CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 63/14

In the matter between:

STOPFORTH SWANEPOEL & BREWIS INCORPORATED Applicant

and

ROYAL ANTHEM INVESTMENTS 129 (PTY) LTD First Respondent

YEUN FAN LAU Second Respondent

SHUN CHENG LIANG Third Respondent

Neutral citation:	*Stopforth Swanepoel & Brewis Incorporated v Royal Anthem Investments 129 (Pty) Ltd and Others* [2014] ZACC 26
Coram:	Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Leeuw AJ, Madlanga J, Nkabinde J, Van der Westhuizen J and Zondo J
Decided on:	2 October 2014
Summary:	Section 34 of the Constitution — right to access to courts — right to fair public hearing — notice and an opportunity to be heard — procedural and substantive fairness not satisfied in this instance

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the North Gauteng High Court, Pretoria):

1. Leave to appeal is granted.

2. The appeal is upheld.

3. The order of the Supreme Court of Appeal in paragraphs 1 and 2 is set aside and replaced with the following:

   "1. The first respondent, Royal Anthem Investments 129 (Pty) Ltd, is ordered to pay the second and third respondents, Yeun Fan Lau and Shun Cheng Liang—

      (a) the sum of R720 000;

      (b) the sum of whatever interest accrued on the said sum of R720 000 pursuant to its investment in an interest-bearing account calculated up to and including 9 December 2009;

      (c) interest on the sum of R720 000 calculated at the legal rate of 15.5 per cent per annum from 10 December 2009 to date of payment.

   2. The first respondent, Royal Anthem Investments 129 (Pty) Ltd, is ordered to pay the second and third respondents, Yeun Fan Lau and Shun Cheng Liang, the sum of R264 723 together with interest thereon calculated at the legal rate of 15.5 per cent per annum from 29 June 2011 to date of payment."

JUDGMENT

NKABINDE J (Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Leeuw AJ, Madlanga J, Van der Westhuizen J and Zondo J concurring):

Introduction

[1] This is an unopposed application for leave to appeal against a decision of the Supreme Court of Appeal. It arises in the aftermath of litigation in the North Gauteng High Court, Pretoria (High Court). The dispute arose out of the terms of a failed sale agreement of immovable property between the first respondent, Royal Anthem Investments 129 (Pty) Ltd (Royal), and the second and third respondents, Yeun Fan Lau and Shun Cheng Liang (respondents).

[2] The applicant, Stopforth Swanepoel & Brewis Incorporated (attorneys), and Royal were sued, as defendants, in an action for the recovery of certain funds paid by the respondents to Royal but which were held in trust by the attorneys. As will become evident later in this judgment, the action was withdrawn against the attorneys. The High Court ordered Royal to repay the funds plus interest. The litigation culminated in an appeal by Royal to the Supreme Court of Appeal.[1] The attorneys were not a party on appeal to the Supreme Court of Appeal. That Court nevertheless amended the restitution order of the High Court against Royal and ordered the

[1] *Royal Anthem Investments 129 (Pty) Ltd v Lau and Another* [2014] ZASCA 19; 2014 (3) SA 626 (SCA) (Supreme Court of Appeal judgment).

attorneys to repay the funds plus an increased amount of interest accrued thereon. The order on appeal is the subject matter of this application.

Factual background

[3] The factual background, dealt with in the judgment of the Supreme Court of Appeal, needs not be repeated here. It suffices to recapitulate the facts giving rise to this application. The respondents agreed to purchase a certain immovable property from Royal and pay it the sum of R3.6 million. The attorneys were the conveyancers in respect of the agreement.

[4] The relevant terms of the agreement were that— (a) the respondents were to pay the deposit into the attorneys' account; (b) the attorneys were obliged to invest the funds, for the benefit of the respondents, in an interest-bearing trust account in terms of section 78(2A) of the Attorneys Act[2] (Act); and (c) the funds were to be paid over to Royal on the date of registration of the property in the name of the respondents.[3] In terms of clause 3.3, the agreement would fall through if any condition thereof

[2] 53 of 1979. Section 78(2A) provides:

> "Any separate trust savings or other interest-bearing account—
>
> (a) which is opened by a practitioner for the purpose of investing therein, *on the instructions of any person*, any money deposited in his [or her] trust banking account; and
>
> (b) over which the practitioner exercises exclusive control as trustee, agent or stakeholder or in any other fiduciary capacity,
>
> shall contain a reference to this subsection." (Emphasis added.)

[3] Clause 2.2.1 reads:

> "Cash: . . . [p]ayable . . . after acceptance hereof which amount is to be deposited at the Conveyancing Attorneys. The amount will be invested in accordance with [s]ection 78(2A) of the Attorneys Act No 53 of 1979, . . . pending the registration of transfer of the property in the name of the [respondents]. The deposit and any other amounts will be paid over to the [attorneys] on date of registration of the property in the name of the [respondents]. Interest earned will be for the benefit of the [respondents]."

remained unfulfilled. To that end, the deposit with interest would be refunded to the respondents.

[5] The amounts of R720 000 for the deposit and R264 723 in respect of transfer duty were transferred to the attorneys by the respondents. These amounts were merely kept in trust by the attorneys and invested in an interest-bearing trust account with Nedbank, pending registration of transfer. It appears, however, that at some stage the attorneys paid the necessary duty to the South African Revenue Service (SARS) to facilitate registration of transfer which was seemingly delayed. Soon after, the sale fell through. This happened when the attorneys had, at the behest of Royal, demanded a substantial sum of interest in respect of the delayed transfer. The respondents refused to pay the interest and demanded a refund for the reason that the sale had lapsed in July 2009 through non-fulfilment of a condition. Royal denied this. When the funds remained unpaid, the respondents instituted action in the High Court against both the attorneys and Royal.

High Court proceedings

[6] The attorneys abided by the decision of the Court. The respondents withdrew the action against the attorneys and proceeded to trial against Royal only. Royal argued that it was entitled to keep the money paid in terms of the contract. However, the Court rejected this argument. It ordered Royal to pay the respondents—

> "1. . . . the amount of R720 000 plus interest thereon at the rate of 15.5 [per cent] as from 1 August 2009 until date of payment;

2. . . . the amount of R264 723 plus interest thereon at the rate of 15.5 [per cent] from the date of payment made by [respondents] to [the attorneys] until date of payment;
3. . . . costs at a scale as between attorney and client, inclusive of the costs occasioned by the employment of two counsel".

Supreme Court of Appeal proceedings

[7] With the leave of the High Court, Royal appealed to the Supreme Court of Appeal against the decision. It needs to be stressed that the attorneys were not party to the appeal. The claim against them had already been withdrawn, and they had filed their notice to abide. The Court held that the deposit had to be refunded to the respondents. Regarding the repayment of the amount paid as transfer duty, the Court found that it became necessary to reclaim the amount because registration of transfer did not proceed. The Court found that the SARS TD3[4] form proved that only R233 000 of the R264 723 had been paid to SARS, as transfer duty. The R233 000 was repaid by SARS on 21 June 2011 and the attorneys deposited the cheque in an interest-bearing trust account "until such time that the court decided to whom [the money] should be repaid." The Supreme Court of Appeal held that the appeal, also in respect of the amount paid for transfer duty, had to fail. The Court held that the attorneys' failure to refund the amounts was as a result of instructions of Royal. Royal therefore accepted it had to bear the costs.

[8] The Supreme Court of Appeal nevertheless considered it necessary to address certain "ancillary issues": it remarked that because the funds were kept by the

[4] The TD3 is a transfer duty form used by SARS.

attorneys, they should be ordered to make repayments of the capital sums plus interest. As regards the rate of interest, the Court ordered repayment at the higher, legal rate from August 2009. The Supreme Court of Appeal then varied the order of the High Court in paragraphs 1 and 2 and ordered the attorneys to pay to the respondents—

> "(1) . . . .
>
> (a) the sum of R720 000;
>
> (b) the sum of whatever interest accrued on the said sum of R720 000 pursuant to its investment in an interest-bearing account calculated up to and including 9 December 2009;
>
> (c) interest on the sum of R720 000 calculated at the legal rate of 15.5 [per cent] per annum from 10 December 2009 to date of payment.
>
> (2) . . . the sum of R264 723 together with interest thereon calculated at the legal rate of 15.5 [per cent] per annum from 29 June 2011 to date of payment."

[9] Aggrieved by the decision and believing that the order constituted an administrative error, the attorneys approached the Supreme Court of Appeal by way of a letter to its Registrar pointing out the mistake and enquiring whether the order could be corrected.[5] They attached the notice of withdrawal of the claim against them for

[5] For ease of reference and completeness the letter reads:

> "Regarding the judgment that was hand[ed] down by the Supreme Court of Appeal of South Africa on 26 March 2014 we humbly want to place the following on record.
>
> We believe as the 1st Defendant in this matter that there was an administrative error when the said order was typed alternatively [there was] a problem when this particular order was recorded.
>
> On 13 September 2010 the 1st Defendant received a notice of withdrawal of the Plaintiffs' claim against the 1st Defendant. We attach hereto as annexure 'A' a copy of this said notice of withdrawal of claim for your attention and consideration.
>
> This follows that as from 13 September 2010 the 1st Defendant was no longer a part of [the] proceedings in the High Court of North Gauteng, Pretoria as well as the Appeal from the 2nd Defendant to the Supreme Court of Appeal of South Africa. We [believe] that this might be the reason why the Honourable Justice Kruger instructed the 2nd Defendant to pay R720 000 as [well] as R264 723 with interest to the Plaintiffs well knowing by all parties that the above

the attention of the Court. They said that the order should have been granted against Royal only.

[10] In response the Acting Chief Registrar of the Court informed the attorneys:

> "The 'notice of withdrawal of claim' which is annexed to your letter had not been included in the appeal record that served before the Court. Instead the record contained a notice to abide the decision of the Court that had been filed on behalf of the [attorneys]. Those considerations, together with the submissions from the Bar on behalf of [Royal], prompted the order that was issued in the matter."

[11] The respondents' response to the attorneys' concerns was that—

> "[the respondents] did not request the Supreme Court of Appeal to order [the attorneys] to pay the interest, but that the Supreme Court of Appeal rather out of own movement proceeded to make such order after the bench during argument specifically pointed out that it was not satisfied with [the attorneys'] conduct herein. We therefore doubt that the order contains administrative errors as alleged."

In this Court

[12] The attorneys now seek leave to appeal against paragraphs 1(c) and 2 of the order of the Supreme Court of Appeal. The attorneys contend that the Supreme Court

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> amounts [are being] kept in trust by the 1st Defendant namely Stopforth Swanepoel and Brewis Inc . . . until such a time that a suitable court order could be obtained by the 2nd Defendant alternatively the Plaintiffs.
>
> In terms of the order given by the Supreme Court of Appeal of South Africa the 1st Defendant take[s] notice thereof and will immediately make payment as per Order 1(a) [and] (b) as well as the amount of R264 723 with interest to the Plaintiffs.
>
> However, we believe due to the reasons set out above that orders 1(c) and 2 should have read that the 2nd Defendant need[s] to pay interest [at] the legal rate of 15.5 [per cent] per annum on the amounts of R720 000 as well as on the amount of R264 723.
>
> We therefore humbly request you to amend the relevant order as indicated above.
>
> Your urgent attention into this matter will [be highly] appreciated." (Emphasis omitted.)

of Appeal's adverse order was granted by default in proceedings in which they were not a party. The complaint is that the order, as it stands, makes the attorneys liable to pay to the respondents the funds plus interest greater than the interest earned on those funds in the interest-bearing trust account. The attorneys explain that the interest at the legal rate of 15.5 per cent per annum would, as at April 2014 when the application was lodged, amount to approximately R600 000.[6]

[13] As is evident from the letters dated 28 March 2014 and 31 March 2014, addressed by the attorneys to the respondents' attorneys, the funds plus interest accrued thereon were paid to the respondents' attorneys.[7] This means that of the order

[6] The attorneys calculate the amount as follows:

> "1. Court order 1(c): R720 000 [at] 15.5 [per cent] as from 10 December 2009 until 26 March 2014 amounts to R478 809; [and]
>
> 2. Court order 2: R264 723 [at] 15.5 [per cent] as from 29 June 2011 until 26 March 2014 amounts to R112 641.46.
>
> Total 1 and 2 amounts to R591 450.46."

[7] The 28 March 2014 letter reads:

> "Ons heg hierby aan 'n afskrif van die bewys van betaling aan u.
>
> Geliewe kennis te neem dat die betaling gemaak word aan u op grond van die Hofbevel van die Appel Hof waarin gelas is dat die kapitaal (R720 000) plus Transport kostes (R264 723) aan u terugbetaal moet word.
>
> Die rente faktor soos in die bevel gestipuleer 1(b) tot en met 9 Desember 2009 word huidiglik bereken deur ons en sal spoedig aan u oorbetaal word.
>
> Ons het reeds aan u genoem dat ons onder dispuut plaas die moratore rente wat betaalbaar is en is die aangeleentheid reeds verwys na die Appelhof vir heroorweging.
>
> Ons is dus afwagtend van u kliënt se instruksies rondom die voorstel rakende klousules 1(c) en 2 van die hofbevel."

The 31 March 2014 letter reads:

> "Your letter dated 28 March 2014 refers.
>
> Attach[ed] hereto find proof of payment of R19 671.31 being the amount of interest until 9 December 2009.
>
> We are waiting the decision of the Supreme Court of Appeal and will revert to you.
>
> We have referred the matter towards our insurers and [await] their response.
>
> We will keep you informed."

of the Supreme Court of Appeal, paragraphs 1(a) and (b) and 2, in part, were complied with.

[14] The attorneys explain that the Supreme Court of Appeal's order in paragraph 2 does not provide for payment of accrued interest on the amounts for transfer duty. The order in paragraph 1(c) provides for interest from 10 December 2009 to date of payment. As at April 2014, it is contended, excess interest had accrued on the deposit and transfer duty, to the sum of approximately R164 240. The accrued interest on the amounts for transfer duty was not provided for in the order of the Supreme Court of Appeal. The attorneys undertook that all accrued interest would have been paid when this application is considered.

[15] The order of the Supreme Court of Appeal, it is submitted, constitutes an infringement of the attorneys' rights to a fair public hearing in terms of section 34 of the Constitution. It is contended further that the Supreme Court of Appeal is regarded as having discharged its duties (*functus officio*) and thus has no power to vary, correct or amend its decision. The attorneys therefore submit that the Supreme Court of Appeal misdirected itself and that the order should be set aside.

[16] In the directions issued by the Chief Justice, the attorneys were directed and the respondents were invited, if they so wished, to file submissions addressing whether (a) the Supreme Court of Appeal had power to correct its decision and (b) the attorneys' letter to the Registrar of that Court was a proper way of approaching that Court as

opposed to a substantive application. Neither Royal nor the respondents responded to the directions. This Court decided to dispose of the matter on the basis of these submissions, without oral argument.

[17] Apart from the jurisdictional aspect, the issues for determination are (a) whether the Supreme Court of Appeal proceedings constituted an infringement on the right to a fair public hearing; (b) whether that Court is *functus officio* to vary, correct or amend its order; (c) whether the letter addressed to the Supreme Court of Appeal was the proper way of approaching that Court as opposed to bringing a substantive application; and (d) appropriate relief. I deal first with the jurisdictional issue.

Should leave to appeal be granted?

[18] The Supreme Court of Appeal may, in terms of section 168(3) of the Constitution, decide appeals before it or issues connected with appeals. The right to a fair public hearing under section 34 of the Constitution is implicated in this matter. It follows thus that this application raises constitutional issues. The adverse order that is the subject matter of the appeal not only affects the attorneys but may also have implications for conveyancing attorneys acting as agents in agreements for the sale of immovable property in general. The order was granted by default against a non-party who had not been afforded an opportunity to be heard. There are prospects of success. The interests of justice require this Court to grant leave to appeal.

Was the attorneys' right to a fair public hearing infringed?

[19] Section 34 of the Constitution entitles everyone "to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court". The right to a fair public hearing requires "procedures . . . which, in any particular situation or set of circumstances, are right and just and fair."[8] "[A]t heart, fair procedure is designed to prevent arbitrariness in the outcome of the decision."[9] In *De Lange*, this Court said that—

> "[t]he time-honoured principles that no-one shall be the judge in his or her own matter and that the other side should be heard [*audi alteram partem*] aim toward eliminating the proscribed arbitrariness in a way that gives content to the rule of law. They reach deep down into the adjudicating process, attempting to remove bias and ignorance from it. . . . *Everyone has the right to state his or her own case*, not because his or her version is right, and must be accepted, but because, in evaluating the cogency of any argument, the arbiter, still a fallible human being, must be informed about the points of view of both parties in order to stand any real chance of coming up with an objectively justifiable conclusion that is anything more than chance. Absent these central and core notions, any procedure that touches in an enduring and far-reaching manner on a vital human interest . . . points in the direction of a violation."[10] (Emphasis added and footnotes omitted.)

[20] It is common cause that the dispute before the Supreme Court of Appeal did not extend to the liability of the attorneys. The protest by the respondents was that Royal had no grounds on which it could lay a claim to the funds. It is undisputed that the attorneys merely kept the funds on the instructions of Royal. After the dispute

[8] *Van Huyssteen and Others NNO v Minister of Environmental Affairs and Tourism and Others* 1996 (1) SA 283 (CPD) at 304G-H.

[9] *De Lange v Smuts NO and Others* [1998] ZACC 6; 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) at para 131.

[10] Id.

arose, the attorneys indicated that they had lodged the funds in an interest-bearing trust account until such time as a court order indicated to whom it should be repaid.

[21] Despite the fact that Royal had instructed the attorneys not to pay, the Supreme Court of Appeal seems to have been firm on granting the relief against the attorneys who were not party to the appeal, had not been joined and whose side was not even heard. The resolve or firmness is apparent from the Court's remarks that—

> "[t]his protest [by the respondents that there were no grounds on which Royal could lay claim to the funds] notwithstanding, the [attorneys appear] to have invested the amount of R233 000 with Nedbank on 28 June 2011 and presumably it is still there. Apart from [Royal's] instruction not to pay it over, I cannot understand why the [attorneys] could ever have thought it should not be immediately repaid to the respondents. They had received R264 723 from the respondents to pay SARS and not to pay [Royal]. That sum was never payable to, nor paid over to, nor held by or on behalf of, [Royal]; it could thus never have been an amount [Royal] was entitled 'to keep' under clause 6. . . . In the circumstances, the respondents were entitled to be repaid the transfer duty of R264 723.
>
> Accordingly, the appeal must fail in respect of both the deposit and the transfer duty. As I have mentioned, the [attorneys'] failure to refund both amounts was pursuant to [Royal's] instructions, and it was accepted by [Royal] that, in consequence, it should bear the costs both in the court below and in this court should its appeal fail."[11]

[22] The Supreme Court of Appeal, having concluded that there were no grounds on which Royal could lay a claim to the funds, acknowledged that the attorneys acted on instructions of Royal and decided that Royal's appeal must fail in respect of both the deposit and transfer duty. That should have been the end of the matter.

[11] Supreme Court of Appeal judgment above n 1 at paras 22-3.

[23] However the Court, of its own accord, addressed what it considered "ancillary issues".[12] The Court acknowledged that the High Court ordered Royal to pay the respondents the amounts. It said that the "parties", referring to Royal and the respondents, "are ad idem the funds lie with the [attorneys] and the latter, rather than [Royal], is the *party* who should be ordered to make payment of the capital sums and interest."[13]

[24] It is indisputable that the attorneys were not a party to the proceedings before the Supreme Court of Appeal. This much was acknowledged by that Court itself.[14] The Court nonetheless proceeded to make an adverse order of liability against the attorneys, despite its findings that they acted on instructions of Royal.

[25] The Supreme Court of Appeal also ordered the attorneys to pay back not only the funds but also an amount of interest greater than the interest the funds were earning in the interest-bearing trust account. This was so despite the fact that their actions were prescribed in terms of section 78(2A) of the Act.[15] The reason advanced for the decision of the Supreme Court of Appeal is thus not good. In my view, the twin notions of procedural and substantive fairness were violated. The manner in which the decision was arrived at and the reasons advanced adversely affected the attorneys' interests.

[12] Id at para 23.

[13] Id at para 24 (emphasis added).

[14] Id at para 1.

[15] See above n 2.

[26] There was no issue on appeal between the attorneys and the respondents regarding the attorneys' liability. The attorneys were not participants on appeal. They should, at the very least, have been invited to make submissions. That did not happen. Consequently, they were not heard. For these reasons, the attorneys are entitled to seek relief in this Court.

[27] In the view I take of the matter, it is not necessary to determine whether the Supreme Court of Appeal was *functus officio* or to pronounce on the correctness of the attorneys' approach to that Court by way of letter as opposed to a substantive application. Next for consideration: what is appropriate relief, in the circumstances?

Appropriate relief

[28] The relief sought by the respondents was aimed at restitution of the funds paid in respect of the sale agreement between Royal and the respondents. The funds have been paid to the respondents' attorneys. On the basis of the attorneys' undertaking regarding the accrued interest of the funds up to and including 9 December 2014, I assume that such interest has now been paid to the respondents or their attorneys. If not, it should be paid.

[29] What remains is whether the attorneys should be saddled with the liability to the respondents, in respect of the legal rate of interest in excess of the accrued interest in the interest-bearing trust account. I do not think so.

[30] The order of the Supreme Court of Appeal places monetary liability on the attorneys to pay the respondents interest in excess of the amounts held by them in trust. The fact that the funds were kept by the attorneys does not justify the imposition of such liability on them. The Supreme Court of Appeal refrained from expressing an opinion on whether payment to the attorneys should be regarded as payment to Royal.[16] Royal's argument was that the funds were paid to the attorneys as its agent meaning that effectively, payment was to Royal.[17] The attorneys acted on instructions of Royal and were obliged to keep the funds in an interest-bearing trust account. This much was accepted by the Court. The Court, however, rejected Royal's argument and saddled the attorneys with the liability to the respondents for interest on the funds in excess of the accrued interest in the interest-bearing trust account. I consider that the payment into the attorneys' account ought to have been regarded as payment to Royal.[18]

[31] Having determined that the attorneys' rights to procedural and substantive fairness have been violated, I conclude that the appeal must succeed and the order appealed against must be set aside. Assuming the funds have now been released, it is appropriate to correct the order of the Supreme Court of Appeal to avoid the attorneys being faced with a judgment against them. Royal is the party that should have been

[16] Supreme Court of Appeal judgment above n 1 at para 17.

[17] Id.

[18] The capacity in which the attorneys were holding the funds was as a fiduciary as is mandated by the Act. See above n 2.

ordered to repay the money paid in respect of the failed sale agreement plus legal interest as well as the interest that accrued on the funds.

Order

[32] The following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Supreme Court of Appeal in paragraphs 1 and 2 is set aside and replaced with the following:

"1. The first respondent, Royal Anthem Investments 129 (Pty) Ltd, is ordered to pay the second and third respondents, Yeun Fan Lau and Shun Cheng Liang—

(a) the sum of R720 000;

(b) the sum of whatever interest accrued on the said sum of R720 000 pursuant to its investment in an interest-bearing account calculated up to and including 9 December 2009;

(c) interest on the sum of R720 000 calculated at the legal rate of 15.5 per cent per annum from 10 December 2009 to date of payment.

2. The first respondent, Royal Anthem Investments 129 (Pty) Ltd, is ordered to pay the second and third respondents, Yeun Fan Lau and Shun Cheng Liang, the sum of R264 723 together with

interest thereon calculated at the legal rate of 15.5 per cent per annum from 29 June 2011 to date of payment."

For the Applicant:	Gildenhuys Malatji Inc.