

SOUTH AFRICA / JUDGMENT

Murcus M Farming CC v Eagles Valley Poultry (Pty) Ltd and Another (UM 239/2020) [2022] ZANWHC 13 (17 March 2022)

[2022] ZANWHC 13

COURT

North West High Court, Mafikeng

BEFORE

R D Hendricks

CASE / FILE NUMBER

UM 239/2020

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IN

THE NORTH WEST HIGH COURT, MAHIKENG

CASE NO: UM 239/2020

Reportable: YES / NO

Circulate to Judges: YES

/ NO

Circulate to Magistrates:

YES / NO

Circulate to Regional

Magistrates: YES / NO

In the matter between:

MURCUS

M FARMING CC

Applicant

and

EAGLES

VALLEY POULTRY (PTY) LTD

1st

Respondent

THE LAND AND

AGRICULTURAL

DEVELOPMENT

BANK OF SOUTH AFRICA

2nd

Respondent

DATE

OF HEARING

:

11 MARCH 2022

DATE
OF JUDGMENT
:
17 MARCH 2022
COUNSEL
FOR APPLICANT
:
MR. NDOBE
COUNSEL
FOR THE RESPONDENT
:
ADV. VOSTER
JUDGMENT ON
APPLICATION FOR LEAVE TO APPEAL

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email. The date and time for hand-down is deemed to be 10H00 on 17 March 2022.

ORDER
Consequently, the

following order is made: (i)
Leave to appeal to either the Full Court of this division or to the Supreme Court of Appeal (SCA) is refused.
(ii)
The applicant is ordered to pay the costs of this application for leave to appeal on the scale as between party-and-party.

JUDGMENT

HENDRICKS DJP

Introduction

[1] This matter served before this Court as an opposed motion on 15 October 2021. After listening to the submissions by counsel acting on behalf of the respective parties, this Court granted an order in the following terms:

“(i) The matter is referred for oral evidence to determine:

(a) Whether there exist an agreement that occupational rent be paid and whether it was the intention of the parties that occupational rent be paid by the respondent, pending the finalization and implementation of the sale agreement;

- (b) If there are any occupational rent to be paid, the calculation and/or computation thereof from the last rental payment.
- (i) The various deponents to the affidavits filed may be called as witnesses, as well as any other witness(es) that the parties may wish to call, provided that notice be given to the other side fourteen (14) days in advance.
- (ii) Any additional documentation that either party may wish to or intend to use must be discovered.
- (iii) Costs shall be costs in the cause.”

This order forms the subject matter of the application for leave to appeal, which is opposed.

[2] The grounds for leave to appeal are the following:

- (a) A referral of the matter for oral evidence is not supported by the facts and legal position applicable to the matter and there exist no dispute of

facts.

- (b) The Court’s failure to interpret clause 6 of the sale agreement.
 - (c) The Court’s failure to determine a relief sought for eviction against the first respondent.
 - (d) The Court has failed to determine the matter by applying the principle of reciprocity or good faith as between persons (Landlord and Tenant).
 - (e) The Court has failed to deal with the matter on the principles of fairness, equality and dignity as enshrined in the Bill of Rights and Constitutional Values.
- [3] The application for leave to appeal is opposed on the basis that the aforementioned order is not appealable and that leave to appeal in any event cannot be granted as it does not comply with the prescripts of Section 17 (1) of the Superior Courts Act 10 of 2013. The first aspect to be dealt with is whether the said order is appealable or not.
- [4] In *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) the characteristics of an appealable order/judgment is set out. Firstly, it must be final in effect and not susceptible of alteration by the court of first instance. Second, it must be definitive of the rights of the parties. Thirdly, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings. Adv. Voster on behalf of the respondent submitted that on two of these grounds, the application for leave to appeal falls short. The order is not final in effect nor does it dispose of a substantial part of the case. The order, because of the material dispute of fact that exist in this matter, simply regulate what steps need to be taken in order to assist this Court to arrive at a just decision.

[5] Mr. Ndobe, who appears for the applicant, contended that this Court erred in referring the matter for oral evidence *mero moto*. The contention is that there is no dispute of fact and neither will oral evidence cure the “dispute” or assist this Court in arriving at a just conclusion. According to him, it is merely a question of interpreting clause 6 of the agreement entered into between the parties, which this Court was obliged to do. I am holding a different view. There can be no prejudice whatsoever if *viva voce* evidence is produced to enable this Court to determine what the true intentions of the parties were at the conclusion of the agreement, in view of the material dispute of fact that exist.

[6] This Court may, in the exercise of its discretion, refer a matter for oral evidence. In *Du Plessis En ‘n Ander v Tzerefos* 1979 (4) SA 819 (O) the following is stated:

“Nie een van die partye het op enige stadium aansoek gedoen dat die aangeleentheid vir mondelinge getuienis verwys moes word nie of dat een van die deponente aan kruisverhoor onderwerp moes word nie. ‘n Hof kan egter ook mero moto ‘n bevel met sodanige strekking maak: Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) te 1165; Oertel NO v Pietrse and Others 1954 (3) SA 364 (O) te 368.”

(emphasis added)

[7] In *Pfizer Inc v South African Druggists Ltd* 1987 (1) SA 259 (t) at 263 F-H the following is stated:

“... The Rule 6(5)(g) application was purely interlocutory, and the order given is no more than a ruling. It is true that the order is specific and contains elements of finality. It is, however, no less interlocutory than many other orders of a like nature which are frequently granted by our Courts and by the Court of the Commissioner of Patents in the course of a hearing and which have been held to be no more than rulings and consequently to be unappealable, such as for instance an order directing a litigant to supply further particulars (cf Pretoria Garrison Institutes v Danish Variety

Products (Pty) Ltd 1948 (1) SA 839 (A)); a temporary interdict (cf *Frank & Hirsch (Pty) Ltd v Rodi & Wienerberger Aktiengesellschaft* 1958 (1) SA 1 (T) (1958 BP 399)); a commission de bene esse (cf *Bell v Bell* 1908 TS 887; or an order for security for costs (*Zipotowski v Anglo American Corporation of South Africa* 1972 BP 374).

(emphasis added)

[8] In *Wallach v Lew Geffen Estates CC* [1993] ZASCA 39; 1993 (3) SA 258 (AD) the following is stated:

“It is plain that the order referring the matter for the hearing of oral evidence was an interlocutory order and that it was a simple

interlocutory order of the kind referred to in Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd 1948(1) SA 839 (A) at 870A. Furthermore this is not a case where

"... the decision relates to a question of law or fact, which if decided in a particular way would be decisive of the case as a whole or of a substantial portion of the relief claimed ..."

as in *Van Streepen and Germs (Pty) Ltd v Transvaal Provincial Administration* 1987(4) 569 (A) at 585 F-G. The "order" given by Coetzee J did not decide the merits. It was merely a direction that further evidence be given before deciding on the merits. It was no more than a ruling. This is clear from a long line of cases decided in this Court and in the provincial divisions. See *Dickinson & Another v Fisher's Executors* 1914 AD 424 at 427-8, *Union Government (Minister of the Interior) and Registrar of Asiatics v Naidoo* 1916 AD 50 at 51-2, *Klep Valves (Pty) Ltd v Saunders Valve Co Ltd* 1987(2) SA 1 (A) at 40H - 41H. See also *Engar & Others v Omar Salem Essa Trust* 1969(2) SA 423 (D) at 425 G-H and the judgment of the Full Bench in the same matter reported in 1970(1) SA 77 (N) at 80 E-H and *Pfizer Inc v South African Druggists Ltd* 1987(1) SA 259 (T) at 262C - 263I.

The subsequent history of the litigation in the Pfizer case affords a practical illustration of the principle. The order that Pfizer sought to appeal against in the judgment referred to was an order by Stegmann J that the deponents to certain of Pfizer's affidavits

should appear to be examined. After the appeal had been struck off the matter came before Eloff DJP. Application was then made on behalf of Pfizer for an order setting aside the order of Stegmann J and directing that the issue be resolved on the papers as they stood. Eloff DJP granted that order and decided the matter on the affidavits. See *Pfizer Inc v SA Druggists Ltd* *Burrells Patent Law Reports* (1986) Vol XI p 713 at 725C. His judgment was upheld on appeal by the Full Bench and this judgment is reported in *Burrells Patent Law Reports* (1987) Vol XII 368. See also *Zweni v Minister of Law and Order of the Republic of South Africa* (a judgment of this Court delivered on 20 November 1992 which is not yet reported). It is clear that according to the criteria there laid down the order of Coetzee J amounted to a non-appealable ruling."

[9] In *The Civil Practice of the High Courts of South Africa*, Fifth Edition, Herbstein & Van Winsen edited by Cilliers, Loots & Nel the following is stated:

"The question whether or not the court may mero motu direct oral evidence to be heard is one regarding which there was until fairly recently scant authority. That this is possible was laid down on appeal in both the former Orange Free State and the former Transvaal. It has, however, been held that, for various reasons, it is a bold step for a presiding judge in an opposed application to refer the matter to evidence or trial mero motu."

[10] In *Nation Treasury v Opposition to Urban Tolling Alliance* 2012 (6) SA 123 (CC) at 231 [25]:

[25] This Court has granted leave to appeal in relation to interim orders before. It has made it clear that the operative standard is "the interests of justice". To that end, it must have regard to and weigh carefully all germane circumstances. Whether an interim order has a final effect or disposes of a substantial portion of the relief sought in a pending review is a relevant and important consideration. Yet, it is not the only or always decisive consideration. It is just as important to assess whether the temporary restraining order has an immediate and substantial effect, including whether the harm that flows from it is

serious, immediate, ongoing and irreparable.

- [11] Insofar as Section 17(1)(a)(i) of the Superior Court Act are concerned, Adv. Voster contended that there is no reasonable prospect of success on appeal. It does not, however, mean that an applicant may not re-argue the merits of the application when seeking leave to appeal. In this regard the court in *Manzi v MEC, Cooperative Governance and Traditional Affairs, Free State Province; In re: Manzi v Nketoane Local Municipality and Others* [2019] JOL 45566 (FB) remarked as follows at para [8] of its judgment:

“The issues raised in those grounds, entail a revisit to the seriously contended issues in which the applicant contends that another court may deal with them differently. In an application for leave to appeal the applicant is not precluded to revisit the issues provided that the court is satisfied that there is a reasonable prospect that the factual matrix would receive a different interpretation by another court.”

I am in full agreement with this contention.

- [12] There are no reasonable prospects that any other court sitting as a court of appeal would arrive at a different decision than what this Court had arrived at. Furthermore, it is not desirable that the matter be dealt with in a piecemeal manner. This matter should be finalized and either party who may not be happy with this Court’s decision, has the right to appeal, but to entertain an appeal at this juncture would be to do so in a piecemeal fashion. This cannot be allowed. In my view, leave to appeal at this stage of the proceedings, should be disallowed.

Order:

- [13] Consequently, the following order is made:

R D HENDRICKS

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT,

NORTH WEST DIVISION, MAHIKENG.

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