

SOUTH AFRICA / JUDGMENT

**South African Securitisation Program
(RF) Limited and Others v Leppan Beech
Incorporated and Others (67751/2011)
[2014] ZAGPPHC 736 (19 September 2014)
[2014] ZAGPPHC 736**

COURT

North Gauteng High Court, Pretoria

BEFORE

Makhubele

CASE / FILE NUMBER

67751/2011

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 67751/2011

DATE: 19 SEPTEMBER 2014

In the matter between

SOUTH AFRICAN SECURITISATION

PROGRAM (RF) LIMITED.....First Plaintiff/
ExcipientSASFIN BANK LIMITED.....Second
PlaintiffSUNLYN (PTY) LIMITED.....Third
Plaintiff

and

LEPPAN BEECH INCORPORATED.....First
DefendantMEGAN ELIZABETH JARVIS.....Second
Defendant

SELLO EUGENE PHAJANE.....	Third
Defendant	
WARREN ROBERT BEECH.....	Fourth
Defendant	
DEIDRE VENTER (previously BONE).....	Fifth
Defendant	
KEVIN PIETERSEN.....	Sixth
Defendant	
WESSEL JOHANNES JACOBUS BADENHORST.....	Seventh Defendant
ELIZABETH LOUW.....	Eight
Defendant	
JUDGMENT : LEAVE TO APPEAL	
MAKHUBELE AJ	

INTRODUCTION

- [1] This is an application by the sixth , seventh and eighth defendants (“defendants”) for leave to appeal against the

judgment

and order I delivered on 31 March 2014. Although the application of the seventh defendant is separate from that of the sixth and eighth, they are identical as was the exception that was the subject of the judgment they seek to appeal.

- [2] The application was filed on 22 April 2014. My acting appointment as a judge ended on 07 March 2014, after which I returned to my fulltime practice as an advocate. I was informed telephonically towards the end of June 2014 by the Office of the Deputy Judge President that there was an application for leave to appeal , however, the papers were only brought to me on 23 July 2014. Therafter I made attempts to hear the matter as quickly as possible. Unfortunately both counsel were not available on one or the other date that I suggested and I was also not available on the dates they suggested. Ultimately the application was heard on 28 August 2014.

NOTICE OF LEAVE TO APPEAL AND GROUNDS THEREOF

- [3] In the written notice, the defendants allege that I erred by:

[3.1] finding that the claim arose while the defendants were still directors of the first defendant.

[3.2] finding that despite the fact that they had resigned as directors when the rental agreement was breached and the plaintiff cancelled it, they were still liable in terms of section 23 of the Attorneys Act, Act 23 of 1979 (“the Act”) on the basis that they were directors when the agreement was concluded.

[3.4] finding that the basis of their liability is by virtue of the fact that the agreement provides for what would happen in the event of breach.

[3.5] construing the defendants’ defence as stating that the plaintiff’s claim is no longer contractual whereas their defence is that the plaintiff elected to cancel the agreement and claim damages based on breach of contract. The plaintiff is not enforcing the agreement by claiming specific performance.

[3.6] not finding that the plaintiff’s damages claim only arose when it elected to cancel the agreement after the applicants had resigned as directors of the first defendant.

ORAL SUBMISSIONS ON BEHALF OF THE DEFENDANTS.

[4] Mr. Prinsloo made the following crisp submissions:

[5] There is no dispute as to the facts.

[6] The nub of the matter is that the breach arose after the defendants resigned as directors of the first defendant.

[7] I made a finding that the breach of the rental agreement triggered the election made by the plaintiff to cancel the agreement and claim damages.

[8] In interpreting the word “contracted”, the test is not when the contract was concluded, but rather when the breach occurred.

[9] A company is a separate entity from its directors. The obligations placed on the directors should be interpreted in a less onerous manner.

[10] This matter concerns the correct interpretation of section 23 of the Attorneys Act. The plaintiff’s cause of action cannot be founded on contract.

[11] The test for leave to appeal is whether there are reasonable prospects of another court coming to a different conclusion than that of the trial court. He referred me to the judgments of Derby

- Lewis and Another v Chairman, Amnesty Committee of the Truth and Reconciliation Commission , and Others¹ and New Clicks South Africa (Pty) LTD v Tshabalala
- Msimanq and Another NNO , Pharmaceutical Society of South Africa and Others v Minister of Health².

- [12] He argued that the appeal, should I grant leave, deserves the attention of the Supreme Court of Appeal because there is no decision on the interpretation of Section 23 of the Attorneys Act.

SUBMISSIONS ON BEHALF OF THE PLAINTIFF

- [13] Mr. Cothill's submitted that the agreement between the parties was for fixed period. The defendants breached it and plaintiff acted in terms of clause 7 thereof.
- [14] The defendants do not dispute that they concluded the agreement. However, they want to decide when they are liable or not in spite of the clear provisions of the agreement with regard to breach and consequences thereof.
- [15] It is correct that the Fundtrust judgment says that the plaintiff may institute action against the remaining directors. However, this is not a defence to the plaintiff's claim though. The defendants' suggestion is a commercial absurdity .
- [16] The application should be dismissed and defendants be ordered to pay costs on an attorney and client scale as it is provided for in clause 7.2 of the agreement.

ANALYSIS OF THE SUBMISSIONS AND GROUNDS OF APPEAL

- [17] I have dealt with all the issues that applicant rely on to justify this application for leave to appeal in my judgment.
- [18] The plaintiff's cause of action is the written agreement entered into between the parties. This agreement makes provision for the parties' respective rights in the event of a breach thereof.
- [19] The high watermark of defendants' case is their submission that the plaintiff's cause of action cannot be founded on contract. They contend that this case is about the interpretation of the word "contracted" in Section 23 of the Attorneys Act.

THE TEST FOR LEAVE TO APPEAL

- [20] I agree with the judgments cited by Mr. Prinsloo with regard to the correct test for leave to appeal.
- [21] In the matter of *Mtirara v Landmark Mthatha (Pty) Ltd 3*, Petse ADJP reiterated the test for leave to appeal and stated the following:
- [14] The requirements for leave to appeal have, in a long line of cases, been held to be existence of a reasonable prospect of success on appeal. (See : *R v Baloi* 1949 (I) SA 523 (A) at 524, *R v Nxumalo* 1939 AD 580 at 582, *R v Ngubane & Others* 1945 AD 185 at 187, *Capital Building Society v De Jager & Others*, *De Jager and Another v Capital Building Society* 1964

(1) SA 247 (A), *Afrikaanse Pers Bpk v Olivier* 1949

(2) SA 890 (O) at 892

- 893. S v Ackerman en 'n Ander 1973 ill SA 765 (A) and S v Sikosana 1980 (4) SA 559 (A) at 562.)
- [15] Although some of the cases cited in the preceding paragraph were criminal cases it has been held that the test is the same and the same need for the test to be applied properly applies also in civil cases. (See : Botes & Another v Nedbank Umited 1983 (3) 27 at 28 C (AD))
- [16] In giving consideration to the application I am therefore enjoined by judicial authority to take cognisance of the test which is of application in matters of this nature. This necessarily entails that I should consider the application objectively and to the extent that human nature allows disabuse my mind of the fact that I reached the conclusion that I did in the main application. Indeed judicial authority enjoins me to reflect dispassionately upon my decision and decide whether there is a reasonable prospect that the Appeal Court may disagree with my decision".
- [22] I am required to consider , objectively, whether there are reasonable prospects of another court coming to a different conclusion than that I arrived at in my judgment.
- [23] I am not required to justify my judgment or offer interpretation thereof. However, certain allegations in the notice of appeal are simply not correct when one reads the judgment properly. The allegation that i made a finding that the plaintiff's cause of action arose when the defendants were still directors is simply not true.
- [24] Having considered all the arguments, I am not convinced that there are reasonable prospects of another court (faced with the same facts before me that are common cause) coming to a different conclusion than that I arrived at in my judgment.
- [25] Accordingly, I make the following order:
- [25.1] The application for leave to appeal is refused; and
- [22.2] The defendants (6, 7 and 8th) are ordered to pay costs jointly and severally, one paying the other to be absolved, on the scale as between attorney and own client

TAN MAKHUBELE AJ

Acting Judge of the High Court

APPEARANCES

PLAINTIFFS / EXCIPIENT : ADVOCATE C COTHILL

Instructed by: Smit Jones & Pratt

C/o Hack Stupel & Ross

PRETORIA

Tel: (012) 325 4185

Fax: (012) 325 7159

Ref: J Pretorius/tn/RF 5493

6th, 7th & 8th DEFENDANTS: ADVOCATE DANIEL PRINSLOO

Instructed by: Routledge Modise Inc Attorneys

C/o Edelstein-Bosman Inc Attorneys

New Muckleneuk, PRETORIA

Tel: (012) 452 8900

Fax: (012) 452 8901/2

Ref: Mr W Scrooby/AB/IR002045

1 202

(3) SA 485 (C) at p.488

2 2005

(3) SA 231 at p.237 D-E

3 607/2007)

[2007] ZAECHC 116 (20 December 2007)

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPPHC/2014/736.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/unknown-plaintiff-v-unknown-defendant-directors-liability-agpphc-2014-67751-2011>

Prepared on 14 October 2026 · Esheria