

SOUTH AFRICA / JUDGMENT

Seaview Plant Hire and Civil Contractors CC and Another v Lukhanji Precast CC (4126/2015) [2017] ZAECHGC 105 (29 June 2017)

[2017] ZAECHGC 105

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Roberson

CASE / FILE NUMBER

4126/2015

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: 4126/2015

DATE HEARD: 15/06/2017

DATE DELIVERED: 29/06/2017

In the matter between

SEAVIEW PLANT HIRE & CIVIL CONTRACTORS CC

1ST APPLICANT

ARTHUR RAYMOND EUGENE DE GOUVEIA

2ND APPLICANT

and

LUKHANJI PRECAST CC

RESPONDENT

JUDGMENT

ROBERSON J:-

- [1] The respondent instituted an action in the Regional Court Queenstown against the applicants for payment of the sum of R614 051.02.

The claim against the first applicant was for goods provided on credit by the respondent. The second applicant was sued in his capacity as surety and co-principal debtor of the first applicant. The applicants defended the action and pleaded, inter alia, that the Regional Court Queenstown did not have jurisdiction over their persons and that the amount claimed exceeded the jurisdiction

of the Regional Court.

[2] On 14 April 2015 the Regional Magistrate, Queenstown, ordered that the action be removed to the High Court Grahamstown. In this application, relying on s 50 of the Magistrates' Courts Act 32 of 1944, the applicants seek to have the magistrate's order set aside on the basis that it is a nullity.

[3] Section 50 of Act 32 of 1944 provides:

"Removal of actions from court to provincial or local division

(1) Any action in which the amount of the claim exceeds the amount determined by the Minister from time to time by notice in the Gazette, exclusive of interest and costs, may, upon application to the court by the defendant, or if there is more than one defendant, by any defendant, be removed to the provincial or local division having jurisdiction where the court is held, subject to the following

provisions-

- (a) notice of intention to make such application shall be given to the plaintiff, and to other defendants (if any) before the date on which the action is set down for hearing;
- (b) the notice shall state that the applicant objects to the action being tried by the court or any magistrate's court;
- (c) the applicant shall give such security as the court may determine and approve, for payment of the amount claimed and such further amount to be determined by the court not exceeding the amount determined by the Minister from time to time by notice in the Gazette, for costs already incurred in the action and which may be incurred in the said provincial or local division.

Upon compliance by the applicant with those provisions, all proceedings in the action in the court shall be stayed, and the action and all proceedings therein, shall, if the plaintiff so requires, be as to the defendant or defendants, forthwith removed from the court into the provincial or local division aforesaid having jurisdiction. Upon the removal, the summons in the court shall, as to the defendant or defendants, stand as the summons in the division to which the action is removed, the return date thereof being the date of the order of removal in an action other than one founded on a liquid document, and, in an action founded on a liquid document, being such convenient day on which the said division sits for the hearing of provisional sentence cases, as the court may order: Provided that the plaintiff in the action may, instead of requiring the action to be so removed, issue a fresh

summons against the defendant or defendants in any competent court and the costs already incurred by the parties to the action shall be costs in the cause.

- (2) If the plaintiff is successful in an action so removed to a provincial or local division, he may be awarded costs as between attorney and client.”
- [4] In contending that the order of the magistrate is a nullity, the applicants relied on the provision in s 50 that only a defendant can apply for an action to be removed to the High Court and there is no provision in the section for an application by a plaintiff.
- [5] The application to remove the action to the High Court was brought in the name of the respondent as applicant. The founding affidavit was deposed to by the respondent’s attorney Anthony McDougall. He referred to the applicants’ plea concerning lack of jurisdiction as well as a counterclaim by the first applicant for damages, which exceeded the jurisdiction of the Regional Court. Paragraphs 9, 10 and 11 of the affidavit read as follows:

“9. The parties object to the said action being tried by the above Honourable Court or any magistrate’s court.

- 10. It would be appropriate the above Honourable Court to waive the necessity for the parties to give and approve security for payment of the amount claimed and for costs already incurred in the said action and which may be incurred in the said provincial division.
- 11. In the light of the pleadings now filed of record in the said action, I have discussed the possibility of removing the said action to the High Court in Grahamstown with the Defendants’ attorney, and the Defendants are in agreement and support the application for the removal and transfer of the matter to Grahamstown. In this regard, I annex hereto the two letters exchanged between the Defendants’ attorneys and myself dated 20 and 26 February 2014, marked “ADM 1” and ADM 2” respectively.”
- [6] The two letters referred to in the affidavit were preceded by a letter from the applicants’ attorney to the respondent’s

attorney dated 19 February 2014, which stated:

“We refer to the above and attach under cover hereof our Plea which will be served on you shortly by our correspondent.

As you will note, we are raising a special plea pertaining to jurisdiction which is set out in the annexure hereto. We furthermore possess a counterclaim and same also exceeds the jurisdiction of the court and prior to us serving and filing same with a request to stay we would appreciate it if you would peruse the Plea and take it under advisement as to whether the matter must be argued or whether we can consent to the jurisdiction of the High Court.”

- [7] The letter from the respondent’s attorney to the applicants’ attorney dated 20 February 2014 stated:

“We refer to the above matter and your letter of the 19th February 2014. Whilst not admitting that your special Plea is good in law and merely as a result of your counterclaim, we confirm that we have no jurisdiction to transferring the matter to the High Court, Grahamstown.”

We will accordingly brief Counsel in this regard and file the necessary and appropriate notices to transfer the matter to the High Court, Grahamstown. Kindly confirm that you will consent to the jurisdiction of the High Court Grahamstown.”

[8] The response from the applicants’ attorney, dated 26 February 2014, was as follows:

“We refer to the above and to your letter of the 20th February 2014 and note the contents thereof.”

We confirm that we will consent to the jurisdiction of the High Court Grahamstown.”

[9] The deponent to the founding affidavit in the present application is the applicants’ attorney, Carl Jeppe. With reference to his letter of 26 February 2014 to the respondent’s attorney, he stated:

“A perusal of annexure “ADM2”, being a letter from the Defendants’ attorney, however, reveals that I merely consented to the jurisdiction of the High Court, Grahamstown.”

He went on to say:

“The Defendants did not at the time oppose the Plaintiff’s application in view of the fact that I was not aware that the transfer of the matter which the Plaintiff was seeking was not permissible in law.”

It was only when I consulted counsel when the Plaintiff in the pending proceedings in this Honourable Court issued a Notice of Bar that I learnt that the transfer was in fact a nullity.”

[10] With reference to s 50 of Act 32 of 1944 he stated that it does not authorise a transfer at the request of a plaintiff and that the rules of the Magistrates’ Courts do not provide for a transfer of an action at the request of a plaintiff.

[11] The respondent’s answering affidavit was deposed to by McDougall. He pointed out that the contents of his affidavit in the removal application had never been disputed and that the applicants associated themselves with the application to remove the matter to the High Court. The application was served on the applicants’ attorney and they did not oppose the application.

[12] Following the order of the magistrate the matter was removed to the High Court and allocated a case number. By letter dated 19 October 2015 addressed to the respondent’s attorney, the applicants’ attorney stated that he had been instructed by the applicants that they acknowledged indebtedness to the respondents for the amount claimed in the action. On 23 June 2016 the respondent filed a notice of intention to amend its particulars of claim to include an allegation that the applicants had admitted the claim, had compromised their defence, and the respondent was therefore entitled to judgment in the amount claimed. The amendment was not opposed.

[13] Thereafter the respondent served a notice of bar. In response, on 16 August 2016, the applicants filed a notice in terms of rule 30

(2) (b) in which they for the first time contended that the order transferring the matter to the High Court was a nullity. The respondent withdrew the notice of bar. The present application was launched on 2 February 2017.

[14] McDougall further pointed out, in alleging that the applicants were estopped from contending that the magistrate's order was a nullity, that should the present application succeed, the respondent would be irrevocably prejudiced because its claim would have prescribed.

[15] It was submitted on behalf of the respondent that the procedure adopted by the applicants was incorrect. Section 22 (1) of the Superior Courts Act 10 of 2013 provides the grounds for the review of proceedings in the magistrates' courts:

"Grounds for review of proceedings of Magistrates' Court

(1) The grounds upon which the proceedings of any Magistrates' Court may be brought under review before a court of a Division are-

- (a) absence of jurisdiction on the part of the court;
- (b) interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;
- (c) gross irregularity in the proceedings; and the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.

[16] The applicants should therefore have brought review proceedings and their failure to do so, so it was submitted, was dispositive of the application.

[17] I shall however assume, without deciding, that the application is in substance an application to review and set aside the magistrate's

order on the ground contained in s 22 (1) (a) of Act 10 of 2013.

[18] In *Oosthuizen v Road Accident Fund* 2011 (6) SA 31 (SCA) at para [10] the following was said with regard to s 50 of Act 32 of 1944:

"There is no statutory equivalent for the plaintiff for an obvious reason. A plaintiff chooses the forum in which to litigate and must bear the consequences of doing so. A plaintiff, having instituted an action in the magistrates' court is, of course, free to change tack by abandoning the action in the lower court and commencing proceedings in a High Court with attendant costs implications."

Further at para [22]:

“It was submitted that there was a discrimination of sorts between plaintiff and defendant reflected in s 50(1) of the Magistrates' Courts Act, which impacts negatively on the appellant's entitlement to have his case adjudicated. It was contended on behalf of the appellant that constitutional norms dictated that a litigant in the circumstances of the appellant should not be left destitute. These submissions ignore the fact that it is a plaintiff who chooses the forum in which to litigate and not a defendant.”

[19] In my view the present matter differs from the situation in *Oosthuizen*, on which the applicants relied, where the appellant/plaintiff unsuccessfully sought to invoke the inherent power of the High Court

to regulate its own process and order the removal of the action from the magistrate's court to the High Court. A request by the appellant/plaintiff's attorneys to the respondent to consent to the removal of the matter had received no response and the appellant approached the High Court directly. In the present matter there has been an order by the magistrate, effectively at the request of both parties, for the reasons contained in the correspondence between the attorneys and in the founding affidavit to the removal application. Although the respondent was the nominal applicant, the substance of the application made it clear

that the removal to the High Court was by consent. Notably paragraph [10] of the founding affidavit deals with the waiver of security and costs already incurred. It is a defendant who is required in terms of s 50 of Act 32 of 1944 to provide security for the amount claimed and costs already incurred. This is not a case where the respondent/plaintiff has to bear the consequences of its choice of forum and is trying to bypass the provisions of s 50 of Act 32 of 1944.

[20] The removal to the High Court was first raised by the applicants in their attorney's letter of 19 February 2014 which makes it clear that in the light of the proposed counterclaim the applicants were suggesting the option of a removal to the High Court as opposed to arguing the issue of jurisdiction in the Regional Court. The respondent's attorney's letter of 20 February 2014 equally makes it clear that what was envisaged was a removal of the action to the High Court. I should mention here that where the letter states “we confirm that we have no jurisdiction to transferring the matter to the High Court, Grahamstown”, what was obviously meant was no objection. Otherwise the sentence makes no sense in the context of a response to the applicants' suggestion of consent to the jurisdiction of the High Court.

[21] The applicants' attorney's letter of 26 February 2014 was in direct response to the respondent's attorney's letter of 20 February 2014, which expressly mentioned a transfer to the High Court. In the context of the correspondence as a whole, the letter of 26 February 2014 could only be interpreted as an agreement to remove the matter to the High Court. The applicants' attorney's statement that in that letter he was only consenting to the jurisdiction of the High Court is in the circumstances disingenuous and opportunistic. His statement is in any event contradicted by his further statement that the applicants did not oppose the application to remove the matter to the High Court. The lack of opposition to the application, and especially in view of the contents of the founding affidavit in that application, indicated an agreement to remove the matter to the High Court. If, as the

applicants' attorney claims, he did not know that the removal "which the plaintiff was seeking"[1] was legally impermissible, such ignorance, if it did exist, did not vitiate the consensual application to remove the matter.

[22] The application was clearly at the behest of the applicants and the respondent and in my view the magistrate did not exceed his powers.

[23] Insofar as the applicants maintained in their special plea that the Regional Court Queenstown did not have jurisdiction over their persons, by consenting to the application to remove the matter they submitted themselves to that jurisdiction in terms of s 28 (1) (f) of Act 32 of 1944.

[24] It was further submitted on behalf of the respondent that the applicants were estopped from retracting their representation that they would consent to the jurisdiction of the High Court. The respondent acted on that representation and it would be prejudiced should the applicants be allowed to act contrary to their representation. I agree with this submission. The express content of the applicants' correspondence and their subsequent conduct caused the respondent to act as it did and they cannot now, as counsel for the respondent phrased it, "seize upon a technicality" in order to avoid the consequences of their representation.

[25] It was submitted on behalf of the applicants that estoppel could not apply because it would give validity to an unlawful order.

However I have already found that the magistrate did not exceed his powers.

[26] It follows from my above reasons that the application cannot succeed.

Order

[27] The application is dismissed with costs.

J M ROBERSON

JUDGE OF THE HIGH COURT

Appearances:

For the Applicants: Adv PPJ van der Berg, instructed by Whitesides Attorneys, Grahamstown

For the Respondent: Adv TJM Paterson SC, instructed by Carinus Jagga Incorporated,
Grahamstown

[1] This is a misleading statement. The applicants and the respondent sought the transfer.

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