

22/3/2018
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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case Number: 52149/2015

In the matter between:

GOVERNMENT EMPLOYEES PENSION FUND

Applicant

And

ADRIAAN WILLEM VAN ROOYEN

First Respondent

LOUISE MULLER

Second Respondent

**JUDGMENT IN THE APPLICATION FOR LEAVE TO APPEAL DELIVERED ON 22
MARCH 2018**

VILAKAZI AJ:

1. This is application for leave to appeal against my order that I granted on the 29th May 2017 upholding the exception by the Respondents that the applicant's Particulars of Claim does not disclose a cause of action and I afforded the applicant an opportunity to amend its Particulars of Claim within 20 days of the order.
2. The applicant instituted two claims against the respondents jointly and severally for damages it alleges it suffered as a result of the respondents unlawful conduct, in allowing ASP(in liquidation)to continue to occupy and trade from the applicant's premises, despite the absence of the lease. The first claim is for the payment of rentals it would have received but for the respondents' unlawful conduct. The second claim is for the payment of the amount it had paid to the Municipality for electricity and water consumed by African Spirit 90 Proprietary Limited (in liquidation) whilst it remained in unlawful occupation of the applicant's premises.
3. The applicant's claims have their genesis from the lease agreement concluded by the applicant and African Spirit (in liquidation)in respect of the premises belonging to the applicant. The applicant alleges that before its liquidation, African Spirit occupied the applicant's premises in terms of a lease agreement. African Spirit in breach of the lease failed to pay monthly rentals and as it was entitled to, the applicant issued summons against African Spirit for payment of arrear rental and for the cancellation of the lease.

4. In the meantime, African Spirit was liquidated at the instance of one of its creditors. The respondents were appointed joint liquidators of African Spirit on 22 December 2014. The applicant alleges that upon their appointment as joint liquidators the respondents unlawfully allowed African Spirit to continue to occupy and trade from the premises. In support of its claim against the respondents it relied on an email dated 16 February 2015 written by the first respondent to the creditors of African Spirit in which it reads as follows:

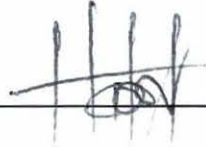
"Please note that there is not a danger of contribution at this stage, we are trading the company in liquidation at this stage and therefore did not vacate the premises"

5. The respondents excepted to the applicant's particulars of claim on the ground that it does not disclose the cause of action. In amplification of their plea the respondents averred the following in paragraph 10 of the exception:

" The respondent does not allege negligence and or recklessness or any other conduct on the part of the First and the Second Excipients which would substantiate that the First and the Second Excipients are personally liable for the relief sought."

6. The applicant's claims are based on delict and in order to establish a case for personal liability against the respondents it has to plead all the essential requirements for delict including fault.
7. At the hearing of the application, I invited counsel for the parties to address me on whether the order I made is appealable having regard to the fact that I afforded the applicant the opportunity to amend its Particulars of claim within the period of 20 days. Mr Gibbs on behalf of the applicant submitted that my order is definitive of the rights of the parties in that I have determined that the respondents are afforded protection in terms of s37(1) of Insolvency Act 24 of 1937. He argued that the thrust of my judgment bars the applicant from holding the respondents personally liable.
8. In response thereto, Mr Greyling, for the respondents conceded that my order is final. In my view this concession is incorrect.
9. It is evident from the particulars of claim that negligence has not been alleged by the applicant. In my view the email viewed objectively cannot be interpreted as establishing the basis for holding the respondents personally liable for the loss suffered by the applicant nor can negligence be inferred from it. Reliance by the applicant on the email was therefore misplaced.
10. There is no averment in the particulars of claim that the respondents were aware that the lease between ASP and the applicant had terminated and that despite that knowledge they allowed ASP to trade from the premises. This was not pleaded and averred in the particulars of claim.

11. I am not satisfied that the applicant is not able to amplify its particulars of claim in the relevant respect and that being the case, my order is therefore not appealable.
12. For the reasons set out above, the application for leave to appeal should fail.
13. The application for leave to appeal is accordingly dismissed with costs.



T. D VILAKAZI
ACTING JUDGE OF THE GAUTENG DIVISION
OF THE HIGH COURT OF SOUTH AFRICA

DATED AND SIGNED AT PRETORIA ON 22 MARCH 2018

FOR THE APPLICANT	:	ADV W.W. GIBBS
INSTRUCTED BY	:	WESSELS & VAN ZYL LE ROUX
FOR THE RESPONDENTS	:	ADV P. J. GREYLING
INSTRUCTED BY	:	SCHABORT & WALKER ATTORNEYS
DATE HEARD	:	20 MARCH 2018
DATE DELIVERED	:	22 MARCH 2018