

SOUTH AFRICA / JUDGMENT

Liesching v Maree (CA338/2011) [2012] ZAECHGHC 88 (16 November 2012)

[2012] ZAECHGHC 88

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J M Roberson, I Schoeman

CASE / FILE NUMBER

CA338/2011

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IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION - GRAHAMSTOWN
CASE NO CA338/2011
DATE HEARD: 19/10/2012

DATE DELIVERED: 16/11/2012
In the matter between
RORY LIESCHING
.....APPELLANT
and
GEORGE FREDERICK MAREE
.....RESPONDENT

JUDGMENT

ROBERSON J:-

- [1] This is an appeal against an order of the Magistrate, Port Elizabeth, granting summary judgment against the appellant.
- [2] In his particulars of claim the respondent alleged that the appellant, an attorney, had received the sum of R12 742.06 into his trust account on behalf of the respondent. This sum was paid to the appellant by the Road Accident Fund (the RAF) following a High Court order, and was in respect of the respondent's past hospital and medical expenses. The appellant paid only the sum of R4 666.64 to the respondent and the respondent was accordingly "deprived of the fruits of the above balance in the form of use, enjoyment and interest thereon." The respondent alleged that the appellant was in contravention of the High Court order, as well as the Uniform Rules, in that the Rules¹ require that the interim payment be

paid to the plaintiff. The respondent accordingly alleged he had suffered damages in the sum of R8 075.42 and interest thereon.

- [3] In his opposing affidavit the appellant stated that he was mandated by the respondent to institute a claim against the RAF for damages arising from injuries suffered by the respondent in a motor vehicle collision. He instituted the claim in the High Court and the action is still pending in respect of quantum only. Owing to the respondent's financial circumstances, the appellant funded the litigation from his own resources and, leaving aside his fees, disbursed more than R50 000.00 in payment of counsel's fees and medico-legal reports. The appellant had no fee arrangement with the respondent and payment of his fees and disbursements was payable on demand. At the time the RAF

paid the money to him in terms of the High Court order, the respondent was indebted to him in an amount far in excess of the amount received from the RAF. In accounting to the respondent, he set off only a portion of the sum received from the RAF, because of the

respondent's financial circumstances at the time. Thereafter he continued to disburse monies on behalf of the respondent and paid R7 250.00 for an actuarial report. The respondent terminated the appellant's mandate and instructed his present attorneys to continue with the action against the RAF.

- [4] The appeal record consisted of the following documents: the summons and particulars of claim; the notice of application for summary judgment and supporting affidavit of the respondent; the High Court order in the matter between the respondent and the RAF; the appellant's notice of opposition to the application for summary judgment; the appellant's opposing affidavit; the notice of appeal; and a certificate of exclusion of certain documents.
- [5] According to the appellant's heads of argument summary judgment was granted on 25 November 2010, and on the same day the appellant's attorneys filed a request for a written judgment in terms of Rule 51 (1) of the Magistrates' Courts rules. The magistrate has to date not responded to this request. The respondent then executed on the judgment and on 6 September 2011 the appellant noted an appeal against the judgment, in order to suspend execution. To date the magistrate has not provided a written statement as required in terms of Rule 51 (8) of the Magistrates' Courts rules.
- [6] Shortly before the hearing of the appeal, the appellant served a substantive application of intention to apply for a postponement of the appeal. The founding affidavit to this application was deposed to by the appellant's attorney, Michael Venter. In the affidavit Venter elaborated on the history of the matter as set out in the appellant's heads. He stated that after the Sheriff had attached the appellant's motor vehicle, he sought an assurance from the respondent's attorney that the vehicle would not be removed and that a sale in execution would not be held, pending the outcome of the appeal and receipt of the

magistrate's response to the Rule 51 (1) request. The respondent's attorney's response was that he was instructed to proceed with execution. The appeal was then noted. The magistrate's response to the notice of appeal was contained in a document dated 14 September 2012, with the heading "Judgment", in which he pointed out that judgment had been granted on 25 November 2010, that the notice of appeal was out of time and there was no application for an extension of time. He requested to be advised accordingly in order for him to furnish the Rule 51 (8) statement. Venter thereafter attempted to obtain an appointment with the magistrate, to no avail. On 11 October 2012 he wrote to the respondent's attorney seeking agreement to a postponement and tendering the wasted costs. The respondent's attorney requested a substantive application for a postponement. On 15 October 2012 Venter addressed a letter to the magistrate pointing out that he had not yet responded to the Rule 51 (1) request and that the appeal was set down for 19 October 2012. The magistrate was requested to indicate his attitude with regard to a response to the Rule 51 (1) request. Venter was of the view that the appellant had no alternative but to apply for a postponement of the appeal owing to the failure of the magistrate to respond to the Rule 51 (1) request and to the respondent's insistence on proceeding with execution of the

judgment.

- [7] At the hearing of the appeal, the application for a postponement and the appeal itself were argued.
- [8] The absence of the magistrate's reasons is not a bar to the hearing of the appeal. See *Watson v Koen h/a BMO* 1994 (2) SA 489 (O) at 490H-491I, and the authorities referred to therein. In particular, the present case was not one which involved findings of fact and credibility, where the magistrate's reasons might have assisted this Court. In granting summary judgment, the magistrate must have decided that the opposing affidavit did not disclose a bona fide defence. This court is in as good a position as the magistrate to decide that question. A postponement of the appeal on the ground that the magistrate had failed to furnish reasons was therefore not necessary, and would have involved unnecessary further expense, at least to the appellant, if not to both parties. It is regrettable that the magistrate did not respond to the Rule 51 (1) request, especially after Venter's letter of 15 October 2012, but the reason for the lack of response is not explained and may be a result of an administrative oversight in bringing the request to his attention.
- [9] In opposing the appeal, in his heads of argument, the respondent took five points in limine. With regard to the merits of the appeal, the submission in the heads was simply that was that there was no merit in the appeal.

First point in limine

- [10] It was submitted that because the appellant failed to include the "summary judgment order" in the appeal record, there was no basis on which this Court could consider the appeal.

- [11] This point is to some extent linked to the absence of the magistrate's reasons, which, as I have already mentioned, does not prevent this court from hearing the appeal. Further there can be no dispute that summary judgment was granted. A copy of the court order, if such an order was issued following the judgment, would have taken the matter no further. The documents which were included in the record, referred to in paragraph
- [4] above, are in my view those necessary for the hearing of the appeal, as required in terms of Uniform Rule 50 (7) (c).
- [12] The submission was made on behalf of the respondent that the appellant's proper course would have been to apply to have the warrant of execution set aside and to have applied for an order compelling the magistrate to furnish reasons. Such a course would in my view have increased both parties' costs and only have delayed the eventual hearing of the appeal.
- [13] It was further submitted that the respondent was not given an opportunity to consider the appeal. I do not agree. The respondent had the necessary documents, including the notice of appeal. In the nature of the case, the absence of the magistrate's reasons did not prejudice the respondent.
- [14] Even if some document from the Magistrates' Court file showing that judgment had been granted (for example the warrant of execution or the magistrate's endorsement on the court file that judgment had been granted, if there was such an endorsement) could have been included in the record, the omission to include such a document was a minor one, and this Court had sufficient information of the background to the appeal to understand and to condone such an omission.

Second point in limine

- [15] The point was taken that the appellant failed to include the request for reasons in terms of Rule 51 (1). According to this sub-rule it is only the magistrate's written judgment which forms part of the record. There was therefore no merit in this point.

Third point in limine

- [16] It was submitted that the appellant failed to comply with the peremptory requirements of Rule 51 (8). The peremptory nature of Rule 51 (8) only applies to the magistrate. Again the submission was made that there was no judgment and the appellant did not disclose what attempts had been made to obtain the written statement. In the light of the judgment in *Watson v Koen* (supra), the appeal could be heard without the written statement and there was therefore no merit in this point.

Fourth point in limine

[17] In terms of Uniform Rule 50 (1) an appeal must be prosecuted within 60 days of the noting of an appeal. It was submitted that the appeal was prosecuted after 60 days had expired and had therefore lapsed. According to the affidavit of Venter and the magistrate's "judgment", the notice of appeal was filed with the clerk of the court on 9 September 2011, not 6 September 2011 as mentioned in the heads of argument. The notice of prosecution of the appeal was served on the Registrar of this Court on 23 November

2011. If the 60 days are computed in accordance with the definition of "court day" contained in Uniform Rule 1, then the appeal was prosecuted within 60 days of the noting of the appeal. If I understood the submission on behalf of the respondent correctly, the 60 days prescribed in Rule 50 (1) are not court days, because the sub-rule does not refer to "court days" and only refers to "days". I disagree with this submission. The definition of "court day" is as follows:

"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 an order of court". (My emphasis.)

The time period contained in Rule 50

(1) is expressed in days, which therefore means court days. The 60 days period commencing from the noting of the appeal, expired on 29 November 2011 if the appeal was noted on 6 September 2011, or on 2 December 2011 if the appeal was noted on the 9 September 2011. Either way the appeal was prosecuted within the 60 day period. The appeal had therefore not lapsed.

Fifth point in limine

[18] The certificate of correctness of the appeal record was dated 23 November 2010. This was obviously a typing error and was of no consequence.

[19] All the points in limine therefore fall to be dismissed.

Merits

[20] I am of the view that the appellant's opposing affidavit disclosed a bona fide defence. There was no dispute that the payment made to the appellant by the RAF was in terms of the High Court order, which was in turn made in terms of Rule 34A. Rule 34A (6) provides:

"The amount of any interim payment ordered shall be paid in full to the plaintiff."

In terms of both the High Court order and Rule 34A (6), it was the RAF which was obliged to pay the respondent. Payment to the appellant, who represented the respondent, was compliance with the order and the Rule. If thereafter the appellant accounted to the respondent in terms of the contract between attorney and client, he would not have been in breach of the order or Rule 34A (6), as alleged by the respondent.

- [21] In addition, the opposing affidavit disclosed a bona fide counterclaim, for the amount of fees and disbursements still owed to the appellant.
- [22] As already mentioned, other than to submit that there was no merit in the appeal, there was no submission in the respondent's heads of argument which supported the magistrate's judgment. Counsel for the respondent was requested to address this Court on the merits. He submitted that the averment by the appellant that he had no fee arrangement with the respondent meant that he was not entitled to deduct his fees from the sum paid out by the RAF. I do not agree with this submission. The averment by the appellant that he had no fee arrangement with the respondent can be interpreted in the context of the opposing affidavit as meaning that the appellant was entitled to account to the respondent at that stage, and that there was no agreement that he could only account to the respondent when the matter was finalised.
- [23] The magistrate should therefore not have granted summary judgment, and the appeal must succeed.
- [24] Counsel for the appellant accepted that the appellant should pay the costs of the application for a postponement, in the event of this Court deciding it could hear the appeal without the magistrate's reasons, but submitted that the respondent should pay the costs of opposition to the application. The application for a postponement was opposed only on the issue of costs, the respondent submitting that if the postponement was granted, the wasted costs should be paid on the attorney and client scale. In view of the circumstances in which the application for a postponement was brought, and the point taken by the respondent that there was no judgment in the record, I am of the view that a punitive award of costs was not warranted. The appellant should therefore pay the costs of the application for a postponement on an unopposed basis. The opposition was limited only to the question of costs and took up very little time when the matter was argued. I therefore do not think it is appropriate to order the respondent to pay the costs of opposition to the application.
- [25] The following order will issue:
- [25.1] The application for a postponement is refused.
- [25.2] The appellant is ordered to pay the costs of the application for a postponement, on an unopposed basis.
- [25.3] The appeal is upheld with costs. The order of the magistrate granting summary judgment is set aside and substituted with the following order:
- “1. *Summary judgment is refused.*
2. The defendant is granted leave to defend.
3. The costs of the application for summary judgment are to be costs in the cause.”

[25.4] The Registrar is directed to forward a copy of this judgment to the Chief Magistrate, Port Elizabeth, in order for her to investigate why there was no response by the magistrate to the Rule 51 (1) request.

J M ROBERSON

JUDGE OF THE HIGH COURT

SCHOEMAN J:-

I agree

I SCHOEMAN

Appearances:-

For the Appellant: Adv H B Ayerst, instructed by Neville Borman & Botha Attorneys,
Grahamstown

For the Respondent: Adv A Frost, instructed by Wheeldon Rushmere & Cole Attorneys,
Grahamstown

1This must be a reference to Rule 34A (6)

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Prepared on 10 October 2026 · Esheria