

SOUTH AFRICA / JUDGMENT

Sugarberry Trading 239 CC t/a Degs Cellular v Mobile Telephone Networks (Pty) Ltd (1503/2021) [2024] ZANWHC 309 (31 December 2024)

[2024] ZANWHC 309

COURT

North West High Court, Mafikeng

BEFORE

Mfenyana

CASE / FILE NUMBER

1503/2021

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION,

MAHIKENG

Case

No: 1503/2021

In the matter between:-

SUGARBERRY TRADING 239

CC

TRADING

AS DEGS CELLULAR

Applicant

and

MOBILE

TELEPHONE NETWORKS (PTY) LTD

Respondent

Coram: Mfenyana J
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 31 December 2024.

ORDER

1. Leave to appeal is granted to the Full Court of this Division.
2. Costs shall be costs in the appeal.

JUDGMENT

Mfenyana J

Background

- [1] This is an application for leave to appeal against the judgment and order handed down by Mongale AJ on 19 January 2023. The application is brought pursuant to the provisions of section 17(2)(a) of the Superior Courts Act, 10 of 2013 (the Act).
- [2] The grounds of appeal as set out in the notice of application for leave to appeal, can be summarized as follows:

That the court erred

2.1 in finding that Rule 6(5)(b)(iii) (aa) finds application in case of applications.

2.2 In finding that the term “any affidavit as contained in Rule 6(5)(b)(iii)(aa) is interpreted to include an application, and that although an application for summary judgment, is supported by an affidavit, it remains an application albeit under the self-contained provisions of Rule 32, and that the only exclusions to Rule 6(5)(b)(iii)(aa) are applications in terms of Rules 43 and 6(12). In so finding, the court did not consider that these applications are not affected by Rule 6(5)(iii)(aa), the appellant further avers.

2.3 In not applying a purposeful and restrictive interpretation to the phrase “any” contained in Rule 6(5)(b)(iii)(aa), in applying a holistic approach as laid down in *University of Johannesburg v Auckland Park Theological Seminary* 2021 (6) SA 1 (CC).

2.4 In applying the dictum in *ABSA Bank Limited v Fumani Sikwabana* (Case No. 2370/15) to the matter at hand

2.5 In considering the plaintiff's (respondent in this application) condonation application in the absence of a substantive application for condonation.

2.6 In finding that the defendant's (appellant in this application) Rule 30 application does not lay a basis for the prejudice suffered by the defendant.

- [3] In opposing the application, the respondent contends in limine that the judgment and order of Mongale AJ is not appealable as it is not dispositive of the parties' rights and obligations in the main action. It further submits that the court should guard against granting leave to appeal if the issue to be dealt with would be dealt with in isolation.
- [4] Regarding the grounds of appeal, the respondent avers that the effect of the leave to appeal, if granted, would lead to the court dealing with the rule 30 in isolation. It contends that a rule 32 application should be interpreted in the context of the provisions of rules 6(5)(b)(iii) (aa) and (bb) as correctly considered by the court.
- [5] In respect of condonation, the respondent avers that contrary to the applicant's contention that there was no condonation application, this was incorporated in its answering affidavit in paragraphs 17 to 24 thereof. It further contends that this was in any event, only necessary if the court found that the summary judgment was filed out of time, which is not the case as the court found that on a proper interpretation of the rules, the summary judgment application was not filed out of time. Consequently, the rule 30 application failed.
- [6] Section 17 (1) of the Superior Courts Act[1] 10 of 2013 sets out the circumstances in which leave to appeal may be granted. It states:
- 17(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that –
- (a) (i) the appeal would have a reasonable prospect of success; or
- (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;...
- [7] It is perhaps necessary to set out a brief factual background of the matter. The respondent (as plaintiff) issued a summons against the appellant (as defendant in the main action). The defendant delivered its notice of intention to defend and thereafter, a plea. On 21 January 2022, the plaintiff served an application for summary judgment on the defendant. This prompted the defendant to file a notice in terms of rule 30(2)(b) complaining that the plaintiff's application for summary judgment constitutes an irregular step as it was filed out of time, and therefore not in compliance with rule 32(2)(b). On the contrary, the respondent avers that the application for summary judgment was not filed out of time. When the respondent did not respond to the applicant's notice in terms of rule 30(2)(b), the applicant filed an application in terms of rule 30(1).
- [8] It is also worth noting that the present application was set down by the respondent after the applicant, having filed its notice of application for leave to appeal, failed to take further steps to advance the application. The respondent thus avers that the matter enjoys no prospects of success on appeal, and that the applicant is not seriously intending to pursue the appeal.

[9] In its judgment, the court considered inter alia whether rule 6(5)(b)(iii) (aa) finds application in an application for summary judgment. It found that it does, as the Rules Board did not include it as part of the exclusions (under sub paragraph (bb)). The court went further to deal with the provisions relating to dies non and concluded that they equally apply to applications for summary judgment.

[10] Rule 6(5)(b)(iii)(aa) states:

“(b) In a notice of motion the applicant must –

(iii) set forth a day, not less than 10 days after service thereof on the respondent, on or before which such respondent is required to notify the applicant in writing, whether respondent intends to oppose such application, and must further state that if no such notification is given, the application will be set down for hearing on a stated day, not being less than 10 days after service on the said respondent of the said notice:

Provided that –

(aa) For the purposes of this subrule, the days between 21 December and 7 January, both inclusive, shall not be counted in the time allowed for delivery of the notice of intention to oppose or delivery of any affidavit...”

[11] For reasons that will be apparent later in this judgment, it is necessary to also set out the provisions of subrule (bb). It provides:

(bb) the provisions of subparagraph (aa) shall not apply to applications brought under subrule 6(12) of this rule and applications brought under rule 43.

[12] Essentially, this application hinges on a narrow issue regarding the interpretation of rule 6(5)(b)(iii)(aa) and its applicability to summary judgment. Ultimately, the enquiry being whether the court erred in dismissing the rule 30(1) application brought by the applicant.

[13] A reading of rule 6(5)(b)(iii)(aa) makes it clear that the rule does not seek to deal with each and every aspect in relation to applications, but is specifically designed to deal with the particulars which must be contained in a notice of motion and the dies non in respect of a notice of intention to oppose and affidavit. It further states that the applicant must specify a day (not less than 10 days) when the respondent should file its notice of intention to oppose, and that in the absence of such notification, the applicant would set the application down for hearing.

[14] With reference to section 17(1) of the Superior Courts Act, Mr Wessels argued on behalf of the applicant that there is a compelling reason why leave should be granted and that an appeal would enjoy great prospects of success, in that the court misconstrued and misinterpreted rule 6(5)(b)(iii).

[15] The applicant's contention is further that rule 32 is a self-contained provision which provides a period of 15 days after delivery of the plea, for filing of a summary judgment application.

According to the applicant, this expired on 5 January 2022. The applicant thus contends that the respondent's reliance on rule 6 is misplaced. The applicant points out the differences between a 'normal' application (rule 6 application), and an application for summary judgment in order to demonstrate that a summary judgment application is not catered for in rule 6.

[16] It is further the applicant's argument that the affidavit referred to in rule 6(5)(b)(iii) (aa) does not include a founding affidavit but refers to a notice of intention to oppose and a subsequent answering affidavit. In this regard, the court agreed with the respondent.

[17] In *Valley of the Kings Thaba Motswere (Pty) Ltd*[2], Smith J stated that the judge whose judgment is sought to be appealed against, should consider, objectively and dispassionately, whether there are reasonable prospects that another court may well find merit in argument advanced by the losing party.

[18] In my view there is merit to the applicant's submission that the interpretation ascribed by the respondent to rule 6(5)(iii)(aa) would effectively mean that summary judgment applications cannot be filed between 21 December and 7 January of each year which would lead to absurdity. It could not have been intended to include a founding affidavit within the ambit of rule 6(5)(b)(iii) (aa).

[19] As regards the appealability of the order of Mongale J, the position is that as a general rule an order refusing summary judgment is not appealable, on the basis that it does not have the effect of a final order as it is an interlocutory application.[3] In the circumstances of the present application, the question is whether there is any reason for the appeal to be heard. In my view there is. There is merit to the applicant's argument that the interpretation ascribed by the court to rule 6(5)(b)(iii)(aa) is not sustainable. The appeal thus, enjoys good prospects of success. Another court would come to a different finding. Having

Order

[20] In the result, I make the following order

S MFENYANA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

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Date of hearing

: 24 May 2024

Date of judgment

: 31 December 2024

[1] Act 10 of 2013.

[2] [2016] ZAECHC 137 (10 November 2016).

[3] Kgatle v Metcash Trading Ltd 2004 (6) SA 410 (T).

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