

SOUTH AFRICA / JUDGMENT

Pillay and Others v Knoop N.O. and Another (8635/2022) [2023] ZAGPJHC 861 (3 August 2023)

[2023] ZAGPJHC 861

COURT

South Gauteng High Court, Johannesburg

BEFORE

N. Manoim

CASE / FILE NUMBER

8635/2022

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**REPUBLIC OF SOUTH
AFRICA**

**IN THE HIGH COURT OF
SOUTH AFRICA**

GAUTENG LOCAL

DIVISION, JOHANNESBURG

CASE NO:

8635/2022

NOT REPORTABLE

NOT OF INTEREST TO

OTHER JUDGES

NOT REVISED

In

the matter between:

SIVALINGAM
PILLAY
(Identity number[...])
First
Applicant
THE UNKNOWN
UNLAWFUL OCCUPIERS OF
THE REMAINING
EXTENT OF
ERF
295 SAXONWOLD, JOHANNESBURG
Second
Applicant
THE UNKNOWN
UNLAWFUL OCCUPIERS OF
THE REMAINING
EXTENT OF
ERF
296 SAXONWOLD, JOHANNESBURG
Third
Applicant
THE UNKNOWN
UNLAWFUL OCCUPIERS OF
THE REMAINING
EXTENT OF
ERF
297 SAXONWOLD, JOHANNESBURG
Fourth
Applicant
And
KURT
ROBERT KNOOP N.O.
(In his capacity as
the Business Rescue Practitioner of
Confident
Concept (Pty) Ltd)
First
Respondent
CONFIDENT
CONCEPT (PTY) LTD (In Business
Rescue)
(Registration
no. 2006/023982/07)
Second
Respondent

JUDGMENT

MANOIM J:

- [1] This is an application for leave to appeal an order I granted on 17 May 2023 in which the applicants were evicted from three residential properties in Saxonwold in Johannesburg, which the first applicant had purportedly leased from a company in business rescue, Confident Concept (Pty) Ltd (“the company”) that owns the properties on question.[1]
- [2] The applicants bring this application pursuant to the provisions of Section 17(1)(a) of the Superior Courts Act 10 of 2013.[2] They rely on both parts of that section to found their appeal, namely that: “the appeal would have a reasonable prospect of success” or “there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.”
- [3] This case for eviction does not depend on the PIE Act which is not raised as an issue. Rather the eviction was done at the behest of the first respondent, Knoop, the Business rescue practitioner (“BRP”) pursuant to the provisions of section 136(2)(b) of the Companies Act 71 of 2008, (“the Act”).[3]
- [4] The leave to appeal contains several grounds of appeal but in argument two lines were pursued. The first is that the BRP had no power to act in respect of one of properties as he had no mandate to do so in terms of the business rescue plan approved by the creditors. The second argument was a broader one which I understand to be made in respect of all three properties. This argument is that the BRP could not rely on section 136(2)(b) because no case had been made out that it was necessary to cancel the lease. It was argued that since, as per the BRP, only R8 million was required to represent the shortfall owing to the company, a sale of the properties with the lease still intact would suffice. The follow up argument on this was that I had failed to consider the provisions of section 136(3) of the Act, which provides for damages to a party in the event of the BRP cancelling an agreement in terms of section 136(2)(b). This was posited as a counter to the argument made by the BRP that the sale with the lease intact would mean the properties would have to be substantially discounted. It was contended for Pillay that the discount would not exceed the damages he would recover hence it should not be a consideration.
- [5] Finally, a more general argument was made about the uniqueness of using section 136(2)(b) and the paucity of the law on this point. The one judgment that the applicants could find emphasised the importance of the doctrine of pactus sunt servanda.[4] This was used as the basis to argue that an appeal would settle what might be possible conflicting judgments. But I do not consider the judgments conflict, since in my judgment I pointed out the differences between the facts in that case and the present one and

hence it was not necessary for me to come to a contrary finding on the law – at most a difference in points of emphasis.

Analysis

- [6] The test on leave to appeal is not controversial and perhaps best set out in the matter of MEC for Health, Eastern Cape v Mkhitha, where the Supreme Court of Appeal held:

“Once again it is necessary to say that leave to appeal, especially to this Court, must not be granted unless there is truly a reasonable prospect of success. Section 17(1)(a) of the Superior Courts Act, 10 of 2013 makes it clear 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 it should be heard. ... A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.”[5]

- [7] I consider that the threshold for leave to appeal has not been reached on any of these arguments as I go on to explain.

- [8] The absence of the mention of erf 296 (which appears from the physical address to be the middle property of the three) is a purely formal point. The business plan gave the BRP the power to sell properties without qualification. The lease is in respect of all three and has not been split up between them; either in respect of Pillay’s or the other applicant’s rights of occupation, nor is there any division in respect of the rental. The allegation that all three erfs, despite separate title deeds and dates of purchase, have been considered as one property has not been refuted by Pillay who was in a position to have done so.

- [9] The BRP is criticised for not providing more information on this issue. But this criticism is manifestly unfair. The BRP was first challenged and tied up in litigation as to his status for two and a half years.[6] Though ultimately the challenge proved unsuccessful he did not have access to the property. His allegation to this effect was not refuted in these papers. A more recent attempt to get the auctioneer on the properties to value them despite agreement was not kept. I was told in argument that this was the fault of the security company not Pillay. But it is Pillay’s version that he has had to hire security as part of his lease commitments. If they are his agents, then it is highly unlikely that they enjoy some autonomy as to who to admit to the property. Certainly, he has never contended that they do. It would be unfair to have expected the BRP to have done more, nor did he need to do so in the absence of any contrary version from Pillay. All Pillay has done despite occupying the properties is to raise an argument based on the papers. He is silent about what he knows about the physical layout of the properties despite occupying them for years.

- [10] But this is not the only point. The BRP whilst not admitting an error regarding Erf 296, points out in his argument that the mandate given to him to market and sell the immovable properties is given generally without any restriction on which may or may not be sold. He also points out in the replying affidavit that the erf was reflected in the valuation which was incorporated and formed part of the business plan that was adopted. I agree that this is the key issue not the absence of the express description of erf 296.

- [11] Moreover, both the context and purpose of the business plan support this interpretation. The company owns a variety of assets, both residential property and commercial. The properties in question are residential properties the former home of the shareholders. It is improbable that the creditors would have given a limited mandate to sell two of the properties and not the third to which they adjoin. No rationale for doing so is expressed in the business plans, nor has Pillay, if he thinks to the contrary, advanced one. He is clutching at straws.
- [12] The version on the severability of the properties is thus not sustainable. I do not consider another court would find otherwise.
- [13] Next the contention that the BRP can market the property for sale with the lease intact is again made without any facts put up by Pillay. After all, on his version his bargain lease is not a simulated transaction. Rather he contended it was a product of the favourable bargaining position a lessee could exploit, because the controversial profile of the shareholders of the company had adversely effected the properties marketability. Well, if that is so, all the more so for anyone who wants to purchase properties. Why pay more for the properties with a tenant in situ who has gained such a beneficial deal and an opaque contract. The controversial terms and circumstances of the lease reasonably oblige the BRP to have taken the steps he did.
- [14] Then the argument was made that according to the BRP in the replying affidavit creditors are only owed R 8 million and the properties if sold, will realise far more than this, as they were when bought for prices in excess of R 20 million. But this is an accountant's argument. The amount outstanding is not static at a moment in time. Nor does it represent the true value of the loss. As long as the properties are the subject of a commercially irrational lease the company suffers a loss from what economists refer to as an opportunity cost - the value the properties might offer to the company and hence its prospects for business rescue if the unencumbered properties are restored to the BRP to exploit. This argument too is not persuasive.
- [15] A further argument linked to the prior one is that I had ignored the provisions of section 136(3) of the Act. This section states:
- "Any party to an agreement that has been suspended or cancelled, or any provision which has been suspended or cancelled, in terms of subsection (2), may assert a claim against the company only for damages."*
- [16] The applicants argued that any discount saved on the price realised by the property sans the lease would be lost in a future damages claim brought at the behest of Pillay. It is correct that I did not consider this argument in my reasons. But I am not persuaded that this would tilt the possibility of success in the applicants' favour. I assume this argument can only be made on behalf of Pillay who is the lessee. This means he would potentially have a damages claim for the costs incurred in getting the equivalent rental for some other property for the balance of the lease period. But this is an entirely speculative claim for which no facts were

put up in the papers. There is no factual or legal basis made out on this point for me to reconsider my original decision.

- [17] Finally, the argument that this case raises novel points may be so, but that does not on its own justify granting leave to appeal. As the Supreme Court of Appeal held in *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre*[7]

“That is not to say that merely because the High Court determines an issue of public importance it must grant leave to appeal. The merits of the appeal remain vitally important and will often be decisive.”

- [18] The merits here do not assist the applicants. The contract in question is not part of the normal trading business of the company which has as among its assets mining companies. Nor is it part of the trading business of the company to lease out residential property - at least not in respect of the three erfs in Saxonwold which were only leased out shortly before it entered business rescue, as I noted in my reasons. Thus, if there are to be precedent making cases, ones with better merits will arise in relation to contracts which are related to the trading business of the company in business rescue.
- [19] Taking all these factors into account the “just and reasonable in the circumstances” standard required by section 136(2)(b) of the Act has been met to justify the cancellation of the lease. As a consequence, the order for eviction was competent. For all these reasons the application for leave fails and the applicants must vacate the properties.
- [20] The applicants are liable for the first respondent’s cost of the appeal.

ORDER: -

- [21] In the result the following order is made:

1. The application for leave to appeal is dismissed.
2. The first, second and third applicants are liable for the costs of the first respondent.

N. MANOIM

JUDGE OF THE HIGH COURT

GAUTENG DIVISION

JOHANNESBURG

Date of hearing: 02 August 2023

Date of judgment: 03 August 2023

Appearances:

For the Applicants:

L. Van Gass

Instructed by:

Louis Weinstein and associates

For the Respondents:

L.V.R. Van Tonder

Smit Sewgoolam Incorporated

[1] The applicants were given 30 days from service of the order to vacate. That time period has since passed.

[2] The applicants who were the respondents in the main application are; the first applicant Sivalingam Pillay and then, respectively,

the unknown occupants of the three properties as the second to fourth applicants.

[3] The other respondent is the company in business rescue Confident Concept (Pty) Ltd.

[4] Du Toit and Others v Azari Wind Proprietary Limited and Others 2022

(2) SA 510 (WCC) at 517D

[5] 2016 JDR 2214 (SCA) paragraphs 16-17.

[6] Admittedly this challenge was not mounted by the applicants in this matter but by one of the shareholders of the company Chetali Gupta and one Ronica Ragavan.

[7] 2016 (3) SA 317 (SCA), paragraph 24.

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