

DISPUTE RESOLUTION ALERT

14 NOVEMBER 2023



CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA

IN THIS ISSUE

The answer lies in the rules of interpretation

In the recent case of *Zoviflo (Pty) Ltd v Prokas and Others (010253/2023)* [2023] ZAGPJHC 918 (15 August 2023), the essential issue for determination by the Gauteng Division of the High Court, Johannesburg, was whether the existence of a nominee agreement was impacted by the failure to successfully conclude and implement a joint venture agreement. Are the agreements interlinked or can they be viewed as independent, standalone contracts between the parties?

How special is special when determining special leave to appeal?

In *Mosselbaai Boeredienste (Pty) Ltd v OKB Motors CC* [2023] ZASCA 91, taken on appeal from the Free State Division of the High Court, Bloemfontein, the Supreme Court of Appeal (SCA) considered the legal principles regarding special leave to appeal.



FOR MORE
INSIGHT INTO
OUR EXPERTISE
AND SERVICES

The answer lies in the rules of interpretation

In the recent case of *Zoviflo (Pty) Ltd v Prokas and Others (010253/2023) [2023] ZAGPJHC 918* (15 August 2023), the essential issue for determination by the Gauteng Division of the High Court, Johannesburg, was whether the existence of a nominee agreement was impacted by the failure to successfully conclude and implement a joint venture agreement. Are the agreements interlinked or can they be viewed as independent, standalone contracts between the parties.

Facts

Zoviflo and Prinia Heritage Trust (trust) concluded a nominee shareholders agreement whereby Zoviflo, as the beneficial owner of the ordinary par shares representing 80% of the entire issued share capital in Prinia Investment Capital (PIC), nominated the trust to hold the shares on its behalf. As the nominee, the trust warranted that it was the actual owner of the shares, which represented 15% of the issued share capital in PIC. In March 2020, Zoviflo and the trust went on to conclude a joint venture agreement with ZJ Purchase Assist (Pty) Ltd (ZJ). The purpose of the joint venture was to acquire other entities and properties for the purposes of building a property portfolio.

Issues

The issue for determination by the court was whether the nominee agreement could be viewed as a standalone and independent

agreement which was not interlinked with the joint venture agreement concluded between the parties.

The respondents submitted that the nominee agreement was interlinked and dependent on the successful conclusion and implementation of a valid and binding joint venture agreement. Therefore, so the argument went, the nominee agreement could not be considered or implemented in isolation from the purpose for which it was executed. Further, the respondents submitted that a valid joint venture agreement did not come into existence between the parties since negotiations were still ongoing. According to the respondents, although a joint venture agreement was signed on 26 March 2020, it was not a final document since the first respondent was dissatisfied with some of its terms – hence the parties continued to negotiate a second joint venture agreement which in the end, did not come into effect.



The answer lies in the rules of interpretation

CONTINUED

Decision

In coming to its decision, the court reaffirmed that when faced with the issue of interpretation of a document, courts must first have regard to the plain, ordinary, grammatical meaning of the words used in the document. While maintaining that words should generally be given their grammatical meaning, it was restated that a contextual and purposive approach must be adopted in the interpretative process.

The court, in interpreting both the nominee agreement and the joint venture agreement, stated that the words used in both documents were both plain and unambiguous. There was nothing in the nominee agreement which linked it to the joint venture agreement nor was

there anything that stated that it was dependent on the successful conclusion and implementation of a valid joint venture agreement. The nominee agreement was clear, in clause 7, that the agreement constituted the entire agreement between the parties with regard to the matter dealt with therein and that no representation, term, condition or warranty expressed or implied that was not contained in the agreement would be binding on the parties.

The court also stated that there was no merit in the argument that the joint venture agreement was merely a working draft. The essence of the matter was that the parties agreed, and the joint venture agreement was reduced to writing and signed by the parties concerned. The negotiation

or suggested changes to the joint venture agreement were negotiated in the form of an addendum to the joint venture agreement, which addendum was not successfully concluded and implemented. The failure to successfully conclude and implement the addendum had no bearing on the nominee agreement which was concluded for a different and separate purpose.

The court concluded that the nominee agreement was a standalone agreement and should be implemented on its own terms. The court reaffirmed that the privity and sanctity of contracts must prevail and unless an agreement is unlawful or is demonstrated as *contra bonos mores*, parties must be held to their agreements.

Eugene Bester and Serisha Hariram

How special is special when determining special leave to appeal?

In Mosselbaai Boeredienste (Pty) Ltd v OKB Motors CC [2023] ZASCA 91, taken on appeal from the Free State Division of the High Court, Bloemfontein, the Supreme Court of Appeal (SCA) considered the legal principles regarding special leave to appeal.

Background

In February 2018, the applicant (plaintiff), Mosselbaai Boeredienste (Pty) Ltd t/a Mosselbaai Toyota and the respondent (defendant), OKB Motors CC t/a Bultfontein Toyota, both motor dealers, concluded an agreement in terms of which the defendant bought a motor vehicle (the vehicle) from the plaintiff for R159,353.76 (the purchase price).

An employee of the defendant, Mrs Steyn, received an invoice from the plaintiff's sales manager's email address. The defendant paid the purchase price into an incorrect bank account because the invoice emailed to Steyn was intercepted by an unidentified third party who fraudulently changed the defendant's bank details on the plaintiff's invoice. The unidentified third party then received the money. Thereafter, the vehicle was delivered to the defendant but the plaintiff of course, did not receive payment of the purchase price.

The next day, Steyn emailed proof of payment for the vehicle which reflected the incorrect bank details. However, this email was again intercepted by the unidentified third party who changed the incorrect bank details to the correct bank details, causing the plaintiff to believe that the defendant had correctly made payment for the vehicle.

Magistrates' Court

The plaintiff instituted an action in the Magistrates' Court for payment of the purchase price of the vehicle. The defendant raised a special plea of estoppel by representation. The court *a quo* upheld the special plea and dismissed the plaintiff's case.

High Court

The plaintiff appealed to the High Court and noted its appeal timeously in terms of Rule 51(3) of the Magistrates' Court's Rules. However, the plaintiff subsequently failed to file a notice for the assignment of a hearing date of the appeal timeously



Cliffe Dekker Hofmeyr

2023 RESULTS

Chambers Global 2022 - 2023 ranked our Dispute Resolution practice in Band 2: Dispute Resolution.

Chambers Global 2018–2023 ranked us in Band 2 for Restructuring/Insolvency.

Tim Fletcher ranked by **Chambers Global 2022 - 2023** in Band 2: Dispute Resolution.

Clive Rumsey ranked by **Chambers Global 2019 - 2023** in Band 4: Dispute Resolution.

Tobie Jordaan ranked by **Chambers Global 2022 - 2023** in Band 4: Restructuring/Insolvency.

Lucinde Rhodie ranked by **Chambers Global 2023** in Band 4: Dispute Resolution

Jackwell Feris ranked by **Chambers Global 2023** as an upcoming dispute resolution lawyer.

Kylene Weyers ranked by **Chambers Global 2023** as an upcoming restructuring/insolvency lawyer.

How special is special when determining special leave to appeal?

CONTINUED

in terms of Rule 50(4)(a) of the Uniform Rules of Court (High Court Rules). This ought to have been done within 40 days of the noting of the appeal, with the result that the appeal lapsed. In terms of the High Court Rules, the plaintiff also did not timeously lodge two copies of the record of appeal with the registrar in terms of Rule 50(7)(a) nor file a power of attorney authorising the plaintiff's attorney to lodge the appeal in terms of Rule 7(2).

The appeal ultimately lapsed on 14 July 2021, and the plaintiff filed the record of appeal on 20 July 2021. The plaintiff then launched an application for condonation of its non-compliance with the above-mentioned High Court Rules, and if successful, the reinstatement of the appeal. The defendant opposed the application on the basis of the tardiness of the plaintiff's attorney and the lack of prospects of success.

The High Court directed that the application for condonation be heard first and the appeal itself at a later stage, depending on the outcome of the condonation application. The High Court dismissed the application for condonation and refused the reinstatement of the appeal, ruling that there were no prospects of success on appeal; and that the plaintiff failed to file a power of attorney in terms of Rule 7(2) of the High Court Rules.

Following the High Court's dismissal of the condonation application and reinstatement of the appeal, the plaintiff approached the SCA with an application for special leave to appeal the High Court's judgment.

The SCA's decision

The SCA noted that a power of attorney is not required in order to reinstate an appeal, and so the main issue for determination was whether the plaintiff established reasonable prospects of success on appeal.

Principles applicable to special leave to appeal

The SCA held that, where special leave is sought, reasonable prospects of success is insufficient and something more, by way of special circumstances, is needed, as found in *Cook v Morrison and Another* [2019] ZASCA 8. The SCA stated that when considering condonation in the context of a reinstatement of an appeal, it holds a judicial discretion, quoting from the Constitutional Court, in *Van Wyk v Unitas Hospital and Another* [2007] ZACC 24; *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* [2000] ZACC 3; *PAF v SCF* [2022] ZASCA 101, which held that:

"... the standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case.

How special is special when determining special leave to appeal?

CONTINUED

Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success."

The SCA stated that it is trite that strong prospects of success can often overcome a poor explanation for any delays. The SCA further asserted that there were four issues to consider in the present matter in determining whether there were prospects of success in the appeal, stating that it was not making any findings on these issues, and only considered them to ascertain if they showed reasonable prospects of success.

First issue: Court a quo's failure to consider factual contradiction by the defendant's witnesses

The defendant raised the defence of estoppel which was upheld by the court a quo. The defendant argued that the plaintiff had negligently misrepresented to the defendant that the banking details on its invoice were the correct banking details. It was common cause between the IT experts that the interception was on the side of the plaintiff. The plaintiff was aware of cybercrime in the motor industry, and failed to take measures to guard against this. Thus, the court a quo ruled that the plaintiff was estopped from denying that the altered bank details were not those of the plaintiff.

Mr Oliver (for the defendant) testified that before he had authorised the electronic transfer of funds to the plaintiff, he had specifically asked Steyn (for the defendant) whether she had verified the correctness of the plaintiff's bank details, which she confirmed. However, when she testified, she denied this.

The SCA highlighted that this material contradiction was not considered by the court a quo.

Second and third issues: Court a quo's failure to make certain findings

The SCA ruled that the court a quo did not determine if the alleged negligence was the proximate cause of the payment having been electronically transferred by the defendant into the incorrect banking account. Another aspect the SCA stated that the court a quo failed to consider was whether the damage that was caused by the third party (the interceptor), was foreseeable.

Fourth issue: Court a quo's failure to consider certain legal principles

The SCA drew a parallel to the interception of cheques. In *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton and Another* [1973] 4 ALL SA 116 (A), the principles to be applied in cases where cheques have been intercepted in the post and misappropriated by a thief have been stated as when a debtor tenders payment by cheque, and the creditor

How special is special when determining special leave to appeal?

CONTINUED

accepts it, the payment remains conditional and is only finalised once the cheque is honoured. Any risk of fraudulent misappropriation should be borne by the debtor since it is the debtor's duty to seek out its creditor. But where the creditor stipulates the mode of payment and the debtor complies with it, any inherent risk in the stipulated method is for the creditor's account.

The SCA posed the question of whether the same legal principles should find application, namely where the debtor remains liable until payment has been credited to the creditor's bank account, noting that the question concerning the interception of a creditor's banking details sent by electronic means has yet not been decided by the SCA.

The SCA also pointed out conflicting High Court judgments on the question of who should bear the loss where a payment is electronically made to a creditor which is fraudulently intercepted by a third party, referring to:

1. *Andre Kock en Seun Vrystaat (Pty) Ltd v Snyman N.O* [2022] ZAFSHC 161, where it was held that the debtor is responsible for verifying the creditor's banking details.
2. *Hawarden v Edward Nathan Sonnenbergs Inc* [2023] ZAGPJHC 14, where it was ruled that the defendant had a general duty of care to the plaintiff, and so the purchaser could not be held liable for the electronic transfer of funds into a banking account where the bank details had been fraudulently changed.
3. *Gerber v PSG Wealth Financial Planning (Pty) Ltd* [2023] ZAGPJHC 270, where it was held that "[t]he proximate cause of the loss was not the hacking, it was the failure to employ the necessary and contractually prescribed vigilance when monies held in trust were paid into a different account".
4. *Hartog v Daly* [2023] ZAGPJHC 40, where it was held that the electronic transfer of funds into the incorrect account did not absolve the debtor from payment.

In light of the above, the SCA held that the applicant had established reasonable prospects of success on appeal, thus granting special leave to appeal, upholding the appeal in respect of condonation and referring the matter to a full bench of the High Court to determine the merits.

Remarks

This case serves to reiterate the principles surrounding special leave to appeal, and it is noteworthy to mention the degree to which the SCA interrogates the merits of the case. It is also interesting to see the extent to which the SCA was/is willing to widen the ambit of the applicable legal principles.

Considering the degree to which the SCA considers the merits, it begs the question of whether it would not be more efficient for the SCA to adjudicate on the case and bring it to finality. The SCA even went as far as to state that there are conflicting High Court judgments, arguably demonstrating that this matter would be one that is required to be decided on appeal to the SCA.

Eugene Bester and Loyiso Bavuma

OUR TEAM

For more information about our Dispute Resolution practice and services in South Africa and Kenya, please contact:



Rishaban Moodley

Practice Head & Director:
Dispute Resolution
Sector Head:
Gambling & Regulatory Compliance
T +27 (0)11 562 1666
E rishaban.moodley@cdhlegal.com



Tim Fletcher

Chairperson
Director: Dispute Resolution
T +27 (0)11 562 1061
E tim.fletcher@cdhlegal.com

Timothy Baker

Director:
Dispute Resolution
T +27 (0)21 481 6308
E timothy.baker@cdhlegal.com

Eugene Bester

Director:
Dispute Resolution
T +27 (0)11 562 1173
E eugene.bester@cdhlegal.com

Neha Dhana

Director:
Dispute Resolution
T +27 (0)11 562 1267
E neha.dhana@cdhlegal.com

Claudette Dutilleux

Director:
Dispute Resolution
T +27 (0)11 562 1073
E claudette.dutilleux@cdhlegal.com

Jackwell Feris

Sector Head:
Industrials, Manufacturing & Trade
Director: Dispute Resolution
T +27 (0)11 562 1825
E jackwell.feris@cdhlegal.com

Thabile Fuhrmann

Joint Sector Head:
Government & State-Owned Entities
Director: Dispute Resolution
T +27 (0)11 562 1331
E thabile.fuhrmann@cdhlegal.com

Tiffany Gray

Director:
Dispute Resolution
T +27 (0)11 562 1388
E tiffany.jegels@cdhlegal.com

Anja Hofmeyr

Director:
Dispute Resolution
T +27 (0)11 562 1129
E anja.hofmeyr@cdhlegal.com

Tendai Jangara

Director:
Dispute Resolution
T +27 (0)11 562 1136
E tendai.jangara@cdhlegal.com

Tobie Jordaan

Sector Head:
Business Rescue, Restructuring & Insolvency
Director: Dispute Resolution
T +27 (0)11 562 1356
E tobie.jordaan@cdhlegal.com

Corné Lewis

Director:
Dispute Resolution
T +27 (0)11 562 1042
E corne.lewis@cdhlegal.com

Vincent Manko

Director:
Dispute Resolution
T +27 (0)11 562 1660
E vincent.manko@cdhlegal.com

Richard Marcus

Director:
Dispute Resolution
T +27 (0)21 481 6396
E richard.marcus@cdhlegal.com

Burton Meyer

Director:
Dispute Resolution
T +27 (0)11 562 1056
E burton.meyer@cdhlegal.com

Mongezi Mpahlwa

Director:
Dispute Resolution
T +27 (0)11 562 1476
E mongezi.mpahlwa@cdhlegal.com

Kgosi Nkaiseng

Director:
Dispute Resolution
T +27 (0)11 562 1864
E kgosi.nkaiseng@cdhlegal.com

Desmond Odhiambo

Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E desmond.odhiambo@cdhlegal.com

Lucinde Rhoodie

Director:
Dispute Resolution
T +27 (0)21 405 6080
E lucinde.rhodie@cdhlegal.com

Clive Rumsey

Sector Head: Construction & Engineering
Director: Dispute Resolution
T +27 (0)11 562 1924
E clive.rumsey@cdhlegal.com

Belinda Scriba

Director:
Dispute Resolution
T +27 (0)21 405 6139
E belinda.scriba@cdhlegal.com

Tim Smit

Director:
Dispute Resolution
T +27 (0)11 562 1085
E tim.smit@cdhlegal.com

Roxanne Webster

Director:
Dispute Resolution
T +27 (0)11 562 1867
E roxanne.webster@cdhlegal.com

Kylene Weyers

Director:
Dispute Resolution
T +27 (0)11 562 1118
E kylene.weyers@cdhlegal.com

Joe Whittle

Director:
Dispute Resolution
T +27 (0)11 562 1138
E joe.whittle@cdhlegal.com

Roy Barendse

Executive Consultant:
Dispute Resolution
T +27 (0)21 405 6177
E roy.barendse@cdhlegal.com

BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

PLEASE NOTE

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa.

Dx 154 Randburg and Dx 42 Johannesburg.

T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.

T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

NAIROBI

Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.

T +254 731 086 649 | +254 204 409 918 | +254 710 560 114

E cdhkenya@cdhlegal.com

STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.

T +27 (0)21 481 6400 E cdh Stellenbosch@cdhlegal.com

©2023 12858/NOV