



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

Case no: 7287/2024

In the matter between:

CONSTANTINE GODFREY VARLEY

First Applicant

BASIC BLUE TRADING

Second Applicant

And

ARTHUR FREDERICK MERKEL

Respondent

ORDER

The application for leave to appeal is dismissed.

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

Nziweni, J

Introduction

[1] This is an application for leave to appeal the whole judgment and order of this Court. The Applicants are raising 6 grounds on which they allege that this Court erred.

[2] I believe it is convenient to outline the grounds for this application while simultaneously addressing the specific merits. The grounds are as follows:

Ground 1:

This court erred in finding that, notwithstanding the authorities being divided on the issue, Plaintiff was not prohibited from proceeding with a summary judgment application, when already having taken a further procedural step by filing a replication to Defendants plea.

[3] The Applicants' argument is based on the premise that conflicting decisions exist within this Division. The Applicants remain steadfast that there are conflicting decisions in this Division concerning whether a summary judgment application is still competent after a Plaintiff has filed a replication.

[4] I addressed this point extensively in the main judgment. There are several problems with the Applicants' submissions. The Applicants' claim regarding public interest and legal certainty fails to acknowledge that there is no conflict of authority in this Division. The main difficulty with the Applicant's contention springs from the fact that the case upon which this argument is predicated upon, does not actually say so.

[5] The Applicants' submissions regarding public interest and legal certainty fail to acknowledge that no conflict of authority exists in this Division. The case cited by Mr Benade is irrelevant to this assertion; the primary difficulty is that the very authority upon which the argument is predicated does not support it.

[6] The Applicants are of the view that *Ingenuity Property Investments (Pty) Ltd v Ignite Fitness (Pty) Ltd* (9845/2022) [2023] ZAWCHC 129; [2023] 3 All SA 458 (WCC); 2023 (5) SA 439 (WCC) (29 May 2023), is in conflict with the case of *Brittlex Real Estate Corporation v CPH Developments (Pty) Ltd* (unreported case number 8167/2022 WCC) dated 03 November 2023.

[7] In *Brittlex* at paragraph 30, the court said something quite interesting on the divided authorities *Brittlex* sought to rely on. The court stated the following:

“...Brittex sought to rely on the (divided) authorities regarding the question of whether a Plaintiff forfeits the right to apply for summary judgment by filing a replication. These cases are of no assistance in *casu*. Firstly, because the cases themselves are divided on the issue. Secondly, this case is plainly distinguishable because Brittex did not file a replication: it took active procedural steps to advance the matter to trial (amended its own pleading) and also filed a Rule 23 Notice in respect of the amended plea.” Emphasis added.

[8] In that light, I fail to discern any ground that supports the Applicants’ assertion in *Brittex*. In the *Brittex* case, the court found that *Brittex*’s action [to amend and filing of Rule 23 Notice] was plainly distinguishable from the replication debate, because *Brittex* had gone further, by amending its own pleadings and filed a Rule 23 Notice. In the *Brittex* matter, the court did not regard replication as an active step that makes summary judgment incompetent. In the *Brittex* case the court made a sharp distinction between the act of filing a replication and taking other active procedural steps to advance a matter to trial.

[9] Thus, I find the *Brittex* matter readily distinguishable from the *Ignite Fitness* matter on both their facts and their core legal outcomes. As such, as previously mentioned, the case cited by Mr Benade in his opinion to support the assertion of conflicting decisions, is in fact not on point.

[10] Thus, Applicants’ reliance on *Brittex* is not well-grounded. Moreover, the existence of divergent precedents between various divisions is a routine feature of our legal system; this Court is not bound by the decisions of different jurisdiction. Consequently, such a divergence does not constitute a compelling ground for granting leave to appeal.

Ground 2:

This Court erred in her finding not to accept the Applicants’ version that:

1. Annexure “POC2” constitutes a non-binding negotiations aimed at exploring potential methods of reimbursing Plaintiff’s venture capital;
2. Which does not establish any legal obligation or admission of liability; and
3. Which was anything more than friendly gestures aimed at repairing their relationship.

[11] I addressed this point extensively in the main application.

[12] Even assuming this to be the case, subjective characterisation cannot trump objective evidence. A label or personal interpretation is secondary to the facts and context from which a reliable conclusion is drawn. The Applicants' ground relies on subjective framing that is simply not borne out by the record.

[13] A party can characterise a transaction as a "friendly gesture" but if the circumstances show something else, the characterisation fails.

Ground 3:

The court erred in not accepting Defendants' explanation as to why 50 % membership interest in second Defendant was not transferred to Plaintiff, i.e. that Plaintiff had in no uncertain terms made it known to Defendants that such transfer would complicate his tax matters in Switzerland ...

[14] The answer to this ground lies in POC1. The main judgment also illustrates this. In this ground the Applicants are challenging this Court's evaluation of evidence. It is now settled that for an Applicant to be granted leave to appeal, an Applicant must demonstrate reasonable prospects of success—specifically, that another court would (not just might) reach a different conclusion based on a "sound, rational basis. Disagreement is not a misdirection" or error of law.

Ground 4:

The Court erred in interpreting of the Defendants' defence with regard to annexure "POC1"

[15] Paragraph 48 of the main judgment reads as follows:

"[48] The Defendants' version does not cater for the existence of POC1. Likewise, the assertion by the Defendants merely suggests that they do not bear knowledge of the character or essential terms of POC1."

[15] The Defendants' own plea substantiates this finding. See paragraph 5 of the plea.

Ground 5:

This Court erred in accepting that the Plaintiff has presented sufficient documentary evidence as proof of his version of the agreement. Support for the Defendants' version of the agreement is found in the conclusion in paragraph 60 of the judgment.

[16] Simply disagreeing with how the Court's weighing of evidence was conducted, is not a valid ground for appeal. The Applicant must show a sound, rational basis for why another court would reach a different conclusion. First and foremost, paragraph 60 of the main judgment does not support the Defendant's version. As such, the Defendants' reliance on paragraph 60 is misplaced as it does not support their case. Once again, the Defendants are challenging this court's finding after evaluation of evidence. This cannot be the ground of appeal. Furthermore, challenging the court's evidentiary findings constitutes a mere disagreement rather than a legitimate ground for appeal.

Ground 6:

The court erred in finding that no real genuine dispute of fact exists in the matter.

[17] The mere presence of a factual dispute is not an automatic bar to summary judgment. For a dispute of fact to successfully defeat a summary judgment application, it must meet a criterion. Insofar as is relevant to the present discussion, this ground can only be a successful ground for appeal if the Applicants can demonstrate that a material and bona fide dispute of fact existed which made it impossible for the court to decide the matter on the affidavits alone. And that there is a triable issue to any material fact.

[18] Under these circumstances, I found in the main judgment that there is no merit to the Applicants' defence to the Plaintiff's cause of action.

[19] In addition, beyond a mere characterisation of the facts as 'disputed,' the Applicant's papers offer no objective circumstances to justify such a finding. Accordingly, the Applicants do not identify the specific, irreconcilable facts that would constitute a genuine dispute; As such leaving the claim unsupported by the record.

[20] The Respondent correctly contends that the Applicants are attempting to re-litigate the matter. This application is entirely devoid of merit and fails to meet the statutory threshold required for the relief sought, as stipulated in section 17(1) of the Superior Courts Act, Act 10 of 2013.

[21] In the result, I make the following order:

Order

21.1 The application is dismissed with costs on scale B.

A handwritten signature in black ink, which has been partially redacted by a black rectangular box. The signature is written over a horizontal line.

NZIWENI, J
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicants : Advocate T Benade

counsel for the Respondent : Advocate R Steyn