

SOUTH AFRICA / JUDGMENT

Strydom v Nick Breytenbach Incorporated (A637/2011) [2013] ZAGPPHC 537 (13 November 2013) [2013] ZAGPPHC 537

COURT

North Gauteng High Court, Pretoria

BEFORE

Preller, Louw AA, Twala J

CASE / FILE NUMBER

A637/2011

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: A637-2011

DATE: 2013-11-13

In the matter between

ALLETTA SOPHIA STRYDOM.....Plaintiff

and

NICK BREYTENBACH INCORPORATED.....Defendant

J U D G M E N T

PRELLER J: Counsel for both parties were agreed with my view that the judgment of the court a quo is difficult to understand and that it is virtually impossible to fathom the reasoning by which the learned magistrate arrived at his conclusion.

The plaintiff issued summons in the Magistrates Court against the defendant for the payment of R95 000.00 on the strength of a written

undertaking that the defendant had given to Greyvensteins

Nortier, a firm of attorneys in the following terms:

"Ons gee hiermee ons kantoor onderneming om met datum van registrasie van bogemelde transport, die bedrag van R95 000.00 alleen aan u kantore oor te betaal."

The rest of the letter is irrelevant. A copy of the letter containing this undertaking, is annexed to the particulars of claim.

In her particulars of claim, the plaintiff referred to this undertaking and added the allegation (which does not appear from the letter in which the undertaking has been given) that the payment was to be made for the credit of the plaintiff.

The defendant pleaded that the undertaking speaks for itself and denied everything to the contrary in the relevant part of the particulars of claim. It may have been wise of the plaintiff to have pleaded that everything that does not accord with the letter of undertaking, is denied as the allegation made by the plaintiff is not necessarily contrary to the terms of the letter of undertaking, but supplements it. That just by the way.

The particulars of claim further allege that transfer of the property had been registered in the Deeds Office of Pretoria but that the defendant failed to make payment of the R95 000.00, which was common cause.

At the trial before the Magistrate, the defendant attacked the plaintiff's locus standi, not in the sense of her capacity to appear in a court, but in her entitlement to the claim, by way of a point in limine and the parties, by agreement, requested the court a quo to adjudicate the latter dispute as a stated case on the basis of agreed facts that form part of the record.

I think it is perhaps apposite to read that into the record. As stated, the agreed facts in the stated case are the following:

1. Annexure A to the plaintiff's particulars of claim is on the face of it, made out in favour of a firm of attorneys, Greyvensteins

Nortier.

2. Annexure A to the plaintiff's particulars of claim was made out in favour of the aforementioned attorneys due to the fact that the plaintiff had to pay Greyvenstein the purchase price of a property which the plaintiff had bought from the said Greyvenstein.
3. The aforementioned Greyvenstein was an attorney in the firm Greyvensteins Nortier.
4. The aforementioned firm of attorneys, Greyvenstein Nortier were the conveyancing attorneys pertaining to the transfer of Erf 22, Tzitzikamma for the said Greyvenstein (as seller) to the plaintiff (as purchaser).
5. When the undertaking Annexure A to the plaintiff's particulars of claim was not fulfilled by the defendant, the plaintiff subsequently paid an amount of R95 000.00 to Greyvensteins Nortier Attorneys, for which payment receipt in that amount was issued by Greyvensteins Nortier to the plaintiff.

6. The property bought by the plaintiff from Greyvenstein was subsequently transferred into the name of the plaintiff and the amount of R95 000.00 was paid to the seller in reduction of the purchase price thereof.

That is the end of the agreed facts as set out in the stated case, but then the document continues to say the following:

"On the assumption that the aforementioned facts are correct, the question arises whether or not, without further ado, the plaintiff has locus standi to insist upon payment in terms of the undertaking, Annexure A to the plaintiff's particulars of claim. The opposing contentions of the plaintiff and the defendant are the following in this regard:

7. The plaintiff contends inter alia that the attorneys firm Greyvensteins Nortier was merely her agent and that she consequently is entitled to collect in terms of the undertaking.
8. The defendant inter alia contends that the firm of attorneys Greyvensteins Nortier received the money on behalf of the seller Greyvenstein as part payment of the purchase price, conditional only upon transfer of the property being effected from Greyvenstein into the name of the plaintiff and that in the premises, the plaintiff has no locus standi to sue on the undertaking without further ado."

That resulted in the incomprehensible judgment of the court a quo dismissing the point in limine.

There are accordingly two issues before us, namely firstly whether the order made by the court a quo is appealable and secondly whether the plaintiff had the necessary right to enforce the undertaking.

Counsel were at the hearing agreed and Mr Jacobs for the respondent very fairly, in my view, conceded that it is correct that this court should regard the point as an appealable one.

I just wish to refer very briefly to two authorities, namely first in the case of Caroluskraal Farms and Others v Eerste Nasionale Bank [1994] ZASCA 23; 1994 (3) SA 407 (AD). The relevant part of that judgment is contained at page 416 E. It is not necessary to refer to the facts of this case, because it is also referred to in the subsequent case of Smith v Kwanon Qubela Town Council 1999 (4) SA 947 (SCA). The entire relevant part of this judgment is contained in paragraph 1 of the judgment by Harms JA of which I shall

quote the following part:

"1. The point in this appeal relates to a point in limine. It concerns the locus standi (in the sense of a lack of authority of Mr Norman Watson who instituted these proceedings in the Eastern High Court, purportedly

acting on behalf of the Town Council). Pursuant to a stated case which dealt with this objection only, Erasmus J came to the conclusion that Watson had the necessary locus standi and he dismissed the objection with costs. That order is appealable..."

Reference is made to inter alia the Caroluskraal case to which I have referred. I think the facts in the latter case are as close to being on all fours with the facts in the present case as one can wish to come. The similarity being that in both cases it was a decision on the locus standi in the sense of capacity to claim of the plaintiff that was in question.

In that case as in the present case, it was a final and irrevocable decision taken by the court on the point concerned that could not be revisited later. In the same way, in the present case, the ruling by the court a quo is final and irrevocable and cannot be revisited if the case should be proceeded with.

Apart from the legal position which is contained in section 83 of the Magistrates Court Act and which limits the right of appeal to final rulings on a point of substance between the parties, there is the very practical consequence of the current case, that if the court a quo were wrong and that the plaintiff did not have the necessary locus standi, it would be senseless to make a finding that the point was not appealable, necessitating the entire trial to be gone through in the court a quo and for the decision to be corrected in a subsequent appeal. In view of the amount involved, that would hardly be worth the costs.

I am accordingly satisfied that this court has the jurisdiction and it is essential that we proceed to dispose of this appeal.

We are bound to the stated case and the agreed facts contained in it. Looking at the particulars of claim, which I suppose we should not do, it is clear that the plaintiff attempted to make a leap that was not supported by the Annexure to the particulars of claim namely the statement that the payment of R95 000.00 had to be made to the firm of attorneys for the credit of the plaintiff. That does not appear from the letter of undertaking and it is not contained in the statement of agreed facts that is before us.

It is clear from the agreed facts that the undertaking was given to the transferring attorneys, being Greyvensteins Nortier for the purchase price of a property that the plaintiff had purchased from Greyvenstein who was also a member of the firm of the conveyancing attorneys.

They attended to the transfer of the property from Greyvenstein to the plaintiff and it was clear that from the letter of undertaking that the amount concerned was to come from another transaction that the defendant was handling on behalf of the plaintiff. We are not told in the agreed facts what the fate was of the transaction that was handled by the defendant. I can only speculate that that transaction did not go through and that the attorney accordingly was of the view that he was no longer under the obligation to make the payment.

The upshot was that the plaintiff had to make good the shortfall on the purchase price from her own pocket and she is now trying to recover that amount from the defendant. It would be unfair to hold the defendant liable for payment thereof, if the transaction that he was handling on behalf of the plaintiff, did not materialise because quite clearly the intention never was that he should pay that amount from his pocket.

In any event, the point in issue is the relationship between the plaintiff and the conveyancing attorneys to whom the payment should have been made. If they were to hold the money in trust for the credit of the plaintiff after receiving it from the defendant, she might have been entitled to claim that they pay it to her, for example if she should decide not to proceed with the purchase of the Tzitzikamma property.

On the other hand, if the money had been held in trust for the seller, that is Greyvenstein, she would have had no control over it and she would not be entitled to claim payment thereof. What is clear, is that from the agreed facts it is impossible to say that the plaintiff was ever entitled to the money or had any right to it, even if the money had been in the trust account of the transferring attorney. That is one of the facts that the plaintiff would have had to prove, bearing the onus in the case as it was, before she could succeed.

The defence raised by the defendant is in my view a valid one, namely that in terms of the undertaking he had no obligation to the

plaintiff but only to the seller and that the seller through his conveyancing attorney or his agent Greyvensteins Nortier were the only parties that would have been entitled to enforce the terms of the undertaking against him.

As a result of that, the plaintiff has not discharged the onus of showing her entitlement to the money and there is simply no agreed fact to support that entitlement of hers.

In the circumstances the proper order of the Magistrate would have been one granting absolution from the instance, with costs.

ORDER

I therefore propose that:

- [1] The appeal be upheld with costs.
- [2] The order of the court a quo be set aside and the following substituted for it:

“The defendant is absolved from the instant with costs.”

LOUW AA: I agree

TWALA J: I agree.

PRELLER J: That is then so ordered.

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