



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case no: **9470/2023P**

In the matter between:

TWK INSURANCE (PTY) LTD

APPLICANT

and

PHILLIP FREDERICK AUGUSTYN

RESPONDENT

In re the application between:

PHILLIP FREDERICK AUGUSTYN

APPLICANT

and

TWK AGRI INSURANCE (PTY) LTD

RESPONDENT

Coram: Mossop J
Heard: 7 August 2024
Delivered: 15 August 2024

ORDER

The following order is granted:

1. The heading to the notice of application for leave to appeal is amended to reflect that the party identified as 'TWK Insurance (Pty) Ltd' is, in fact, 'TWK Agri Insurance (Pty) Ltd'.

2. The application for leave to appeal is dismissed with costs to be taxed on scale B.

JUDGMENT

MOSSOP J:

[1] Notwithstanding the heading to this application for leave to appeal, I shall continue to refer to the parties as they were referred to in the main application.

[2] On 18 March 2024, I delivered a written judgment in which I granted judgment in favour of the applicant and ordered the respondent to pay him the amount of R269 632.60. The respondent seeks leave to appeal against that judgment. The delay in hearing this application for leave to appeal has been occasioned by my prolonged absence from Pietermaritzburg, having been assigned duties in Mtubatuba for a session and, unexpectedly, Durban for two sessions.

[3] Before dealing with the merits of the application, I must first swiftly deal with an ancillary issue. The heading to the notice of application for leave to appeal identifies the party seeking leave to appeal as being 'TWK Insurance (Pty) Ltd'. That entity was not the entity cited as the respondent in the main application: the respondent in the main application was 'TWK Agri Insurance (Pty) Ltd'. Mr Heyns SC, who now appears for the respondent, submitted from the bar that this was an unnoticed typographical error and that the respondent is, indeed, the same party against whom judgment was granted by me. This was not disputed by Ms Ploos van Amstel, who appears for the respondent, and I accordingly accept this to be the case. The heading to the notice of application for leave to appeal will therefore reflect the amendment of the name 'TWK Insurance (Pty) Ltd' to 'TWK Agri Insurance (Pty) Ltd'.

[4] The facts of the matter are comprehensively set out in my written judgment and I do not intend to repeat them with the same detail in this brief judgment. They

cannot, however, be entirely ignored for they provide the context to this judgment and I accordingly mention them briefly.

[5] It was not in dispute in the main application that the applicant had sold his insurance business in Ladysmith, KwaZulu-Natal, to the respondent in February 2016. That sale agreement provided for several suspensive conditions that had to be met before the sale became binding. One of those conditions was the following:

‘4.1.2 Dat die Verkoper [the applicant] teen nie later nie as 31 Januarie 2016 ’n onafhanklike kontrakteursooreenkoms met die Koper [the respondent] aangaan ...’.

An independent contractor’s agreement was duly concluded between the parties. It was identified as being an ‘independent service agreement’ (the agreement) and was attached to the applicant’s founding affidavit. Amongst other things, it stated the following:

‘The consultant [the applicant] agrees and certifies that the consultant is not entitled in fact or in law, nor does the consultant have any expectation of, employment with the company [the respondent], and is an independent consultant with, and independent contractor to the company.’

[6] The applicant at some stage attended upon a farmer (the farmer) who sought insurance for his agricultural fields. The applicant failed to ensure that certain fields that were planted to soya beans (the soya fields) were included in an insurance proposal that he prepared and which he presented to the farmer for his approval. The farmer, like the applicant, did not notice the omission of the soya fields from the insurance proposal and approved it. The insurance proposal was accepted by the insurance company to whom it was presented and a policy of insurance was issued that did not include the soya fields. The soya fields were thereafter damaged by hail and the insurance company, when faced with a claim for the damage, declined to pay because they were not covered by the policy of insurance issued by it.

[7] Without any legal process being issued by the farmer, or the applicant being consulted, the respondent accepted liability for what occurred and agreed to compensate the farmer for his loss. To do this, the respondent claimed on its own insurance, which claim was met by its insurers. The insurance payment was insufficient to meet the farmer’s loss, and so, after some negotiation, it was agreed

that the farmer's claim would be reduced and he was paid that reduced amount, which the respondent paid utilising the insurance pay out and other monies.

[8] At the same time, the applicant was admittedly due certain commissions by the respondent. The respondent declined to pay them to him and set those commissions off against the amount that it had been required to pay the farmer. Aggrieved by the non-payment of his commissions, the applicant brought the application for their payment, which served before me and which led to the judgment in respect of which leave to appeal is presently sought by the respondent.

[9] When the application for leave to appeal was argued before me, there was agreement between Mr Heyns and Ms Ploos van Amstel that the test for leave to appeal has been developed and is now at an elevated level compared to the past. Section 17(1) of the Superior Courts Act 10 of 2013 (the Act) now regulates applications for leave to appeal from a decision of a high court and it provides as follows:

'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;
- (b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and
- (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.'

[10] Prior to the enactment of the Act, the applicable test in an application for leave to appeal was whether there were reasonable prospects that an appeal court may come to a different conclusion than that arrived at by the lower court. The enactment of the Act has changed that test and has significantly raised the threshold for the granting of leave to appeal.¹ The use of the word 'would' in the Act indicates that there must be 'a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against'.²

¹ *Public Protector of South Africa v Speaker of the National Assembly and others* [2022] ZAWCHC 222 para 14.

² *The Mont Chevaux Trust v Goosen and others* [2014] ZALCC 20; 2014 JDR 2325 (LCC) para 6.

[11] It appears therefore that leave to appeal should only be granted where a court is of the opinion that an appeal would have a reasonable prospect of success, and which prospects are not too remote.³ As was stated by Schippers AJA (as he then was) in *MEC for Health, Eastern Cape v Mkhitha and another*:⁴

‘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.’

[12] The applicant's notice of application for leave to appeal is a substantial document covering some 11 pages. I have read and considered it and the heads of argument prepared by Mr Heyns and Ms Ploos van Amstel. I also listened carefully to the arguments of both counsel.

[13] Ms Ploos van Amstel categorised the application for leave to appeal in her heads of argument as falling, broadly speaking, into one or more of four separate grounds identified by the respondent. I find that classification to be helpful and I propose to adopt it in this judgment.

[14] The first ground is that I erred in concluding that the respondent was not in law liable for the acts and omissions of the applicant. There was no dispute by the respondent that the applicant was not an employee of the respondent. But the argument now pressed by Mr Heyns is that the applicant was an agent of the respondent and the respondent was therefore in law liable for his conduct.

[15] I have already made reference earlier in this judgment to an extract from the agreement that identifies the applicant as being an independent contractor to the respondent. In addition thereto, the agreement recorded that the applicant undertook:

‘... to pay income tax, if any, as independent contractor.’

³ *Ramakatsa and others v African National Congress and another* [2021] ZASCA 31 para 10.

⁴ *MEC for Health, Eastern Cape v Mkhitha and another* [2016] ZASCA 176 para 17.

[16] The true nature of the legal relationship between the parties is to be determined from the precise wording of the agreement. The parties agreed to the words in the two extracts to which reference has been made. There are other similar references in this regard in communications between the respondent and the applicant. On concluding the agreement, the respondent wrote to the applicant on 6 July 2018 and referred to the agreement as an ‘onafhanklike kontrakteursooreenkoms’ (independent contractor’s agreement). In terminating the agreement on 15 March 2023, the respondent indicated in a letter to the applicant that the letter referred to:

‘Die verkoop van besigheid en onafhanklike ooreenkomste en addendums aangegaan tussen uself en TWK ...’.

[17] There can therefore be very little doubt that the parties viewed the applicant as an independent contractor to the respondent. In *Niselow v Liberty Life Association of Africa Ltd*,⁵ the Supreme Court of Appeal addressed the issue of an independent contractor as follows:

‘An independent contractor undertakes the performance of certain specified work or the production of a certain specified result. An employee at common law, on the other hand, undertakes to render personal services to an employer. In the former case it is the product or the result of the labour which is the object of the contract and in the latter case the labour as such is the object (see *Smit v Workmen’s Compensation Commissioner*). Put differently,

“an employee is a person who makes over his or her capacity to produce to another; an independent contractor, by contrast, is a person whose commitment is to the production of a given result by his or her labour”.’ (Citation omitted)

[18] In this matter, it is clear that a result was desired and it was identified. That was the sourcing of new clients for the respondent. That is what the agreement required of the applicant. Lest this be unclear in this regard, the agreement forbade the applicant from dealing with any existing clients of the respondent. Indeed, if he approached any existing clients of the respondent, he suffered the risk of the respondent terminating the agreement.⁶

⁵ *Niselow v Liberty Life Association of Africa Ltd* 1998 (4) SA 163 (SCA).

⁶ Clause 13.10 of the agreement reads as follows: ‘The Parties agree that the consultant will refrain from rendering service to any existing client of the Company, in the event of the consultant rendering service to any existing client of the company, this agreement will terminate without any further notice.’

[19] It appears to me that one of the essential differences between an independent contractor and an agent is the degree of control that the principal has over the conduct of the independent contractor or agent. The more control that exists, the more likely that the relationship is one of agency. It is so that the agreement contains certain general clauses requiring the applicant to perform in a bona fide fashion and use his best endeavours to carry out his duties. But as to control over how he performed, the agreement provided as follows:

‘It is however recorded that any control and supervision exercised by the company in respect of the consultant shall be solely for the purposes of ensuring that the consultant properly discharges his duties in terms of this agreement, and not for the purposes of establishing or indicating the existence of any employment relationship between the parties.’

[20] Ms Ploos van Amstel drew my attention to the following extracts from *Mohun and another v Phillips NO obo S and another*,⁷ where the Supreme Court of Appeal stated the following:

‘Our law is clear that the principal is not liable for the civil wrongs of an independent contractor, except where the principal was personally at fault.’⁸

And:

‘The matter must be determined on the basis that as a fact, the first appellant was an independent contractor. In this regard, Nugent JA clearly stated in *Chartaprops 16 (Pty) Ltd and another v Silberman* that it is well established that the relationships to which vicarious liability applies do not include the relationship of a principal and an independent contractor. The party who appointed the independent contractor could only be liable in delict for its own failure to take reasonable steps to guard against foreseeable harm.’⁹ (Footnote omitted.)

[21] The general position in our law is thus that a principal is not responsible for the delicts of an independent contractor save for the limited grounds mentioned in the extract above. In my view, that is unlikely to be viewed differently by another court.

[22] I have considered afresh the agreement and I remain of the view that it was intended to produce a contract of work. The applicant was, therefore, an

⁷ *Mohun and another v Phillips NO obo S and another* [2022] ZASCA 186.

⁸ *Ibid* para 34.

⁹ *Ibid* para 37.

independent contractor and the respondent was not in law ordinarily liable for his conduct.

[23] The second ground of appeal is that I erred in finding that the applicant did not become indebted to the respondent. By virtue of the fact that the respondent is not in law liable for the conduct of an independent contractor such as the applicant, it follows that as a matter of logic, the applicant did not automatically become indebted to the respondent as contended for by the respondent. Which is not to say that such liability categorically does not exist. It may exist if determined to exist by the decision of a court of law. That was lacking when the respondent purported to apply set off. There was thus no mutual indebtedness at the time when set off was invoked.

[24] The third ground of appeal relates to the amount which the respondent was ordered to pay relating to the applicant's accrued commissions. The respondent asserts that the amount of R269 632.60 found by me to be due to the applicant ought to be reduced by some R29 660.64. I explained my conclusions in this regard in my judgment that is sought to be appealed against, and there is no merit to this ground.

[25] The final ground of appeal is that I ought to have dismissed the application with costs. As Ms Ploos van Amstel points out, this is a conclusion and not a ground. She is clearly correct.

[26] After reflection, and taking into account the submissions made by both legal representatives, I remain unpersuaded that another court would come to a different conclusion than the one to which I came. In the circumstances, I make the following order:

1. The heading to the notice of application for leave to appeal is amended to reflect that the party identified as 'TWK Insurance (Pty) Ltd' is, in fact, 'TWK Agri Insurance (Pty) Ltd'.
2. The application for leave to appeal is dismissed with costs to be taxed on scale B.

MOSSOP J

APPEARANCES

Counsel for the applicant	:	Mr G F Heyns SC
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