

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

CASE NUMBER:

3657/2007

5 **DATE:**

14 FEBRUARY 2011

In the matter between:

EDWARD STREET PROPERTY

10 **INVESTMENTS BK**

Applicant

and

JEAN LAMBRECHTS

1st Respondent

WILLEM JOHANNES LAMBRECHTS

2nd Respondent

MARIUS EDWARD ARTHUR CONRADIE

3rd Respondent

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J U D G M E N T E X T E M P O R É

Application for Leave to Appeal

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HENNEY, AJ:

After having listened to the arguments, insofar as this application is concerned, it now seems that a fresh argument
25 was raised that the particulars of claim did not make out a
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cause of action, because the evidence upon which the particulars of claim is based, was inadmissible evidence. In essence it is argued that having regard to the rule of Hollington v Hewthorn, [1943] 2 ALL ER 35 (CA), the judgment
5 was an opinion of another court which would be inadmissible in subsequent civil proceedings and because of that, there was no cause of action disclosed. That in essence it seems is the basis of this application for leave to appeal.

10 It is common cause that this argument was never raised as a defence in the papers. It is incumbent on the party that brings an application for leave to appeal, to afford reasons as to why that was not raised in the earlier proceedings. No such reasons were afforded by counsel as to why they omitted to
15 raise that argument in the initial application for summary judgment. It is now just foisted upon the court "oh we forgot about this, please listen to this argument also", but there were no justifiable reasons given by Advocate Tredoux as to why this was not raised earlier. A court will favourably consider a
20 fresh argument when considering whether leave to appeal should be granted, if compelling reasons had been given why it was not raised earlier.

The defendants have not done this. As said by the attorney for
25 the plaintiff, there had to be an exception raised against the
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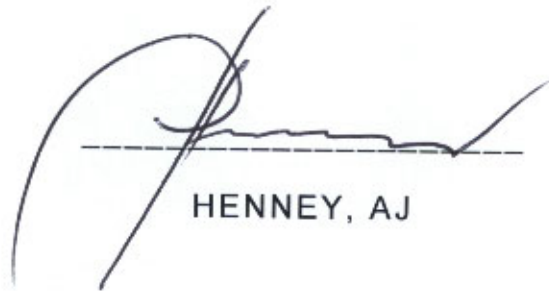
summons upon which the summary judgment was based, that was not done.

Should one have regard to the merits of this new argument,
5 then I am also not convinced that this argument has any merit
for the following reasons. In the Hollington v Hewthorn and
the other matters that were referred to as authority for the
position of the defendants, it became an issue upon which the
court in those matters had to adjudicate. When an issue is
10 disputed during the course of a subsequent civil trial, it would
be inadmissible to present the opinion of another court as
evidence to prove that disputed point. That is not what
happened in this matter.

15 In this matter there was never an issue as to the amount that
was disputed and whether it is a liquidated amount in money.
In essence what the defendants alleged was that they are not
liable because of certain reasons. In the subsequent argument
that was raised during the hearing of the summary judgment
20 application. The fact that whether the amount claimed was
proven or not, was not in dispute. The dispute was whether
the defendants, even if one should have regard to the new
defence that was raised during the summary judgment
proceedings was always "we are not liable, someone else is,
25 we do not dispute the amount".

**THE APPLICATION FOR LEAVE TO APPEAL IS DISMISSED
WITH COST.**

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A handwritten signature in dark ink, appearing to be 'Henney, AJ', is written over a horizontal dashed line. The signature is stylized with a large, sweeping initial 'H' and a checkmark-like flourish at the end. Below the signature, the text 'HENNEY, AJ' is printed in a simple, sans-serif font.

HENNEY, AJ