CONSTITUTIONAL COURT OF SOUTH AFRICA

Tiekiedraai Eiendomme (Pty) Limited v Shell South Africa Marketing (Pty) Limited and Another

CCT 96/18

Date of hearing: 12 February 2019
Date of judgment: 9 April 2019

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Tuesday, 9 April 2019, the Constitutional Court handed down judgment in an application for leave to appeal against a judgment of the Supreme Court of Appeal that dismissed an application to uphold an agreement between the applicant (Tiekiedraai) and the second respondent (Hall) for the sale of property on which the first respondent (Shell) had erected a filling station.

In 1991, Shell and Hall concluded a written lease agreement. In the lease agreement, Hall undertook that, if it ever wished to sell the land, it would first offer it to Shell on the identical terms on which it planned to sell to a third party (a right of pre-emption). Once the offer had been made, Shell would have 30 days within which to exercise this right.

On 28 October 2014, Tiekiedraai sent an email to Hall in which it stated that it wished to purchase the leased land for R17 million. Its email, which constituted an offer to purchase, stated that further terms and conditions would be agreed upon in due course. On 30 October 2014, Hall forwarded a copy of Tiekiedraai's email to Shell. The email accurately described the land to be sold. However, the further terms and conditions of the agreement had not yet been decided.

Shell immediately started the process to secure board approval to purchase the leased land. Hall took the view that Shell's 30-day period to exercise its right of pre-emption started to run on 30 October 2014 and therefore that the right of pre-emption would lapse on 30 November 2014. Accordingly, on 4 December 2014, Hall and Tiekiedraai

concluded a "Sale of Fixed Property Agreement". In that agreement, Hall agreed to transfer title of the leased land to Tiekiedraai. On 5 December 2014, Hall sent the agreement, which included all the terms of the sale, to Shell. Shell then attempted, unsuccessfully, to exercise its right of pre-emption in an email to Hall on 9 December 2014.

Aggrieved, Shell lodged an application against Hall and Tiekiedraai in the High Court, Gauteng Division, Pretoria (High Court), seeking to enforce its right of pre-emption. The High Court concluded that the requirements for triggering the 30-day period for Shell to exercise its right of pre-emption were detailed and explicit, and that Hall's email of 30 October 2014 fell short of these requirements. This meant that Shell had validly and timeously exercised its right of pre-emption, within 30 days of 5 December 2014, when Hall forwarded the full Tiekiedraai sale agreement to it. The High Court granted Shell an order in which Shell would step into the shoes of Tiekiedraai ("stepping-in" remedy). The effect of that order was that the agreement concluded between Tiekiedraai and Hall on 4 December 2014 was now "deemed to have been concluded between Hall and Shell". The Supreme Court of Appeal confirmed the reasoning and order of the High Court, finding that Shell had validly exercised its right of pre-emption.

Before the Constitutional Court, Tiekiedraai sought, for the first time, to challenge the "stepping-in" remedy the High Court granted as well as the contractual doctrines underlying it. Tiekiedraai sought leave to appeal on the basis that the interpretation of the disputed clause and the additional arguments it advanced raised arguable points of law of general public importance in terms of section 167(3)(b)(ii) of the Constitution.

In a unanimous judgment penned by Cameron J, the Court held that Tiekiedraai's arguments had to be considered in light of the Constitutional Court's decision in *Paulsen v Slip Knot Investments 777 (Pty) Limited*, which introduced the well-established interests of justice criterion for deciding applications for leave to appeal points of law. The criterion seeks to ensure that the Court does not entertain any and every application for leave to appeal brought to it. The Court found that the issues which Tiekiedraai sought to raise regarding the "stepping-in" remedy were indeed arguable points of law of general public importance. Further, the Court found that Tiekiedraai had persuasively pointed out that the common law in this area has long been unsettled. This affords rich ground for this Court's attention.

Nevertheless, these questions were not argued at all before the High Court and the Supreme Court of Appeal. The Court noted that it is wary of deciding issues as a court of first and last instance; this is especially so on questions of common law where the Constitutional Court values the views and expertise of the Supreme Court of Appeal. The Constitutional Court is not simply an additional appellate forum or "super-appeal court". A super-appeal cannot be available to an ordinary litigant who has who has simply not thought of a point before. The Constitutional Court's appellate powers exist not to determine novel issues raised for the first time before it, but to intervene in and correct determinations by lower courts on points that they have heard and decided.

Tiekiedraai thus failed to show that the interests of justice required that the questions it now wished to raise should to be decided by the Constitutional Court. The common law arguments equally failed to meet the interests of justice criterion. Given these considerations, the Court found that it need not consider whether there were good prospects of success on the points of law Tiekiedraai sought to raise. The Court accordingly refused leave to appeal with costs.

A concurring judgment by Jafta J recognised that legal points may be raised for the first time on appeal on condition that proper notice is given and there would be no unfairness or prejudice to other parties. However, the difficulty which confronted Tiekiedraai was that for it to raise those points it had first to seek permission of the Constitutional Court, which could be granted only if this Court had jurisdiction to entertain the appeal in the first place.