

SOUTH AFRICA / JUDGMENT

Weaving v Reck and Others (11579/06)

[2010] ZAWCHC 381 (23 April 2010)

[2010] ZAWCHC 381**COURT**

Western Cape High Court, Cape Town

BEFORE

Fourie R

CASE / FILE NUMBER

11579/06

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**IN THE HIGH COURT OF
SOUTH AFRICA
(WESTERN
CAPE HIGH COURT. HELD AT CAPE TOWN)
CASE**

NUMBER: 11579/06**DATE:** 23
APRIL 2010

In the matter between: KEVIN WAYNE WEAIVING
.....Plaintiff
and
RICHARD
ANTHONY MARCUS RECK
&
3 OTHERS
.....Defendants

JUDGMENT

FOURIE. R: Defendants brought an application in terms of Rule 48 for the review of the Taxing Master's ruling in relation to certain items in a Bill of Costs presented for taxation by Plaintiff. The application for review came before me in Chambers and on 2 February 2010, I made an order in terms of which the review was allowed in respect of certain items in the Bill of Costs, taxed and allowed by the Taxing Master on 12 September 2008. Plaintiff now seeks leave to appeal to the full court of this Division against my decision. Defendants oppose the application. At the outset I

raised the question whether my decision is appealable. In *Menzies Birse & Chiddv v Hall* 1941 CPD 297 the full bench of this Division held that a decision made by a Judge in Chambers under the former Rule 48 of the Rules of the Supreme Court of South Africa, Cape of Good Hope Provincial Division, is not subject to an appeal. The relevant provisions of

the former Rule 48 were for practical purposes in identical terms to the present Rule 48. In *Menzies* the full bench reasoned as follows at 302 in concluding that the decision made by a Judge in Chambers on review in terms of the said Rule 48, is not appealable: "Under the rule now in question the Judge sits purely as a Judge in Chambers and is not purported, whether in term time or in vacation, to exercise the functions of the Court and there is, in my opinion, no appeal from his decision." And further; "The object of the rule was certainly to cheapen reviews of taxation....Here he (the litigant) is given a right of review which is in reality a revision on the merits of that ruling and is in no sense a proceeding of the court. It was consequently competent by this rule to make such revision the last word on the subject." There is, in my view, no basis upon which the *Menzies* case can be distinguished. As mentioned earlier, the former Rule 48 is for all practical purposes identical to the present Rule

48. (See also *Vaaltvn v Goss & Another* 1992(3) SA 549 (ECD). I am accordingly bound by the *Menzies* decision. Apart from being bound by this full bench decision, I am in agreement with the principle enunciated therein. The object of Rule 48 is clearly to cheapen reviews of taxation. It was therefore competent, by means of Rule 48, to use the words of Davis, J in the *Menzies* case, to make the revision of a taxation in these circumstances the last word on the subject. This approach is also, in my view, in line with the provisions of Section 21A of the Supreme Court Act. No. 59 of 1959. which section was introduced in terms of an amendment in 1996. It provides that where leave to appeal is sought in respect of an issue of costs only, the applicant has to show the existence of extraordinary circumstances before leave to appeal is granted. There are no such circumstances in the instant case. I was invited by Plaintiff's counsel to follow the decision in *Vaaltvn*, *supra*, in which the Full Court of the Eastern Cape Division held that although it had difficulty in dissenting from or even in distinguishing the *Menzies* case, it should hear the appeal as it involved a matter of importance not only to the parties in *casu* but also to other litigants and their legal advisers. I decline this invitation. Firstly, *Menzies* clearly states that, where there is no statutory provision allowing an appeal in a matter such as the present, the decision is not appealable. Second, even if I had the necessary inherent jurisdiction to grant leave to appeal, on which I express no view,

it should in terms of the *Vaaltvn*

judgment

only be granted in matters which are also of importance to other litigants and their legal advisers. This was found to be the case in *Vaaltvn*, as it concerned the interpretation of Rule 69(3) of the Uniformed Rules of Court. However, in the present matter I was concerned with the interpretation of a specific court order, which can only be of importance to the present parties. I

should add, that there is another important fact which, in my view, militates against the granting of leave to appeal, namely, that the main action between the parties has been set down for hearing in May 2010. The trial is therefore likely to be completed before any appeal is heard. Paragraph 5 of the relevant order of Thring, J provides that any other outstanding aspect of costs is to stand over for determination at the trial. Any outstanding aspects of wasted costs can therefore be argued at the trial in May. Finally, I should say that even if I had the authority to grant leave to appeal in this case. I would have refused same as I am, for the reasons furnished in my written judgment, not satisfied that Plaintiff has shown that he has a reasonable prospect of success on appeal. However, this view of mine is of mere academic value, as I am bound by the decision of the full bench that no appeal lies in this instant. In the result, THE APPLICATION IS STRUCK FROM THE ROLL WITH COSTS. FOURIE, J

JUDGMENT

FOURIE. R:

Defendants brought an application in terms of Rule 48 for the review of the Taxing Master's ruling in relation to certain items in a Bill of Costs presented for taxation by Plaintiff. The application for review came before me in Chambers and on 2 February 2010, I made an order in terms of which the review was allowed in respect of certain items in the Bill of Costs, taxed and allowed by the Taxing Master on 12 September 2008.

Plaintiff now seeks leave to appeal to the full court of this Division against my decision. Defendants oppose the application.

At the outset I raised the question whether my decision is appealable. In *Menzies Birse & Chiddv v Hall* 1941 CPD 297 the full bench of this Division held that a decision made by a Judge in Chambers under the former Rule 48 of the Rules of the Supreme Court of South Africa, Cape of Good Hope Provincial Division, is not subject to an appeal. The relevant provisions of the former Rule 48 were for practical purposes in identical terms to the present Rule 48. In *Menzies* the full bench reasoned as follows at 302 in concluding that the decision made by a Judge in Chambers on review in terms of the said Rule 48, is not appealable:

"Under the rule now in question the Judge sits purely as a Judge in Chambers and is not purported, whether in term time or in vacation, to exercise the functions of the Court and there is, in my opinion, no appeal from his decision."

And further;

"The object of the rule was certainly to cheapen reviews of taxation....Here he (the litigant) is given a right of review which is in reality a revision on the merits of that ruling and is in no sense a proceeding of the court. It was consequently competent by this rule to make such revision the last word on the subject."

There is, in my view, no basis upon which the *Menzies* case can be distinguished. As mentioned earlier, the former Rule 48 is for all practical purposes identical to the present Rule

48. (See also *Vaaltvn v Goss & Another* 1992(3) SA 549 (ECD). I am accordingly bound by the *Menzies* decision. Apart from being bound by this full bench decision, I am in agreement with the principle enunciated therein.

The object of Rule 48 is clearly to cheapen reviews of taxation. It was therefore competent, by means of Rule 48, to use the words of Davis, J in the *Menzies* case, to make the revision of a taxation in these circumstances the last word on the subject.

This approach is also, in my view, in line with the provisions of Section 21A of the Supreme Court Act, No. 59 of 1959, which section was introduced in terms of an amendment in 1996. It provides that where leave to appeal is sought in respect of an issue of costs only, the applicant has to show the existence of extraordinary circumstances before leave to appeal is granted. There are no such circumstances in the instant case.

I was invited by Plaintiff's counsel to follow the decision in *Vaaltvn*, *supra*, in which the Full Court of the Eastern Cape Division held that although it had difficulty in dissenting from or even in distinguishing the *Menzies* case, it should hear the appeal as it involved a matter of importance not only to the parties in *casu* but also to other litigants and their legal advisers.

I decline this invitation. Firstly, *Menzies* clearly states that, where there is no statutory provision allowing an appeal in a matter such as the present, the decision is not appealable. Second, even if I had the necessary inherent jurisdiction to grant leave to appeal, on which I express no view, it should in terms of the *Vaaltvn*

judgment

only be granted in matters which are also of importance to other litigants and their legal advisers.

This was found to be the case in *Vaaltvn*, as it concerned the interpretation of Rule 69(3) of the Uniformed Rules of Court. However, in the present matter I was concerned with the interpretation of a specific court order, which can only be of importance to the present parties.

I should add, that there is another important fact which, in my view, militates against the granting of leave to appeal, namely, that the main action between the parties has been set down for hearing in May 2010. The trial is therefore likely to be completed before any appeal is heard. Paragraph 5 of the relevant order of Thring, J provides that any other outstanding aspect of costs is to stand over for determination at the trial. Any outstanding aspects of wasted costs can therefore be argued at the trial in May.

Finally, I should say that even if I had the authority to grant leave to appeal in this case. I would have refused same as I am, for the reasons furnished in my written judgment, not satisfied that Plaintiff has shown that he has a reasonable prospect of success on appeal. However, this view of mine is of mere academic value, as I am bound by the decision of the full bench that no appeal lies in this instant.

In the result, THE APPLICATION IS STRUCK FROM THE ROLL WITH COSTS.

FOURIE, J

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