**CONSTITUTIONAL COURT OF SOUTH AFRICA**

**Case CCT 96/18**

In the matter between:

**TIEKIEDRAAI EIENDOMME (PTY) LIMITED** Applicant

and

**SHELL SOUTH AFRICA MARKETING (PTY) LIMITED** First Respondent

**H L HALL & SONS (GROUP SERVICES) (PTY) LIMITED** Second Respondent

**REGISTRAR OF DEEDS, PROVINCE OF MPUMALANGA** Third Respondent

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| **Neutral citation:** | *Tiekiedraai Eiendomme (Pty) Limited v Shell South Africa Marketing (Pty) Limited* [2019] ZACC 14 |
| **Coram:** | Cameron J, Froneman J, Jafta J, Khampepe J, Ledwaba AJ, Madlanga J, Mhlantla J, Nicholls AJ and Theron J |
| **Judgments:** | Cameron J (unanimous): [1] to [27]<br>Jafta J (concurring) [28] to [43] |
| **Heard on:** | 12 February 2019 |
| **Decided on:** | 9 April 2019 |
| **Summary:** | Jurisdiction — leave to appeal — arguable points of law raised on appeal |

## ORDER

On appeal from the Supreme Court of Appeal:

1. The application for leave to appeal is dismissed with costs.

## JUDGMENT

CAMERON J (Froneman J, Jafta J, Khampepe J, Ledwaba AJ, Madlanga J, Mhlantla J, Nicholls AJ and Theron J concurring):

*Introduction*

[1] The principal question in this application for leave to appeal is whether this Court should consider novel arguments that the applicant, Tiekiedraai Eiendomme (Pty) Ltd (Tiekiedraai),[1] seeks to raise for the first time in this Court. This is after the High Court of South Africa, Gauteng Division, Pretoria (High Court) and the Supreme Court of Appeal both rejected its main argument in a contractual dispute with the first respondent, Shell South Africa Marketing (Pty) Ltd (Shell).

[2] On 30 October 2014, the second respondent, H L Hall & Sons (Group Services) (Pty) Ltd (Hall), the lessor of a piece of land on which Shell as lessee operated Gateway Motors in Mataffin near Mbombela, emailed to Shell a copy of an "offer to purchase" that Tiekiedraai had made to it on 28 October 2014. The offer specified the purchase price as R17 million. It accurately described the land to be

[1] Tiekiedraai's full registered name is K2014/49699/07 trading as Tiekiedraai Eiendomme (Pty) Ltd.

sold. However, the further terms and conditions of the agreement had not yet been decided. Clause 6.7 of Tiekiedraai's offer said that these were "to be agreed upon".

[3] Shell's lease agreement gave it a right of pre-emption over the leased land. Hall undertook in the lease that it would not sell or otherwise dispose of the premises to any third party without first having offered it to Shell. Clause 21 spelt out with precision what this meant. Before selling, Hall had first to offer to sell the land to Shell:

> "on the identical terms and conditions in all respects upon which [Hall] was prepared to sell or dispose of it … to the third party."

Clause 21.3 provided a 30-day period for Shell to exercise its right of pre-emption.

[4] When precisely was the 30-day period triggered? This formed the heart of the litigation in which Hall, Shell and Tiekiedraai have been enmeshed since December 2014. Did Hall's email of 30 October 2014 forwarding Tiekiedraai's offer to Shell trigger the 30 days? Shell said No – Tiekiedraai's offer was in its own terms incomplete: "further terms and conditions" were yet "to be agreed". So the trigger was only later – on 5 December 2014, when Hall forwarded to it a complete "Sale of Fixed Property Agreement". In that agreement, Hall agreed to transfer the title of the leased land to Tiekiedraai. Insisting on its view of clause 21, Shell in writing exercised its right of pre-emption on 9 December 2014.

*Litigation history*

[5] Ten days later, Shell lodged an application in the High Court. It cited Hall, Tiekiedraai and the Registrar of Deeds in Mpumalanga (who has abided by the Courts' decisions and taken no part in the litigation). The High Court held that clause 21's requirements for triggering the 30-day period for Shell's right of pre-

emption were detailed and explicit.[2] Hall's email of 30 October 2014 fell short.[3] This meant that Shell validly and timeously exercised its right of pre-emption later, within 30 days of 5 December 2014, when Hall forwarded the full Tiekiedraai sale agreement to it.[4]

[6] The High Court debated the precise form of the order with the parties. It said the order proposed, namely, that Shell would "step into the shoes of" Tiekiedraai "is not controversial and was not contested in argument".[5] It declared that the agreement with Tiekiedraai that Hall forwarded on 5 December 2014 was "deemed to have been concluded between [Hall] as the seller and [Shell] as purchaser".[6]

[7] In this lay the seeds of Tiekiedraai's novel stance before this Court. The "stepping-in" remedy the High Court granted is that envisaged in certain of the judgments of the Appellate Division in *Owsianick*[7] and *Oryx*.[8] Tiekiedraai would later assert that it is very far from being uncontroversial.

[8] The High Court refused leave to appeal, but the Supreme Court of Appeal granted it. The only issue Tiekiedraai took to that Court was the meaning of clause 21. It failed.[9] The Supreme Court of Appeal[10] dismissed the appeal with costs. The Court found that, on well-accepted principles of interpretation, Hall's email on 30 October 2014 did not contain the "identical terms and conditions in all respects" upon which Hall proposed to sell to Tiekiedraai. It did not comply with the plain

[2] *Shell South Africa Marketing (Pty) Ltd v H L Hall & Sons (Group Services) (Pty) Ltd* [2015] ZAGPPHC 1154 (22 May 2015) (Bertelsmann J) at para 11.

[3] Id at para 12.

[4] Id at para 13.

[5] Id at para 14.

[6] Id at para 15.1.

[7] *Owsianick v African Consolidated Theatres (Pty) Limited* 1967 (3) SA 310 (A); [1967] 3 All SA 337 (A).

[8] *Associated South African Bakeries (Pty) Limited v Oryx & Vereinigte Bäckereien (Pty) Limited* 1982 (3) SA 893 (A) (*Oryx*).

[9] *K2014/49699/07 t/a Tiekiedraai Eiendomme (Pty) Ltd v Shell South Africa Marketing (Pty) Ltd* [2018] ZASCA 4; 2018 JDR 0499 (SCA) (28 March 2018) (Supreme Court of Appeal judgment).

[10] Mbha JA, Swain JA, Mothle AJA, Hughes AJA and Schippers AJA concurring.

meaning of the lease. This meant Shell validly exercised its right of pre-emption on 9 December 2014. No mention was made of the order the High Court granted or of the stepping-in remedy.

*In this Court*

[9] Tiekiedraai now seeks leave to appeal to this Court. It persists with its argument that Shell exercised its right of pre-emption outside the 30-day period. But its chief arguments are radically different. It now seeks for the first time to challenge the "stepping-in" remedy the High Court granted and the contractual doctrines underlying it that were expounded in *Owsianick*, *Oryx* and *Moolman*[11] (now to be read in the light of this Court's decision in *Mokone*[12]). Hall opposed Shell's application in the High Court, but did not appear in the Supreme Court of Appeal or in this Court.

*Issues*

[10] Tiekiedraai does not claim that its dispute with Shell about clause 21 raises any constitutional issue. Instead, it says it should be granted leave to appeal because this clause plus its additional arguments raise arguable points of law of general public importance which this Court ought to consider and determine under section 167(3)(b)(ii) of the Constitution.[13]

[11] *Hirschowitz v Moolman* 1985 (3) SA 739 (A); [1985] 2 All SA 319 (A) (*Moolman*).

[12] *Mokone v Tassos Properties CC* [2017] ZACC 2*;* 2017 (5) SA 456 (CC); 2017 (1) BCLR 1261 (CC).

[13] Section 167(3) of the Constitution provides:

> "The Constitutional Court—
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> (a) is the highest court of the Republic; and
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> (b) may decide—
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> (i) constitutional matters; and
>
> (ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court; and
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> (c) makes the final decision whether a matter is within its jurisdiction."

[11] Tiekiedraai's argument on clause 21 must be considered in the light of *Paulsen*.[14] That was the first case in which this Court considered the amplified jurisdiction the Seventeenth Amendment conferred on it. This Court held that the words "which ought to be considered"[15] rest on the well-established interests of justice criterion. This, the Court said, "aims to ensure that the Court does not entertain any and every application for leave to appeal brought to it".[16]

[12] This has a practical bite. It means that arguable points of law of general public importance will be before this Court only if it grants leave to appeal; and it will grant leave involving points of this kind only if the interests of justice require it. Otherwise expressed, this Court will consider a law point, however interesting, arguable or important, only if the interests of justice require it to do so. The practical implication of this will emerge soon.

[13] Tiekiedraai cannot be correct that the contractual interpretation before the High Court and the Supreme Court of Appeal raises an arguable point of law of general public importance. The sole issue in clause 21 is the interpretation of its specific wording. Nothing of general or wider importance flows from it. It might be different if the lease had been a standard-form document in widespread use, affecting a large number of consumers; but Tiekiedraai did not and could not make this case.

[14] Instead, Tiekiedraai tried to invoke *Mokone*.[17] There this Court did consider a lease agreement. But the comparison is misconceived. *Mokone* concerned the renewal of a lease, which occurs every day in commercial practice. The question there was whether a right of pre-emption was renewed with the rest of the lease. On that, Madlanga J said, "the effect of an extension or renewal of a lease on clauses of

[14] *Paulsen v Slip Knot Investments 777 (Pty) Ltd* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC).

[15] Section 167(3)(b)(ii) of the Constitution in *Paulsen* id at para 13.

[16] *Paulsen* id at para 30.

[17] *Mokone* above n 12.

this nature arises not infrequently".[18] Its impacts and consequences were "substantial, broad-based, transcending the litigation interests of the parties, and bearing upon the public interest".[19] Not so here. The significance of the lease's wording is confined to three parties and three parties only: Tiekiedraai, Hall and Shell.

[15] Quite different are the questions of remedy, equity and precedence in time and in entitlement that Tiekiedraai raises from *Owsianick* and *Oryx*. These are questions of real and wide substance. Tiekiedraai seeks to put in issue the interpretation of rights of pre-emption, their impact on the law of property, and what remedies should be available against a third party purchaser for their breach and whether the High Court's order conforms with statutory formalities for the sale of land.[20]

[16] These questions plainly do raise arguable points of law of general public importance. Tiekiedraai pointed out, persuasively, that the common law in this area has long been unsettled – and might even be unascertainable.[21] In addition, as it notes, *Mokone* ventured on long-settled Appellate Division authority to mould it more closely to the Constitution. It asks this Court to do the same here.

[17] Should we? We may accept that the position as between three parties, two of whom are parties to a sale agreement that trenches upon the third's pre-existing pre-emptive right, including what remedy should be granted, affords rich ground for this Court's attention. But these questions, intriguing and consequential as they are,

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[18] Id at para 16.

[19] Id at para 17.

[20] In terms of section 2(1) of the Alienation of Land Act 68 of 1981.

[21] Naudé "The rights and remedies of the holder of a right of first refusal or preferential right to contract" (2004) 121 *SALJ* 636 at 641:

> "The court's failure to spell out the basis of the *Oryx* mechanism leaves the impression that it is a fiction at work with all the dangers flowing from it. One commentator has even declared that the precise nature, effect and basis of the so-called *Oryx* mechanism *cannot* be ascertained with certainty."

See, too, on the common law issues, Sonnekus "Regshandelinge in stryd met opsies en voorkoopregte enersyds en andersyds handelinge verrig deur regsubjekte onderworpe aan beperkinge van hul kompetensiebevoegdhede – inhoudelik nie-verwarbaar" (2018) 3 *TSAR* 624; Sonnekus "Die saaklike ooreenkoms in 'n abstrakte stelsel – *animus transferendi dominii* en voorkoopregte" (2018) 3 *TSAR* 638.

were not before the High Court or the Supreme Court of Appeal. And they are not before this Court. They arise for decision here only if this Court grants leave to appeal on them. In other words, unless Tiekiedraai passes the interests of justice test, meaning that this Court "ought"[22] to consider these issues, they cannot and should not be decided in this litigation.

[18] Alive to this difficulty, Tiekiedraai sought to persuade this Court to grant it the leave it required. But Tiekiedraai finds itself in a trap. It says: this Court should grant it leave because these questions are arguable and of public importance, and it has jurisdiction because they are arguable and of public importance. But this is circular. Tiekiedraai must show more than that interesting and arguable questions of importance arise. It must show why the interests of justice require them to be decided *in this litigation*. And in this quest Tiekiedraai fails entirely. No interests of justice considerations suggest that Tiekiedraai should be granted leave to appeal on its new common law arguments.

[19] This is not the consequence of judicial parsimony. It is the consequence of the Constitution's wording. A considerable road hump in Tiekiedraai's way is that this Court is wary of deciding issues as a court of first and last instance. This is especially so in questions of common law doctrine, where this Court often solicits the views and expertise of the Supreme Court of Appeal. In *Sarrahwitz* this Court noted that "[i]t is only under exceptional circumstances that this Court would agree to be burdened with the development of the common law as a court of first and last instance".[23] This caution is not insurmountable – as *Sarrahwitz* shows.[24] But there is no reason to override that compunction here. Tiekiedraai offers no persuasive reason why this Court should intrude on the consequences of the parties' dealings.

[22] Section 167(3)(b)(ii) of the Constitution.

[23] *Sarrahwitz v Maritz N.O.* [2015] ZACC 14; 2015 (4) SA 491 (CC); 2015 (8) BCLR 925 (CC) at para 21.

[24] Id at para 27, where this Court described the applicant as a "vulnerable litigant" to whom in the interests of justice "a measure of compassion" should be extended.

[20] Related is the respect this Court pays to the views of the High Court and of the Supreme Court of Appeal. Our precedents say that this Court functions better when it is assisted by a well-reasoned judgment (or judgments) on the point in issue.[25]

[21] And why are these missing here? The only reason is that Tiekiedraai did not raise the points it now wants to argue when the matter was before the High Court and the Supreme Court of Appeal. And the only reason for this seems to be that counsel did not think of them then. They occurred only after the Supreme Court of Appeal rejected what was then Tiekiedraai's only argument. This is an incident of professional service that should not be allowed to affect the best functioning of the appellate process.

[22] Tiekiedraai had a fair hearing before the High Court, where it was able to present all the arguments it wished.[26] And it had a fair appeal before the Supreme Court of Appeal, where it had the same opportunity. The arguments it then sought to advance were fully ventilated, properly considered and comprehensively determined.

[23] Tiekiedraai's further quest is possible only because of this Court's special place in the appellate hierarchy as a super-appellate court, which offers litigants the possibility of a super-appeal. A super-appeal cannot be available to an ordinary litigant who has simply not thought of a point before. It is different where a point of law is apparent on the papers and the parties simply misunderstood the law. There a court can raise the legal point of its own accord.[27]

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[25] *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs* [2005] ZACC 19; 2006 (1) SA 524 (CC); 2006 (3) BCLR 355 (CC) at para 39; *Carmichele v Minister of Safety and Security* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 55 and *Amod v Multilateral Motor Vehicle Accidents Fund* [1998] ZACC 11; 1998 (4) SA 753 (CC); 1998 (10) BCLR 1207 (CC) at para 33.

[26] Section 34 of the Constitution provides:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[27] See the exposition in *Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd* [2013] ZACC 39; 2014 (1) SA 521 (CC); 2014 (2) BCLR 182 (CC) at para 39, particularly at para 39(b).

[24] That is not the case here. This Court cannot be taxed to consider novel points not raised before simply because of its position as a super-appellate body over all other courts. Generally speaking, apart from its power to afford direct access,[28] this 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.

[25] Obviously cases arise where this Court should consider points of law not considered before. But there must be something extra. There is none here. Hall and Shell were contractants dealing at arm's length with each other, as were Tiekiedraai and Hall. So far it may appear, the parties had enough legal resources to enable each of them to secure their best interests in the courts below. That must be the end of the matter.

[26] Given these considerations, whether the arguable points of law Tiekiedraai seeks to invoke have good prospects on appeal does not arise. Nor do the questions whether the matter is academic for Tiekiedraai (as Shell contended), or whether the High Court order strips Tiekiedraai, as it claimed, of its entitlement to claim damages against Hall.

*Order*

[27] The following order is made:

1. Leave to appeal is refused with costs.

JAFTA J:

[28] Section 167(6) of the Constitution.

[28] I have had the benefit of reading the judgment of my colleague Cameron J (first judgment). I agree that leave to appeal should be refused for lack of jurisdiction. I write to provide additional reasons for refusing leave.

[29] It is now trite that this Court may decide matters in respect of which it has jurisdiction. And that jurisdiction becomes present either if the matter raises a constitutional issue or an arguable point of law of general public importance which ought to be considered by this Court.[29] Tiekiedraai attempted to rely on the latter basis of jurisdiction.

[30] Since Tiekiedraai sought leave to appeal, it was duty bound to demonstrate that the matter in which it sought leave raised an arguable point of law of general public importance. This it could have done by identifying that point in the record which forms the subject-matter of the appeal.

[31] Put differently, the arguable point of law must appear in or emerge from the record of appeal because it is the record that determines the scope of the appeal. The judgment appealed against must ordinarily be tested against issues which were placed before the Court that granted it. This is because an appeal corrects mistakes in the decision of the court below.

[32] Here, Tiekiedraai tells us that there are three arguable points of law but two of them were not raised in the courts below. The first is contestation about the right of the holder of a pre-emptive right to step into the shoes of a third party with whom the grantor of that right had concluded a sale agreement. This right was recognised in *Oryx*[30].

[29] *Paulsen* above n 14 at paras 13-6. See also section 167(3) above n 13.

[30] *Oryx* above n 8. See also *Moolman* above n 11.

[33] The second point, which is related to the first, is that the declaration of the kind the High Court granted, that a contract of sale exists between the grantor and grantee of the right of pre-emption on the terms concluded by the grantor with a third party disregards legal principles that are foundational to our law of contract. Tiekiedraai accepts that both these points were not raised before the Supreme Court of Appeal which granted the decision against which Tiekiedraai seeks to appeal.

[34] In order to rely on those points, Tiekiedraai called to help the principle that legal points may be raised for the first time on appeal on condition that proper notice is given and there is no unfairness or prejudice to other parties. Reliance was placed on *Naude*.[31] But the difficulty confronting Tiekiedraai is that since these are not constitutional points it must found jurisdiction on them as arguable points of law of general public importance in terms of section 167(3)(ii) of the Constitution. This provision specifies that this Court must grant leave to appeal if the points are to be argued. Thus, for Tiekiedraai to raise these points, it had to obtain the leave of this Court first: but this could be granted only if this Court had jurisdiction to entertain the appeal, in the first place.

[35] Differently put, the Constitution requires that the matter must raise an arguable point of general public importance for this Court to grant leave to appeal to hear it. And the Court cannot grant that leave on a fabricated point that does not appear or emerge from the record.

[36] So, with the points not emerging from the record, and not having been raised in the Courts below, Tiekiedraai found itself in a dilemma. Permission to raise a legal point for the first time on appeal applies in instances where the appeal court has jurisdiction over the appeal. Without jurisdiction, it would be incompetent for a court to grant permission, for a court may only make rulings in respect of a matter over which it already has authority to adjudicate. What Tiekiedraai seeks here is that this Court must first grant it permission to raise the two points and once such permission is

[31] *Naude v Fraser* [1998] ZASCA 56; 1998 (4) SA 539 (SCA) at 558.

given, then this Court would have competence to entertain the appeal. This amounts to putting the cart before the horse. To change the metaphor, Tiekiedraai seeks to pull up jurisdiction from its own bootstraps. That is not permissible.

[37] When this was put to Tiekiedraai at the hearing, it realised the difficulty and submitted that it relied on the third arguable point of law. This was described as the proper interpretation of the right of pre-emption contained in clause 21 of the lease between Hall and Shell. It contended that both Courts below incorrectly interpreted that clause by assigning a literal meaning to the language employed.

[38] The submission lacks substance. There is nothing in the lease that indicates that the language used in clause 21 carries some meaning other than its ordinary meaning which was how the Court below construed it. The words employed in the clause were not defined so as to give them a special meaning. The fact that the meaning advanced by Tiekiedraai differs from the interpretation of the Court below does not, without more, give rise to an arguable point of law.

[39] A point of law is arguable if it carries some prospects of success.[32] As observed in *Paulsen*, it is not every argument that renders a point of law arguable. The point must have reasonable prospects of success when considered in the context of the entire case.

[40] But even if one were to accept that an arguable point of law was raised, that would not be enough for purposes of jurisdiction. The point must transcend the interests of the parties in a particular litigation. It must affect the interests of the wider public, hence it has to be of general public importance. It may not affect the interests of the entire public but as a minimum it must implicate the interests of a section of the public, large enough to be regarded as of general importance.[33]

[32] *Paulsen* above n 14 at paras 21-2.

[33] Id at para 26.

[41] The clause with whose interpretation we are concerned with here is peculiar to the lease between Hall and Shell. What makes it peculiar is the specific details in its terms which are not generally found in leases. Its generality is limited to the nature of the pre- emption it confers upon Shell.

[42] Lastly, even if an arguable point of law of general public importance was raised, it would not follow that jurisdiction was established. Over and above that, the applicant must demonstrate that the point relied on ought to be considered by this Court. This involves the exercise of a discretion on the part of this Court. The applicant must point to factors which warrant that the matter ought to be entertained. There may be an overlap between this requirement and the enquiry on the interests of justice, the other condition for the granting of leave. Jurisdiction and the interests of justice remain separate requirements.

[43] Tiekiedraai has failed to meet these requirements and consequently has not shown that this Court's jurisdiction is engaged.

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| For the Applicant: | Adv C H J Badenhorst SC and Adv L I Schäfer instructed by Hough & Bremner Attorneys |
| For the Respondents: | Adv M Smit instructed by Cliffe Dekker Hofmeyer Inc |