

SOUTH AFRICA / JUDGMENT

Hoban v ABSA Bank Ltd t/a United Bank and Others (275/1997) [1999] ZASCA 12; [1999] 2 All SA 483 (A) (19 March 1999)

[1999] ZASCA 12

COURT

Supreme Court of Appeal

BEFORE

Mahomed, Howie, Olivier, Farlam, Madlanga

CASE / FILE NUMBER

275/1997

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Case No 275/1997

IN THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA In the matter of: DONAL PATRICK HOBAN Appellant and ABSA BANK LIMITED t/a UNITED BANK First Respondent

THE REGISTRAR OF DEEDS, PRETORIA Second Respondent THE SHERIFF, SUPREME COURT, SANDTON Third Respondent LINDA HOWELLS (formerly HOBAN) Fourth Respondent STAND 14 RIVERSIDE CC Fifth Respondent

CORAM : MAHOMED CJ, HOWIE, OLIVIER JJA, FARLAM and MADLANGA AJJA.

DATE OF HEARING: 4 March 1999 DATE OF DELIVERY 19 March 1999 Execution - Immovable Property - “Days” in Rule 46 (7) (c). _____

J U D G M E N T

/HOWIE JA: . . .

HOWIE JA:[1] The home of appellant and his ex-wife was the subject of a sale in execution at the instance of the first respondent bank. The sale was arranged for Friday 22 April 1994. In terms of rule 46 (7) (c) of the Uniform Rules as it read then (it has since been amended) the sale had to be advertised in locally circulating newspapers

“not less than three days and not more than five days”

before the sale date. It was advertised on the preceding Friday. The sale took place and the property was sold.[2] If “days” in the subrule meant calendar days then the advertisements were published more than five days before the sale, in conflict with the requirement in question. If “days” meant “court days”, as defined in rule 1, then the sale was advertised on the fifth preceding court day in compliance with the requirement concerned.[3] Contending for non-compliance, appellant applied in the High Court at Johannesburg for orders i a setting aside the sale as invalid and affording concomitant relief. The Court (Tuchten AJ) found that the advertisements failed to comply with subrule (7)(c) but held that this did not invalidate the sale. For that and other reasons the application was dismissed. With the learned Judge’s leave appellant contests such dismissal. [4] If there was compliance with the subrule then the appeal must fail. [5] In holding that there was non-compliance with subrule (7)(c) the Court below relied on the decision in *First Consolidated Leasing Corporation Ltd. v Theron* 1974 (4) SA 244 (T), preferring it to the decision in *Röntgen v Reichenberg* 1984 (2) SA 181 (W). In the former case, which dealt with subrule (7)(d), Eloff J held that the word “days” in that paragraph meant calendar days. In the *Röntgen* case, concerning subrule (7)(c), it was decided by Coetzee J that “days” meant court days.[6] Rule 1 is the definition provision in the Rules or, to use a term sometimes employed, the interpretation provision. It says, as it did at the relevant time:

“In these rules and attached forms unless the context otherwise indicates —

...

‘court day’ shall mean any day other than a Saturday, Sunday or Public Holiday, and only court days shall be included in the computation of any time expressed in days prescribed by these rules or fixed by any order of court . . .”

[7] Rule 46 is entitled “Execution - Immovables” and it is appropriate for present purposes to quote the relevant provisions as they read in 1994:

“(1) A writ of execution against immovable property shall contain a full description of the nature and situation (including the address) of the immovable property to enable it to be traced and identified by the sheriff. . .

- (2) An attachment shall be made by the sheriff of the district in which the property is situate or by the sheriff of the district in which the office of the registrar of deeds or other officer charged with the registration of such property is situate, upon a writ as near as may be in accordance with Form 20 of the First Schedule. (3) The mode of attachment of immovable property shall be by notice in writing by the sheriff served upon the owner thereof, and upon the registrar of deeds or other officer charged with the registration of such immovable property . . . (4) After attachment, any sale in execution shall take place in the district in which the attached property is situate and be conducted by the sheriff of such district
- (7) (a) The sheriff shall appoint a day and place for the sale of such property, such day being, except by special leave of a magistrate, not less than one month after service of the notice of attachment. (b) The execution creditor shall, after consultation with the sheriff, prepare a

notice of sale containing a short description of the property, its situation and street number, if any, the time and place for the holding of the sale and the fact that the conditions may be inspected at the office of the sheriff, and he shall furnish the sheriff with as many copies of the notice as the latter may require. (c) The deputy sheriff shall indicate two suitable newspapers (whenever possible one in each of the official languages) circulating in the district in which the property is situated and require the execution creditor to publish the said notice once in each of the said newspapers, not less than three days and not more than five days and in the Government Gazette not later than two weeks before the date appointed for the sale and to furnish him, not later than the day prior to the date of the sale, with one copy of each of the said newspapers and with the number of the Gazette in which the notice appeared.

- (d) Not less than ten days prior to the date of the sale, the sheriff shall forward by registered post a copy of the notice of sale referred to in paragraph (b) above to every judgment creditor who had caused the said immovable property to be attached and to every mortgagee thereof whose address is known. (e) Not less than ten days prior to the date of the sale, the sheriff shall affix one copy of the notice on the notice-board of the magistrate's court of the district in which the property is situate, or if the property be situate in the district in which the court out of which the writ issued is situate, then on the notice-board of such court, and one copy at or as near as may be to the place where the said sale is actually to take place.
- (8) (a) The conditions of sale shall, not less than 20 days prior to the date of the sale, be prepared by the execution creditor as near as may be in accordance with Form 21 of the First Schedule, and the said conditions shall be submitted to the sheriff to settle them. The execution creditor shall thereafter supply the sheriff with two copies of the conditions of sale, one of which shall lie for inspection by interested parties at his office.
- (b) Any interested party may, not less than 10 days prior to the date of the sale, upon twenty-four hours' notice to the execution creditor and the bondholders apply to the magistrate of the district in which the property is to be sold for any modification of the conditions of sale and the magistrate may make such order thereon, including an order as to costs, as to him may seem meet.
- (11) If the purchaser fails to carry out any of his obligations under the conditions of sale the sale may be cancelled by a judge summarily on the report of the sheriff after due notice to the purchaser, and the property may again be put up for sale, and the purchaser shall be responsible for any loss sustained by reason of his default, which loss may, on the application of any aggrieved creditor whose name appears on the sheriff's distribution account, be recovered from him under judgment of the judge pronounced summarily on a written report by the sheriff, after such purchaser shall have received notice in writing that such report will be laid before the judge for such purpose; and, if he is already in possession of the property, the sheriff may, on 10 days' notice, apply to a judge for an order ejecting him or any person claiming to hold under him therefrom. . . .

- (14) (a) The sheriff shall not pay out to the creditor the purchase money until transfer has been given to the purchaser, but upon receipt thereof he shall forthwith pay into the deposit account of the magistrate of the district all moneys received in respect of the purchase price.
- (b) The sheriff shall as soon as possible after the sale prepare in order of preference, as hereinafter provided, a plan of distribution of the proceeds and shall forward a copy of such plan to the registrar of the court. Immediately thereafter the sheriff shall give notice by registered post to all parties who have lodged writs and to the execution debtor that the plan will lie for inspection for 15 days from a date mentioned at his office and at the office of the registrar, and unless such parties shall signify, in writing, their agreement to the plan, such plan shall so lie for inspection.
- (c) After deduction from the proceeds of the costs and charges of execution, the following shall be the order of preference:
- (i) the claims of preferent creditors ranking in priority in their legal order of preference; and thereafter
- (ii) the claims of other creditors whose writs have been lodged with the sheriff in order of preference appearing from sections ninety-six and ninety-nine to one hundred and three (inclusive) of the Insolvency Act, 1936 (Act No 24 of 1936) as amended.
- (d) Any interested person objecting to such plan shall, within five days of the expiry of the period referred to in paragraph (b) of this sub-rule give notice in writing to the sheriff and all other interested persons of the particulars of his objection and shall bring such objection before a judge for review on 10 days' notice to the sheriff and the said persons. (e) The judge on review shall hear and determine the matter in dispute and may amend or confirm the plan of distribution or may make such order including an order as to costs as to him seems meet.
- (f) If -
- (i) no objection be lodged to such plan, or (ii) the interested parties signify their concurrence therein, or (iii) the plan is confirmed or amended on review,

the magistrate shall, on production of a certificate from the conveyancer that transfer has been given to the purchaser and on the request of the sheriff, pay out in accordance with the plan of distribution. If the address of a payee is not known the amount due to him shall be paid into the Guardian's Fund established under any law relating to the administration of estates.

[8] By amendment in 1996 a further subrule was added, reading as follows:

"(16) In this rule, the word 'days' shall have the same meaning as 'court days' as defined in rule 1 of the Rules."

That can, of course, have no bearing on the present issue and the ensuing discussion proceeds on the basis of the pre-amendment position. [9] The relevant reasoning in the First Consolidated Leasing case is contained in the following passage (at 246 in fine):

“Now it is true that in Rule 1 which defines “court days” it is said that only court days shall be included in the computation of the number of days for which the Rules make provision, but that definition is subject to the context in which the word “days” is used. I think that in the context of Rule 46 (7)(d) calendar days were intended and not court days. Rule 46 has nothing to do with procedural steps connected with a law-suit, and the considerations which prompted the draftsman of the Rules to exclude Saturdays, Sundays and public holidays in computing the number of days allowed for procedural steps in litigation, could not have applied to the steps required to be taken when property is sold in execution.”

- [10] That statement was endorsed by Mynhardt J in the unreported case of *Manrim (Pty) Ltd and Another v Bank of Lisbon International and Others* (Transvaal Provincial Division case 17464/95, judgment having been delivered on 27 September 1995). In elaborating upon the above-quoted reasons in the First Consolidated Leasing case, Mynhardt J considered that the expressions “one month” in subrule (7)(a) and “two weeks” in subrule (7)(c) signified —

“[t]he clear intention of the rule . . . that in this particular instance there is no need to read the reference to days as a reference to court days as one ordinarily would do in the context of other rules . . .” (At 4 of the typed judgment).

- [11] The Court below agreed with the reasoning of Eloff J and Mynhardt J and added that it was unlikely that the legislature would in the same subrule have provided for the computation of time by reference to different standards.[12] By contrast, Coetzee J held in *Röntgen* (at 185 G - H) that there was nothing in Rule 46 which in any way indicated a meaning of “days” other than court days and that there was therefore no contextual basis for departing from the defined meaning. To reach that conclusion the learned Judge commenced with one of the Oxford English Dictionary meanings of “context”. It is: “the parts which immediately precede or follow any particular passage or ‘text’ and determine its meaning”. On the strength of this he continued (at 184 H) —

“In my view this time-honoured phrase which appears in the definition sections of legislation (‘unless the context otherwise indicates’) means that another meaning is to be given to the particular word or phrase so defined only if the parts which precede or follow that particular word or phrase indicate that it is used in a different sense or with a different meaning. One therefore has to examine the language used in the particular sections to determine whether the defined word is used clearly in a different sense in any related passage which precedes or follows the one that falls to be interpreted and, if so, whether contextually the same meaning is intended in the passage in question.”

However, the learned Judge then proceeded (at 185 A - G) to draw, and enlarge upon, what he considered was a crucial and self-evident distinction between language and context on the one hand and legislative intention on the other. The case before him, so he considered, only concerned the former because

“(w)hen one deals with a word, as defined, in the same Act, it becomes a matter of language and context, in its strict sense. There is then very little scope for legislative intention as an aid to interpretation as it is normally applied in the construction of statutes, because in that very piece of legislation its meaning is irrebuttably fixed. Only if the context in a particular passage or section of that Act contradicts that meaning, may it be departed from for the purpose of that section” (At 185 F - G).

Finally, to emphasise his view of the minimal role of legislative intention in the case before him, Coetzee J viewed Eloff J’s observation that rule 46 had nothing to do with procedural steps in litigation as irrelevant, being speculation about legislative intention and unconnected with context (at 185 H).[13] These, then, are the competing dicta which must be considered in deciding the essential issue.[14] In my view, with due respect, the reasoning and the conclusion in First Consolidated Leasing were wrong. In the first place, it is not correct that the rule has nothing to do with procedural steps connected with a law suit. Quite plainly the rule deals with procedural matters and execution is undoubtedly connected with litigation. It is the process whereby the successful litigant seeks to exact payment of the judgment debt in which the litigation has culminated. Not only that. Subrules (11) and (14) clearly provide for proceedings before a judge, in connection with which time limits are set which are stated in days, and which proceedings can terminate in orders for various forms of relief. This being so, there is as much reason for “days” in those subrules to mean court days as there is in the rules dealing with litigation.[15] Secondly, even assuming that the rule applies only to matters unconnected with litigation, that cannot justify the adoption of a meaning of “days” other than the defined meaning. The definition is expressly to apply to “any time. . . prescribed by these rules” i.e whether the rules pertain to litigation or not.[16] Thirdly, the defined meaning has to apply also to periods fixed in days “by any order of court”. Therefore “days” in any such period laid down by an order under subrule (11) will obviously have to mean court days. If Eloff J were right, “days” would then have different meanings in one and the same rule depending on which subrule was under consideration. That cannot have been the drafter’s intention. It would lead to confusion and uncertainty.[17] In the fourth instance, there is no justification for the view expressed by Eloff J that the reason for stipulating court days in relation to litigation cannot also apply to execution. If “days” mean calendar days then the minimum three day period in subrule (7) (c) could include a long weekend occasioned by a public holiday. Interested parties, particularly the judgment debtor and potential purchasers, would have no business days in which to try to make necessary financial arrangements. Here, once again, is as much reason for “days” to mean court days as there is in the rules concerning litigation. [18] Finally, and most importantly, it is not enough to warrant departure from the defined meaning that the subject matter of the rule or section under examination differs from the subject matter of provisions in which the defined meaning clearly does apply. That is not the test. There is a line of cases, including decisions of this Court, in which the true approach is stated. The inference is compelling that none of them was drawn to the Court’s attention in either the First Consolidated Leasing case or in the Röntgen matter. They are collected in *Canca v Mount Frere Municipality* 1984 (2) SA 830 (TkSC) at 832 B - G in a passage which in my opinion sets out the position correctly. It reads:

“The question whether a word in a particular section of a statute should be given its statutory definition or the ordinary meaning has come up for decision in a number of cases. Mr Findlay, for respondent, cites as an example the case of Limbada v Principal Immigration Officer 1933 NPD 146 at 150, and amongst the cases to which I have also had reference are Town Council of Springs v Moosa and Another 1929 AD 401 at 417; Commissioner of Customs and Excise and Another v Officer Designated under Act 24 of 1936, s 39 (2) and Another N O 1958 (1) SA 86 (W) at 88; Commissioner for Inland Revenue v Simpson 1949 (4) SA 678 (A) at 692 and Brown v Cape Divisional Council and Another 1979 (1) SA 589 (A) at 600. In some of these cases the Court was concerned with a definition section which expressly provided (as here) that the definition should be applied “unless inconsistent with the context”, and in others the definition section did not contain those qualifying words. In all cases, however, the same basic approach was adopted, albeit that such approach was formulated in different ways. Strictly the “context” of a word or passage in a text would consist of “the parts which immediately precede or follow” that word or passage (see in this regard the definition of “context” in the Shorter Oxford English Dictionary) but in no case to which I have had reference did the Court confine itself to so narrow an examination of the Act in determining the question in issue. The principle which emerges is that the statutory definition should prevail unless it appears that the Legislature intended otherwise and, in deciding whether the Legislature so intended, the Court has generally asked itself whether the application of the statutory definition would result in such injustice or incongruity or absurdity as to lead to the conclusion that the Legislature could never have intended the statutory definition to apply.”

- [19] Adopting the correct test, it is plain that the application of the defined meaning of “days” in rule 46 cannot lead to any injustice, incongruity or absurdity. Counsel for appellant properly conceded as much. It is therefore that meaning which must govern. The consequence is that the newspaper publications in the present case complied with the subrule. The appeal must accordingly fail.[20] Although, therefore, the conclusion in the Röntgen case was correct, it is nevertheless necessary to say two things about the reasoning underlying it. The above-quoted passage at 184 H in that judgment, relying as it does on the cited dictionary definition of “context”, might tend to convey that “context” is confined to parts of a legislative provision which immediately precede and follow the particular passage under examination. If that was what the learned Judge did mean then, with respect, he defined context too narrowly. “Context” includes the entire enactment in which the word or words in contention appear: *Re Evans* [1891] 1 QB 143 and in its widest sense would include enactments in *pari materia* and the situation, or “mischief”, sought to be remedied: *Attorney-General v Prince Ernest Augustus of Hanover*, [1957] AC 436 (HL), [1957] 1 All ER 49. That is the first point. The second is that there is no justification for the distinction, so heavily relied on by the learned Judge, between linguistic context and legislative intention. The moment one has to analyse context in order to determine whether a meaning is to be given which differs from the defined meaning one is immediately engaged in ascertaining legislative intention. One remains so engaged until the interpretation process is concluded. It is only concluded when legislative intention is established. As remarked by E Cameron in *LAWSA*, 27, 207 par 229:

“ . . . context does no more than reflect legislative meaning which in turn is capable of being expressed only through words in context ”.

The appeal is dismissed with costs.

C T HOWIEMAHOMED CJ)OLIVIER JA)FARLAM AJA) CONCURMADLANGA AJA)

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