

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG NORTH DIVISION PRETORIA

19/5/2014.

Case No 49588/2008

19/5/14 *E. M. L.*
In the matter between:

OFF-BEAT HOLIDAY CLUB

First Applicant

FLEXI HOLIDAY CLUB

Second Applicant

and

SANBONANI HOLIDAY SPA SHARE BLOCK LIMITED

First Respondent

SANBONANI DEVELOPMENT (PTY) LIMITED

Second Respondent

HANS MICHAEL HARRI

Third Respondent

HANS MICHAEL HARRI N.O.

Fourth Respondent

HELEEN DUPORETHA HARRI N.O.

Fifth Respondent

VINCENT CHRISTOPHER CALACA N.O.

Sixth Respondent

SANBONANI HOTEL MANAGEMENT (PTY) LIMITED

Seventh Respondent

THE REGISTRAR OF COMPANIES

Eighth Respondent

PHILIP JOUBERT

Ninth Respondent

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

1. The matter has a long and involved history. The applicants are minority shareholders of the first respondent. They sought relief against the respondents in terms of sections 266, 267 and 252 of the old Companies Act 61 of 1973, based upon allegations that the second to seventh respondents as majority shareholders and as entities controlled by the third respondent, acted to the detriment of the first respondent. In particular they alleged that:
 - (i) a Value Added Tax refund was wrongfully diverted from first respondent to second respondent;
 - (ii) a hotel was constructed encroaching upon the first respondent's property;
 - (iii) an amendment of the first respondent's articles of association was manipulated and share blocks were unlawfully diverted to legitimise the encroachment of the hotel upon the first respondent's property;
 - (iv) shares attaching to the share blocks affected by the wrongful construction of the hotel were unlawfully transferred to a trust controlled by the third respondent;
 - (v) share blocks were created in respect of common property affected by the hotel construction and wrongfully manipulated for the construction of the hotel;
 - (vi) a loan account was incorrectly reflected in the first respondent's books purporting to evidence a non-existent liability to the first respondent's detriment.
2. After argument had been heard, the court appointed a provisional curator *ad litem* to the first respondent and requested him to investigate whether there

were indeed grounds to proceed on behalf of the first respondent against the third respondent or any entity controlled by him.

3. The court further issued a rule *nisi* calling upon all interested parties to show cause on the return day why the allegedly unlawful steps taken in respect of the first respondent's share blocks, shares and articles detailed above should not be set aside and, where necessary, rectified; and further why the shares allegedly unlawfully issued should not be cancelled.
4. The return day was defined as the date upon which judgment would be given once the curator's report had been received and the parties had been given an opportunity to file further papers.
5. The provisional curator's report concluded that the VAT refund plus interest thereon remained an asset of the first respondent that could be reclaimed. It also confirmed that the construction of the hotel was completed in conflict with the original diagram and that the issue of the additional shares and creation of additional share blocks was unlawful, as was their transfer to a trust under the control of the third respondent. These actions caused financial prejudice to the first respondent.
6. The provisional curator *ad litem* raised further issues of manipulative action on the part of the hotel operator which caused detriment to the first respondent. No rental had ever been paid by the hotel operator to the first respondent in respect of the use of the first respondent's immovable property, while the first respondent had to pay rental to the hotel operator for the use of the hotel's laundry, linen storage and shelving facility, which rental was *prima facie* exorbitant. The loan account also constituted potential prejudice to the first respondent.

7. After hearing further argument the court held in its judgment that the rights sought to be enforced by the applicants through the appointment of the curator *ad litem* had prescribed and that only the failure to pay rental for the use of the first respondent's land and the enforcing of excessive rental payments against the first respondent had not prescribed. It was only in respect of the pursuit of these two potential causes of action that the appointment of the curator *ad litem* was confirmed and in respect of which he was empowered to institute action on behalf of the first respondent. The applicants' further claims were held to have prescribed and no authority was granted to the curator to proceed with any action in respect thereof.
8. In effect, therefore, the court dismissed these claims on the ground of prescription.
9. The court's judgment does not deal in as many words with the rule *nisi* the return day of which arrived with the handing down of the court's judgment. As a matter of law, the rule therefore expired as it was neither confirmed nor extended. In addition, the reason for the issuing of the rule fell away once the court found that the potential causes of action in respect of which the rule called on interested parties to make submissions were unenforceable. Such conclusion would, with respect to all concerned, appear to be trite.
10. The applicant's legal advisers did not see matters in this light. They were of the view that the rule remained in existence because its fate was not dealt with in the judgment. It was for this reason that no leave was sought to appeal against its having been set aside when the applicants applied for leave to appeal against the court's judgment. Its fate was only referred to in supplementary heads of argument for the first time, when the proposition was

advanced that the rule should be confirmed at that stage as it was still in existence absent a specific finding to the contrary in the court's judgment.

11. Only after the application for leave to appeal had been dismissed did the applicants decide to seek condonation for the failure to apply for leave to appeal against the dismissal of the rule *nisi* within the time limits prescribed by the Rules. The reason for this omission was the mistaken view their legal advisors took of the law relating to provisional orders not dealt with by the court on their return day. The condonation application was vigorously opposed on the grounds that the explanation for the failure to seek leave to appeal against the court's refusal to confirm the rule was unacceptable.
12. It was furthermore argued that the wording of Rule 49 of the Rules of Court does not allow a piecemeal process of applying for leave to appeal and does not contemplate a second application for leave if not all the grounds of appeal have been raised; or all the issues needed to be addressed in an appeal have not been covered in the first application. The wording of the Rule does not deal expressly with this question. Given the conclusion to which the court has come in respect of the other issues that need to be addressed in this application the court will assume, without finally deciding, that a second application may be permissible if the circumstances are such that the interests of justice demand that an extraordinary leave to appeal be granted.
13. There is no debate about the fact that the reasons advanced for the non-compliance with the aforesaid time limits in seeking leave to appeal are unusual, to say the least. *Non constat*, however, that the explanation lacks candour or *bona fides*. Indeed, the applicants' view that the provisional order had survived the judgment was advanced during argument on the original

application for leave to appeal against the judgment already. In the light of these facts the explanation is acceptable.

14. The next question that needs to be considered is the prospect of success that the proposed appeal against the dismissal of the provisional order enjoys. If there is no realistic prospect of success there is no rational purpose in granting leave to appeal.
15. The grounds advanced for granting leave to appeal against the refusal to confirm the rule attack the court's finding that the causes of action forming the subject matter of the rule *nisi* had prescribed. As the court has already refused leave to appeal against the judgment based upon these findings, it is clear that no leave can be granted on the merits of the issue sought to be appealed against. Given the court's finding that the above mentioned causes of action have prescribed, it would be absurd to confirm a rule that could have no effect whatever on the dispute between the parties.
16. The proposed appeal is unlikely to succeed. The application for condonation for the late launching of an application for leave to appeal against the court's refusal to confirm the provisional order is dismissed with costs, such costs to include the costs of two counsel.
17. The respondents argued with conviction that the costs should be granted on a punitive scale if the application were to fail because of the extraordinary nature of the explanation that was proffered for the delay in launching the latter. Unusual the explanation certainly was, but it was neither *mala fide* nor vexatious and thus no punitive costs order is called for. The costs are to be taxed on the party and party scale.

The following order is therefore issued:

1. The application for condonation for the late launching of an application for leave to appeal against the court's dismissal of the provisional rule granted when the provisional curator *ad litem* was appointed, is dismissed with costs, such costs to include the costs consequent upon the employment of two counsel.

Signed at Pretoria on this 19th day of May 2014.



E BERTELSMANN

Judge of the High Court.