

SOUTH AFRICA / JUDGMENT

Libalele v Libalele and Another (3830/2016) [2017] ZAECMHC 16 (13 June 2017) [2017] ZAECMHC 16

COURT

Eastern Cape High Court, Mthatha

BEFORE

S M Jolwana

CASE / FILE NUMBER

3830/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE LOCAL DIVISION: MTHATHA

CASE

NO. 3830/2016

In

the matter between:

ROBERT
NZININI
LIBALELE Applicant
and
VUSUMZI
LIBALELE &
ANOTHER Respondents

JUDGMENT

JOLWANA AJ:

- [1] The applicant approached court on an urgent basis seeking a Rule Nisi calling upon the respondents to show cause to this Court on a date to be determined by Court why:

1.1 the respondent should not be interdicted and restrained from executing the judgment handed down by the learned Magistrate Mr Time, in Centane Magistrate's Court on 16 September 2015 whilst the appeal is pending;

1.2 the respondent's conduct in executing the said judgment without a declaratory order of a competent court should not be declared irregular;

1.3 the period within which to duly prosecute the appeal should not be extended; and

1.4 the respondents should not be directed to pay costs of this application.

[2] The prayer reflected in 1.1 above was made to operate as an interim order. The respondent filed a Notice to Oppose indicating

therein that he was consenting to the confirmation of the interim relief and the extension of the period within which the appeal could be prosecuted. He also registered his opposition to the grant of an order declaring his conduct in executing the said

judgment

without a declaratory order of a competent Court irregular as well as the order for costs against him. This court is only required to deal with the issue of the declarator and that of costs. Because of my conclusion on the declarator, there is no reason to deal with the extension of the period within which to prosecute the appeal. In any event, the respondent has consented thereto.

[3] The first respondent instituted proceedings in the Magistrate's Court, in Centane for an order directing the applicant to sign all transfer documents necessary to effect transfer of ownership of allotment No. 153 situate at Holela Administration at Area, Qora "A", Centane into the name of the first respondent in these proceedings and other ancillary relief. That order was granted on 4 September 2015.

[4] On 12 October 2015 the Applicant filed a Notice of Appeal against the judgment. There was a delay in the prosecution of the appeal. The delay is explained as follows by the Clerk of the Civil Court, Centane:

"This is to confirm that Mr Time was the presiding magistrate in this case and after he gave judgment he was off sick for a long time. We waited for him to come back so that he can help us in typing the record because some of the proceedings were not mechanically recorded through the failure of power, and now is busy with the record and after it is finished it will be forwarded to High Court, Mthatha as Notice of Appeal was noted."

[5] This letter is dated 11 October 2016, more than a year since the delivery of the judgment in respect of which the appeal was noted. The letter was precipitated by the fact that after waiting for more than a year since judgment was granted in his favour without any progress being made in prosecuting the appeal, the first respondent instructed the Sheriff to execute the judgment.

- [6] On the 10 October 2016 the first respondent issued a Notice in terms of Rule 51 (9) of the Magistrates' Court Rules in terms of which he informed the Applicant, inter alia, that because the applicant failed to prosecute the appeal within the time prescribed by the Rules of the Court of Appeal, applicant's appeal shall be deemed to have lapsed.
- [7] The Notice also brought to the attention of the applicant that in terms of Rule 50 of the Rules[1] he was required to prosecute the appeal within 60 days of noting the appeal, failing which his appeal would be deemed to have lapsed.

The notice further stated that the appeal in this matter was deemed to have lapsed and judgment was being executed forthwith.

- [8] The first respondent submits that the Sheriff executed the writ on the applicant on the same day that his attorneys received the letter from the clerk of the Court which explains the reasons for the delay. On receipt of the said explanation he consented to the granting of the interdict but only opposed the declarator as well as the order of costs. Since the interdict has been confirmed with the consent of the respondent there is no need to expand further on the factual matrix of this matter. The only issue for determination is whether the first respondent was entitled to proceed and execute the judgment of the court a quo on the lapsing of the sixty day period within which an appeal should be prosecuted after it has been noted.
- [9] The sixty day period and the lapsing of the appeal are provided for in Rule 50 (1) of the Rules, which provides:

"An appeal to the Court against the decision of a magistrate in a civil matter shall be prosecuted within sixty days after the noting of such appeal, and unless so prosecuted it shall be deemed to have lapsed".

- [10] Rule 51 (9) of the Magistrates Court Rules, contains a similar provision and it provides thus:

"A party noting an appeal or a cross appeal shall prosecute the same within such time as may be prescribed by rule of the Court of appeal and, in default of such prosecution the appeal or cross-appeal shall be deemed to have lapsed, unless the court of appeal shall see fit to make an order to the contrary."

- [11] The issue is whether a successful party in the Magistrates Court can, without more, simply proceed and execute a judgment in his favour when the appeal is deemed to have lapsed.
- [12] The position in the High Court is clearly dealt with in terms of section 18 (1) of the Superior Courts Act[2] which provides as follows:

"Subject to subsections (2) and (3), and unless the Court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal".

There is no similar provision at all in the Magistrate's Court Act or the Rules.

- [13] The cases that I have been referred to and those I have found have proceeded on the basis of whether or not the application to declare an appeal to have lapsed can be heard by a single judge or not, or whether the full court that will deal with the appeal itself should determine the declaration of an appeal to have lapsed. In *Metier Mixed Concrete v Dax Edward Goose*[3] Chetty J put it as follows:

"I am accordingly of the view that the provisions of the Superior Courts Act are clear that a court of first instance is a court comprising a single judge, and that an application, such as that before me to declare an appeal to have lapsed, is indeed competent to serve before a single judge".

- [14] In our law noting an appeal has always been understood to mean that the judgment appealed against cannot be executed or acted upon until the appeal is finalised. Undesirable consequences sometimes resulted from the noting of an appeal. For instance, a party having noted an appeal would sometimes be tardy in prosecuting an appeal and the party in whose favour the judgment was granted would end up being remediless.

- [15] In *Re Goodman*[4] is an instance where the plaintiff in the Magistrate's Court did not prosecute the appeal after noting it. The defendant, in whose favour judgment had been granted, approached the Supreme Court for an order dismissing the appeal. Bressler J put the position as follows:

"There does not appear to be authority which would in the circumstances justify the dismissal asked for. No case was in any event cited. This is most unfortunate as it seems clear that the Magistrates' Court cannot ignore the existence of the notice of appeal thus permitting appellant to defeat the consequences of the judgment against him[5]. *This is of course a most undesirable state of affairs which might well enjoy legislative correction."*

- [16] There is reason to believe that Rule 50 (1) of the Uniform Rules of Court might have been a response to the state of affairs lamented by Bressler J which provides for the appeal lapsing upon not having been prosecuted within 60 days of noting. Landsman J had occasion to deal with the question of the lapsing of an appeal that has been noted in the case of *Nawa vs Marakala*,[6] and said:

"I am satisfied that a single judge has by virtue of s 13 (1) (a) of the Supreme Court Act 59 of 1959 the jurisdiction to entertain an application, such as this one, for a declaration that an appeal has lapsed. It is salutary practice for a single judge, sitting in term time, to refer a matter concerning a procedural aspect of an appeal within his or her jurisdiction to a bench consisting of an appropriate number of judges where it necessitates a consideration of the prospects of success of an appeal. Where the prospects of success of an appeal need not be traversed, it is permissible for a single judge to dispose of the matter."

- [17] I have come to the conclusion that both Rule 50 (1) of the Uniform Rules as also Rule 51 (9) of the Magistrates' Court Rules in terms of which an appeal that is not prosecuted within 60 days of noting is deemed to have lapsed do not entitle the party in whose favour the judgment was granted in the court before to act on that judgment. I am not aware of any authority for the contrary position. During argument no authority was cited for that

proposition. It is incumbent on a person seeking to enforce a judgment of a prior Court to launch a substantive application in the High Court for a declaration that the appeal has lapsed and that he should therefore be allowed to prosecute the judgment. I am fortified in this conclusion by section 18 (1) which in relation to the appeals noted against the decisions of a High Court provides:

“Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.”

- [18] The Magistrate’s Court is part of the judicial system provided for in section 166 of the Constitution[7] and it is specifically listed there as part of the Courts. Section 165 of the Constitution vests the judicial authority of the Republic in the Courts and in terms of subsection (5) thereof “An order or decision issued by a Court binds all persons to whom and organs of the state to which it applies”.
- [19] There is no rational basis or authority for interpreting the legal position differently in so far as the effect of noting an appeal against the decision of the Magistrates’ Courts is concerned. The legal position has to be that the decision appealed against in the Magistrate’s Court remains suspended until the appeal is finalised. Rule 50 (1) of the Uniform Rules and Rule 51 (9) of the Magistrate’s, Court Rules are, in any view, no basis for treating judgments of the Magistrates’ Courts differently. The fact that there is no equivalent provision to section 18 of the Uniform Rules in the Magistrates’ Court Rules is certainly no rational basis for that contention either. This is more so if one takes into account the single united court structure that is provided for in section 166 of the Constitution. Any contrary interpretation would result in an undesirable consequence of creating confusion not only in the legal profession and the legal system but also to the members of the public in general who are directly affected by judicial pronouncements.
- [21] In the result I make the following order:
1. The Rule Nisi issued by this Court on the 25 October 2016 is hereby confirmed.
 2. The first respondent’s conduct in executing the judgment of the court a quo without a declaratory order of the High Court is declared irregular.

S M JOLWANA

JUDGE OF THE HIGH COURT (ACTING)

Appearances:

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Heard on: 19 May 2017

Delivered on: 13 June 2017

- [1] Uniform Rules of Court issued by the Chief Justice in terms of ss (2) of s 43 of the Supreme Court Act 59 (1959).
- [2] Superior Courts Act 10 of 2013.
- [3] Metier Mixed Convete (Pty) LTD v Dax Edward Goose (10145/15) 2016 ZAKZPHC 32 at para 26
- [4] 1957
- (2) 111 at 112 (G).
- [5] My emphasis.
- [6] Nawa and Others v Marakala and Another 2008 (5) SA 275 at 278 A-B
- [7] The Constitution of the Republic of South Africa, 1996.

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