

SOUTH AFRICA / JUDGMENT

Gardener v Whitaker (CCT26/94)

[1994] ZAECHC 1 (12 December 1994)

[1994] ZAECHC 1**COURT**

High Courts - Eastern Cape

BEFORE

C Froneman

CASE / FILE NUMBER

CCT26/94

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IN THE SUPREME COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION)

CCT26/94

CASE NO. : 997/94

DATE DELIVERED: 12.12.94

In the matter between:

NIGEL MAURICE RHETT GARDENER Applicant

and

ERIC WHITAKER Respondent

J U D G M E N T

FRONEMAN, J:

The applicant seeks leave to appeal against the judgment given by myself in the action brought by the applicant against the respondent and which was delivered on 11 November 1994. As is apparent from the judgment, I held the provisions of Chapter 3 of the Constitution of the Republic of South Africa Act, no.200 of 1993 ("the Constitution") to be applicable to the matter and proceeded to decide the matter on that basis. In terms of the notice of application for leave to appeal the applicant now "desires leave

to appeal to the Constitutional Court of the Republic of South Africa against those portions of the judgment and order...delivered on 11 November 1994 in which the Honourable Judge found that plaintiff/applicant had failed to prove that defendant's statement

was not worthy of protection as an instance of freedom of speech or expression and that accordingly the only appropriate order was one of absolution from the instance with costs."

The notice then goes on to set out a number of grounds for the application for leave to appeal, to which I will refer more fully

later.

s.20(4) of the Supreme Court Act, no.59 of 1959 provides as follows:

"(4) No appeal shall lie against a judgment or order of the court of a provincial or local division in any civil proceedings or against any judgment or order of that court given on appeal to it except-

- (a) in the case of a judgment or order given in any civil proceedings by the full court of such a division on appeal to it in terms of subsection (3), with the special leave of the appellate division;
- (b) in any other case, with the leave of the court against whose judgment or order the appeal is to be made or, where such leave has been refused, with the leave of the appellate division."

S.102(11) of the Constitution provides that appeals to the Appellate Division and the Constitutional Court shall be

"regulated by law, including the rules of such courts, which may provide that leave of the court from which the appeal is brought, or to which the appeal is noted, shall be required as a condition for such appeal."

The application of the provisions of the Constitution to the action between the parties was done in terms of the provisions of s.101 (3) of the Constitution. S.103(12) of the Constitution provides that "appeals arising from matters referred to in s.101 (3) and which relate to issues of constitutionality shall lie to the Constitutional Court."

The conditions upon which the Constitutional Court may be seized of any matter within its jurisdiction, including presumably its appellate jurisdiction, shall, in terms of s.100(1) of the Constitution be regulated by rules prescribed by the President of the Constitutional Court in consultation with the Chief Justice, which rules shall be published in the Gazette.

At the hearing of the application I raised the query whether application for leave to appeal was necessary as far as any appeal to the Constitutional Court was concerned, but from the foregoing provisions it seems clear that such leave is necessary. I see no reason why the requirement that there should be reasonable prospects of success on, appeal should not also apply in applications for leave to appeal to the Constitutional Court

I have mentioned that the notice of application for leave to appeal sets out a number of grounds upon which the application is based.

Those set out in paragraphs 1, 2, 3, 4, 5, 7 & 8 all relate to constitutional issues. The approach taken in the judgment may be said to be somewhat novel and it is unnecessary to go into any detail on the question of whether there are reasonable prospects of success on appeal to the Constitutional Court. Suffice it to state that I consider that there are reasonable prospects of success on appeal. That, however, does not apply to the grounds set out in paragraph 6 & 9 of the notice of application for leave to appeal.

In terms of paragraph 6 it is stated that I erred in holding that there was nothing in pleadings and the manner in which the trial was conducted in the instant case which would adversely affect the applicant if the changes introduced by the Constitution were applied to the case. Apart from the fact that I am not quite sure that this is a constitutional issue, both parties, including the applicant, were, (after oral argument was heard) invited to submit further written argument on the following, namely:

- (1) whether the fact that the matter was pending on 27 April 1994 precluded the application of the provisions of the Constitution to the matter, and,
- (2) whether the provisions of Chapter 3 of the Constitution apply to relations between individuals and the State and, if so, to what extent the provisions of Chapter 3 may have an affect on the law of defamation.

As noted in the judgment, neither the applicant nor the respondent took up this invitation and in my view the applicant cannot now, as a ground of appeal, rely on the allegation that he may have been prejudiced by the approach that I took in the judgment.

Paragraph 9 of the application for leave to appeal states that I erred in finding that the performance of the respondent in the witness box negated the submission made on behalf of the applicant that the respondent acted with malice towards applicant in publishing the statement complained of by applicant. This does not seem to me to be a constitutional issue, but merely a ground for an appeal on fact.

Accordingly I grant leave to appeal to the Constitutional Court against the judgment granted by myself on 11 November 1994, on the grounds set out in paragraphs 1, 2, 3, 4, 5, 7 & 8 of the notice of application for leave to appeal, but not in respect of the grounds set out in paragraphs 6 & 9 of the said notice.

The costs of this application will be costs in the appeal.

J C FRONEMAN

JUDGE OF THE SUPREME COURT

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