

SOUTH AFRICA / JUDGMENT

Gentleman v Hlazo (438/08) [2010]

ZAECGHC 109 (12 May 2010)

[2010] ZAECGHC 109

COURT

Eastern Cape High Court, Grahamstown

BEFORE

JM Roberson, C Plasket

CASE / FILE NUMBER

438/08

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IN THE

HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE – GRAHAMSTOWN)

CASE NO: 438/08

DATE HEARD: 29 April 2010

DATE DELIVERED: 12/05/10

REPORTABLE/NOT
REPORTABLE:

In the matter between
Z W GENTLEMAN
APPLICANT
ZWELIZIMA HLAZO
RESPONDENT

JUDGMENT

ROBERSON J:-

- [1] This is an application in terms of Rule 53 of the Uniform Rules, for the review and correction of certain proceedings in the Magistrate's Court for the district of Cradock, on the ground of gross irregularity in the proceedings. Although the Magistrate was not cited as a respondent in the review, the application was served on him and he dispatched the record of the proceedings and his reasons, as called upon to do so in the notice of motion. There was no opposition to the application by the Magistrate and the respondent abided the decision of the court.

- [2] The applicant was the defendant in an action instituted by the respondent in the Magistrate's Court. The respondent's claim was for payment of damages arising from a motor collision between the parties' respective motor vehicles, the respondent alleging that the negligence of the applicant was the sole cause of the collision. The applicant counterclaimed with a similar claim and alleged that the negligence of the respondent was the sole cause of the collision.
- [3] The trial was set down for hearing before the pleadings had closed. The respondent had not yet pleaded to the counterclaim. Rule 22
- (1) of the Magistrate's Courts Rules provides that a trial shall be set down after the pleadings have closed.
- [4] On the day of set down, the trial proceeded in the usual manner. Each party's attorney delivered an opening address, evidence was led, the cases were closed, and the attorneys addressed the court on the merits. (Quantum had been agreed.) According to the transcribed record (and confirmed by the Magistrate in his reasons), it was only at this latter stage that the applicant's attorney brought to everyone's attention that there was no plea to the counterclaim, and asked for default judgment on the counterclaim. The Magistrate then postponed the matter, recording that it had irregularly been set down for trial, and declined to give judgment until there had been compliance with the rules. The respondent thereafter delivered his plea to the counterclaim and judgment was eventually delivered on the claim and the counterclaim.
- [5] In his founding affidavit, the applicant said that the trial had proceeded after his attorney had advised both the Magistrate and the plaintiff's attorney that the pleadings had not closed. The transcribed record does not bear this averment out. It was only in his address after the cases were closed that the applicant's

attorney raised the fact that the pleadings had not closed. The applicant also said that on the day judgment was delivered, his attorney was not present because he had not been paid, and the Magistrate did not give him (the applicant) an opportunity to address the court, or enquire whether or not he wanted to proceed without legal representation. In his reasons, the Magistrate said that the applicant did not say that he had not paid his attorney, but said the attorney was on his way. The Magistrate state further that his office had tried to contact the applicant's attorney, only to learn that he was in another court. The attorney's office was requested to send a fax with his instructions but did not do so. Judgment was thereafter delivered.

- [6] A court will not set aside proceedings on review where the irregularity has caused no prejudice to the applicant. (*Jockey Club of South Africa and Others v Feldman* 1942 AD 340 at 359, *Rajah & Rajah Ltd. v Ventersdorp Municipality* 1961 (4) SA 402 AD at 407 H to 408 A, *Building Improvements Finance v Additional Magistrate, Johannesburg* 1978 (4) SA 790 TPD 793 A-C.)

Jockey Club of South Africa and Others v Feldman

1942 AD 340

Rajah & Rajah Ltd. v Ventersdorp Municipality

1961 (4) SA 402

Building Improvements Finance v Additional Magistrate, Johannesburg

1978 (4) SA 790

[7] The complaints of the applicant do not, in my view, demonstrate prejudice. Both parties were accorded a full hearing by the Magistrate, including the opportunity to address the court after the cases were closed. In my view there was no irregularity in the judgment being delivered in the absence of the attorney. The matter had been fully argued and neither the applicant nor his attorney, if they had been present would have been entitled to argue the matter further. The applicant did not indicate in his affidavit on what further matter he would have addressed the court. The trial proceeded as it would have if the pleadings had been closed, and the pleadings were closed before judgment was delivered.

It was not suggested that the trial had not been conducted fairly.

[8] In the passage referred to in *Rajah & Rajah Ltd* (supra) Holmes JA said:

Rajah & Rajah Ltd

‘The underlying principle is that the Court is disinterested in academic situations’.

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In the present case the situation is academic: a judgment has been delivered following a full hearing. No purpose would be served in repeating this process.

[9] The following order is made:

[9.1] The application is dismissed.

[9.2] There is no order as to costs.

J M ROBERSON

JUDGE OF THE HIGH COURT

PLASKET J

I agree

C PLASKET

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