



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

JUDGMENT (LEAVE TO APPEAL)

Case no: 12598/2024

In the matter between:

STEPHEN MALCOLM GORE N.O.

First Applicant

DONOVAN THEODORE MAJIEDT N.O.

Second Applicant

NONKULULEKO LAWRENCIA TWALA N.O.

Third Applicant

NICHOLAS TIMKOE N.O.

Fourth Applicant

GREG MICHAEL TIMKOE N.O.

Fifth Applicant

[In their capacities as the joint provisional liquidators
of Reeco Holdings (Proprietary) Limited (in liquidation)]

and

BOTLIERSKOP PRIVATE GAME RESERVE

(PROPRIETARY) LTD

First Respondent

THOMAS ARNOLDUS NEETHLING

Second Respondent

GEDEELTE 68 ROOIPOORT (PROPRIETARY) LTD
Respondent

Third

ORDER

- 1 The applicants' application for leave to appeal is dismissed with costs, such costs to include the cost of Senior Counsel payable on Scale C and Junior Counsel payable on Scale B.
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JUDGMENT

DAVIS AJ:

- [1] The applicants seek leave to appeal against that part of my judgment delivered on 26 February 2026, in terms whereof I dismissed with costs the applicants' claim for an order directing the respondents to pay to the applicants, in their capacities as liquidators of Reeco Holdings (Proprietary) Limited (in liquidation) ('Reeco') the sum of R 9.2 million.¹
- [2] The applicants have advanced numerous grounds in support of the application for leave to appeal, most of which are a repetition of the arguments advanced at the hearing of the matter, which I have already considered and rejected for the reasons set out in my judgment. I have nothing to add thereto, and do not intend to canvass the arguments again.

¹ The applicants seek to appeal against the orders in paragraphs 62.6 and 62.8 of the judgment.

Suffice it to say that I am not persuaded that an appellate court would reach a different conclusion.

- [3] There is, however, one aspect raised in oral argument on behalf of the applicants, which I need to address.
- [4] Mr Woodland argued that I had erred in giving effect to an unlawful transaction, being the fictitious consultancy agreement entered into between Reeco and Botlierskop, the purpose whereof was to evade taxation. He contended that, because the purpose of the agreement was to evade tax, the sham consultancy agreement was void, and the Court should not have given effect to an unlawful agreement. Therefore, so Mr Woodland contended, the Court should have ordered the respondents to repay the R 9.2 million paid in terms of the sham consultancy agreement to the liquidators of Reeco, which was an illegal agreement.
- [5] Now it is trite that an agreement which is for a purpose which is unlawful, immoral or against public policy is void and unenforceable. I accept that the fictitious consultancy agreement, which formed part of a stratagem aimed at evading taxation, was unlawful and void. But *non constat* that the applicants are entitled, without more, to restitution of performance merely because the agreement is void.
- [6] The law provides a specific remedy where performance has been made in terms of an illegal contract, as is the case here where Reeco made a payment to Botlierskop on the strength of the sham consultancy agreement. A party who has performed in terms of an illegal agreement may reclaim the performance with an enrichment action, the *condictio ob turpem vel iniustam*

causam. The requirements for this action must be specifically pleaded and proved.

- [7] The difficulty for the applicants is that they based their claim exclusively on the *condictio furtiva*, and it was on this basis that the case was decided. I am not persuaded that my findings with regard to the *condictio furtiva* were wrong.
- [8] The applicants did not claim restitution of a payment made in terms of an illegal agreement. The issue of enrichment, a factual question which is an essential requirement for the *condictio ob turpem vel iniustam causam*, has not been canvassed in the papers. Had the applicants put up a case in terms of the *condictio ob turpem vel iniustam causam*, the respondents would likely have mounted a defence in terms of the *par delictum* rule (which would no doubt have spawned a debate about whether or not the *par delictum* rule should be relaxed in the specific circumstances).
- [9] Since these issues have not been pleaded and ventilated in the papers, I am of the view that an appellate court could not, and would not, entertain the argument now sought to be advanced on behalf of the applicants, which involves a change of tack.
- [10] For these reasons I am of the view that the proposed appeal would have no prospects of success, and the application for leave to appeal must therefore be refused.

[11] I am also of the view that the proposed appeal does not raise any important legal issues which warrant the attention of an appellate court. The application for leave to appeal cannot succeed on that ground.

[12] I therefore make the following order:

11.1 The applicants' application for leave to appeal is dismissed with costs, such costs to include the cost of Senior Counsel payable on Scale C and Junior Counsel payable on Scale B.

D M DAVIS
ACTING HIGH COURT JUDGE

Appearances:

For the applicants: G Woodland SC
M Harrington
Instructed by Gillan & Veldhuizen Inc
Mr P J Veldhuizen / Ms M Van Heerden

For the respondents: M P van der Merwe SC
B Prinsloo
Instructed by Van der Merwe Attorneys
Mr P Van der Merwe