



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO.	
(2) OF INTEREST TO OTHER JUDGES: YES / NO.	
(3) REVISED.	
DATE <u>23/2/2017</u>	SIGNATURE

CASE NO: 36842/2016

DATE: 23/2/2017

IN THE MATTER BETWEEN:

HEINRICH VON LANDSBERG

**1st Applicant/1st
Defendant**

**UNIVERSAL PULSE TRADING 367
(PTY) LTD
(Registration number 2010/017403/07)**

**2nd Applicant/2nd
Defendant**

And

HENDRIK CHRISTOFFEL DE BEER

Respondent/Plaintiff

JUDGMENT

(In the application for leave to appeal)

KOLLAPEN J:

1. The applicants (the defendants in the main action) have applied for leave to appeal against the whole of the judgment and order of this Court of the 26th of July 2016 when summary judgment was granted in favour of the respondent in the sum of R2 989 208.00 together with interest and costs. The grounds upon which the application is advanced are set out in some detail in the application for leave to appeal. The applicant also seeks condonation for the late filing of the application for leave to appeal, as well as the late request for the transcription of the judgment of the 26th of July 2016.
2. The respondent opposes both applications.

Condonation

3. It appears that on the 28th of July 2016 and thereafter on the 2nd of August 2016, the applicants caused a Notice of Application for leave to appeal to be served on the respondent's attorneys. The notice however was not filed in accordance with the Practise Directive of this Division in that it appears to have been filed with the General Office of the Registrar of the Court as opposed to the Civil Appeals Registrar. The applicant seeks to explain this as an oversight on the part of a member of staff of its attorneys while the respondent contends that it constituted a deliberate effort to delay the prosecution of the appeal.
4. It is also common cause that the Applicants only applied for a transcript of the judgment of this Court of the 26th of July 2016, on the 14th of December 2016 and all that the applicants offer by way of explanation is that this was an oversight.

5. It is not in dispute that the Practice Directive of this Division insofar as it relates to Leave to Appeal in Civil Matters, clearly provides that the application for leave to appeal must be filed with the Registrar in charge of civil appeals and in addition places an obligation on the applicant to forthwith take the necessary steps to cause the judgment to be transcribed.
6. While the explanation offered by the applicant in respect of the transcription at least is lacking in detail and particularity, my view is that the interests of justice insofar as they relate to the causing of unnecessary delay, compel me in the direction of granting the condonation sought. However the opposition to this part of the relief was not unreasonable and certainly on the facts was justifiable with the result that the costs of the application for condonation should be borne by the applicant. I intend to include that as part of the order I will make.

The merits of the application

7. In argument Mr du Plessis SC dealt with four issues (without abandoning the other grounds raised in the application for leave to appeal). They were:
 - i. There was no basis to make an order for joint and several liability:

When I have regard to the Particulars of Claim, the respondent relies on the conclusion of a joint venture between itself and the applicants and sets out in sufficient particularity the details of the joint venture as well as the conduct of both applicants in acting in advance of the joint venture including the sale of properties and the receipt of monies, and arising out of that, concludes that the applicants are indeed jointly and

severally liable to him. I am satisfied that a proper basis for joint and several liability has been established in the formulation of the respondent's claim and this point is not sustainable.

- ii. That Annexure E (being a calculation prepared by the respondent and revised by the first applicant purporting to depict the flow of money arising out of the transaction and the parties' share in the joint venture), does not accord with the details of the transaction the joint venture would be involved in, and as set out in greater detail in the Particulars of Claim. The Court in granting summary judgment accepted Annexure E (as amended by the first applicant) as an acknowledgement by the applicants of their liability to the respondent. It hardly matters whether it accords with the full detail of the envisaged transactions and even if it does not, it can hardly detract from the conclusion to be drawn from it. In any event in his affidavit opposing summary judgment, the first applicant (in his personal capacity as well as in his capacity as director of the second applicant) says the following:

"The schedule annexed by the plaintiff to its particulars of claim as Annexure E is also dated. I dealt with this dated schedule and with the updated schedule in detail in my affidavit filed in the Anton Pillar proceedings. A copy of the updated schedule is annexed hereto as Annexure SJ4. The plaintiff is accordingly fully aware of the fact that his current claim is based on an incorrect schedule and that the allegations in his particulars of claim are incorrect."

There was no complaint then that the schedule was incomplete or at variance with the proposed transactions and as indicated, the applicants put up the amended schedule as a corrected version of the schedule prepared by the respondent. They can hardly now seek to distance themselves from it.

8. The other arguments raised deal with what has been described as total confusion with regard to which of the entities entered into which agreements, and as well as there being no allegation as to where the monies derived from the joint venture were paid into. Apart from the fact that these issues were never canvassed in the affidavit opposing summary judgment, the Particulars of Claim are clear with regard to the parties and the terms of the joint venture and the manner in which the applicants sold the properties and received the monies to which the respondent claims entitlement, as part of the joint venture. This basis of the attack on the judgment of this Court also is lacking in merit.

9. With regard to the other grounds raised, they are all dealt with comprehensively in the judgment of the 26th of July 2016 and my view is that having regard to all the grounds upon which the applicants place reliance, it can hardly be said that the appeal would have a reasonable prospect of success.

10. Finally I wish to refer to the *dicta* in **MAJOLA v NITRO SECURITISATION 2012 (1) SA 226**, where the Court remarked at paragraph 25 that:

“The purpose of summary judgment is to ‘enable a plaintiff with a clear case to obtain swift enforcement of a claim against a defendant who has no real defence to that claim’. It is a procedure that is intended ‘to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights’. If a court hearing an application for summary judgment is satisfied that a defendant has no bona fide defence to a plaintiff’s claim and grants summary judgment as a consequence, it should be slow thereafter to grant leave to appeal, lest it undermine the very purpose of the procedure.”

I fully associate myself with the above remarks, which have relevance in these proceedings.

ORDER

11. In the circumstances I make the following order:

- I. Condonation for the late filing of the application for leave to appeal and the ordering of the transcription of the judgment is granted.
- II. The applicants are ordered to pay the costs of the application for condonation, which costs are to include the costs of two counsel.
- III. The application for leave to appeal is dismissed with costs including the costs of two counsel.

36482/2016

HEARD ON: 17 February 2017

DATE OF JUDGMENT: 23/02/2017

APPEARANCES:

FOR THE 1ST & 2ND APPLICANTS:

Adv. R du Plessis SC

INSTRUCTED BY:

Johann de Wet Attorneys (ref.:
Johann de Wet/RU0001)

FOR THE RESPONDENT:

Adv. C A da Silva SC

INSTRUCTED BY:

Hennie Kotze Attorneys (ref.: H N
Kotze)