



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case no: **4425/2021**

In the matter between:

SIMBRA CATTLE BREEDERS' SOCIETY OF SOUTH AFRICA
(Registration number: 62/98/R-13)

Applicant

and

SIMMENTALER CATTLE BREEDERS' SOCIETY OF SOUTH AFRICA Respondent
(Registration number: 62/98/R-05)

CORAM: JP DAFFUE J

HEARD ON: 9 FEBRUARY 2022

DELIVERED ON: 11 FEBRUARY 2022

JUDGMENT BY: DAFFUE J

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 14:00 on 11 February 2022.

I INTRODUCTION

- [1] On 25 November 2021 De Kock AJ dismissed the applicant's application. It now seeks leave to appeal to the Supreme Court of Appeal, alternatively the Full Bench of the court against the whole of the judgment and order. In the absence of De Kock AJ whose acting stint came to an end, the application was allocated to me. The parties were invited to file further heads of argument if they so wish and by agreement a virtual hearing was conducted. Only the applicant filed further heads of argument.

II THE TEST IN ADJUDICATING APPLICATIONS FOR LEAVE TO APPEAL

- [2] The applicant endeavoured to bring its application within the ambit of s 17(1)(a)(i) and (ii) of the Act.¹ It has to convince the court 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 manner under consideration."
- [3] The bar of the test to be applied has been raised with the inclusion of the word "would" in the first sub-section with the apparent purpose to alleviate the case-load of the Supreme Court of Appeal or the Full Bench of the High Court. Allegations such as possibility of success, an arguable case or one that is not hopeless will not suffice.²
- [4] The substantial importance of the case to the appellant or to both the appellant and the respondent constitutes a compelling reason why an appeal should be heard.³ Other compelling reasons include the fact that the decision sought to be appealed against involves an important question of law and that the administration of justice, either generally or in the particular case concerned, requires the appeal to be heard.⁴ However, the merits of the appeal remain vitally important.

¹ Superior Courts Act, 10 of 2013

² MEC for Health, Eastern Cape v Mkhita & another 1221/2015 [2016] ZASCA 176 (25 November 2016) & S v Smith 2012 (1) SACR 567 (SCA) at para 7

³ *Phillips v SA Reserve Bank* 2013 (6) SA 450 (SCA) at 458F - H

⁴ Erasmus, Superior Court Practice vol 1 at A2 - 556

III THE GROUNDS OF APPEAL

[5] Two grounds of appeal are relied upon.

First ground of appeal:

[6] The learned judge recognised that part A of the notice of motion was framed for *interim* relief pending adjudication at a later stage of part B,⁵ but erred in not dealing with and adjudicating the issues raised in respect of part A insofar as she decided to determine part B.

[7] The learned judge ought to have heard and decided the relief sought in part A of the application, which was the only relief enrolled for determination by the court and in the circumstances of the case the determination of part B on the first day of enrolment constituted both a procedural and a substantive error, which deprived the applicant of the opportunity of:

7.1 being hear on the first part of its application;

7.2 securing *interim* relief pending the outcome of the second part of its application;

7.3 supplementing its affidavits in respect of the relief sought in part B; and

7.4 presenting written submissions on the relief sought in part B, to give effect to what was resolved at the Annual General Meeting (“the AGM”) of 15 January 2021.

[8] Had the learned judge entertained part A on its prayer-for terms – as an urgent application for *interim* interdictory relief – the test applied to any disputes of fact on the papers would have been that established in *Webster v Mitchell* where inherent probabilities are *inter alia* considered as opposed to *Plascon-Evans* where, save in exceptional circumstances, relief may only be granted

⁵ Judgment at para 3

on the facts alleged by the respondent together with the facts relied upon by the applicant which the respondent has admitted. In the second scenario legal issues are resolved on common cause facts and unless circumstances are special, motion proceedings for final relief are not designed to determine probabilities.

[9] The applicant's counsel submitted that it would enjoy reasonable prospects of persuading a court of appeal to:

9.1 entertain part A of the application and, in that event, uphold the appeal and grant *interim* interdictory relief against the respondent; and

9.2 set aside the dismissal of part B of the application.

[10] The applicant's counsel submitted furthermore that they were unaware of any decided case in which a court overlooked, or disregarded relief sought in part A of an application and heard and decided only part B thereof, especially in circumstances where the applicant had filed submissions only in respect of part A. Whether or not a court may competently and fairly do so in the exercise of its discretion and jurisdiction to regulate its own proceedings is, according to the applicant, a matter of novelty and natural justice that warrants the attention of a court of appeal.

Second ground of appeal

[11] Despite acknowledging the common cause facts that a resolution was passed at the AGM and two distinct societies were created as a consequence of the resolved restructuring, the learned judge held that the application was to be dismissed on the basis of a material dispute of fact regarding what was voted on by members in attendance at the AGM.

[12] In doing so, the learned judge approached the determination of part B of the application by asking the wrong question and thus applying the wrong test.

[13] Approaching the enquiry in this manner, the learned judge considered there to be a genuine dispute of fact on a material issue and held that the applicant was not entitled to final relief based on the strength of the respondent's version of what was voted on and notwithstanding the common cause facts. In other words, the judgment sought to 'break the tie' by preferring the say-so of the respondent.

[14] By contrast, the question of what was resolved at the AGM⁶ was one of *law*, being the proper interpretation of the resolution ("the resolution") recorded in paragraph 7 of the common cause minute ("the minute") of the AGM, making specific reference to restructuring of the Society as presented. The judgment does not scrutinise or even set out the wording of the resolution.

[15] In failing to consider or determine the proper interpretation of the records of what was resolved at the AGM, the learned judge overlooked or disregarded what was resolved by the attending members, insofar as interpretation is a matter:

15.1 for the court and not for witnesses (whose opinions or recollections are generally inadmissible); and

15.2 of law and not of fact.⁷

[16] The learned judge misdirected herself in enquiring of the parties what they subjectively intended to resolve (or agree) and did not seek to ascertain what was objectively agreed to by the members as resolved. No consideration was had to the purpose that the *ad hoc* committee had been appointed for in the first place, or to the contents of the presentation made at the AGM, being the culmination of the *ad hoc* committee's work and the basis on which the resolution was passed.

⁶ Annexure TV5, p 57

⁷ *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* 2009 (4) SA 399 (SCA) at para 39; *Cornerstone Logistics (Pty) Ltd and Another v Zampak Cape Town Depot (Pty) Ltd* (879/2020) [2022] ZASCA 12 (25 January 2022) at para 50

- [17] Thus, there was no material dispute of fact on the papers before the court when what was resolved is properly interpreted. In the result, the learned judge erred in applying the rule in *Plascon-Evans* as opposed to the rule in *Securefin*. Therefore, it is submitted that the applicant would enjoy at least reasonable prospects of persuading a court of appeal to reconsider part B of the application and in such event uphold the appeal, set aside the dismissal of part B and grant final relief against the respondent.
- [18] Finally, it is the applicant's case that the interpretive interplay between the presentation, the resolution and minute is a matter of complexity that warrants the attention of the Supreme Court of Appeal.

IV EVALUATION

- [19] Mr Els submitted on behalf of the respondent that his opponent appearing for the applicant at the hearing on 18 November 2021 was not ambushed. I must say that Mr Els made it clear in his heads of argument filed on 12 November 2021 in terms of this court's practice directives that insofar as the matter was previously removed from the roll and then set down on the ordinary motion roll, the relief in part A became academic. There is merit in the argument, but as Mr Pearse who did not appear before the learned judge submitted, there is no indication on the record that his colleague, Ms Benson on behalf of the applicant abandoned part A and/or waived the applicant's rights in this regard. It was always the intention to apply for supplementary affidavits to be filed, whether or not the relief in part A was granted or dismissed.
- [20] Mr Els submitted that the applicant in any event failed to prove the four requirements for *interim* interdicts and particularly failed to prove the requirement for an anti-dissipatory interdict in respect of intention. Mr Pearse's response hereto was that the learned judge did not all deal with part A and it cannot now be argued what the outcome of the judgment would be if part A were to be adjudicated.
- [21] Mr Els also pointed out that there was no application for postponement or application for papers to be supplemented. Mr Pearse response hereto was

that the matter was enrolled for adjudication of part A and not part B and therefore such applications were not called for.

- [22] I do not sit as a court of appeal and although I may have a particular view of the matter, I am of the opinion that the applicant would have reasonable prospects of success as the court of appeal may well be inclined to find that the learned judge erred in dealing with part B *mero motu* and without giving the applicant's counsel an opportunity to address her in this regard.
- [23] Mr Els submitted with much vigour that no court of appeal will interfere with the judgment pertaining to part B insofar as the applicant could not even prove a *prima facie* right, not to speak of a clear right. He submitted that no cause of action was relied upon and the request for a money judgment had no merit. On his version the Simbra members effectively resigned and the only resolution taken at the meeting of 15 January 2021 was to amend the constitution to provide for future donations. The central theme of Mr Els' submissions was that the applicant could not succeed with a money judgment.
- [24] I must say that I would have expected the applicant to present a transcription of the video presentation in the founding affidavit. It did not do that and decided just before the hearing to rely on rule 36(1) to present this video presentation in evidence. This might have been futile for the applicant's case if part B was before the learned judge for adjudication, but a court of appeal may well find that the learned judge erred in adopting the approach she had by considering the factual disputes and refraining from interpreting the resolutions taken at the AGM, bearing in mind the video presentation. Mr Pearce quoted the video presentation in the heads of argument which is really unusual. Such evidence should have formed part of the application papers. Fact of the matter is that a court of appeal may well find that such background circumstances could never have been ignored in interpreting the resolutions taken at the AGM.
- [25] A court of appeal may well find that the resolutions taken at the AGM had to be interpreted with reference to not only the words used, but also the context and purpose and equally important, the background circumstances. The

presentation of the *ad hoc* committee played a vital role in the decision-making process of members. I quote the following from the minute:

25.1 Paragraph 7.1 of the minute, headed “[r]estructuring of the Society – Board members”, noted that “[an audio visual] presentation [(“the presentation”) was] previewed during the meeting.”

25.2 Paragraph 7.1.1 of the minute was headed “[P]roposed restructuring and the financial implication”.

25.3 Paragraph 7.1.2 of the minute addressed the amendments to the Constitution.

25.4 Paragraph 7.1.3 of the minute, headed “[b]esluite”, recorded that members had been requested to approve the following:

- “1) The restructuring of the Society with effect from 1 January 2021 as presented.
- 2) To approve the amended Constitution as the Constitution of the Simmentaler Society of Southern Africa.
- 3) Mandate the President and Vice-President of the current Society, in conjunction of with the Auditor of the Society and other individuals as they may deem fit, to implement the restructuring as approved” (emphasis added).

25.5 The same paragraph of the minute reiterated the resolution as follows:

“The decision that will be taken today is contained in 7.1.3:

- 1) The restructuring of the Society with effect from 1 January 2021 as presented.
- 2) To approve the amended Constitution as the Constitution of the Simmentaler Society of Southern Africa.
- 3) Mandate the President and Vice-President of the current Society, in conjunction of with the Auditor of the Society and other individuals as they may deem fit, to implement the restructuring as approved” (emphasis added).

[26] The respondent tried to show that the amendment of the constitution was the only aspect that members were asked to vote on. However, I agree with Mr Pearse that such a statement appears to be “deplorable” insofar as the presentation and background circumstances are indicative of a 60/40 % split of assets in favour of the respondent. A court of appeal may well find it to be totally “unbusinesslike” that the resolution should be interpreted on the basis that

the respondent would keep all its assets, but be entitled to make future donations to certain breeders' associations in its sole discretion. I repeat that our courts are enjoined to have regard to the text, context and purpose of a document such as an agreement or resolution as well as to any pertinent background facts or materials known to those responsible for the document's preparation and production. The exercise is objective and unitary in nature.⁸ In *casu*, such facts and materials include the presentation made at the AGM, which the learned judge erred in overlooking and disregarding. The presentation was the focal point of the AGM, and the key to interpreting and thus understanding what was resolved by the attending members. This presentation was available to members even before the date of the AGM.

[27] I conclude that it is reasonably possible that a court of appeal would find that the learned judge ought to have appreciated that, like a judgment or award, a resolution is to be read and understood in its terms, with particular reference also to its 'evident' or 'manifest' purpose, but not with reference to what is said about it, even by those who voted on it, whose views are typically inadmissible.⁹

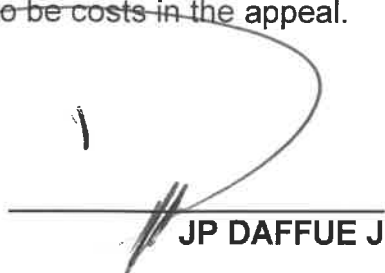
[28] Mr Pearce insisted that the issue warrants the attention of the Supreme Court of Appeal. Mr Els was indecisive insofar as he submitted that in the event that leave to appeal is granted, it may be to either the Supreme Court of Appeal or the Full Bench. I am satisfied that the Supreme Court of Appeal should deal with the appeal.

⁸ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) [18]- [26]; *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) [12]; *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (6) SA 1 (CC) [65]-[68]; *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* 2022 (1) SA 100 (SCA) [25]-[26], [36]-[51]

⁹ *Firestone South Africa (Pty) Ltd v Gentiruco AG* 1977 (4) SA 298 (A) 604; *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Others* [2012] JOL 29082 (SCA) [13]; *SOS Support Public Broadcasting Coalition and Others v South African Broadcasting Corporation (SOC) Ltd and Others* 2019 (1) SA 370 (CC) [52]-[54]; *Martrade Shipping and Transport GmbH v United Enterprises Corporation and MV 'Unity'* (1085/2019) [2020] ZASCA 120 (02 October 2020) [3]

V ORDER

[29] Leave is granted to the applicant to appeal to the Supreme Court of Appeal against the whole of the judgment and the order of 25 November 2021 under case number 4425/2021, costs of the application ~~to be costs in the appeal.~~



JP DAFFUE J

On behalf of applicant: Advv RM Pearse SC with GY Benson *et* S Mhlongo
Instructed by: MVMT Attorneys
 c/o Phatshoane Henney Attorneys
 BLOEMFONTEIN

On behalf of respondent: Adv APJ ELS
Instructed by: Honey Attorneys
 BLOEMFONTEIN