



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: 20506/2023

In the matter between:

WILLEM DE SANDERS GREEF N.O.

First Applicant

RUDOLPH PHILIP BOTHA N.O.

Second Applicant

(In their capacities as Trustees of the W De S Greeff
Family Trust)

and

GPP PROPERTIES CC

First Respondent

THE REGISTRAR OF DEEDS, CAPE TOWN

Second Respondent

JUDGMENT

PARKER AJ

[1] On the 13th September 2024, I granted an order in which I upheld the First Defendant's exception. In addition, I granted the Plaintiff's leave to amend the particulars of claim if it so desired within 10 days from the date of the order. Costs were also awarded against the Plaintiff including the cost of two counsel where so employed on scale A and scale B respectively.

[2] On the 7th of October 2024, the plaintiff filed its leave to appeal which was heard on the 31st of October 2024.

[3] The grounds of the appeal opined by the Appellant were that there is a reasonable prospect that the Court of Appeal upon a proper interpretation of the court's judgment and order:

3.1. That it is in the interest of justice and to maintain the cardinal feature of our democracy necessary to unbundle the order and to unscramble the settlement agreement. The facts and reasons upon which the court relied in support of its aforesaid finding were not pleaded by the plaintiffs as part of their particulars of claim. Consequently, the court erred to in its determination of the exception issues. In so doing, the appellant relied on various case law including Road Accident Fund v Taylor and Other Matters.¹

3.2. The court erred not to hold that the terms of the settlement agreement did not accord with the law and the settlement agreement could not have been made an order of court on the 17th of November 2014. An argument advanced by the Appellant is that the court is inter alia only entitled to make a settlement agreement an order of court if and when its terms accord with the law and are not at odds with public policy². It was also argued that the law will not preserve a transaction which it has prohibited³. Furthermore, courts are generally reluctant to decide upon an exception regarding the interpretation of a contract without the hearing of admissible evidence when such evidence is pleaded or

¹ Road Accident Fund v Taylor and Other Matters 2023 (5) SA 147 (SCA) para 31

² Eke v Parsons 2016 (3) SA 37 (CC) para 26

³ Legator McKenna Inc and Another v Shea and Others 2010 (1) SA 35 (SCA) para 29

appears from the relevant contract. There is a reasonable prospect that a higher court will hold that the settlement agreement on a proper interpretation thereof, do not accord with the provisions of the law . Thus the settlement agreement is null and void because of non-compliance with the provisions of Section 39(e)(ii) of the Act.⁴ The Plaintiff avers that its particulars of claim contained averments to support a valid and enforceable cause of action.

- 3.3. The court erred in holding that the Plaintiffs are obliged to effect the restitution as it was necessary for the Plaintiffs to plead restitution or tender restitution to complete their cause of action, albeit with a lack of particularity. In respect of this ground of appeal, the doctrine of restitution in integrum does not apply when no valid contract came into existence and consequently, it was not necessary for the Plaintiff to plead and tender restitution in order to complete the cause of action.
- 3.4. The court erred by not finding that the Plaintiffs particulars of claim do upon reasonable interpretation disclose a valid and enforceable cause of action were not defined when the court found that the particulars of claim will have to be more elaborate. In furtherance of its argument, plaintiff submitted that the court erred to consider facts and reasons that were not defined in the particulars of claim for adjudication and determination by the court.
- 3.5. The court erred in finding that the particulars of claim are bad in law.

⁴ Swart v Smuts 1971 (1) SA 819 (A) at 829C to H; Adlem and Another v Arlow 2013 (3) SA 1 (A)

[4] I expounded on the law of exceptions at paragraph 22 of my judgment, that exceptions exist to weed out cases without legal merit. Much turned on a court order which remained binding until set aside. I have also reflected on the interest of justice when referring to Section 92(1), 92(3) and section 197(1), of the Constitution of the Republic of South Africa, which I will not repeat here, suffice to say it is untenable for parties to ignore court orders.

[5] In a nutshell, the Appellant takes issue with paragraphs 22 to 26 of my judgment and states that there is a reasonable prospect that a Court of Appeal, will upon proper interpretation of the judgment⁵ come to a different conclusion. That it is the purpose of pleadings to define the issues for the other party as well as the court⁶, and the facts and reasons upon which the court relied in support of its aforesaid findings were not pleaded by the plaintiffs as part of their particulars of claim. Consequently, the court erred to adjudicate and determine the exception on the basis of such unpleaded issues.

The test

[6] Section 17(1) of the Superior Courts Act, no. 10 of 2013, provides as follows:

"17 Leave to appeal

(1) Leave to appeal may only be given with a judge or judges concerned or of the opinion that-

(a) (i) The appeal would have a reasonable prospect of success
or;

⁵ HLB International (South Africa) (Pty) Ltd v MWRK Accounts and Consultants (Pty) Ltd 2022 (5) SA 373 (SCA) paras 25 to 28

⁶ Fischer and Another v Ramahlele and Others 2014 (4) SA 614 (SCA) para 13
Molusi and Others v Voges NO and Others 2016 (3) SA 370 (CC) para 28

- (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 adjust and prompt resolution of the real issues between the parties"*

[7] From the wording of the section 17(1), the threshold for granting the leave to appeal has been raised. The former test that leave should be granted if there is a reasonable prospect that another court might come to a different conclusion is no longer the basis for an appeal. The Appellant now has to convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A sound rational basis that there is such a prospect of success on appeal has to be demonstrated⁷.

[8] In resisting the leave to appeal, First Respondent relied on *Ramakatsa and Others v African National Congress and Another*⁸.

"the test of reasonable prospects of Sussex postulates a dispassionate decision based on the facts and the law that the Court of Appeal could reasonably arrive at a conclusion different to that of the trial court. In other words, the appellants in this matter need to convince this court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of

⁷ MEC Health, Eastern Cape v Mkhitha (1221/15) [2016] ZASCA 176 (25 November 2016) para 17

⁸ Ramakatsa and Others v African National Congress and Another [2021] ZASCA 31 (31 March 2021 at para 10 and see *Four Wheel Drive Accessory v Rattan* 2019 (3) SA 451 (SCA) at para 34

succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist"

[9] In applying this test, the operative words are prospects of success which I then considered thus as follows..

Evaluation

[10] The general principles has been spelt out in *Goodwin Stable Trust v Duohex (Pty) Ltd and Another*⁹ where it was held:

"whilst there may be a tendency to seek to grant leave to simply to allow outstanding questions to be finally determined, it seemed to me that, in balancing the rights of the parties to the litigation the court's responsibility is to avoid the temptation simply to take the opportunity to have the question answered and rather to apply its mind as to whether or not the answer will probably be in favour of the applicant for leave to appeal."

[11] Much of the argument presented by the Appellant was presented at the hearing and I agree with the Respondents that the Appellant has sought to rehash the very same arguments in its leave to appeal.

[12] The Appellants contend that the Implied finding in paragraph 27 of the judgment that the court was entitled to make the settlement agreement an order of court is relevant to this issue. This is not so. What the rationale conveyed is , the order was competent at the time it was granted. For the unbundling of that order and to ensure the particulars of claim suffice , it will have to be more elaborate, which falls on the lap of the Appellant.

⁹ *Goodwin Stable Trust v Duohex (Pty) Ltd and Another* 1999 (3) SA 353 (C) at 354/355

[13] The Appellants' attempt to counter paragraph 27 of the judgment does not assist it. I say so because it alleges that the Plaintiff did tender restitution and therefore there is a reasonable prospect that the Court of Appeal will on a proper interpretation of the Plaintiffs particulars of claim hold that:

13.1 Restitution is a distinct contractual remedy that applies when a contract containing reciprocal rights and obligations is cancelled¹⁰.

13.2 The doctrine of *restitutio in integrum* does not apply when no valid contract came into existence – i.e. when either the *condictio indebiti* or the *conditio ob turpem vel iniustam causam* find application¹¹.

13.3 Consequently it was not necessary for the plaintiffs to plead and tender restitution in order to complete their cause of action.

13.4 The Plaintiffs particulars of claim is amenable to the reasonable interpretation that the Plaintiffs did not plead that they tender restitution in that the Plaintiffs merely required the cancellation of the relevant deeds of transfer and servitude in order to revive the parties rights in terms of section 6(2) of the Deeds Registries Act as they existed immediately before the conclusion of the settlement agreement and the granting of the order of 17th November 2014.¹²

13.5 Consequently, the court erred to hold that the Plaintiffs are obliged to effect the restitution, albeit with a lack of particularity. I do not agree. I remain of the view that the particulars need to be elaborate.

¹⁰ Baker v Probert 1985 (3) SA 429 (A) at 438H to 439C

¹¹ Yarona Healthcare Network (Pty) Ltd v Medshield Medical Scheme 2018 (1) SA 513 (SCA) paras 48 to 54

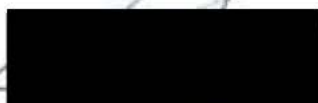
¹² Especially with reference to paras 12.6, 16.3, 16.4 and the prayers contained in the particulars of claim

[14] In conclusion for the reasons in my judgment, it is my view that there is no substance and weight to the intended appeal. It is my view that there are no reasonable basis that there would be prospects of success on appeal. The Appellant has shown no compelling reason why the appeal should be heard, and has not advanced conflicting judgments on the matter under consideration. Therefore, the appeal has not met the threshold for the test for an appeal.

[15] It is therefore ordered that:

15.1 The appeal is dismissed

15.2 The appellant is liable for costs including the costs of two Counsel on scale A.



PARKER AJ
Acting Judge of the High Court

Appearances

Counsel for the Plaintiff: Adv D J van der Walt SC

Bloemfontein Chambers

Instructed by: Spangenberg Zietsman & Bloem Attorneys

Bloemfontein

Counsel for the First Defendant: Adv A La Grange SC & Adv L Liebenberg

Cape Town Chambers

Instructed by: Nel Mentz Steyn Ellis Inc.

Humansdorp

Date of Hearing: 31 October 2024

Date of Judgment: 20 February 2025

This judgment was handed down electronically by circulation to the parties' representatives by email.