

SOUTH AFRICA / JUDGMENT

B-Sure Africa Insurance Brokers (Pty) Ltd and Others v Dotsure Insurance Company Limited and Another (A2023/041879) [2024] ZAGPJHC 958 (24 September 2024)

[2024] ZAGPJHC 958

COURT

South Gauteng High Court, Johannesburg

BEFORE

B.C Wanless, Adams, Wilson

CASE / FILE NUMBER

A2023/041879

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

Case

No: A2023-041879

(1)

REPORTABLE: NO

(2) OF INTEREST TO OTHER

JUDGES: NO

(3) REVISED YES

SIGNATURE

DATE: 24 Sept 2024
In
the matter between
B-SURE
AFRICA INSURANCE BROKERS (PTY) LTD
First Appellant
UBERSURE
INSURANCE BROKERS (PTY) LTD
Second Appellant
STEPHEN
WILLIAMS
Third Appellant
BYRON
PUCKLE
Fourth Appellant
and
DOTSURE
INSURANCE COMPANY LIMITED
First Respondent
FORSURE
SA (PTY) LTD
Second Respondent

JUDGMENT

WANLESS J (Adams J and Wilson J concurring)

Introduction

- [1] This appeal is by leave of the Supreme Court of Appeal (“the SCA”) in respect of the order granted by Senyatsi J (“the Senyatsi order”) in the High Court of South Africa (Gauteng Division, Johannesburg) on the 16th of September 2022 under case number 4302/2022.
- [2] In terms of the Senyatsi order the Appellants were found to be in contempt of the order granted in this Court on 14 November 2019 by Mtati AJ (“the Mtati order”) and the Third Appellant (Stephen Williams) was committed to prison. The Senyatsi order was granted despite the fact that the Respondents (Applicants in the court a quo) abandoned such relief and only sought an order declaring the Appellants (Respondents in the court a quo) to be in breach of the settlement agreement entered into between the parties and/or the Mtati order (“the lesser relief”). The lesser relief was not included in the Senyatsi order.

- [3] It being common cause between the parties that the court a quo had erred in granting the aforesaid relief the Respondents were requested, by the Appellants, to abandon same and/or agree that the Appellants should be granted leave to appeal against the Senyatsi order. The Respondents declined this request. In the premises, it was necessary for the Appellants to institute this appeal. The Respondents did not file an application for leave to cross-appeal on the basis that the court a quo should have granted the lesser relief.
- [4] During the course of argument at the appeal before this Court, Counsel for the Respondents (who had requested this Court to grant the lesser relief) was asked as to whether this Court, sitting as a court of appeal, had the requisite jurisdiction to grant the relief sought by the Respondents in the absence of a cross-appeal. Whilst it was submitted, on behalf of the Respondents, that this Court did indeed have such jurisdiction, Respondents' Counsel was unable to provide this Court with any authority in respect thereof. Following the hearing of this appeal on the 28th of February 2024 the legal representatives of the Respondents sought leave, from this Court, to bring to the attention of this Court relevant authorities dealing with the foregoing issue. Arising therefrom, this Court issued a directive whereby both parties were entitled to file concise Supplementary Heads of Argument dealing with the issue. These Supplementary Heads of Argument were received by this Court on or about the 22nd of March 2024. In the premises, judgment in this matter was finally reserved on that date.
- [5] Arising from the foregoing the first issue for this Court to decide is whether, in the absence of a cross-appeal by the Respondents, this Court has the requisite jurisdiction to find that the court a quo should have granted the lesser relief. In the event of this Court holding that this Court does not have such jurisdiction then the appeal must be successful on the basis that it is common cause between the parties that the Senyatsi order should be set aside. In the event that this Court holds that it does have the jurisdiction to consider the lesser relief as sought by the Respondents, then it would be incumbent upon this Court to make an appropriate order in respect thereof.

The case for the Respondents

- [6] In light of the fact that, inter alia, the issue of "jurisdiction" (as set out above) was raised (primarily) on behalf of the Respondents, it is convenient to deal first with the submissions made on behalf of the Respondents. Thereafter, the submissions made on behalf of the Appellants will be considered.
- [7] Broadly speaking the case for the Respondents rests on two premises. These are:
- 7.1 the law prior to and after the Superior Courts Act, 10 of 2013 ("the Act") coming into operation on 23 August 2013 with reference to subsection 19(d) of the Act; and
- 7.2 the decision of the Full Court of this Division in the matter of Octagon Chartered Accountants v Additional Magistrate, Johannesburg and Others).[1]

The position prior to the Superior Courts Act

The position after the Superior Courts Act

“The Supreme Court of Appeal or a Division exercising appeal jurisdiction may, in addition to any power as may specifically be provided for in any other law – confirm, amend or set aside the decision which is the subject of the appeal and render any decision which the circumstances may require.”

- [10] Following thereon the Respondents seek to rely on the decision of Octagon where the Full Court of this Division considered, inter alia, the effect of subsection 19(d) of the Act and whether an appeal court may alter or vary an order where no cross-appeal had been made. Octagon was decided after the Act came into force and the Full Court held, inter alia, on the facts which existed in that matter and in terms of subsection 19(d) of the Act, that the Full Court, as an appeal court, did have the power to vary the order of the court a quo.
- [11] Counsel for the Respondents (Adv AG South SC, with him Adv JHF Le Roux) did not cite any further authorities in the Respondents’ Supplementary Heads of Argument in support of the aforesaid

submissions

made on behalf of the Respondents.

The case for the Appellants

- [12] Adv EJJ Nel (on behalf of the Appellants), submitted that the Respondents had effectively changed their case “midstream”. Having admitted that the order in the court a quo should not have been granted, it was submitted that the Respondents now request this Court to replace the Senyatsi order with an order granting the Respondents the alternative or lesser relief.
- [13] In support of this submission it was further submitted that:
- 13.1 the Respondents had failed to comply with the Uniform Rules of this Court (“the Rules”);
- 13.2 this Court does not have the jurisdiction to entertain the request of the Respondents to replace the Senyatsi order;
- 13.3 subsection 19(d) of the Act does not confer any more powers on an appeal court than what it had prior to the Act;
- 13.4 Octagon does not assist the Respondents. In fact, it is not even necessary for this Court to consider the principles as set out therein.

Discussion

The failure of the Respondents to comply with the Rules and sections of the Act.

- [14] It is common cause in this matter that the Respondents did not apply for and, hence did not obtain, leave to appeal the court a quo's failure to grant the lesser relief which is now sought by the Respondents, as prescribed by subrule 49 (1) of the Rules. Also, it is common cause that the Respondents failed to note a cross-appeal in respect of that failure in terms of the provisions of subrule 49(3) of the Rules.
- [15] Arising therefrom, it is imperative to note that (a) the Respondents have failed to comply with the peremptory provisions of both of the aforesaid subrules and (b) the Respondents have failed to place before this Court an application seeking condonation for the foregoing non-compliance on behalf of the Respondents. In addition, the Respondents elected not to take these steps conditionally in the event of any opposition to the Appellants' appeal to set aside the Senyatsi order being unsuccessful.
- [16] In addition to the foregoing, it is also necessary to take cognisance of the fact that, in terms of section 16 of the Act, an appeal lies only "upon leave having been granted" and section 17 of the Act prescribes the test and procedure for obtaining that leave to appeal.
- [17] In the fairly recent decision of *DRD Gold Ltd v Nkala*[5] the SCA held[6] as follows:
- "[17] Similar to the position under the Supreme Court Act , the jurisdictional requirements for a civil appeal from the High Court sitting as a court of first instance, are twofold. These are that:*
- (a) There is a 'decision' of the High Court within the meaning of s 16(1)(a); and
 - (b) The required leave to appeal has been granted under s 17(2) by either the High Court or this court.

It goes without saying that both requirements must be present."

- [18] Neither the Rules[8] nor the Act distinguish between appeals and cross-appeals. Also, the Supreme Court Act did not draw any such distinction and, in the matter of *Gentiruco AG v Firestone SA (Pty) Ltd*[9] the SCA held:

"Why should a cross-appellant be treated more favourably than an appellant? It may happen quite fortuitously that one party notes his appeal before the other. Moreover, both parties have already had an equal bite at the appeal cherry in the Provincial Court. And why should a cross-appeal be exempted from leave to appeal, whether or not it arises out of or is incidental to the subject-matter of the appeal? After all, one of the objects in circumscribing the right to a further appeal is to ensure that generally only arguable appeals of substantial importance to the parties {that label is by no means used with any precision} are brought before this Court ; cross-appeals are not necessarily of that quality, even if they do arise out of or are incidental to the subject -matter of the appeal. Indeed, it by no means necessarily follows that, because a lower Court grants leave to appeal, it will also grant leave to cross-appeal." [10]

- [19] The importance of this dictum by the SCA cannot be over-emphasised. In the present matter, in light of the failure of the Respondents to seek leave to cross- appeal, both the learned Judge in the court a quo and the SCA, when leave to appeal was refused in the court a quo and the Appellants petitioned the SCA for such leave, giving rise to the appeal before

this Court, were denied the benefit of considering whether, in the event of the appeal being unsuccessful, the court of appeal (this Court) should be entitled to consider the lesser relief sought by the Respondents (or not).

Has the Act changed the common law by giving this Court (a court of appeal) the jurisdiction to replace the Senyatsi order with a different order in the absence of a cross-appeal by the Respondents?

- [20] As dealt with earlier in this judgment, it is common cause that prior to the commencement of the Act our courts had confirmed, on numerous occasions, that an appeal court did not have the requisite jurisdiction to vary an order of the court a quo in the absence of a cross-appeal. The Respondents submit that since the commencement of the Act on 23 August 2013, in terms of subsection 19(d) thereof, an appeal court does have the requisite jurisdiction to enable it to do so. In support of this proposition the Respondents rely on the decision in *Octagon* (supra).
- [21] The predecessor to the present Act was the Supreme Court Act, 59 of 1959 (“the Supreme Court Act”). Subsection 22(b) of the Supreme Court Act was virtually identical to subsection 19(b) of the present Act and provided that an appeal court had the power to “confirm, amend or set aside the judgment or order which is the subject of the appeal and to give any judgment or make any order which the circumstances may require.”
- [22] If a direct comparison between the wording of subsection 22(b) of the Supreme Court Act and subsection 19(b) of the Act^[11] is carried out, it is clear that the “amendments” in respect of the same provision in the Act do not, in any manner whatsoever, alter the meaning thereof. In this regard:

22.1 the words “the judgment or order” in subsection 22(b) have been changed to read “the decision” in subsection 19(b); and

22.2 the words “to give any judgment or make any order” in subsection 22(b) have been changed to read “render any decision” in subsection 19(b).

- [23] In the premises, it must be accepted that (i) the authorities cited by the Respondents^[12] in support of the common cause fact that an appeal court may not, inter alia, vary the order of the court a quo in the absence of a cross-appeal, remain good authority and (ii) the provisions of subsection 19(d) of the Act have not altered or changed the common law pertaining thereto, post the Act coming into operation on the 23rd of August 2013. The finding as set out in (ii) will be dealt with in more detail hereunder.

Has the common law changed pursuant to the commencement of the Act?

- [24] Post 23 August 2013 the SCA has, on a number of occasions, confirmed that a court of appeal will only have jurisdiction to consider substantive relief sought by a respondent if leave to cross-appeal has been obtained as required by sections 16 and 17 of the Act.

[25] In the matter of *Monyepao v Ledwaba*[13] the SCA held:

“.....whatever the subject-matter of the proposed cross-appeal, leave to cross-appeal is necessary because the rules relating to appeals apply

mutatis mutandis to cross-appeals.”[14]

[26] Further, in the matter of *Gent v Du Plessis*[15] it was held by the SCA that:

“[15] As mentioned above, Mr du Plessis’ application for special leave to cross-appeal was refused by this court. This had a significant impact on the matter. In Shatz Investments (Pty) Ltd v Kalovyrrnas this court was confronted with the question whether, without any cross-appeal, it could correct an order of a trial court by making a prayer for interest, which that court had not granted. Trollip JA said the following:

‘...The court a quo did not award it, possibly because it was not claimed in the pleadings. But, be that as it may, in the absence of any cross-appeal to correct the order of the court a quo to plaintiff’s advantage and defendant’s detriment by including an award of such interest, we cannot deal with it....’

[16] This dictum reaffirmed trite principles. These are that a respondent in an appeal may support the order appealed against on any ground that properly appears from the record. In order to obtain a variation of the order, however, a respondent must cross-appeal with the necessary leave, save perhaps in exceptional circumstances where there is no prejudice to the appellant.”[16]

Does Octagon assist the Respondents? Is it even necessary for this Court to consider the principles as set out therein?

[27] In the Supplementary Heads of Argument filed at the request of the Respondents and with the leave of this Court, Counsel for the Respondents relied solely on Octagon in support of the submission that, post the promulgation of the Act, this Court had the requisite jurisdiction to replace the order of the court a quo despite the absence of a cross-appeal. As set out earlier in this judgment, Octagon is a decision of the Full Court of this Division. However, not only did Counsel for the Respondents rely solely on Octagon but, as correctly pointed out by Counsel for the Appellants, no decisions of the SCA (or for that matter the Constitutional Court) are relied upon by the Respondents.

[28] As was correctly submitted by Counsel for the Appellants, in accordance with the doctrine of stare decisis, it is trite that this Court (the Full Court of this Division) is bound to follow the decisions of the SCA (as set out above) and not Octagon. In the premises, the submission made on behalf of the Appellants that it is not necessary for this Court to consider Octagon, must be correct.

[29] Nevertheless, in the event that this Court has, in any manner whatsoever, misunderstood or misinterpreted the sole reliance by Counsel for the Respondents upon the decision in Octagon (either intentionally or in error), in the face of the binding authority of a superior court (the SCA), it is desirable to deal (as briefly as possible in order not to burden this judgment unnecessarily) therewith.

[30] It is correct that the Full Court in Octagon considered the question as to whether, in light of subsection 19(d) of the Act and contrary to the common law principle that a court of appeal may not alter an order to the detriment of the appellant in the absence of a cross-appeal, whether that court, on the particular facts before it, could, in that instance, do so.

[31] Counsel for the Appellants submitted (correctly in the opinion of this Court) that Octagon is not authority for the proposition that an appeal court has jurisdiction to grant a respondent substantive relief without a valid cross-appeal. This submission was based on:

31.1 Octagon did not concern the jurisdictional requirements for an appeal or cross-appeal. The Full Court did not deal with sections 16 or 17 of the Act or even consider the authorities in relation thereto, namely *Goodridge v Botha*[17] and *Gentiruco* (supra));

31.2 Octagon was about the power of an appeal court to vary a procedural order where a failure to do so would give rise to impractical and untenable results. In this regard, there can be no doubt that the High Court has such power to regulate its procedures in the interests of the proper administration of justice; and

31.3 the question in the present appeal before this Court is whether this Court can grant a substantive order where a cross-appeal for such relief was not made. The erstwhile Appellate Division and the SCA have, since *Goodrich* and *Gentiruco*, consistently found this to be impossible on the basis that the jurisdictional requirements relating to appeals also apply to cross-appeals.[18]

[32] Adv EJJ Nel further submitted that the Respondents' application of Octagon is incorrect in that:

32.1 the Respondents have not pointed to any consequences of upholding the appeal (and dismissing the application in the court a quo) that would be impractical or untenable (which is what Octagon was about);

32.2 instead the Respondents complain about not being afforded a bite at the proverbial appeal cherry. However, they only have themselves to blame for not having noted a cross-appeal or seeking leave to cross-appeal.

[33] This Court is in agreement with the aforesaid submissions made on behalf of the Appellants.

Conclusion

[34] Apart from that as already dealt with herein, there are certain fundamental difficulties with the relief as sought by the Respondents. These are:

34.1 the relief sought by the Respondents is on the basis of the Appellant's appeal being dismissed. In the premises, the issue as to whether this Court has jurisdiction to grant the relief sought by the Respondents in the present matter only merits consideration if the appeal were to be refused;

34.2 as dealt with earlier, it is common cause that the appeal setting aside the Senyatsi order must be successful;

34.3 as part of the relief sought the Respondents do not seek an order that the hearing of the appeal be re-opened. That relief is limited to the replacement of the Senyatsi order with the so-called lesser relief;

34.4 however, the merits of the lesser relief were not ventilated at the hearing of the appeal and the Appellants have not been afforded an opportunity of being heard by this Court on the issue;

34.5 in the premises, if the order sought by the Respondents was granted by this Court that would have the effect of infringing upon the right of the Appellants to a fair hearing.[19]

[35] Ultimately, should this Court grant the relief as sought by the Respondents the Appellants would be severely prejudiced in that a substantive order (and not merely a procedural one as in Octagon) would be confirmed against them. Conversely, if the appeal is upheld, there can be no prejudice to the Respondents. It remains open to the Respondents to enforce any of the rights available to them in terms of, inter alia, the settlement agreement entered into between the parties.

[36] At the end of the day (as also correctly submitted by the Appellants' Counsel) the law in this matter is clear. That is:

36.1 in terms of sections 16 and 17 of the Act, an appeal court does not have the requisite jurisdiction to consider issues on appeal without leave to appeal to that court having been granted;

36.2 there is no distinction between appeals and cross-appeals. As held by the erstwhile Appellate Division, a cross-appeal is "...simply an appeal which is conveniently tacked on to another appeal".[20]

36.3 it must follow that without there being a valid cross-appeal (with leave having been granted) a court of appeal does not have jurisdiction to consider substantive and alternative relief sought by a respondent;

36.4 under the circumstances, this Court does not have the jurisdiction to deal with the "lesser" relief now sought by the Respondents.

[37] In light of the foregoing the appeal must be upheld.

Costs

[38] It is trite that, unless unusual circumstances exist, costs should normally follow the result. Further, it is trite that a court has a general discretion, to be exercised judicially, in respect of the issue of costs. No unusual circumstances exist in this matter that would cause this Court to deviate from the norm and deny the Appellants their costs.

[39] The Appellants seek an order that the Respondents pay the costs on the scale of attorney and client. It is common cause, alternatively, was not seriously disputed by the Respondents, that following upon agreement between the parties that the court a quo had erred in granting the relief that it did the Respondents were requested, by the Appellants, to abandon same and/or agree that the Appellants should be granted leave to appeal against the Senyatsi order. The Respondents declined this request. In the premises, it was necessary for the Appellants to institute this appeal.[21]

[40] Had the Respondents simply agreed to the eminently reasonable request made on behalf of the Appellants, both parties could have avoided the incurring of substantial legal costs. Instead, the Respondents declined to do so, thereby forcing the Appellants to institute this appeal and mulcting the Appellants in further costs. To make matters worse the Respondents opposed the appeal, thereby vastly increasing those costs. Not only did it become necessary for the Appellants to seek leave to appeal from the court a quo but (when that leave was refused by Senyatsi J) it became necessary for the Appellants to seek leave to appeal from the SCA (which leave was then granted).

[41] In opposing the appeal before this Court the Respondents failed not only to note a cross-appeal but also to seek leave to cross-appeal (from either the court a quo or the SCA). The failure of the Respondents to follow these basic rules of litigation did not deter the Respondents who then boldly pursued their opposition before this Court. In that regard, the Respondents proceeded to request this Court for leave to file Supplementary Heads of Argument which only resulted, once again, in increasing the costs.

[42] When considering the scale of costs to be awarded, it is trite that an important factor to be considered is whether the actions of a party have caused any inconvenience to the court. In this particular matter, it is clear that the path followed by the Respondents has caused great inconvenience to this Court. In this regard, it was necessary for this Court, inter alia, to not only peruse the record of appeal; hear argument and consider Supplementary Heads of Argument but, thereafter, to prepare this judgment.

[43] Arising therefrom, both the appeal roll and the already onerous workload of this Court, have been burdened unnecessarily. Having regard thereto (together with the other factors as dealt with above) it would be appropriate if this Court marked its displeasure by making an award that the Respondents pay the costs arising from this appeal on a punitive scale. Such an order would not only protect the integrity of this Court but would also ensure that,

insofar as possible, the Appellants would not be out of pocket in respect of the costs unnecessarily incurred by the actions of the Respondents. These costs will include the costs reserved by the SCA in the order of that court dated the 30th of March 2023, under case number 1251/2022.

[44] With regard to the costs of two Counsel the Appellant was only represented at the hearing by Junior Counsel. Likewise, only Junior Counsel drafted the Appellants' Supplementary Heads of Argument. However, it is apparent from the record of appeal that the Appellants were represented, at certain occasions, by both Junior and Senior Counsel. The Respondents were represented by two Counsel and sought an order in respect thereof, had the Respondents been successful in this appeal. Arising therefrom, the Respondents cannot be prejudiced in the event of this Court awarding the Appellants the costs of Senior Counsel, where so employed.

Order

[45] This Court makes the following order:

1. The appeal is upheld;
2. The order of Senyatsi J ("the Senyatsi order") in the High Court of South Africa (Gauteng Division, Johannesburg) on the 16th of September 2022, under case number 4302/2022, is set aside and replaced with an order dismissing the First and Second Applicants' application with costs, which costs are to be paid by the First and Second Applicants, jointly and severally the one paying the other to be absolved;
3. The Respondents are to pay the costs of this appeal, jointly and severally the one paying the other to be absolved, on the scale of attorney and client;
4. The costs as set out in paragraph 3 hereof are to include:
 - 4.1 the costs of the applications for leave to appeal in both the High Court of South Africa (Gauteng Division, Johannesburg) and the Supreme Court of Appeal; and
 - 4.2 the costs of two Counsel, including the costs of Senior Counsel, wherever so employed.

B. C WANLESS

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION

JOHANNESBURG

Date of Hearing: 28 February 2024

Judgment

reserved: 22 March 2024 Date of Judgment: 24 September 2024 APPEARANCES On behalf of the Appellants: Adv. E.J.J Nel Instructed by: Jansen & Jansen Inc. On behalf of the Respondents: Adv. A.G. South SC Adv. J.H.F. le Roux Instructed by: Edward Nathan Sonnenbergs Inc.

[1] 2018

(4) SA 498 (GJ)

[2] 1915 AD 611

[3] 1976

(3) SA 791 (AD)

[4] 1958

(3) SA 97 (AD)

[5] 2023

(3) SA 461 (SCA)

[6] At paragraph [17]

[7] Emphasis added; no citations

[8] Subrule 49(3) states “...the provisions of these Rules with regard to appeals shall *mutatis mutandis* apply to cross appeals.”

[9] 1972

(1) SA 589 (AD) at 607G – 608A

[10] Emphasis added.

[11] Paragraph

[9] *ibid*

[12] Paragraph

[8] *ibid*

[13] 2020 JDR 0875 (SCA) at paragraph [6]

[14] Emphasis added

[15] 2020 JDR 2865 (SCA) at paragraphs [15] and [16]

[16] Emphasis added

[17] 1954

(2) SA 540 (AD) at 544

[18] Setsedi v Mamelodi Town Council and Others [1991] ZASCA 148; 1992 (1) SA 483 (AD) at 494A; National Union of Metalworkers of South Africa (NUMSA) and Others v Henred Fruehauf Trailers (Pty) Ltd [1994] ZASCA 153; 1995 (4) SA 456 (AD) at 475F-G; Langa CJ and Others v Hlope 2009 (4) SA 382 (SCA) at paragraph [30]

[19] South African Health Products Regulatory Authority and Another v African Christian Democratic Party (869/2021) [2022] ZASCA 158 (21 November

2022) at paragraphs [15] to [18]

[20] Goodrich (supra) at 544.

[21] Paragraph

[3] ibid

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