IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

Case no: 3323/2013
Date heard: 5.9.2014
Date delivered: 9.9.2014

In the matter between:

GYSBERT JACOBUS VAN DEVENTER	**First Applicant / Third Defendant**
ADDO AFRIQUE SAFARI LODGE	**Second Applicant / Fourth Defendant**

vs

ANTHONY LAURISTON BIGGS	**First Respondent / First Plaintiff**
RIDGE FARM CC	**Second Respondent / Second Plaintiff**
ALLAN COUSINS	**Third Respondent / First Defendant**
GERALD WHITEHEAD	**Fourth Respondent / Second Defendant**
ADDO AFRIQUE ESTATE (PTY) LTD	**Fifth Respondent / Fifth Defendant**
ADDO AFRIQUE ESTATE PORTION 21 (PTY) LTD	**Sixth Respondent / Sixth Defendant**
ANTHONY BIGGS N.O.	**Seventh Respondent / Seventh Defendant**
LARA BIGGS N.O.	**Eight Respondent / Eighth Defendant**
MARK ANTHONY BIGGS N.O.	**Ninth Respondent / Ninth Defendant**
ANDRE PRETORIUS N.O.	**Tenth Respondent / Tenth Defendant**

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

TSHIKI J:

[1] Applicants herein have filed an application for leave to appeal my decision on the grounds, *inter alia*, that:

[1.1] I erred in finding that the Settlement Agreement constituted a "sort of hybrid arbitration expert determination" whereas the agreement was no more than a settlement of dispute between shareholders and directors in the company with an agreed

contractual methodology to determine loan account values and the equalisation therefore.

[1.2] I erred in holding that the substitute directors' decisions could only have been attacked in terms of section 33 (1) of the Arbitration Act.

[1.3] I erred in holding that the substitute directors were given a mandate akin to that of an arbitrator, whereas the substitute directors were appointed to independently and impartially and as contractually agreed, reach decisions affecting the parties and the company.

[1.4] I erred in not holding that the substitute directors were bound to act *arbitrium boni viri*, to exercise the judgment of a reasonable man, to act reasonably and as otherwise pleaded in paragraph 26 of the Particulars of Claim. In particular, that I erred in not finding that the substitute directors acted contrary to the principles stated above where they failed to have regard to relevant facts, including other potential valuations, other than by Boshoff.

[1.5] I erred in not holding that the allegations contained in paragraph 26 of the Particulars of Claim constituted a tenable cause of action (not excipiable) and erred in not holding that any attack on the decision of the substitute directors was no limited to grounds of attack available to dissatisfied parties to an arbitration.

[1.6] I erred in not holding that the first and second plaintiffs had a contractual right to challenge the substitute directors' decision where such decision was taken contrary to what was pleaded in paragraph 26 of the Particulars of Claim.

[1.7] I erred in holding in these proceedings (prior to proper ventilation in an action) that the substitute directors had reached their decision honestly and in good faith.

[1.8] I erred in effectively finding that the relief sought in the Summons constituted a review as envisaged in terms of Rule 33 and accordingly erred in holding that the condonation was required whereas the cause of action is not a review was contemplated in rule 53, but rather an attack on the exercise of a function which was contractually bestowed on the substitute directors.

[1.9] I erred in finding that the Summons commencing action constituted an abuse of the civil process of this Court where a tenable cause of action is set out.

[1.10] I erred in finding that the first and second plaintiffs were compelled to comply with the provisions of section 33 of the Arbitration Act under circumstances where the Act is not applicable to the present situation.

[1.11] I erred in not finding that the sole reliance by the substitute directors on Boshoff's valuation under the particular circumstances constituted conduct which plaintiffs were in law entitled to challenge. In this regard, the mere fact that the substitute directors, to some extent at least, realised the inadequacy of their determination by making a second determination, justified a finding that their initial determination could not stand.

[1.12] I erred in finding that the allegations contained in the Particulars of Claim could not be properly decided without the full record in terms of Rule 53. In this regard, that this Court erred therefore in not holding, as stated above, that the relief sought in the Particulars of Claim was not a review as contemplated in terms of Rule 53 and erred in not finding that the Particulars of Claim was non-excipiable and that evidence to be led at the trial should not be pre-empted.

[1.13] I erred in holding that the proceedings were a nullity for not proceeding in terms of Rule 53 and therefore erred in holding that no amendment could have been granted.

[1.14] I erred in ordering that no penalty interest shall accrue in favour of the first and second respondents on their loan accounts after the period 22 April 2013. In this regard, that I failed to take into account that in terms of clause 9 of the Settlement Agreement, implementation of the Property Exchange is held in abeyance until "settlement with SAN Parks, so as not to contravene the existing interdict over the property in question, under case no: 1201/2010.

[1.15] I erred in granting the order contained in paragraph 44 (1) of the judgment and the costs order in terms of paragraph 42 (2) under circumstances where this Court should have dismissed the application with costs.

[2] It is my considered view that I only need to deal with those aspects raised by the applicants which I may not have dealt with fully, if any, in the judgments. I, however, believe that my main judgment is comprehensive. Both judgments against which the applicants have filed an application for leave to appeal have dealt with all the issues involved in this case.

[3] Both counsel confirmed that they are *ad idem* that if I dismiss the application for leave to appeal in the main action, it follows that even the application to lead further evidence and to amend falls to be dismissed.

[4] In my view, the challenge against the decisions of the substitute Directors' decisions has no merit at all. Both judgments relied upon by the Court in ***Telcordia Technologies Inc v Telkom SA Ltd*** 2007 (3) SA 266 (SCA) para [50-51] and ***Lufuno***

Mphaphuli & Associates (Pty) Ltd v Andrews and Another 2008 (2) SA 448 at 445 para [22] deal with the same issue as the one in our case. Therefore, in addition to the fact that I agree with them, I am also bound by them. The main trust emphasized in both judgments is the sanctity of contract. One cannot agree that the decision arrived at by the arbitrator would be final and binding on them so long as he arrives at his decision honestly and in good faith, unless he can show dishonesty and *mala fides*, he cannot challenge such decision. He is bound by the contract he made before the decision, which is that the decision would be final and binding. They have not shown any *mala fides* and or dishonesty on the part of the substitute Directors.

[5] Any other consideration by the applicant cannot apply in their case.

[6] With respect to paragraph 14 of the grounds of appeal relating to ordering "no penalty interest shall occur in favour of the first and second respondents on their loan accounts", applicant herein caused the delay in the whole process and therefore, cannot expect the respondents to pay penalty interest in such circumstances.

[7] In my view, there are no reasonable prospects that another Court may come to a different decision than the one arrived at by this Court.

[8] Therefore, the application for leave to appeal is dismissed with costs.

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P.W. TSHIKI
JUDGE OF THE HIGH COURT

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