathews 1926 TPD 21; Scriven Brothers, *op cit*; and Beiles v Glazer (1947) 2 PH A79 (W).

[8] Ibid.

[9] [2022] 1 All SA 457 (FB).

[10] At paragraph [16].

[11] The court only dealt with the question of whether the applicants had demonstrated a *prima facie* or clear right. Insofar as the court suggested that the pending action proceedings constituted an alternative remedy, this was

limited to the protection of the applicants' rights in relation to the liquidation and distribution of the assets of the

erstwhile partnership.

[12] The first respondent asserted, in his answering affidavit to the main application, that the second respondent trades as PEG Labelling (not PEG Labels).

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