

SOUTH AFRICA / JUDGMENT

Wohlkinger and Others v Schoonbee and Others (2022/23317) [2024] ZAGPJHC 297 (26 February 2024) [2024] ZAGPJHC 297

COURT

South Gauteng High Court, Johannesburg

BEFORE

De Beer

CASE / FILE NUMBER

2022/23317

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REPUBLIC OF SOUTH
AFRICA

IN THE HIGH COURT OF
SOUTH AFRICA,
GAUTENG DIVISION,
JOHANNESBURG

Case Number: 2022/23317

1.REPORTABLE:

No

2.OF INTEREST TO OTHER

JUDGES: No

3.REVISED: No

26 March

In the matter between:

WOLFGANG
WOHLKINGER
First Applicant
RUI
MIGUEL DE FIGUEIREDO N.O
Second Applicant
TANYA
ROCHA
N.O
Third Applicant
obo LWWS
HOLDINGS TRUST (IT3059/2004)
THE UNKNOWN OCCUPIERS
OF UNIT 5
MONT
BLANC HEIGHTS
Fourth Applicant
and
CONRAD
LODEWYK SCHOONBEE N.O
First Respondent
ANGELA
DEBORAH SCHOONBEE N.O
Second Respondent
GERHARD
JOHANNES VISSER N.O
Third Respondent
obo BY DIE GROOT
DORINGBOOM
INVESTMENT
TRUST (IT 9894/2006)

IN RE:

CONRAD
LODEWYK SCHOONBEE N.O
First Applicant
ANGELA
DEBORAH SCHOONBEE N.O
Second Applicant
GERHARD
JOHANNES VISSER N.O
Third Applicant
WOLFGANG
WOHLKINGER
First Respondent
RUI
MIGUEL DE FIGUEIREDO N.O
Second
Respondent
TANYA
ROCHA
N.O

Third Respondent
obo LWWS
HOLDINGS TRUST (IT3059/2004)
MONT
BLANC HEIGHTS
Fourth Respondent
EKHURULENI
METROPOLITAN MUNICIPALITY Fifth
Respondent
This matter has been
heard on Microsoft Teams and is otherwise disposed of in terms of the
Directives of the Judge President of
this Division.

JUDGMENT

APPLICATION FOR LEAVE TO APPEAL

DE BEER AJ

1. On 21 November 2023 this court handed down its judgment evicting the Applicants from the immovable property known as Unit [...], M[..] B[...] H[...], situated at corner S[...] and O[...] Streets, B[...] G[...], B[...] (“the property”). Furthermore, interdicting and restraining the Applicants from entering and/or occupying the aforesaid property pursuant to them having vacated or being ejected from the property.
2. The Applicants now applies for leave to appeal against the order and judgment. This application is opposed by the Respondents

(Applicants a quo). The judgment against which leave to appeal is sought, is detailed and I do not intend to regurgitate my reasoning and findings.

3. The application for leave to appeal is premised on grounds set out in the application for leave to appeal dated 12 December 2023. The grounds are repetitive in nature and several grounds are duplicated. The following is my own summary and I do not include all the grounds:

3.1. The court erred in granting the eviction order.

3.2. The court erred in dismissing the fact that the Respondents had knowledge of the long lease upon acquiring the immovable property, thereby finding that there is no lease agreement to which the Respondents are bound by, or a lease that justify the Applicants occupation of the property.

3.3. The court erred in not having regard to the pending review application before the Rental Tribunal.

3.4. The court erred and misdirected itself in not giving judicial recognition to the pending Section 381 (3) investigations commissioned by the Assistant Master of the High Court.

3.5. The court erred in disregarding the several disputes of fact.

4. The Respondents relied on the *rei vindicatio* and only needs to prove ownership and that the Applicants had no right to occupy.

5. Section 4(8) of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998 (“PIE Act”) stipulates that if the court is satisfied that all the requirements of this section have been complied with and no valid defence has been raised by the unlawful occupier, it must grant an order for eviction.

6. The Applicants’ only attack on the eviction application per se was premised on the fact that they had a right to occupation by virtue of a long-term lease.

6.1. The long lease was not registered against the title deed.

6.2. Resultant, the Applicants bore the onus and had to proof that the Respondents had sufficient knowledge of the long-term lease when they acquired the property. The Applicants had to establish that the Respondents had the degree of knowledge of the long-term lease which would render it legally binding.[1] Insufficient evidence was produced that would lead the court to believe that the Respondents had knowledge of the said lease. The

Applicants failed to discharge this onus.

6.3. The auction pack as referred to by the Applicants was overridden by the express clause, clause 2.6 contained in the sale agreement. The said clause clearly stipulated that the property is not subject to a lease.

6.4. In addition, the auction pack clearly stipulated that units sold individually are sold without any leases in place.

6.5. The Applicants’ representative in his heads of argument submitted that the Respondents must first cancel the agreement before embarking on an eviction application. The case authority is clear that it can be done upon application. Notwithstanding the afore and in this instance, cancelation is not required, because the Applicants first had to establish knowledge of the long lease for it to binding on the Respondents and for the principle of “huur gaat voor koop” to apply.

6.6. Regard being had to the defence specifically raised by the Applicants to the eviction application, the Court was satisfied that all the requirements for the eviction were met, and no valid defence had been raised by the unlawful occupier.

7. As stated before, a long-term lease is not effective against a successor of a lessor for longer than 10 years if it is not registered or the successor had no knowledge when he/she obtained the leased land.[2] By virtue of the fact that the long term-lease was not registered, and the fact that Respondents had no knowledge of the lease when they acquired the property, there was no agreement to which the Respondents were bound by. Accordingly, the legitimacy of

the lease agreement determined by the Rental Tribunal, and the subsequent review application had no bearing on the facts before me. The eviction application is not dependant on the Rental Tribunal's

ruling.

8. The court's disregard of the alleged section 381 enquiry is premised on the inadmissible hearsay evidence tendered in the

answering affidavit with no reliance on section 3(1)(c) which could not have been taken into consideration because of its lack of evidential value.[3]

8.1. The Clarification affidavit filed by the Applicants was done without the permission of the court and there was no formal application to admit the same. It was therefore regarded as pro non scripto.

8.2. The Applicants tendered evidence to the section 381 enquiry was unsupported because of the lack of confirmatory affidavits by any of the individuals referred to in the answering affidavit.

8.3. The section 381 enquiry in terms of the Companies Act [4] is not a defence to the rei vindicatio. It is and remain an enquiry by the Master into the conduct of the liquidator and has no bearing on the Respondents as the registered

owner or the right to occupation.

8.4. Lastly, the order obtained by Cloete Murray NO (Joint Liquidators) on 19 January 2023 before my sister, Justice Janse van Nieuwenhuizen militates against the assertions levelled against the liquidators that sold the property.

9. With reference to *Soffiantini v Mould* [5] it was held:

"If by mere denial in general terms the respondent can defeat or delay an applicant who comes to court on motion, then motion proceedings are worthless, for a respondent can always defeat or delay petitioners by such a device."

It is necessary to make a robust, common-sense approach to a dispute on motion as otherwise the effective functioning of the court can be hamstrung and circumvented by the most simple and blatant stratagem. The court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so, justice can be defeated or seriously impeded and delayed by an over-fastidious approach to a dispute raised in the affidavits." (Own emphasis)

10. It is an abused and often-utilised stratagem by practitioners to argue that a dispute of fact exists where there is none. On the real issue in question i.e. the eviction, there is no dispute of fact.
11. The test to be applied in an application for leave to appeal is set out in section 17(1)(a) of the Superior Courts Act 10 of 2013 which provides that:

“(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-

(a)

(i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;” (own emphasis)

12. The Supreme Court of Appeal set out the application for a test to grant leave to appeal in *Cook v Morrisson and Another* [6] as follows:

“[8] The existence of reasonable prospects of success is a necessary but insufficient precondition for the granting of special leave.

Something more, by way of special circumstances, is needed. These may include that the appeal raises a substantial point of law; or that the prospects of success are so strong that a refusal of leave would result in a manifest denial of justice; or that the matter is of very great importance to the parties or to the public. This is not a closed list (*Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986

(2) SA 555 (A) at 564H – 565E; *Director of Public Prosecutions, Gauteng Division, Pretoria v Moabi* 2017

(2) SACR 384 (SCA) ([2017] ZASCA 85) para 21.”

13. In *MEC for Health, Eastern Cape v Mkhita*[7] the Supreme Court of Appeal emphasised the application for the test for leave to appeal and found as follows in paragraphs [16] to [18]:

“[16] Once again it is necessary to say that leave to appeal, especially to this court, must not be granted unless there truly is 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.

[17] An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. 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.

[18] In this case the requirements of 17(1)(a) of the Superior Courts Act were simply not met. The uncontradicted evidence is that the medical staff at BOH were negligent and caused the plaintiff to suffer harm. The special plea was plainly unmeritorious. Leave to appeal should have been refused. In the result, scarce public resources were expended: a hopeless appeal was prosecuted at the expense of the Eastern Cape Department of Health and ultimately, taxpayers; and valuable court time and resources were taken up in the hearing of the appeal. Moreover, the issue for decision did not warrant the costs of two counsel.” (own emphasis)

14. The above legal principles enunciated, emphasise, that the requirement for a successful leave to appeal is more than a mere possibility that another judge might come to a different conclusion. The test is whether there is a reasonable prospect of success that another judge would come to a different conclusion.
15. The workload in the judiciary is ever increasing and a judge who considers any application for leave to appeal, has a judicial duty to ensure that unmerited appeals do not become part of the workload of a Full Court of this division and/or the Supreme Court of Appeal. Appeals without merits should simply not be granted leave to appeal.
16. Regard being had to the afore, I am of the firm view and persuasion that another court would not come to a different conclusion and that there is no compelling reason to grant leave to appeal.

ORDER

1. The Applicants leave to appeal is dismissed.
2. The Applicants, jointly and severally, the one paying the other to be absolved, are ordered to pay the Respondents costs.

DE BEER AJ

ACTING JUDGE OF THE GAUTENG DIVISION, JOHANNESBURG

APPEARANCES:

For the First to Fourth Applicants: Mr. T Dunn

Instructed by:

TJC Dunn Attorneys

For the Respondents:

Adv. CJC Nel

Instructed by:

Van Der Meer & Schoonbee Attorneys

Date of Hearing:

26 March 2024 – Microsoft Teams

Date of Judgment: 26 March 2024

[1] Grant and Another v Stonestreet and Others 1968

(4) SA 1 (A) at 16H-17A, 20.

[2] Section 1(2) of the Formalities in respect of the Leases of Land Act 18 of 1969.

[3] Law of Evidence Amendment Act 45 of 1988.

[4] Act 61 of 1973.

[5] 1956 (4) SA 150 (at 154 G-H).

[6] 2019

(5) SA 51 (SCA).

[7] 2016 JDR 2214 (SCA).

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