

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA (Northern Cape Division)

Case Nr: 108/2007
Case Heard: 14/04/2009
Date delivered: 24/04/2009

In the matter between:

Veneska Beleggings BK

APPLICANT

(Registration nr 1998/020988/23)

and

Hendrik Schalk Snyman

1st RESPONDENT

Adriaan Johannes Cloete

2nd RESPONDENT

JUDGMENT

Henriques AJ:

1. This is an application for leave to appeal against the whole of the judgment of Nduna AJ delivered on 28 November 2008.
2. For the sake of convenience I will referred to the parties as in the main application.
3. The respondents seek leave to appeal on the following grounds:

- “1. Die hof a quo het fouteer deur die regshulp soos uiteengesit in die Kennisgewing van Mosie toe te staan.
2. Die hof a quo het gefouteer deur te bevind dat die respondente weier om die besigheid aan applikante te oorhandig. Dit was die respondente se saak dat hulle bereid is en aangebied het en weereens aanbied om dit wat hulle ingevolge die ooreenkoms tussen die partye ontvang het, terug te lewer maar dat hulle nie in staat is of verplig is om te lewer dit wat hulle nie ingevolge die ooreenkoms tussen die partye ontvang het nie.
3. Die hof a quo het fouteer deur te bevind dat die respondente afstand gedoen het van die verweer dat die applikant versuim het om restitusie aan te bied.
4. Die hof a quo het 'n wanvoorigting begaan deur te bevind dat applikant nie verplig was om te restitueer wat hy ontvang het nie en dat respondente hulle reg om betalings wat gemaak is, terug te ontvang verbeur het.
5. Die hof a quo het homself wanvoorgelig deur respondente te gelas om meer aan applikant terug te lewer as wat respondente ingevolge die bepalings van die ooreenkoms ontvang het. Alternatiewelik deur nie te spesifiseer dat sodanige items as wat die respondente nie ontvang het uit hoofde van die ooreenkoms nie (bv. die dranklisensies en die perseel, ens) nie aan applikant gelewer hoef te word nie.

6. *Die hof a quo het fouteer deur te bevind dat die respondente se verweer dat 'n geldige verkoping nie tot stand gekom het nie en dat die kontrak nietig was, nie kan slaag nie weens die bevinding van die Hof dat dit res iudicata was en wel onder andere omdat dit nie gepleit of bewys is nie.*
7. *Die Verhoorhof het fouteer deur nie te bevind dat die partye verplig was om te restitueer dit wat hulle oor en weer ontvang het uit hoofde van die ooreenkoms nie.*
8. *Die hof a quo het fouteer deur te bevind dat die respondente vals en/ of oneerlik is.*
9. *Die hof a quo moes gelas het dat respondente moet restitueer dit wat hulle ingevolge die ooreenkoms ontvang het en dat applikant die koste moet betaal. Deur te gelas dat respondente **"die besigheid wat te Hoofstraat 37 Postmasburg as 'n hotel en 'n buiteverbruik bedryf word onder die naam Postmasburg Hotel"** aan applikant terug te lewer, het die hof respondente gelas om meer terug te lewer as wat respondente ontvang het."*
4. The application for leave to appeal served before me on 14 April 2009. Prior to considering the application for leave to appeal I dismissed an application in terms of Rule 30 and an application for a postponement. The reasons for dismissing such applications form part of the record of the proceedings.
5. Mr Anderson who appeared for the respondents, then argued the application for leave to appeal.

6. The matter has a somewhat long history and served before several Judges in this Division. On 22 June 2007 the applicant was successful in obtaining an order before Williams J. At the time of the granting of her order, the first respondent had withdrawn his opposition to the application provided that no costs order would be made against him. The second respondent had consented to paragraphs 2.1 and 2.2 of the notice of motion being made an order of Court.

7. Paragraphs 2.1 and 2.2 of the notice of motion in terms of which Williams J granted her order provided as follows:

*"2.1 ... dat verklaar word dat die sluiting deur die partye van die addendum gedateer **16 Januarie 2007** 'n nuwe ooreenkoms tussen die party daar gestel het bestaande uit die ooreenkoms gedateer **16 Augustus 2006** soos gewysig en aangevul deur die addendum ("**die nuwe ooreenkoms**");*

*2.2 Dat verklaar word dat die Applikante die nuwe ooreenkoms op **31 Januarie 2007** regsgeldiglik kanselleer het ..."*

8. At issue before Williams J was who should pay the costs of the application and whether or not the applicant could in terms of the prayer for "further and/or alternative relief", obtain an order directing the respondents to return the business within a specified period of time to the applicant.

9. Williams J declined to grant an order for the return of the business for reasons set out in paragraph 25 of her judgment.

10. However, when the matter was considered by Williams J, at no stage was the validity of the original agreement of 16 August 2006 placed in dispute neither was the validity of the addendum of 16 January 2007.
11. Nowhere in their papers did the respondents raise the fact that the original agreement of 16 August 2006 did not come into existence based on non-compliance with the suspensive conditions contained in Clause 10. The respondents also did not place in issue that the business was handed over to them, or that they were the owners of the business, nor did they indicate that they were unable to operate the business by using the applicant's liquor license. Neither did they allege that they were unable to obtain their own liquor license. There was never an insistence that the applicant comply with the suspensive conditions contained in clause 10 nor had they sought to compel the applicant to comply therewith.
12. In addition the respondents also did not challenge the terms of the addendum to the original agreement, or allege that the original agreement had been amended and further that the applicant had cancelled the agreement.
13. In essence the grounds of appeal upon which the respondents relied were based on the fact that the original agreement concluded on 16 August 2006, which was then varied in terms of the addendum dated 16 January 2007, had never come into existence and was thus never a valid and binding agreement. Mr Anderson, in the first instance, argued that as a result of the fact that the original agreement of 16 August 2006, never came into existence as a result of the non-fulfilment of the suspensive condition in relation to the liquor license, the addendum

concluded in January 2007 could never have amended such contract as if the original contract was invalid and was not concluded so too would the addendum.

14. Thus it followed, according to Mr Anderson, that the respondents would not forfeit monies paid towards the purchase price and would only be required to restore to the applicants what they had received.
15. I am unable to agree with the submissions advanced by Mr Anderson. The effect of the judgment of Williams J is that a valid and binding agreement came into existence in respect of the agreement of 16 August 2006 as amended by the addendum of 16 January 2007 which was validly cancelled.
16. Clause 2 of the addendum read with Clause 13 of the original agreement makes provision for the applicants to repossess the business. In addition clause 3 of the addendum provides that any payments made by the respondents would be forfeited to the applicant.
17. As regards the return of the business I am of the view that there can be no doubt in the mind of the respondents as to what has to be returned. The respondents have to return what they received (if, they are able to) at the time of the conclusion of the original agreement. Clause 3 of the agreement of 16 August 2006, deals with the assets of the business. In the event of these items no longer being in the possession of the respondents they cannot return these items. In any event the items listed in annexure A to the notarial contract which are set out at pages 183 to 192 of Volume 2 in the application for the

return of the business clearly sets out the items which the respondents would be required to return.

18. Leave to appeal should only be granted if an applicant has a reasonable prospect of success on appeal. See in this regard **Van Heerden v Cronwright and Others** 1985 (2) SA 342 (T), **Botes and Another v Nedbank** 1983 (3) SA 27 (A), **Normkow Administrators (Pty) Ltd v Fedsure Health Medical Scheme** 2005 (1) SA 80 (W).
19. For the reasons aforementioned, I am of the view that there is no merit in the application for leave to appeal as there are no reasonable prospects of another Court coming to a different decision.
20. In the result I make the following order:-

The application for leave to appeal is dismissed with costs.

**J I HENRIQUES
ACTING JUDGE
NORTHERN CAPE DIVISION**

For the Applicant:	Adv B Knoetse SC
Instructed by:	Elliot, Maris, KIMBERLEY
For the Respondents:	Mr W Anderson
Instructed by:	Mjila and Partners, KIMBERLEY