

SOUTH AFRICA / JUDGMENT

Tshikovhi v Nemathithi (A09/2015)

[2017] ZALMPTHC 10 (28 August 2017)

[2017] ZALMPTHC 10

COURT

Limpopo High Court, Thohoyandou

BEFORE

MF Kganyago, A Lamminga

CASE / FILE NUMBER

A09/2015

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, THOHOYANDOU

CASE NO: A09/2015

REPORTABLE: YES

OF INTEREST TO OTHER JUDGES: YES

DATE: 28/08/2017

In the matter between:

MAANDA GODFREY TSHIKOVHI

APPELLANT

AND

LUVHENGU PORTIA NEMATHITHI

RESPONDENT

APPEAL JUDGEMENT

KGANYAGO J

- [1] The appellant has brought an appeal against the whole judgment of the court a quo.
- [2] The appellant has sold to the respondent erf 724 Thohoyandou Block G Extension for R75 000-00. The respondent duly paid the full purchase price. However, due to some other problems the property could not be transferred to the respondent. The transaction was cancelled and the appellant offered to refund the respondent her full purchase price. The

appellant issued the respondent with two post dated cheques in the sum of R35 000-00 and R40 000-00 respectively. The respondent was supposed to have cashed the two cheques on two different dates.

- [3] However, on dates on which the respondent was supposed to have cashed both cheques, she could not do so as the bank has informed her that payment has been stopped.
- [4] The respondent instituted action against the appellant claiming payment of the sum of R75 000-00. The respondent's cause of action was based on the two cheques of R35 000-00 and R40 000-00 of which the appellant has stopped payment.
- [5] The appellant in his plea to the plaintiff's particulars of claim does not dispute that he has stopped payment of the two cheques. The appellant has pleaded that after the first deal was cancelled, the parties agreed that the appellant will look for an alternative site as a replacement to the first deal. According to the appellant, he did find that alternative site, but the respondent has failed to accept or reject the alternative site. The appellant contends that since the respondent has failed to either accept or reject the alternative site, she has instituted action against him prematurely. The appellant further contends that payment of the two cheques was stopped after an agreement was reached that the respondent will settle for an alternative site.
- [6] At the trial the appellant also raised the issue that the respondent has failed to file a replication to his plea. The court a quo granted judgment in favour of the respondent in the sum R75 000.00 plus costs and interest from date of issue of the summons until date of repayment.
- [7] The appellant has now appealed against the whole judgment of the court a quo on the ground that the court a quo should have found that the plaintiff's evidence was not pleaded by way of replication. The other ground is that after the first agreement was cancelled they entered into a subsequent agreement to get the respondent an alternative site and the appellant did get it, but the respondent did not make a choice of either accepting or rejecting the alternative site.
- [8] In his heads of arguments the appellant has raised a point in limine stating that the oath taken by the respondent when she testified in the court a quo did not comply with the provisions of section 39 (2) of the Civil Proceedings Evidence Act No 25 of 1965.
- [9] Now this court is called upon to firstly determine whether there is merit in the appellant's point in limine, and secondly whether the court a quo was correct in granting judgment in favour of the respondent.
- [10] I will first deal with the point in limine. If the point in limine is upheld, it will dispose the whole appeal. The appellant's point in limine was not raised as a ground of appeal. The appellant's notice of appeal was never amended to include that point in limine. The point in limine was raised for the first time in the appellant's head of arguments.

[11] In *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* [2008] ZASCA 6; 2008

(3) SA 371 (SCA) at para 13 the court said:

"...There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter."

[12] Even though in *Wightman* it refers to an answering affidavit, in my view it is not different from a legal advisor who settles a notice to appeal. He/she must make sure that all grounds of appeal are covered in the notice of appeal. If he/she fail to do so, he/she cannot be allowed to rely on a ground that was not raised in the notice of appeal. Based on that point alone, in my view, the appellant's point in limine stand to fail.

[13] The appellant's other ground of appeal is that the court a quo should have held that the plaintiff's evidence was not pleaded by way of a replication. In terms of Rule 21 of the Magistrate Courts Rules of Court, the plaintiff shall where necessary deliver a replication to the defendant's plea.

[14] In *Milne No v Shield Insurance Co Ltd* 1969 (3) SA 352 (A) at page 353 C-D the court said:

"A plaintiff who does not wish to file a replication because it would contain a mere denial of the allegations in the plea, may either do nothing in which case the pleadings will be closed after the lapse of 14 days."

[15] In other words it is unnecessary for the plaintiff to deliver a replication if the plaintiff wishes only to deny the allegations

contained in the defendant's plea. That is the argument that has been raised by respondent that it was unnecessary for her to deliver a replication as she was only to deny the allegation in the appellant's plea. What the respondent is simply saying is that even if she had filed her replication, she was not going to plead any fresh facts to the appellant's plea. Therefore, in my view, there was nothing that compelled the respondent to deliver a replication to the appellant's plea.

[16] Now I must determine whether the appellant was justified in stopping payment of the two cheques. According to the appellant, he has stopped payment of the two cheques as there was an agreement that he will find an alternative site for the respondent and that he had found one and was waiting for the respondent to make decision whether to accept or reject the alternative site.

[17] However, according to the respondent's version, at the time she was supposed to present the first cheque to the bank for payment, the appellant told him not to do so as he was having a family bereavement and that she should present the cheque at later agreed date. However, when she went to the bank after the agreed date, she was told that payment has been stopped. She attempted to cash the second cheque, and again was informed by the bank that payment has been stopped. Thereafter the appellant made settlement proposal which were

not acceptable to respondent.

- [18] The appellant does not dispute that he owes the respondent R75 000-00. His defense is that the respondent did not come back to him to indicate whether she accept or reject the alternative site. The appellant contends that he would not have allowed the two cheques to be cashed whilst the parties have agreed on an alternative site and therefore, he was justified in stopping payment of the two cheques.
- [19] The question which must firstly be determined is whether there was a valid agreement which has extinguished the dispute between the parties.
- [20] In *Jurgens and Others v Volkskas Bank Ltd* [1992] ZASCA 152; 1993 (1) SA 214 (A) at page 218 J to 219 A the court said:

"An offer is a manifestation of the offeror's willingness to contract, made with the intention that it shall become binding as soon as it is accepted by the offeree."

- [21] As I have already pointed out in paragraph 18 above, the appellant does not dispute that he is indebted to the respondent, but that they had an agreement on an alternative site. However, this contention is contradicted by the appellant's counsel in the court a quo. This is an extract of what the appellant's counsel said on page 80 of the transcribed record:

"Mr Mathivha: Your worship there are no settlement agreement. Court: Ok

Mr Mathivha: However there are settlement proposal that were made all along".

- [22] The question is whether the parties have reached finality in relation to the settlement proposal which culminated into a valid settlement agreement that settled the parties' dispute. That was answered by the appellant himself on page 101 during his evidence in chief. This is the extract of what he was asked and his answer:

"Question by Mathivha: What caused the new deal to collapse?

Answer by appellant: The problem was in relation to the legal costs, which the defendant, the plaintiff's attorneys were demanding from me. That this transfer was not going to take place. Before the transfer would take place I should pay them the legal costs since she incurred them at the time when they were busy trying to assist her to get her money or the stand back from me. I said that there was nothing wrong that I did at all. Nothing wrong that I have done. Hence I could not be able to pay them. I was not even prepared to pay a single cent back following that. Because I did not just do this deliberately to imply all these costs".

- [23] It is clear that the new deal which the appellant is referring is the proposals regarding the alternative site. Part of the respondent's settlement proposal was that the appellant should pay her costs, and a condition which the appellant was not prepared to accept. That resulted in the settlement negotiations collapsing. In the end the appellant's offer was never accepted by the respondent. Therefore, the appellant's willingness to contract was not binding since the respondent did not accept his offer. It can therefore not be said that there was a valid

settlement agreement which has brought the existing dispute to an end.

[24] In my view, if indeed there was a valid settlement agreement, it would have been disingenuous of the respondent to attempt to cash the first and second cheque despite the existence of a valid agreement. From the transcribed record it is clear that the appellant initiated settlement negotiations after the respondent has instituted action against him. In my view, when the respondent presented the cheques for payment, the settlement proposal in relation to the alternative site has not yet been initiated by the appellant. Therefore, there was nothing wrong preventing the respondent from presenting the two cheques to the bank for payment. There was no justification in the appellant stopping payment of the two cheques.

[25] In the circumstances, in my view, there is no merit in the appellant's appeal, and his appeal stand to fail.

[26] In the result I make the following order:

26.1 The appeal is dismissed with costs.

MF Kganyago

Judge of the High Court of South Africa

I agree

A Lamminga

Acting Judge of the High Court of South Africa

DATE OF HEARING: 11TH AUGUST 2017

DATE OF JUDGMENT: 29th AUGUST 2017

ATTORNEY FOR THE APPELLANT: MATHIVHA ATTORNEYS

COUNSEL FOR THE APPELLANT: MR MATHIVHA

ATTORNEY FOR RESPONDENT: BRESLER & BECKER INC

COUNSEL FOR THE RESPONDENT: ADV VAN DEN ENDE

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZALMPTHC/2017/10.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/tshikovhi-v-nemathithi-unknown-topic-almpthc-2017>

Prepared on 9 October 2026 · Esheria