

SOUTH AFRICA / JUDGMENT

Bella Rosa Investment Holdings v Silver Falcon Trading 84 CC (18681/2015) [2016] ZAWCHC 91 (28 July 2016) [2016] ZAWCHC 91

COURT

Western Cape High Court, Cape Town

BEFORE

A.G. Binns-Ward

CASE / FILE NUMBER

18681/2015

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Republic

of South Africa

IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

Case

number: 18681/2015

Not

reportable

Not

of interest to other judges

Before:

The Hon. Mr Justice Binns-Ward

Hearing:

28 July 2016

Judgment

delivered: 28 July 2016

In the

matters between: BELLA
 ROSA INVESTMENT HOLDINGS (PTY)
 LTD Applicant
 (Respondent
 in application for leave to appeal)
 and
 SILVER
 FALCON TRADING 84
 CC Respondent
 (Applicant
 in application for leave to appeal)

JUDGMENT

BINNS-WARD J:

- [1] The respondent in the principal case has applied for leave to appeal against the judgment of Ndita J ordering its eviction from the leased premises and directing that that the lessor's tacit hypothec of the applicant in the principal case 'be affected (sic) and confirmed'.
- [2] The principal case was entertained by the learned judge as an urgent application in the Third Division. As often happens in the urgent court, an order was made without reasons being furnished. The order did not expressly provide, as is customary in such circumstances, that reasons would be furnished upon application by either party in writing. Nevertheless, such a provision fell to be implied in my view. It is well established as a matter of constitutional principle that litigants are entitled to reasons from a court for its judgment.
- [3] As it happened, the respondent did apply to the learned judge for reasons; albeit that the application was apparently submitted outside the period provided for such requests in terms of rule 49(1)(c) of the Uniform Rules. Notwithstanding its lateness, I am prepared, in the exercise of the courts inherent discretion in respect of the regulation of its procedures and practices, to treat the request for reasons as having been made effectively.
- [4] The judge subsequently became indisposed due to ill health before reasons were furnished, and despite the passage of several months she has failed to resume office.
- [5] The application for leave to appeal was therefore enrolled at the instance of the applicant in the principal case for hearing before another judge and allocated by the Judge President for determination by me.
- [6] The respondent's counsel took a point in limine that the application was, to use counsel's words, 'premature', in the absence of reasons from Ndita J. Mr Woodland submitted that, in the absence of the judge's reasons, the application for leave to appeal could not competently be entertained

because one was not able to identify the basis upon which she had decided the case. As I understood the argument, an absence of reasons from the judge presented an absolute bar against the further disposal of the matter. The only way forward, suggested Mr Woodland, if one were not to await the judge's eventual recovery, was to have the principal application heard and determined afresh.

- [7] The respondent's counsel sought support for their argument in this respect from the judgment of Corbett JA in *Botes and Another v Nedbank Ltd* 1983 (3) SA 27 (A) and that of the Constitutional Court in *Strategic Liquor Services v Mvumbi NO and Others* 2010 SA 92 (CC). Neither of those judgments is on point in my respectful view. Neither of them deals with the position when the judge who heard and decided the matter has become prevented by force of circumstances from being able to give reasons. The

judgments merely go to emphasise the importance of the principle that parties are ordinarily and usually entitled to reasons for a judgment. Indeed, at paragraph 13 of the Constitutional Court's judgment, the qualification attached by the employment of the words 'ordinarily' and 'usually' is expressly articulated. It is also apparent that the absence of reasons, either for the judgment taken on appeal, or the judgment granting leave for it to go on appeal, had not prevented the Appellate Division from substantively disposing of the appeal in the *Botes* matter. It is evident from the report of the *Botes* case that the appeal in that matter had been dismissed in the leading judgment of Howard AJA, which was not reported. The reported judgment of Corbett JA was supplementary in character; given not on the merits of the case, but on the aspect of principle arising out of the lamentable failure of the court *a quo* in that matter to have furnished reasons.

- [8] The test in applications for leave to appeal is evident from the provisions of s 17(1) of the Superior Courts Act 10 of 2013. In the respects relevant for current purposes they essentially restate the common law. There must be a reasonable prospect that another court might on appeal determine the matter differently in a substantive sense, and the matter must appear to be a live matter in the sense that its determination on appeal should not appear to be in respect of a matter that had become moot. With benefit of insight into the papers before Ndita J, there is nothing that would disqualify me from being able to make those determinations. Indeed, s 17 expressly provides for the determination of applications for leave to appeal by a different judge if the judge whose judgment is impugned is not available to hear the application.
- [9] In my view there is no prospect that the application for leave to appeal against the eviction order would succeed. The applicant had sought the ejectment order on the basis of an alleged breach by the respondent of its rental payment obligations. The respondent disputed the allegations, but treated the institution of proceedings for its ejectment as a repudiation of the contract, which it accepted. It is clear then that on any approach the respondent was not entitled to remain in occupation of the premises and the applicant was entitled to its immediate eviction. Mr Woodland submitted that the acceptance of the repudiation had been conditional. I do not consider that that contention is supported on the papers. The

repudiation was subject to the reservation by the respondent of its rights. The rights that the respondent would have consequent upon its acceptance of the alleged repudiation by the applicant are determined by law, and not

by conditions which the respondent might have purported to (but did not) attach. Those rights did not include a right to remain in the premises.

- [10] The fact that the ejectment order may in the end have been supported by the respondent's allegations rather than those by the applicant in its founding papers, did not result in the judge's order being substantively incompetent. It was a consideration that might have exercised the learned judge when it came to the formulation of a costs order, but it is only exceptionally that an appeal will be entertained on a question of costs only.
- [11] I therefore conclude that the proposed appeal against paragraph 4 of the learned judge's order, namely for the eviction of the respondent enjoys no prospects of success.
- [12] As to order 'effecting and confirming' the applicant's hypothec, it is plain that the respondent had disputed its relevant indebtedness. The operation of the hypothec could only be confirmed in respect of an established debt. As indebtedness is often a disputed issue in cases in which the lessor seeks to enforce its common law hypothec, the usual procedure to deal with the practical difficulties to which this gives rise in the enforcement of the hypothec is for the lessor to apply for an interdict against the disposal by the lessee of the property subject to the hypothec pending the determination of the existence of the debt to which it allegedly pertains. The applicant did not seek such an interdict in the current case. In the context of the dispute concerning the debt I am of the view that there is a reasonable prospect that another court might hold that the order made in paragraph 3 of the order granted by Ndita J should not have been made.
- [13] The order was interdictory in character. Issues of mootness fall to be assessed on the position that obtained when the matter came before the judge. I think it would be appropriate in the circumstances to grant leave to appeal against paragraph 3 of Ndita J's order.
- [14] Practical issues arise out of the execution of the ejectment order when the matter of the hypothec remains unresolved pending the determination of an appeal. I consider that this should be addressed by attaching an appropriate condition to the order granting leave to appeal. Section 17(5) of the Superior Courts Act provides for the entrenchment of the common law power that courts enjoyed to attach such conditions. The respondent tendered security in the amount of R125 000, being the assessed value of the property subject to the hypothec. In the application for leave to appeal the respondent complains that the hypothec should not have been confirmed by Ndita J in the face of that tender. It seems to me that it would do no injustice to the respondent in the circumstances if the appeal against paragraph 3 of the order it wishes to prosecute were to be made subject to the condition that it should furnish the applicant's attorneys with security in cash or in the form of an appropriate guarantee from a registered bank in the sum of R125 000 in favour of the applicant in the

principal case to be payable in the event of its appeal not succeeding, alternatively, in the event of the appeal not being conscientiously prosecuted in accordance with the applicable rules.

- [15] The outcome of the appeal might foreseeably affect the appropriate costs order at first instance and therefore leave to appeal will also be granted against paragraph 6 of the order made by Ndita J.
- [16] The provisions of paragraph 2 of the order made by Ndita J are merely a restatement of the provisions of the lease and are of no meaningful effect in the ultimate determination of the real issues in dispute between the parties.
- [17] Paragraph 5 of the order was supplementary to the terms of paragraph 4, and falls to be treated consistently with the determination of the application for leave to appeal against that paragraph..
- [18] In the context of the dichotomous outcome of the application for leave to appeal, I consider that it would be just to direct that the respondent in the principal case should pay half of the applicant's costs in the matter and that the remaining half should be costs in the appeal, provided that if the appeal is not prosecuted they shall be paid by the respondent.
- [19] (I wish to make it clear that nothing in this judgment in the application for leave to appeal should be understood to in any way derogate from the right of the applicant in the principal case to apply separately, if so advised, for interdictory relief to protect its position in respect of its hypothec pending the determination of the appeal.)
- [20] The following order is made:
1. Subject to it providing the applicant in the principal case with security in the sum of R125 000 in respect of the movable property on the leased premises that is subject to the applicant's landlord's hypothec, and the further provisions of this order, the respondent in the principal case is granted leave to appeal to the Full Court of the Western Cape Division of the High Court against paragraphs 3 and 6 of the order made by Ndita J on 30 October 2015.
 2. The security to be provided in terms of paragraph 1, above shall be provided before the removal by the respondent of any moveable property from the leased premises, or before noon on Monday 1 August 2016, whichever occurs first, and shall be in the form of cash payable to the attorneys of record of applicant in the principal case, to be held in trust pending the determination of the appeal, or by way of a guarantee in favour of the applicant in the principal case by a registered bank, and shall be payable to the applicant in the principal case upon the dismissal of the appeal, or upon the failure by the respondent to conscientiously prosecute the appeal in accordance with the applicable rules of court.
 3. The application for leave to appeal is otherwise dismissed.

4. The respondent in the principal case shall pay 50 per cent of the applicant's costs of suit in the application for leave to appeal. The remaining 50 per cent shall be costs in the appeal, or in the event that the appeal is not prosecuted, paid

by the respondent.

A.G. BINNS-WARD

Judge of the High Court

APPEARANCES

Counsel for applicant in the principal case:

A. Ferreira

Attorneys for applicant in the principal case:

Van Wyk Fouché Inc

Counsel for respondent in the principal case:

GW Woodland SC

A. Brink

Attorneys for respondent in the principal case:

Theron and Partners

Stellenbosch

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