

SOUTH AFRICA / JUDGMENT

Brite Season Trading t/a Freight All v Govender (AR 9/2013) [2013] ZAKZPHC 20 (13 May 2013)

[2013] ZAKZPHC 20

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Gorven, Mnguni

CASE / FILE NUMBER

AR 9/2013

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NOT REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

CASE NO: AR 9/2013

In the matter between:

BRITE SEASON TRADING T/A FREIGHT ALL

.....Appellant

and

SITHAMBARAN GOVENDER

.....Respondent

JUDGMENT

GORVEN J

- [1] In this matter, the appellant instituted action against the respondent and three other defendants out of the Magistrate's Court for the Regional Division of KwaZulu-Natal, Durban, by no earlier than 25 February 2011. The respondent entered a special plea to this action. The special plea relied on an order issued out of the High Court on 18 November 2008. This order arose from an application launched by the appellant against the respondent and the first and second plaintiffs in the action in which the following material relief was sought:

‘(a) That the First and or Second Respondent is interdicted, restrained and prohibited from paying out the amount of R115 000.00 to the Third Respondent under Momentum Investo investment plan contract number 01 002526884, which is underwritten by the Second Respondent and ceded to the First Respondent by the Applicant pending an action to be instituted against the Third Respondent;

(b) That the Applicant is directed to institute an action against the Third Respondent within thirty days (30) from the grant of this order.’

The order of 18 November 2008 granted this relief.

[2] The action instituted by the appellant, and to which the special plea was taken, is that action envisaged in both paragraphs

(a) and (b) of the order in question. It is not necessary, for the purposes of the appeal to calculate when precisely the 30 day

period referred to in paragraph (b) of the order elapsed. This is so because on any calculation, that period clearly elapsed more than two years prior to the action being instituted. The action was launched without any application for condonation being sought by the appellant. The special plea prayed that the appellant's action be dismissed with costs.

[3] The magistrate, in the court a quo, upheld the special plea and dismissed the action with costs. It is against this order that the appellant is appealing.

[4] In this matter, no evidence was necessary since there is no dispute as to the date upon which the High Court order issued, neither is there any dispute as to the date upon which action was instituted in the Magistrate's Court. There is further no dispute that no application for condonation was launched by the appellant. It was the appellant who applied for the High Court order which was

ultimately granted. In other words, the appellant chose to limit the time within which to bring its action against the respondent. A court order may not simply be ignored. One placing time limits on the parties is no exception to this rule. In the case of *Muller v NewZealand Insurance Company Ltd*¹ the court ordered the plaintiff to deliver further particulars within four days after service of the order on the plaintiff. The plaintiff failed to do so and the action was dismissed. Likewise, in a matter governed by time limits fixed by the rules, a defendant who became aware of a default judgement granted against him failed to launch an application for rescission timeously and the out of time application was dismissed as a result.² Even if a court order has not been complied with, an application for condonation can be launched and, if good cause is shown, a court can condone non-compliance and extend the time limit.

- [5] In the present matter, the appellant simply ignored the court order. Absent an application for condonation for non-compliance, the action was instituted beyond the period granted in the court order. This means that the magistrate was correct in upholding the special plea and dismissing the action with costs. The appeal must fail. In the result, the appeal is dismissed with costs.

I agree:

MNGUNI J

DATE OF HEARING: 13 May 2013

DATE OF JUDGMENT: 13 May 2013

FOR THE APPELLANT: M Nhlangulela instructed by MONDLI NHLANGULELA ATTORNEYS

FOR THE RESPONDENT: VINESH BADRI & PARTNERS.

1 1965

(2) SA 569 (D).

2Nair v Naicker 1942 NPD 3.

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