

SOUTH AFRICA / JUDGMENT

Pypers and Others v Odendaal & Summerton Inc (A733/12) [2013] ZAGPPHC 221 (19 July 2013)

[2013] ZAGPPHC 221

COURT

North Gauteng High Court, Pretoria

BEFORE

MJ Teffo, J Baloyi

CASE / FILE NUMBER

A733/12

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IN THE NORTH GAUTENG HIGH COURT PRETORIA

CASE NO: A733/12

DATE:19/07/2013

In the matter between:

CORNELIUS GREGORIUS PYPERS..... First Appellant

FREEDOM FRONT PLUSSecond Appellant

JACOBUS JOHANNES HOFFMAN.....Third Appellant

and

ODENDAAL & SUMMERTON INC.....First Respondent

ADRIAAN IZAK ODENDAAL.....Second Respondent

TEFFO. J:

- [1] This Court is required to determine whether the respondents are entitled to the costs of the two applications they had filed prior to the appeal hearing now that the appeal has been withdrawn. The issue will encompass a determination whether it was proper for the respondents to have brought the other application before Louw J and not wait for the application to be heard simultaneously with the appeal.

[2] The issue revolves around the following background facts: The appellants filed an appeal against the judgment of Magistrate K Naidoo sitting at Meyerton in the Magistrate's Court for the district of Vereeniging on 13 June 2010, dismissing their application for rescission of a judgment dated 16 March 2012 with costs and granting the respondents' application for the striking out of their defence with costs.

[3] The plaintiffs in the court below are respondents in the appeal and the defendants are the appellants. For purposes of this judgment I will refer to the parties as they were referred to in the court below.

[4] A brief history of the facts that led to the appeal is as follows:

4.1 The first and second plaintiffs who are a firm of attorneys and the director respectively, sued the defendants in the court below for damages arising from allegations that the defendants uttered and published words which were defamatory of the plaintiffs to the effect that the second plaintiff could be involved in illegal and corrupt activities in conducting his firm's trust account.

4.2 The parties exchanged pleadings and after the defendants delivered the plea, the plaintiffs served them with a request for further

particulars.

4.3 This led to the plaintiffs delivering a notice to compel the defendants to furnish them with the requested further particulars.

The matter was set down for argument and there was no appearance on behalf of the defendants. The plaintiffs' application was granted ordering the defendants to furnish them with the requested further particulars within ten (10) days of the order failing which, allowing the plaintiffs to return to court with same papers to apply for the striking out of the defendants' defence.

4.4 As a result the defendants filed an application for rescission against the order. On the same day the plaintiffs brought a counter-application for the striking out of the defendants' defence on the ground that the defendants had not furnished them with the requested further particulars. The rescission application was dismissed with costs and the counter-application was granted with costs.

4.5 The defendants then launched an appeal against this decision on 30 July 2012 without filing security for costs. Security for costs was only filed on 22 October 2012 together with an application for condonation for the late filing of security and the record of proceedings from the court below was filed on 23 October 2012.

4.6 On 10 October 2012 the plaintiffs launched an application to declare the appeal invalid (under Case No 58797/12). This application was heard on 22 April 2013 by my brother Louw J in the opposed motion roll. Judgment was reserved.

4.7 On 24 October 2012 the appeal hearing was enrolled for 11 June 2013.

4.8 On 17 May 2013 the defendants launched an application to strike the appeal from the roll of 11 June 2013.

4.9 On 29 May 2013 judgment was handed down and Louw J referred the matter for hearing to a full court on 11 June 2013 and reserved the costs for decision by the appeal court.

4.10 On 6 June 2013 the plaintiffs' attorneys received a notice of withdrawal of the appeal from the defendants' attorneys. The defendants also tendered the costs of the appeal on a scale as between party and party which costs include the costs of one junior counsel. This offer was accepted by the plaintiffs.

[5] The parties could not agree on the costs of the application that was heard by Louw J on 22 April 2013. I was informed by the parties that the application was argued by senior counsel on behalf of the plaintiffs and that the plaintiffs pray for an order for costs which include the costs of senior counsel for that day.

[6] The parties did not also agree on the costs of the application to strike the appeal off the roll.

[7] The plaintiffs' counsel made the following submissions:

7.1 The application before Louw J was made because the appeal had lapsed on 26 September 2012 as the appeal was not accompanied by security for costs as required by Rule 51(4) of the Magistrate's Court Rules.

7.2 The other reason was that the finding of the court below that the defendants sought to appeal was not appealable taking into account that it was not a final order as no judgment was made with regard to quantum.

7.3 The defendants' attorneys were informed as early as October

2012 that the record of proceedings in the Magistrate's Court that was filed was not in order but, still they proceeded to set the appeal down for hearing.

7.4 Plaintiffs' attorneys alerted the defendants' attorneys that the appeal had lapsed in terms of Rule 49(6) of the Uniform Rules of Court and Rules 50(1) and 51(9) of the Magistrate's Court Rules. They also disputed that the defendants had complied with the court rules regarding the noting of the appeal. They notified the defendants' attorneys about their intention to apply to court for confirmation that the appeal had lapsed.

7.5 He also challenged the third defendant's opposing affidavit to the application that was before Louw J on the basis that the allegations thereof were not confirmed by the other defendants.

7.6 In the main counsel for the plaintiffs submitted that they are entitled to the costs of the two applications including the costs of senior counsel who argued the application before Louw J. He emphatically submitted that that application was necessary as the

defendants had persisted on continuing with the appeal while they had alerted them of the flaws in the appeal which they could have rectified before setting the appeal down for hearing. He contended that had Louw J dealt with the matter and gave judgment without referring the matter to the appeal court, the issues raised could have been disposed off and it would not have been necessary to deal with them on the day of the appeal hearing. He argued that costs could have been saved. As regards the application to strike the appeal from the roll, he argued that the defendants' attorneys set the appeal down for hearing before the record was corrected and before Louw J handed down judgment in the application heard on 22 April 2013. He asked for costs on a scale as between attorney and client.

[8] On the other hand the defendants' counsel made the following

submissions:

8.1 The two applications referred to above deal with the same issues and there is no reason why they were brought. He referred to the application before Louw J and argued that it should have waited until the day of the appeal hearing. As regards the application to strike the appeal off the roll he submitted that the plaintiffs' attorneys knew by the end of May 2013 that the appeal was going to be withdrawn. Accordingly, the defendants did not find it necessary to oppose the application as there was nothing to strike once the appeal was withdrawn. He also argued that there was no need to instruct senior counsel in the application that was before Louw J as the matter was not complex.

[7] The plaintiffs' counsel referred the court to the following cases: *Pilane v Northern Cape Tractors (Pty) Ltd* 1971 (3) SA 619 (NC), *Lipschitz NO v Saambou-Nasionale Bouvereniging* 1979 (1) SA 527 (T), *Commissioner South African Revenue Services, Gauteng West v Levue Investments (Pty) Ltd* [2007] SCA 22 RSA and *Nawa and Others v Marakala and Another* 2008

(5) SA 275 BH while the defendants' counsel also referred to the matter of *South African Allied Workers Union (In Liquidation) and Others v De Klerk NO and Another* 1992 (3) SA 1 (A).

[8] In terms of s 13(2)(a)(i) of the Supreme Court Act 59 of 1959 ("the Supreme Court Act") a High Court shall for the hearing of any appeal against a judgment or order of an inferior court, be constituted before not less than two judges. It has been held that within the context of s 84 of the Magistrates' Court Act 32 of 1984, the expression "Court of Appeal means the division of the Supreme Court to which the appeal lies, and that a single judge sitting in chambers may entertain an application for an extension of time under the section (*Motsamai v Read* 1961 (1) SA 173 (O); *Heyneke v Dranklisensieraad van Welkom* 1965 (3) SA 737 (O); *De Sousa i/ Cappy's Stall* 1975 (4) SA 959 (T)).

[9] However, there is an established practice that applications for an extension of time in respect of civil appeals from the Magistrates'

Court be heard by the Court of Appeal and not by a single judge (*Meyer v Dowson & Dobson Ltd* 1967 (4) SA 628 (T); *Multilateral Motorvoertuigongelukfondse v Pretorius* 1994 (1) SA 814 (O)).

[10] In *Motsamai v Read* referred to supra the reason for this rule of practice has been stated as follows:

the relief sought, is a matter ancillary to the appeal and on its success depends the appellant's right to proceed with the appeal or not. An application of this kind could involve a consideration of the merits of the appeal ...It is much better for all the parties concerned to let these matters, which are really part of the proceedings on appeal, come before the full court of appeal rather than before a single judge, who may by his refusal to grant relief, finally decide the issue between the parties. The full court can then, especially where there is argument on the merits, combine the hearing of the appeal with that of the application and so save costs."

[13] In *Lipschitz v Saambou-Nasionale Bouvereniging* referred to supra the following principle was articulated:

"The scope of the rule of practice whereby applications for condonation of procedural shortcomings in appeals are heard by a court comprised of as many judges as would constitute the court of appeal is limited to applications where the prospects of success have to be canvassed. This consideration, does not, however, necessarily enter into application under Rule of Court 49(1) and where it does not, a single judge can entertain the application, for a court entertaining such an application sits as a court of first instance."

[14] In *Pilane v Northern Cape Tractors (Pty) Ltd* referred to supra it was held that an objection that the notice of appeal from a decision in a Magistrates' Court is invalid as security has not been given timeously, can only be taken on notice of motion with supporting affidavits.

[15] In *Nawa and Others v Marakala and Another* also referred to supra the court held that by virtue of s 13(1)(a) of the Supreme Court Act, a single judge of the High Court had jurisdiction to entertain an application for a declaration that an appeal had lapsed. The court further held that where the prospects of success of an appeal, were not required to be transversed, it was permissible for a single judge to dispose of the matter.

[16] In *South African Allied Workers Union (In Liquidation) and Others v De Klerk NO and Another* also referred to supra Smallberger JA said the following:

"The current practice in applications for the condonation of a failure to comply with the Rules of the Appellate Division relating to the prosecution of an appeal is for such application to be set down at the same time as the hearing of the appeal. Since the court would have before it and would have studied the judgment of the court a quo, the heads of argument and, indeed, the full appeal record, the prospects of success or otherwise would be reasonably apparent."

[17] I did not find the case of *Commissioner South African Revenue Services, Gauteng West v Levue Investments (Pty) Ltd* referred to supra relevant to the issues before me in that it dealt in the main with the refusal of condonation for the late filing of the record even where there were prospects of success in the appeal.

[18] While it has always been the plaintiffs' contention that for the fact that their application before Louw J had nothing to do with the prospects of success in the appeal but only related to procedural aspects in prosecuting the appeal, they felt it necessary to bring it on motion proceedings before a single judge. The defendants maintained, and relying on the decision in *South African Allied Workers Union (In Liquidation) and Others v De Klerk NO and Another* referred to supra, that applications of this nature should be set down on the same date with the appeal hearing. I will deal with this decision later in my judgment.

[11] It is common cause between the parties that the defendants' attorneys were alerted several times by the plaintiffs'

attorneys of the flaws in their prosecution of the appeal. They were also alerted of the plaintiff's intention to launch an application declaring the appeal invalid prior to the plaintiffs doing so. Nothing happened, e.g, no security for costs in the appeal was filed, etc until on 10 October 2012 when the plaintiffs launched the application to declare the appeal invalid. At that time the appeal was also not yet enrolled for hearing. Security for costs together with an application for condonation were only filed on 22 October 2012 and the record on 23 October 2012. There were also concerns that the application for condonation was not properly filed as it was only included as an annexure in the record of proceedings and the notice that security was filed. It is important to note that the appeal was launched on 30 July 2012 after the order that was sought to be appealed against was given on 12 June 2012. It is also important to be mindful of the fact that the defendants' attorneys were also alerted that as the appeal was lodged without security for costs on 30 July 2012, it had lapsed on 26 September 2012.

[12] Taking all these facts into account I am of the view that the plaintiffs were correct to bring the application to declare the

appeal invalid before a single judge and not wait for the date of the appeal hearing as at that time nothing was happening. There was no proper appeal before Court as no security was filed. The aim was to dispose of the matter even before the appeal could be set down. As I understood the reasons for launching the application, the application only dealt with procedural aspects of prosecuting the appeal. This step was prompted by the failure of the defendants to comply with the Court rules.

[21] The decision in *South African Allied Workers' Union (in liquidation)* as referred to above does not bar a party who is in the same situation like the plaintiff to bring an application of this nature before a single judge as held in the other matters referred to above. I am of the view that although it is preferable that such applications should be heard on the same date as the hearing of the appeal especially where prospects of success need to be canvassed at the hearing of the application, there is no reason why a single judge should not hear the application where prospects of success in the application are not going to be decided upon.

- [22] For those reasons and based on the decisions referred to above I find that the plaintiffs are entitled to the costs of the application that came before Louw J on 22 April 2013. It was argued that the matter was not complex to warrant the services of a senior counsel. Looking at the matter as it was and the issues I am persuaded that the matter was complex and warranted the services of senior counsel.
- [23] Nothing happened after 10 October 2012. It was only on 22 and 23 October 2012 that the defendants filed security for costs, the application for condonation and the record for the proceedings in the Magistrate's Court. Even after these were filed, the plaintiffs' attorneys notified the defendants' attorneys that the record was not in order and concerns were also raised that there was no compliance with the court rules. Without dealing with the issues raised, the defendants' attorneys proceeded to set the appeal down for hearing.
- [24] The plaintiffs' counsel submitted that upon realising that despite all the concerns raised, the defendants had persisted to proceed with the appeal and considering that the judgment on the application before Louw J was still reserved, the plaintiffs launched an application to strike the appeal off the roll. The defendants' counsel argued that the same issues were raised in the application before Louw J as in the application to strike the appeal off the roll. He also submitted that the plaintiffs knew towards the end of May 2013 that the appeal was going to be withdrawn and that it was therefore not necessary for the defendants to oppose the application as there was nothing to strike once the appeal was withdrawn.
- [25] According to the record the application to strike the appeal off the roll was launched on 17 May 2013. Louw J's judgment was handed down on 29 May 2013 and at that time the plaintiffs were not aware that the appeal was going to be withdrawn. The application was not opposed. I am of the view that there was nothing wrong for the plaintiffs to bring that application taking into account that the appeal was set down before the defendants could rectify the record and deal with the other issues that were raised by the plaintiffs. At the time the application was launched there was no judgment by Louw J. The plaintiffs wanted to play safe. I do not agree that the two applications raised the same issues in that after the plaintiffs had launched the application to declare the appeal invalid on 10 October 2012, security for costs and the record of proceedings were filed although the record of proceedings in the Magistrate's Court was still not proper. In the circumstances I find that it was proper for the plaintiffs to also bring an application to strike the appeal off the roll as they could not anticipate the decision by Louw J in the other application and the date of appeal hearing was approaching. For the same reason I also find that the plaintiffs are entitled to the costs of the application to strike the appeal off the roll.
- [13] The plaintiffs also asked for costs for the striking application on a scale as between attorney and client given the way the appeal was prosecuted by the defendants as highlighted above. It is clear from the record of the proceedings and the documents filed of record that the defendants disregarded the court rules when they noted the appeal. For the reasons I gave above and in exercising my judicial discretion I grant costs as requested by the defendants.

[14] In the result I make an order in the following terms:

14.1 That the first, second and third appellants pay the costs of the appeal on the scale as between party and party, jointly and

severally, the one paying the other to be absolved. Such costs shall include the costs of one junior counsel.

14.2 That the first, second and third appellants pay the costs of the respondents' application to strike out the appeal on the scale as between attorney and client jointly and severally, the one paying the other to be absolved.

14.3 That the first, second and third appellants pay the costs of the respondents' application brought under Case No 58797/2012

jointly and severally, the one paying the other to be absolved, which shall include the costs of two counsel for argument on 22 April 2013.

MJ TEFFO

JUDGE OF THE NORTH GAUTENG HIGH COURT, PRETORIA

I agree:

J BALOYI

ACTING JUDGE OF THENORTH GAUTENG HIGH COURT, PRETORIA

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