

SOUTH AFRICA / JUDGMENT

Deksny Trading CC and Another v Hernani In Re: Deksny Trading CC and Others v Hernani (58802/2011) [2017] ZAGPPHC 582 (18 August 2017)

[2017] ZAGPPHC 582

COURT

North Gauteng High Court, Pretoria

BEFORE

G Shakoane

CASE / FILE NUMBER

58802/2011

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 58802/2011

In

the matter between:-

DEKSNY

TRADING

CC First

Applicant

ANDRÉ

DE

KLERK Second

Applicant

and

MORGADO

VIEIRA DA COSTA. RENATO

HERNANI Respondent

Consolidated

with Case No: 16660/2012

In

re: DEON
DE
KLERK Third
Applicant
MORGADO
VIEIRA DA COSTA RENATO
HERNANI Respondent

JUDGMENT

SHAKOANE, AJ

- [1] This judgment is in respect of an application for leave to appeal by Deksny Trading CC ("Deksny") and Andre de Klerk in both his personal and official capacity as member and/or director of Deksny and trustee of the De Klerk Family Trust. There was a second application for leave to appeal by the Third Applicant, Mr Deon de Klerk in Case Number: 16660/12, but which has been abandoned for the reasons mentioned below.[1]
- [2] The leave to appeal is sought against my judgment in the matter of 7 September 2016 in which I found in favour of the Respondent, Mr Da Costa and made an order against the Applicants in the following terms[2]:

"1. The Second and Third Defendants in their personal capacities and/or in their capacities as trustees of the Andre de Klerk Family Trust are declared to be jointly and severally liable with the corporation or company (as it currently is), being the First Defendant for the First Defendant's debts to the Plaintiff in terms of the provisions of Section 64 of the Close Corporations Act.

2. That the First, Second and Third Defendants jointly and severally, the one defendant paying the other defendants to be absolved, pay to the Plaintiff the amount of US\$200 000,00, or the equivalent thereof in South African Rands as at the time or date of payment, together with interest thereon at the rate of 15,5% per annum from 30 August 2009 to date of payment.
3. That the First, Second and Third Defendants jointly and severally, the one defendant paying the other defendants to be absolved, pay to the Plaintiff the further amount of US\$84 000,00, or the equivalent thereof in South African Rands as at the time or date of payment, together with interest thereon at the rate of 15,5% per annum, calculated from 30 December 2010 to date of payment.
4. The Plaintiff is directed to file with the Registrar, an affidavit sworn to by an authorised dealer in foreign exchange, stating the rate of exchange between the US Dollar and South African Rand ruling as at the time or date of the swearing of such affidavit.
5. A copy of such affidavit is to accompany any writ or warrant of execution issued by the Plaintiff in terms of the Rules of Court, pursuant to this order.

6. That the First, Second and Third Defendants are to pay the Plaintiff's costs, including the costs of the affidavit in paragraphs 4 and 5 above, jointly and severally, and on the scale as between attorney and client, the one Defendant paying the other Defendants to be absolved".
- [3] In their application Deksny and Mr Andre de Klerk have raised more than ten grounds cumulatively, on which they contend that I erred in the findings I made and in terms of which I arrived at the judgment and order I made[3] and they argue that "there is a reasonable possibility that another court may come to another decision" and therefore that leave to appeal be granted to them to the Full Court of this division.[4]
- [4] Mr Deon de Klerk being one of the trustees of the De Klerk Family Trust which is alleged to be shareholder in Deksny and who was the Third Defendant (now third applicant) in the second action in case no. 16660/12 was represented by a different firm of attorneys[5] and Counsel[6] in the application for leave to appeal. In fact a separate application for leave to appeal was filed on his behalf on 29 September 2016.[7]
- [5] The Respondent opposed both the applications for leave to appeal. However, at the commencement of the hearing for leave to appeal I was informed by both Messrs Barnard who appeared for the Applicants and Keyter who appeared for the Respondent that the Respondent has abandoned the judgment insofar as it concerns Mr Deon de Klerk and consequently that there would be no appearance by Counsel for Mr Deon de Klerk, Mr Anorlidi.
- [6] In the circumstances, this judgment involves only the application for leave to appeal by Deksny and Mr Andre de Klerk. Therefore, for purposes of this judgment and for convenience I refer to all of these two parties collectively as "the Applicants" unless and/or except where the context requires otherwise.
- [7] As mentioned earlier above, the Applicants have raised more than ten grounds in terms of which they contend that I have erred in my findings and judgment and then that "there is a reasonable possibility that another court may come to another decision" and consequently that they be granted leave to appeal to the Full Court of this division.[8]
- [8] At the outset I need to point out that the approach and statement by the Applicants in their notice of application for leave to appeal quoted in the preceding paragraph regarding the basis on which the Court is required to test the grounds for leave to appeal and decide whether or not to grant leave is not the correct approach and/or test as provided for in the Superior Courts Act,[9] which is the empowering provision regarding applications for leave to appeal and the determination thereof by the Court.
- [9] The test current in determining whether or not a party applying for leave to appeal should succeed is not whether "there is a reasonable possibility that another court may come to another decision" but whether the Applicant for leave to appeal has prospects of success in that another Court may come to a different conclusion, and/or that there is

some other compelling reason in the grounds advanced for leave to appeal warranting the Court of appeal to hear the matter.[10]

- [10] It is against the backdrop of the foregoing and in the context and on the basis of that test that I proceed to consider and determine whether the Applicants have reasonable prospects of success on appeal in the sense required in terms of Section 17 of the Superior Courts Act above. If they do, leave to appeal has to be granted, but if they don't then leave to appeal has to be refused.
- [11] In the second of their grounds raised for leave to appeal in the notice of application for leave to appeal, the Applicants contended that I should not have found Mr Deon de Klerk to be liable because there was no evidence of his active participation or involvement in the affairs of the company, including the fact that he did not partake at the trial in the matter. For the reasons mentioned earlier above,[11] this ground of appeal is no longer of relevance for purposes of the determination of the application for leave to appeal.
- [12] As for the first ground for leave to appeal advanced by the Applicants which is that I should not have granted the judgment and order in favour of the Respondent as I did, and that I should have dismissed the Respondent's claim with costs, I deal with same towards the end part of this judgment since it is more of a conclusion emanating from the totality of the grounds raised for leave to appeal[12].
- [13] Regarding the third ground for leave to appeal the Applicants contend that I erred in my interpretation and application of the provisions of Section 64 of the Close Corporations Act mainly in that the evidence I relied on was never presented before me by the witnesses and al.so that there was no proof including in the form of financial statements that the corporation is unable to pay its debts to the Respondent as well as the fact that Messrs Andre de Klerk and Willem Snyman were not showed to have conducted the affairs of the corporation in a manner that is heedlessly gross or dishonest. The challenge by the Applicants in this regard is materially repeated in the fourth ground of leave to appeal wherein it is further suggested that the Respondent had not been able to prove the inability of the corporation to pay its debts and/or that "a fraudulent misrepresentation" has been made by the Applicants as required in terms of Section 64 and the authority in MA Vleisagentskap CC & Another v Shaw N.O.[13]
- [14] As also argued by Mr Keyter on behalf of the Respondent, the Applicants' challenge on the grounds set out in the preceding

paragraphs is misplaced and without merit. That is, in my view, particularly so in that firstly, I have expressly found in my judgment that the Applicants' conduct fell within the purviews of "a fraudulent scam to take [the respondent's] money and never to return the money to him".[14]

A similar finding in that regard is made later in the judgment.[15] The Applicants seem to have failed to appreciate the contents of my judgment, hence their allegation and suggestion that I did not make a finding that there was "a fraudulent misrepresentation ". I did.

- [15] Secondly, evidence of recklessness on the part of the Applicants emerged during the hearing when it came out from Mr Andre de Klerk that a loan was given to BSA without provision for proper or adequate surety as security for the loan and that the funds are being used to pay for litigation costs against BIZ Africa.[16] Thirdly, regarding the Applicants' ability to repay the money Mr Andre de Klerk claimed during his evidence under re-examination by Mr Barnard that there is money available but when asked as to why that money is not being refunded to the Respondent he was unable to provide any honest answer or at all, which to me patently indicated that no such money is available.[17]
- [16] Fourthly, further basis on why I found that the corporation is unable to pay its debts were set out in the main judgment when I was dealing with argument by Mr Barnard in his written heads of argument contending that the corporation would be able to pay its debts.[18] Fifthly and lastly, the Applicants as represented by Mr Barnard were not able to provide the transcript of the trial proceedings

supporting the allegations that the evidence as recorded in my judgment and on which I based my findings was not the correct evidence. It was important that the transcript be made available because the evidence I refer to in my judgment is based on my notes and obviously the Applicants' contentions are based on their Counsel, Mr Barnard's notes which he took during the trial - so the transcript of the record would have been the neutral and most reliable source to indicate whether or not, the Applicants' said

attack on my findings were founded. I raised this point with Mr Barnard during argument and his response was that it wasn't necessary. I do not agree.

- [17] Then in the fifth ground on which the application for leave to appeal is based it is contended by the Applicants that I erred in applying principles concerning interpretation of contracts because in the present matter the Respondent did not rely on any written agreement but only an oral agreement. In my view, this contention by the Applicants is misplaced particularly in that the rules or principles for the interpretation of contracts are equally applicable where the contract is an oral or verbal one, and in any event in the present matter the agreement was partly oral and partly written as also evidenced by the signing of the CK2 forms by the parties with a view to selling one third of the members' share interest to the Respondent. Indeed, Mr Barnard conceded that the CK2 documents are relevant and that I was entitled to take same into account as part of the total evidence when I was deciding the matter in my judgment.

- [18] The sixth ground of challenge by the Applicants relates to the fact that I have made a statement in my judgment regarding the onus of proof in instances where certain assertions or averments are made by the parties and that I erred in applying the aforementioned

principles. The Applicants clearly misconstrued the purpose and effect of my sentiments in that regard because I clearly did not

apply that principle but merely stated it in passing.[19]

[19] In the seventh ground of their application for leave to appeal, the Applicants mount the challenge that I erred in not finding that the Respondent had no locus standi in respect of the claim for the payment of \$84 000,00. In my view there is no merit in this ground of challenge by the Applicants

particularly in that no special plea was taken or advanced by the Applicants that the Respondent has no locus standi. On the contrary, the Applicants abandoned their special pleas and their Counsel, Mr Barnard confirmed such abandonment on record at the commencement of the trial.

[20] It is trite law that once such abandonment is made on record it is binding on the Applicants and they may not willy nilly seek to later renege from same.[21] Moreover, Mr Keyter's argument that the said challenge by the Applicants is of no moment because the transaction involved took place between the Respondent and the Applicants, also has some substance to it.

[20] As for the grounds of application for leave to appeal in paragraphs 8 to 10 in the notice of application for leave to appeal, same are like the third and fourth grounds based on the Applicants' contention that I made findings based on evidence which was never presented by the witnesses on record and that the costs order I granted in favour of the Respondent included costs in respect of previous delays and postponements for which the Court that heard such matters already made cost orders against the Applicants. These contentions by the Applicants are clearly unfounded and Mr Barnard for the Applicants had serious difficulty in attempting to advance argument to persuade the Court in that regard particularly for the three reasons following.

[21] Firstly, as mentioned in paragraph [16] above, the Applicants inexplicably failed to obtain and file the transcript of the

proceedings in order to provide the required support for their contention. Secondly, Mr Barnard for the Applicants was unable to

deal with or controvert my observations and findings relating to Messrs Andre de Klerk and Willem Snyman's candour and demeanour as witnesses in the witness box.[22] Thirdly and lastly, insofar as concerns the order of costs which I granted in favour of the Respondent, it is evident from my judgment

that it did not include aspects of the delays and postponements in respect of which cost orders have already been made and also that I have expressly given reasons regarding the reprehensible nature of the conduct of the Applicants which warranted the granting of costs against them on the attorney and client scale.[23] Mr Barnard was unable to advance any convincing submissions why those reasons could not be sufficient to warrant the costs order I made.

[22] Applying the test for leave to appeal as set out above,[24] I am inclined to agree with the submission by Mr Keyter on behalf of the Respondent that the Applicants will have no prospects of success on appeal in that no other Court may come to a different conclusion and further, in my view, there is also no other compelling reason in the grounds for leave to appeal as relied upon by the Applicants warranting a Court of appeal to hear the matter.

[23] In the result, I find that the Applicants have failed to make out a case for this Court to grant leave to appeal. I therefore make the order following:

1. The Applicants' application for leave to appeal is refused.
2. The Applicants are to pay the costs of the application for leave to appeal.

G SHAKOANE

Acting Judge of the High Court

Gauteng Division, Pretoria

FOR THE APPLICANTS: Mr H M Barnard

INSTRUCTED BY: Daan Beukes Attorneys of 1288 Dickenson Avenue Waverley

Pretoria

FOR RESPONDENT: Mr H Keyter

INSTRUCTED BY: J P Kruyshaars Attorneys of 707 Chamberlain Street Riviera

DATE OF JUDGMENT: 18 AUGUST 2017

[1] Paras [4] to [6], *infra*

[2] Pp 35 to 37, para [70]

[3] Para 2, *supra*

[4] Application for leave to appeal bearing the Registrar's date stamp of 27 September 2016, paras 1 to 10 thereof.

[5] Couzyn, Hertzog & Horak Attorneys; p 83 of the paginated application papers

[6] Para 5, *infra*

[7] Pp 81 to 84 of the paginated application papers

[8] Para [3], *supra*

[9] No. 10 of 2013

- [10] Superior Courts Act, Section 17(1)(a) and (4); KZN Law Society v Shanna (2017] 3 All SA 264 (KZP) at 272h
- [11] Paras (1), [4] & [5], supra
- [12] Para [8], supra; paras [16] and [20] to [23], infra
- [13] 2003(6) SA 714 at 722 Ito 723 B; Notice of application for leave to appeal, p 10, para 4.2 to p 11, para 4.5
- [14] Main judgment, p 26, para [50] and [51]
- [15] P 31, para [60]
- [16] Main judgment , p 25, para [48] to p 27, para [52]
- [17] P 27, para [52]
- [18] P 31, para [61] to p 32, para [63]
- [19] Main judgment, pp 10 to 11, para [20]
- [20] Main judgment, p 6, para [12]
- [21] Dengetenge Holdings v Southern Sphere Mining and Development Co Ltd
- [2013] 2 All SA 251 (SCA) at 259c to 260c and the cases cited therein
- [22] Main judgment, pp 29 to 30,para (57)
- [23] P 34, para [68] to p 35,para [69] and pp 36 to 37, para [70] 6
- [24] Paras [9] and [10], supra

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