

SOUTH AFRICA / JUDGMENT

Lewis NO and Others v Cooper NO and Another, Lewis v Soundprops 236 (Pty) Ltd and Others (11292/08, 14889/08) [2009] ZAWCHC 51 (27 February 2009)

[2009] ZAWCHC 51

COURT

Western Cape High Court, Cape Town

BEFORE

P B Fourie

CASE / FILE NUMBER

11292/08, 14889/08

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IN

THE HIGH COURT OF SOUTH AFRICA

[CAPE

OF GOOD HOPE PROVINCIAL DIVISION]

Case

No: 11292/08

In

the matter between:

JUSTIN

RORY MCKENZIE LEWIS N.O. First
Applicant

JUSTIN

RORY MCKENZIE LEWIS Second
Applicant

ROBERT

WILLIAM SEMPLE Third
Applicant

CORNELIA

LEWIS Fourth

Applicant

(First

to Fourth Applicants in the main application)

and

PETER

COOPER N.O. First

Respondent

THE

TRUSTEES FOR THE TIME BEING OF THE
HELDERFONTEIN
FARMING TRUST Second
Respondent
(First
and Second Respondents in the main application)
CASE
NO: 14889/08
JUSTIN
RORY MCKENZIE LEWIS
(and
all that hold title under him) First
Applicant
(First
Respondent in the main application)
SOUNDPROPS
236 (PTY) LTD First
Respondent
PETER
COOPER N.O. Second
Respondent
GESINA
CHRISTINA COOPER N.O. Third
Respondent
FREDRICK
STIGLINGH HUMAN N.O. Fourth
Respondent

JUDGMENT

DELIVERED: 27 FEBRUARY 2009

FOURIE J:

- [1] Applicants apply, in respect of each of the two judgments in the abovementioned applications, which were heard together on 13 November 2008, for an order granting them leave to appeal. Mr. Lewis has previously appeared in person in all the court proceedings, but Adv. Nortje now appears on behalf of the applicants. The application for leave to appeal is opposed by respondents and Adv. Van der Merwe appears on their behalf
- [2] At the outset, I should make it clear that the application for leave to appeal does not comply with the requirements of rule 49 (1) (b). The applicants' notice of application for leave to appeal comprises one page, which states that the grounds of appeal are outlined in an annexed application for condonation. A rambling affidavit of some 11 pages is annexed to the application for condonation, which latter application, I should mention, was not opposed. It is clear that the application for leave to appeal falls far short of the requirement that the grounds of appeal must be clearly and succinctly set out in clear and unambiguous terms, so as to enable the court and the respondents to be fully informed of the case the

applicants seek to make out and which respondents are to meet in opposing the application for leave to appeal. See *Songono v Minister of Law and Order*, 1996 (4) SA 384 (E) at 385I-J.

- [3] However, it has to be borne in mind that the application was prepared by Mr. Lewis, who is a layman, and I am prepared to allow applicants some leeway in regard to the formal requirements of an application of this nature. I will accordingly not dismiss the application for leave to appeal on the basis of non-compliance with Rule 49

(1) (b).

- [4] The application for condonation and annexed affidavit, on a benevolent interpretation thereof, seem to rely on the following as grounds of appeal:

My refusal to grant a postponement of the two applications;

That the heads of agreement referred to in the judgment, ought to have been found to be "ultra vires".

That it ought to have been found that the heads of agreement had been breached by denying Lewis access to the Draaiberg fruit proceeds.

It follows that, apart from the grounds referred to above, applicants do not seek leave to appeal in regard to any of the other issues dealt with, or findings made, in my judgment.

- [5] The refusal of a postponement would not normally constitute a ground of appeal, in the absence of an indication of the basis upon which such refusal has had an effect on the outcome of the proceedings. Applicants do not suggest that the granting of the postponement would have led to a different result, nor do they show in any way that they have been prejudiced in their conduct of the applications by the refusal of the postponement. In any event, I am satisfied that applicants had failed to provide any acceptable grounds for the postponement of the applications.

- [7] I am further of the view that the remaining grounds of appeal upon which applicants rely, as set out in paragraph 4 (b) and

- (c) above, have no merit. The contention that the court should have found that the heads of agreement were "ultra vires" (presumably null and void) contradicts the basis upon which applicants brought the application under case number 11292/2008, namely that the heads of argument constitute an enforceable agreement, which applicants are entitled to avoid due to a non-disclosure on the part of Mr. Cooper, representing the respondents. No "ultra vires" argument was raised at the hearing of the applications. The issue of the

Draaiberg fruit proceeds was fully dealt with in my judgment and I am not convinced that another court will come to a different conclusion in regard thereto.

[8] At the hearing of the application for leave to appeal, Mr. Nortje raised various additional grounds upon which, he submitted, the applicants have a reasonable prospect of success on appeal. However, the difficulty in regard to these grounds (save for one ground referred to hereinafter), is that same were not raised in the affidavits filed on behalf of applicants nor have they previously

been dealt with in argument. These grounds have therefore also not been dealt with in my judgment. Respondents have obviously not had the opportunity of dealing with the new grounds in their answering papers or in argument. I have been prepared to allow applicants some leeway in regard to the formal requirements of the notice of application for leave to appeal, but cannot entertain these new

grounds raised by Mr. Nortje at this late stage of the proceedings. The respondents will clearly be prejudiced if the new grounds are now to be considered, as same had not been raised in the papers, nor at the hearing of the applications or in the application for leave to appeal.

[9] The one relevant ground relied upon by Mr. Nortje, relates to the interpretation of clause 21.5 of the Helderfontein Trust. I have fully dealt with this issue in my judgment and am not convinced that another court will come to a different conclusion in regard thereto.

[10] In the result the application for leave to appeal against the judgment in case numbers 11292/2008 and 14889/2008, is refused with

costs.

P B Fourie, J

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