

SOUTH AFRICA / JUDGMENT

Kloof Investments 2004 CC v Isaacs (A900/2010) [2011] ZAWCHC 184 (25 March 2011) [2011] ZAWCHC 184

COURT

Western Cape High Court, Cape Town

BEFORE

Louw, NC Erasmus, Ndita

CASE / FILE NUMBER

A900/2010

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER A900/2010

DATE 2011-03-25

In the matter between

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KLOOF INVESTMENTS 2004 CCAppellant

and

GARY ISAACSRespondent

JUDGMENT

LOUW, J:

In this appeal the respondent has applied for the appeal to be struck from the roll with costs on a number of bases, one of which is that the appellant has failed to deliver a notice of appeal in terms of Rule 49(2). I shall refer to the parties herein as they were in the Court a quo. In that court the applicant (who is now the appellant) sought the ejection of the respondent from premises owned by the applicant on the basis that it had validly cancelled the respondent's lease for failure to pay the rental. The respondent denied that it was in arrears with rental, claiming that because the applicant had breached the lease he was entitled to automatic setoff of certain amounts resulting in an overpayment of rental. The applicant relied in turn on clause 4.6 of the lease

which disentitled the lessee to "withhold, delay or abate payment of the rental by reason of any breach of the lease" by the lessor. The applicant contended that on a proper interpretation, clause 4.6 excluded setoff. The matter came before Mia AJ who did not deal with the interpretation of clause 4.6 but held that the issue of setoff could not, because of disputes of fact relating to the alleged breaches by the applicant, be decided on the papers and in consequence dismissed the application with costs.

The applicant sought leave to appeal on the basis that the defence of setoff was excluded by clause 4.6. Mia AJ refused leave. The applicant then applied for leave to appeal to the SCA, again on the basis that clause 4.6 excluded the defence of setoff. Leave to appeal was granted on the 10th of February 2011 by the SCA to the full bench of this court. On the 15th of February 2011 the representatives of the parties met with the Judge President who gave permission for the appeal to be heard on a priority date. The precise ambit of what the judge president's dispensation in terms of Rule 49(18) amounted to, is in dispute. On the 14th of March 2011 a notice of set down of the appeal for today the 25th of March 2011 was delivered to the respondent's attorneys. Again the circumstances of how the notice came to be issued and by whom it was issued is in dispute. On the 14th of March 2011 the applicant's heads of argument was emailed to the respondent's attorneys. Now Rule 49(2) and (3) reads as follows: 49(2) "If leave to appeal to the full court is granted the notice of appeal shall be delivered to all the parties within 20 days after the date upon which leave was granted or within such further longer period as may upon good cause shown be permitted. 49(3) The notice of appeal shall state whether the whole or part only of the judgment or order is appealed against and if only part of such judgment or order is appealed against it shall state which part and shall further specify the findings of fact and/or a ruling of law appealed against and the grounds upon which the appeal is founded." Now the time period of 20 days for the delivery of the notice of appeal expired on the 10th of March 2011. It is common cause that no notice of appeal has been delivered in this matter and that there is no application for

condonation or extension of the period of 20 days. The respondent has raised further issues relating to the late filing of a power of attorney and security by the applicant but these need not detain us further. In his answering affidavit in the striking application the applicant's attorney relied on the directive given by the Judge President for an expedited hearing of the appeal. In paragraph 11 of that affidavit the following is stated: "It is correct that no notice of appeal as contemplated in Rule 49(2) was delivered by the appellant. This is as a consequence of the directive given by the judge president in chambers in relation to the expedited hearing of the matter. I accordingly deny that the appellant's appeal is not properly before this court and cannot lawfully be entertained." In my view this contention applicant's attorney is clearly incorrect. On the version of the applicant as to what occurred in the judge president's chambers which was later admitted by the respondent's attorney, it is clear that the judge president did not give an express directive that Rule 49(2) not be complied with. In my view it cannot be read into the judge president's dispensation and directive for an expedited hearing of the appeal, that Rule 49(2) need not be complied with at all. The authorities, I have found, do not deal with the position where there is no notice of appeal. They deal with the position where there is a defective notice. *Herbstein & Van Winsen* the 5th edition at page 1159 states the following: "Every notice of appeal

to the full court must state whether the whole or part only of the judgment or order is appealed against and if only part of the judgment is appealed against it must state which part. The notice must also specify the finding of fact and/or ruling of law appealed against and the ground upon which the appeal is founded. These requirements are peremptory." The authors then refer to a judgment *Songono v Minister of Law & Order* 1 996 (4) SA 384 Eastern Cape at 385 where the following was said: "The grounds of appeal are required inter alia to give the respondent an opportunity of abandoning the judgment, to inform the respondent of the case he has to meet and to notify the court of the points raised." The authors then continue to state that "It is submitted that a notice of appeal which does not comply with these requirements is fatally defective and invalid and that unless the court is prepared to grant an application for condonation of the defect and to allow a proper notice of appeal to be filed, the appeal must be struck off the roll with costs." In support of this view the authors referred to a number of cases including a decision of the then Appellate Division in *De Jaquer v Diner* and another 1957

- (3) SA 567 AD where the following is said at 571 F to H and again at 574 A to B. That was a case where the notice of appeal did not comply with Rule 6(3) of the then Appellate Division Rules which required that a notice of appeal "shall state whether the whole

or part only of the order of court appealed from is appealed against and if part only then what part." Having come to the conclusion that in that case the notice of appeal did not specify exactly what part of the orders were being appealed against the court then continued at 574A: "The notice of appeal in the present case leaves the respondent in the dark, it is ambiguous and it is embarrassing in the sense that they do not know whether to abandon any of the items in respect of which judgment was given in their favour." Further down on the same page at 574D the following is said: "The respondents notified the appellant of the defect on the 12th of December 1956. The appellant has done nothing to cure the defect, he has not asked for it to be condoned and for leave to file a proper notice of appeal as he might have done under Rule 12. In the circumstances the rule of this court being no less peremptory than its counter part in the Magistrate's Court Act, the appeal is struck off the roll with costs." And that a fortiori is exactly what Mr Uijts who appeared this morning on behalf of the respondent has asked this Court to do in view of the fact that there is no notice of appeal in this matter. In this case it was only in the applicant's heads of argument that the issue was raised for the first time that the debts the respondent seek to set off are unliquidated and are therefore, whatever the correct interpretation of clause 4.6 may be, not capable of being set off. This point was never raised before and is the kind of point which so it seems to me should have been raised in a notice of appeal. I may add that if one were to have regard to the front page of the record which was prepared by the applicant's attorneys, the appeal, and I quote, is "against the cost order of Ms Acting Justice Mia in the Western Cape High Court on the 12,h of November 2010." This simply further adds to the confusion in this matter. In my view in the absence of a notice of appeal and no application for extension for the period in terms of Rule 49(2) there is only one order that can be made namely that THE APPEAL BE STRUCK FROM THE ROLL WITH COSTS. It is so ordered then. LOUW, J

The applicant sought leave to appeal on the basis that the defence of setoff was excluded by clause 4.6. Mia AJ refused leave. The applicant then applied for leave to appeal to the SCA, again on the basis that clause 4.6 excluded the defence of setoff. Leave to appeal was granted on the 10th of February 2011 by the SCA to the full bench of this court. On the 15th of February 2011 the representatives of the parties met with the Judge President who gave permission for the appeal to be heard on a priority date. The precise ambit of what the judge president's dispensation in terms of Rule 49(18) amounted to, is in dispute.

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49(3) The notice of appeal shall state whether the whole or part only of the judgment or order is appealed against and if only part of such judgment or order is appealed against it shall state which part and shall further specify the findings of fact and/or a ruling of law appealed against and the grounds upon which the appeal is founded."

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condonation or extension of the period of 20 days. The respondent has raised further issues relating to the late filing of a power of attorney and security by the applicant but these need not detain us further.

In his answering affidavit in the striking application the applicant's attorney relied on the directive given by the Judge President for an expedited hearing of the appeal. In paragraph 11 of that affidavit the following is stated:

"It is correct that no notice of appeal as contemplated in Rule 49(2) was delivered by the appellant. This is as a consequence of the directive given by the judge president in chambers in relation to the expedited hearing of the matter. I accordingly deny that the appellant's appeal is not properly before this court and cannot lawfully be entertained."

In my view this contention applicant's attorney is clearly incorrect. On the version of the applicant as to what occurred in the judge president's chambers which was later admitted by the respondent's attorney, it is clear that the judge president did not give an express directive that Rule 49(2) not be complied with. In my view it cannot be read into the judge president's dispensation and directive for an expedited hearing of the appeal, that Rule 49(2) need not be complied with at all.

The authorities, I have found, do not deal with the position where there is no notice of appeal. They deal with the position where there is a defective notice. Herbstein & Van Winsen the 5th edition at page 1159 states the following:

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"The grounds of appeal are required inter alia to give the respondent an opportunity of abandoning the judgment, to inform the respondent of the case he has to meet and to notify the court of the points raised."

The authors then continue to state that

"It is submitted that a notice of appeal which does not comply with these requirements is fatally defective and invalid and that unless the court is prepared to grant an application for condonation of the defect and to allow a proper notice of appeal to be filed, the appeal must be struck off the roll with costs."

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This simply further adds to the confusion in this matter. In my view in the absence of a notice of appeal and no application for extension for the period in terms of Rule 49(2) there is only one order that can be made namely that THE APPEAL BE STRUCK FROM THE ROLL WITH COSTS. It is so ordered then.

LOUW, J

I agree. N C ERASMUS, J I agree. NDITA, J

I agree.

N C ERASMUS, J

NDITA, J

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