

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

THE REPUBLIC OF SOUTH AFRICA



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

Case No: 1783 / 2022

In the matter between:

K SEVEN INVESTMENTS CC

Plaintiff

and

ANCHORPOPS 162 (PTY) LTD

First Defendant

ANCHORPOPS 156 (PTY) LTD

Second Defendant

MEHBOOB ADAM

Third Defendant

Coram: Wille, J

Heard: 24 February 2025

Delivered: 12 March 2025

JUDGMENT ON LEAVE TO APPEAL

WILLE, J:

INTRODUCTION

[1] This is an application for leave to appeal chartered by the plaintiff. For ease of reference, I will refer to the parties as they were cited in the action proceedings. After I heard the parties, I decided to reserve my judgment as the adjudication of this application for leave to appeal called for a hefty dose of judicial restraint.¹

[2] I say this because the several grounds of appeal (if not all) deal with issues never engaged with or dealt with in the pleadings or during the action proceedings. As much as I may find these grounds of appeal interesting, I must exercise judicial restraint. The legal position that finds application has been eloquently formulated as follows:

‘...Turning then to the nature of civil litigation in our adversarial system, it is for the parties, either in the pleadings or affidavits, which serve the function of both pleadings and evidence, to set out and define the nature of their dispute and it is for the court to adjudicate upon those issues. That is so even where the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution, for “it is impermissible for a party to rely on a constitutional complaint that was not pleaded”. There are cases where the parties may expand those issues by the way in which they conduct the proceedings. There may also be instances where the court may mero motu raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being decided. Beyond that it is for the parties

¹ It was not legally permissible for me to deal with the new appeal grounds piloted by the plaintiff.

*to identify the dispute and for the court to determine that dispute and that dispute alone...*²

[3] The following passage in the same judgment further emphasises the legal position:

*‘...The parties may have their own reasons for not raising those issues...they may choose not to do so because of its implications for the further conduct of the proceedings...they may feel that their case is sufficiently strong as it stands to require no supplementation...’*³

OVERVIEW

[4] The plaintiff’s pleaded case, which the defendants were called upon to meet, was that they allegedly owed R2 845,000.00 (plus interest and costs) to the plaintiff as a result of a ‘performance’ which the plaintiff had rendered to the first defendant, according to the fee agreement concluded between them.⁴

[5] The fee agreement recorded, among other things, the following:

*‘...the plaintiff submitted a proposal to the Government of the Republic of South Africa: Department of Performance Monitoring and Evaluation in the Presidency (“DPME”) for the award of the tender put out by DPME (T7 of 2013/14) for the letting of the building situated on Erf 6[...] Hatfield Township, Gauteng Province at 3[...] G[...] Street, Hatfield, Pretoria (“the first defendant’s property”)...’*⁵

[6] The structure was that if this governmental department awarded the tender to the plaintiff, the first defendant and the department would conclude a lease for the

² Fischer and Another v Ramahlele and Others 2014 (4) SA 614 at paragraph [13].

³ Fischer and Another v Ramahlele and Others 2014 (4) SA 614 at paragraph [14].

⁴ On 5 April 2024 (“the fee agreement”). The second and third defendants were cited as sureties.

⁵ This is following clause 3.1.2 of the fee agreement.

first defendant's property. This was the 'arrangement' agreed upon per the fee agreement's terms.⁶

[7] Further, the first defendant acknowledged that if the tender was awarded as aforesaid and the lease concluded, then the plaintiff would have been the 'effective cause' of the conclusion of the lease agreement. The defendants pleaded that they disputed the plaintiff's claims, arguing that the plaintiff was not entitled to the amount claimed because neither it nor its sole member were the holders of the requisite fidelity fund certificates at the time when the plaintiff allegedly rendered the performance that formed the basis of its claim.⁷

[8] The defendants contended that the plaintiff never filed a replication, demonstrating that the legal shield they had specifically raised in their plea was bad in law.⁸

[9] Thus, the defendants conducted the trial and their defence to the plaintiff's claims based on the pleaded case before this court. This, they were entitled to do.⁹

[10] Notwithstanding the pleaded case and the common cause facts that emerged during the trial proceedings, the plaintiff (in the application for leave to appeal) charters an argument that a court of appeal will arrive at a different result based on one or more of numerous new grounds of appeal now advanced, none of which were pleaded by the plaintiff nor investigated during the trial.¹⁰

[11] Self-evidently, it must be so that the plaintiff cannot, to the prejudice of the defendants, now advance fresh lines of argument which were never pleaded by nor investigated during the evidence at trial.¹¹

⁶ This follows clause 3.2 of the fee agreement (these are standard terms used by estate agents).

⁷ The defendants specifically pleaded this defence from the outset.

⁸ The defendants did not know what case they had to meet.

⁹ This was the case that the defendants had to meet at the trial.

¹⁰ How the defendants are meant to deal with these new grounds of appeal is difficult to understand?

¹¹ Naude v Fraser 1998 (4) 539 (SCA) at 563.

THE FIRST GROUND OF APPEAL

[12] This ground goes to the 'definition' of an estate agent. The plaintiff never pleaded these new extensive legal and factual contentions it seeks to now advance under this ground of appeal.¹²

[13] The defendants were never alerted to them as part of the case they were called upon to meet. The court is criticised for ignoring issues never raised at the trial.¹³

[14] Further, the defendants were never required to address these new issues in the pleadings or during the evidence at the trial. Thus, it must be that the line of argument the plaintiff seeks now to pursue for the first time is legally impermissible.¹⁴

THE SECOND GROUND OF APPEAL

[15] The core complaint here is that the court imposed upon the plaintiff the onus to prove the fidelity fund certificate defence raised by the defendants. This is challenging to understand as I made no findings (in any manner whatsoever) that the plaintiff failed to discharge any onus in connection with the shield raised by the defendants. The fidelity fund certificate defence was a legal hurdle the plaintiff had to overcome.¹⁵

THE THIRD GROUND OF APPEAL

[16] This complaint goes to the factual findings that were made. The plaintiff ostensibly relies on 'new' facts to underpin this ground of appeal.¹⁶

¹² This was not engaged with during the trial.

¹³ The plaintiff's case was that it acted for "itself".

¹⁴ The plaintiff now seems to rely on new facts never engaged with during the trial.

¹⁵ The plaintiff failed in this connection.

¹⁶ These new facts are not identified.

[17] The plaintiff contends that the defendants failed to establish facts supporting their defence. This is difficult to understand as the plaintiff refused to answer the single question I asked him after he had testified, which answer (if given) may have assisted in the further determination of the matter.¹⁷

THE FOURTH GROUND OF APPEAL

[18] The core of this complaint also goes to the issue of the fidelity fund certificate. What is now advanced was never pleaded in support of a contention that the fidelity fund certificate requirement did not apply to the plaintiff or that the plaintiff's conduct fell beyond the ambit thereof.¹⁸

THE FIFTH GROUND OF APPEAL

[19] This is the same ground of appeal chartered by the plaintiff in the first ground of appeal. The fee agreement remained the contractual foundation for the plaintiff's claim against the defendants.¹⁹

[20] Thus, if the plaintiff wished to rebut the reliance on the fidelity fund shield raised by the defendants, it should have pleaded this by setting this out in detail by way of a replication to the defendant's plea so that the defendants could be alerted to the case they had to meet at the trial. The prejudice to the defendants is self-evident.²⁰

THE SIXTH GROUND OF APPEAL

[21] Again, this goes to the issue of the fidelity fund certificate. The sole member of the plaintiff testified that the plaintiff acted on its 'own' behalf or, as he put it, for 'itself'. That is precisely why I attempted to engage further with this issue and asked

¹⁷ The plaintiff filed no replication to the legal defence raised by the defendants.

¹⁸ Nowhere can such pleaded allegations be found.

¹⁹ This does not form the subject of any dispute.

²⁰ No replication was filed by the plaintiff.

this witness a single question, which he declined to answer. I asked this question because the plaintiff was not the owner of the subject property, and I wanted to understand how he 'contracted' with the property owner. No answer was forthcoming. That is, among other things, why I concluded that the plaintiff conducted itself as an agent.²¹

CONSIDERATION

[22] I made specific factual findings based mainly on the common cause facts taken together with the sole member of the plaintiff's refusal to answer the question I put to him. It is challenging to understand how this amounted to a demonstrable and material misdirection that is wrong, which would commend itself to the appeal process of another court.²²

[23] Thus, there is no sound, rational basis upon which I can conclude that the plaintiff has prospects of success on appeal. This court may only give leave to appeal if it is of the opinion that the proposed appeal would have a reasonable prospect of success.²³

[24] The mere possibility of success or an arguable case is not enough.²⁴

CONDONATION APPLICATION

[25] The plaintiff failed to adhere to the procedural directives required to pursue its application for leave to appeal. Eventually, the plaintiff filed a belated application for condonation for leave to appeal against the order I handed down many months ago.²⁵

²¹ This issue was never engaged with by the plaintiff.

²² This is because my question was not answered at all.

²³ In terms of section 17(1) (a) (i) of the Superior Courts Act, 10 of 2013.

²⁴ MEC for Health, Eastern Cape v Mkhitha [2016] ZASCA 176 (25 November 2016) at para [17].

²⁵ My judgment and order was handed down on 8 October 2024.

[26] I could not find any 'substantial' legal grounds supporting the application for condonation piloted on behalf of the plaintiff in support of its application for leave to appeal. However, to attempt to bring some finality to these proceedings and, given the defendants' election not to oppose the application for condonation, I granted condonation for the late filing of the application for leave to appeal.²⁶

ORDER

[27] The following order is granted:

1. Condonation for the late filing of the leave to appeal is granted.
2. The application for leave to appeal is refused.
3. The applicant shall be liable for the costs of the condonation application.
4. The applicant shall be liable for the costs of the leave to appeal.
5. These costs shall include costs of counsel on Scale C.

E. D. WILLE
(Cape Town)

²⁶ This is despite the fact that no case had been made out for condonation.