

FORM A
FILING SHEET FOR EASTERN CAPE HIGH COURT, PORT ELIZABETH
JUDGMENT

ECJ:

PARTIES: **PHINDILE ALFRED VENA**

And

**NOMTHANDAZO VENA
KHANYISA DISTRIBUTORS
ROLAND MEYER N.O.**

- Registrar: **2461/08**
- Magistrate:
- High Court: **EASTERN CAPE HIGH COURT, PORT ELIZABETH**

DATE HEARD: **20/05/09**

DATE DELIVERED: **28/05/09**

JUDGE(S): **JONES J**

LEGAL REPRESENTATIVES –

Appearances:

- for the Applicant(s): **ADV: J.D. Huisamen**
- for the Respondent(s): **ADV: B.S. Dyke**

Instructing attorneys:

- for the Applicant(s): **BOQWANA LOON & CONNELLAN ATTORNEYS**
- for the Respondent(s): **JONKELOWITZ & SCHARGES ATTORNEYS**

CASE INFORMATION -

- *Nature of proceedings* : **APPLICATION FOR LEAVE TO APPEAL**

Possibly reportable

THE HIGH COURT OF SOUTH AFRICA

In the Eastern Cape High Court
Port Elizabeth

Case No 2461/2008

In the matter between

PHINDILE ALFRED VENA

Applicant

and

**NOMTHANDAZO VENA
KHANYISA DISTRIBUTERS CC
ROLAND MEYER N.O.**

**1st Respondent
2nd Respondent
3rd Respondent**

SUMMARY: Application for leave to appeal – on the ground that there was a reasonable prospect (a) that it was erroneous to dismiss the claim solely because the matter was not urgent and (b), on the merits, that the court should have found that payment other than in cash or by irrevocable guarantee does not amount to payment in law – while there were reasonable prospects in respects on the urgent point it would be superfluous to give leave on that ground if there were not also prospects on the merits – on the facts there were no prospects on the merits – leave to appeal refused. The dismissal of an application does not necessarily preclude an applicant from re-instituting his application, because an order dismissing an application is akin to an order for absolution from the instance. The court considered the propriety of dismissing an application solely for want of proof of urgency and without reference to the merits, instead of striking it off the roll. This may be justifiable in cases of an abuse of the urgency procedure.

JUDGMENT

JONES J:

[1] This is an application for leave to appeal against an order dismissing an application with costs. It was preceded by an application for an order condoning the applicant's failure to bring this application within the time laid down by the rules of court. The application was one day late. The lateness is properly explained and does not give rise to prejudice. Condonation is therefore granted.

[2] The litigation arises out of the settlement of a divorce action between the applicant and his wife, the 1st respondent, who are the real parties to the present dispute. The settlement provided for the appointment of a receiver, the 3rd

respondent, to realise, liquidate and distribute the remaining assets in the joint estate. For present purposes, the remaining assets were the 50% interest of the applicant and the 1st respondent in two closed corporations, (a) Khanyisa Distributors CC, the 2nd respondent, which operates the business of a service station at certain premises at Uitenhage, and (b) Meondo CC which operates a franchise known as Budget Meat and Grillers from the same premises. Each party wanted to take over the 50% share held by the other. The closed corporations were related in such a way that the disposal of the service station business to one party meant that the meat franchise business would also have to go to that party. The parties negotiated for a fair basis upon which one or the other would acquire them. The method they agreed to was that both parties would submit offers for the service station closed corporation to the receiver who would accept one of the offers; the successful offeror would take over the two closed corporations, and the other party would be paid out for his or her half share, which was determined by the amount of the successful bid. The applicant submitted an offer for R1 400 000-00. The 1st respondent submitted an offer for R1 700 000-00. The 1st respondent's offer was accepted. The parties entered then into a written agreement dated 16 September 2008 – annexure PAV 2 – in order to provide for the way forward. The agreement recorded the offers and the acceptance of the 1st respondent's offer, and provided that the 1st respondent was given a stipulated period after the date of acceptance to make payment to the receiver. If she failed, the applicant's bid would stand as the accepted bid, subject to the same condition relating to payment.

[3] The applicant took the view that the 1st respondent failed to meet the deadline, with the result that her offer fell away and his offer become the accepted offer. The 1st respondent considered that she had, on the contrary, indeed made payment as

required by the agreement, annexure PAV 2. The result was that the applicant brought an application as a matter of urgency for an order upholding his contentions. He applied for a rule *nisi* (a) requiring the 1st respondent to vacate the premises of the service station and to hand the keys to the receiver, and (b) requiring the receiver to accept his offer of R1 400 000-00, and to transfer the 1st respondent's interest in the service station closed corporation into his name. He further asked for the rule to operate as an interim interdict pending the return day.

[4] I dismissed the application. I did so on two bases. First, I held that the applicant had failed to prove grounds of urgency which justified a departure from the normal rules of court, and, following *Caledon Street Restaurants CC v Monica D'Aviera* (unreported Eastern Cape High Court, Port Elizabeth reference No 2656/97 SECLD, 7/11/1997, Kroon J) where the facts are not markedly dissimilar, I ruled that the application should be dismissed without reference to the merits. I decided nevertheless to deal with the application on the merits, which was the second basis for my conclusion. The application for leave to appeal is based, first on the contention that I should not have dismissed the application for want of urgency, but should instead have simply struck the matter off the roll; and, secondly, on the ground that the 1st respondent's payment was not a legally valid payment.

Urgency

[5] My finding was that the applicant's allegations did not comply with rule 6(12) (b) which requires him to set out explicitly the circumstances rendering the matter urgent and also the reasons why he will not be afforded substantial redress at a hearing in the ordinary course. He gave no reasons at all why he could not get substantial redress at a hearing in due course. The circumstances allegedly giving

rise to the commercial urgency upon which he relied were the reverse of being explicit. Instead, they were set out in vague, incomplete, and insubstantial terms and did not seem to me to have bearing on the relief sought in the notice of motion or the issues in dispute, other than that the divorce between the parties was disruptive of the business of the service station. The grounds of urgency alleged certainly did not justify giving the respondents two court days within which to give notice of an intention to oppose and to file opposing affidavits. A postponement was inevitable and was granted. The 1st respondent filed her opposition as soon as reasonably possible, on 12 December 2008. The applicant's replying affidavit was not filed until 8 January 2009. He gave no explanation for his delay and one is therefore left in doubt about the *bona fides* of his case for urgency. The urgency appears to have completely disappeared. In consequence, I find myself echoing the remarks of Kroon J at page 21 of the judgment in *Caledon Street Restaurants CC* that 'in my judgment, therefore, the use that the applicant made of the procedure relating to matters of urgency was a misuse, indeed an abuse, of the process of the court. On that ground alone I find that the applicant should be non-suited'.

[6] I do not believe that there are reasonable grounds that another court will depart from the findings of fact and the inferences to be drawn there from. Nevertheless, I would have granted leave to appeal on the urgency issue on a point of law if that had been the only reason for the dismissal of the applicant's claim. This is because Mr *Huisamen* has drawn my attention to the decision of the Supreme Court of Appeal in *Commissioner, South African Revenue Services v Hawker Air Services (Pty) Ltd; Commissioner, South African Revenue Service V Hawker Aviation Partnership And Others* 2006 (4) SA 292 (SCA) where, in dealing with

dismissal of a claim for want of urgency, Cameron JA is reported as follows (at 299G-300A para 9, footnotes omitted):

One of the grounds on which Patel J dismissed the applications was that at their inception they had lacked urgency. This was erroneous. Urgency is a reason that may justify deviation from the times and forms the Rules prescribe. It relates to form, not substance, and is not a prerequisite to a claim for substantive relief. Where an application is brought on the basis of urgency, the Rules of Court permit a Court (or a Judge in chambers) to dispense with the forms and service usually required, and to dispose of it 'as to it seems meet' (Rule 6(12)(a)). This, in effect, permits an urgent applicant, subject to the Court's control, to forge its own Rules (which must 'as far as practicable be in accordance with' the Rules). Where the application lacks the requisite element or degree of urgency, the Court can, for that reason, decline to exercise its powers under Rule 6(12)(a). The matter is then not properly on the Court's roll, and it declines to hear it. The appropriate order is generally to strike the application from the roll. This enables the applicant to set the matter down again, on proper notice and compliance.

[7] I have two comments. First, I do not understand this judgment to place any restriction on the discretion of a trial court to dismiss a claim as a mark of its displeasure at an abuse of the process of the court, whether it is an abuse of the procedure of urgency or any other procedure. The issue of abuse of the process of the court was not raised or considered by the Supreme Court of Appeal. The judgment may, therefore, not be applicable in this case.

[8] Second, the judgment suggests that an order striking the application from the roll is an appropriate order because, in that event, the matter can be set down again after proper notice is given. It is indeed so that the applicant should, if so advised, not be deprived of the right to set the matter again. That is why I did not give judgment for the respondents but instead made an order dismissing the claim. My understanding of an order for the dismissal of a claim in circumstances such as

these is that, generally speaking, it is equivalent to an order for absolution from the instance, in which event it is open to an applicant to set the matter down again. In a given set of circumstances, it may be that dismissal may amount to a final judgment on an issue, with the consequence of *res judicata*. But that is not in the normal course where the case turns on a procedural point, and, I believe, it is not the case here. The correct position, as I see it, is stated in *Herbstein and Van Winsen The Civil Practice of Supreme Court of South Africa* 5th ed at 684. The learned authors describe some of the orders that a court may make in the following terms:

‘The court may grant judgment outright in favour of the either party, or **it may give absolution from the instance or, what amounts to the same thing, dismiss the action**’ (my emphasis).

The term absolution from the instance is not usually used in motion procedure; the order is almost always to dismiss the application. In support of the statement that dismissal of an action amounts to same thing as absolution from the instance, the learned authors cite *Cloete v Greyling* (1907) 24 SC 57; *Municipality of Christiana v Victor* 1908 TS 1117; *Eldred v Van Aardt and Bell* 1924 SWA 79 82; *Becker v Wertheim, Becker & Leverson* 1943 (1) PH F34 (A); and *Bulford v Bob White’s Service Station (Pvt) Ltd* 1973 (1) SA 188 (RA) 193G. See also *Regering van die RSA v SA Eagle Versekeringsmaatskappy* 1985 (2) SA 42 (O) 56J-57D. There is a measure of reservation on the point in *Purchase v Purchase* 1960 (3) SA 383 (N) 385A where the order, however, was not the dismissal of the claim. The court made no order on an application but gave the applicant leave to apply on the same papers, if so advised, on proper notice to the respondent (see rule 6(6)). The weight of authority, including the Appellate Division authority of *Becker v Wertheim Becker &*

Leverson supra, supports the statement in *Herbstein and Van Winsen*. This element of the issue is not given consideration in the *Commissioner, South African Revenue Services v Hawker Air Services (Pty) Ltd* judgment. The judgment does not say, though it might imply, that claim in the case before it could not have been re-instituted once it was dismissed. It would seem to me that such a claim cannot be re-instituted only if dismissal gives rise to the matter being *res judicata*, as, for example, where an application for leave to appeal is dismissed on its merits. In my view the judgment of the Supreme Court does not intend to overrule what would appear to be an established line of decisions on the dismissal of claims generally, a line which has stood unquestioned for many years.

[9] Be that as it may. Mr *Huisamen* is, in my opinion, correct in his submission that the statement in *Commissioner, South African Revenue Services v Hawker Air Services (Pty) Ltd* gives a basis for an argument, which might reasonably be accepted on appeal, that it was not proper in this case to dismiss the action solely for want of proof of urgency. This conclusion would, in the ordinary course, justify leave to appeal. It is, however, superfluous to give leave to appeal on the urgency point, which is procedural, if there is no reasonable prospect of the appeal succeeding on its merits.

The merits

[10] Mr *Huisamen*'s argument before me is that the 1st respondent's purported payment to the receiver, as set out in a letter of guarantee issued by a firm known as Business Partners, was not a legally valid payment because it was subject to conditions which had not yet been fulfilled, and that, no other payment having been made within the stipulated time, she has failed to perform in terms of the agreement

annexure PAV 2, and her offer has lapsed. This argument is supported by the authorities to which he refers and which state that if the agreement is silent on the kind or method of payment, payment must be in cash or by unconditional and irrevocable guarantee. The argument is correct as far as it goes. The question is whether it is applicable to the facts and circumstances of this agreement.

[11] The agreement specifies by when payment must be made. It does not specify how it must be made. This, says Mr *Huisamen*, brings into play the general principles of the common law which say that payment means payment in cash. Mr *Dyke*, for the 1st respondent, does not agree. His starting point is the principle in *Esterhuysen v Selection Cartage (Pty) Ltd* 1965 (1) SA 360 (W) 361D-F, an authority upon which both parties relied. That judgment lays down that:

The relevant principles can be summarised as follows. In contract, where the debtor is obliged to pay money to the creditor, the medium of payment must be that which the contract expressly or impliedly specifies, as determined by reference to its terms and such evidence of custom, usage and the surrounding circumstances as is admissible to aid in its interpretation. In this regard, in an ordinary commercial contract, in the absence of anything signifying the contrary, only some slight indication in the contract or evidence would generally suffice for inferring or implying that payment of the creditor can be effected by cheque, because that is now a widely used and recognised medium of payment in such transactions. In the absence, however, of such contractual definition of the medium, the payment must be made in legal tender. In that case, a tender of payment by cheque, if objected to by the creditor, is not valid. (Williston on Contract, vol. 6 paras. 1810, 1819 note 7; Chitty on General Principles of Contract, 22nd ed. paras. 1056, 1074, 1087; Wessels on Contract, 2nd ed. para. 2227; MacKeurtan on Sale, 3rd ed. p. 215; Schneider & London v Chapman, 1917 T.P.D. 497).

[12] I think that Mr *Dyke* is correct in his submission that on the acceptable facts (as determined in accordance with *Plascon-Evans Paints Ltd v Van Riebeeck Paints*

(Pty) Ltd 1984 (3) SA 623 (AD) at 634E-635C) the agreement impliedly authorised and contemplated payment in the form given by the 1st respondent, and that neither party contemplated that payment was to be in cash or its equivalent. On the facts, this is how the 1st respondent understood it; how the receiver understood it; and, indeed, how the applicant himself understood it. In his papers the applicant annexes a bankers' letter which guarantees payment of his offer of R1 400 000-00 and which is also subject to conditions. This is the method of payment to be expected in normal commercial usage applying to this kind of deal, where the parties to the transaction do not have millions of rand in cash or its equivalent readily available. On the facts the conditions imposed by Business Partners are the kind of conditions which are ordinarily imposed and ordinarily met in business practice. They related to the implementation of matters already agreed to, already arranged, and easily achieved – the registration of a mortgage bond as security, the furnishing of a sole suretyship document by the remaining member of the closed corporation, and the cancellation of the old suretyships. These are things which could only be done in the future, when the business is transferred to the purchaser. Conditions like these can be evaluated to see whether the payment is conditional in respects which take it beyond that which is contemplated by the parties to a particular agreement. Here, they pass the test. In this instance nothing further was to be done than the normally expected attorney's work in altering the membership of the closed corporation, cancelling the applicant's suretyship and replacing it with a sole suretyship by the 1st respondent, and registering a new bond *pari passu* with the transfer of the business. These are the same things which would have had to be done if the applicant's offer had been accepted. On the face of it, therefore, the payment by the 1st respondent was payment in terms of the agreement between the parties. If the officious

bystander had asked whether the agreement intended payment in cash, everybody involved would have said 'Of course not'.

[13] Mr *Dyke* has a second argument. It is that the objection now raised by the applicant is not an objection initially made by him, either in his founding papers or in reply. It is not the case that the 1st respondent was called upon to meet. The applicant's founding affidavit raised a number of specific respects in which the 1st respondent's payment is alleged to fall short of the requirements of the agreement. His chief complaint was that her payment was out of time. In this, he was patently wrong on the facts and the objection was not pursued at the hearing. He raised other points as well – that payment was for a lesser sum – R900 000-00 – than the R1 700 000-00 offered; that the payment was not in terms of the agreement because it imposed additional obligations and onerous burdens on him which he was not prepared to accept; and, that the payment was in contravention of s 40(a) of the Close Corporations Act No 69 of 1984. These were answered by the 1st respondent, and, where necessary, factual allegations were made in support of her opposition. They were all rejected in the judgment as being without substance, and they have not been raised in the application for leave to appeal. They are no longer in issue between the parties. What is now in issue is an objection which was nowhere raised in the applicant's papers. Nowhere is there a suggestion of the invalidity of the method of payment on the ground that it was not a cash payment as required by the agreement. Nor was the point argued before me at the hearing. An obvious point like this was probably not taken before because everybody accepted that on the facts the method of payment was what both parties contemplated and was in terms of their agreement. If it were purely a point of law, there could of course be no objection to it being taken for the first time on appeal. But it is not purely a point of law. It goes to

the issue, in the language of the *Esterhuysen* judgment *supra*, of what the agreement of the parties expressly or impliedly specified as the method payment, which must be determined by reference to its terms and such evidence of custom, usage and the surrounding circumstances as is admissible to aid in its interpretation. The 1st respondent was alerted to the other objections to her payment and reacted, *inter alia*, by leading evidence. Mr *Dyke* correctly contends that her opposition would have dealt fully with the argument presently suggested if it had been raised in the papers. She is clearly prejudiced in the conduct of her defence if it is now raised because she will be denied the opportunity of dealing with it in evidence. The applicant must accordingly be confined to the case which he made out in his papers.

[14] In the result I am of the view that there are no reasonable prospects of success on the merits. This is not because the legal submissions upon which the argument is based are unsound, but because the legal principles in question do not apply to the facts found proved, and the facts found proved cannot be altered or moulded so that the principles can be applied to them. The application for leave to appeal must be dismissed, with costs.

RJW JONES
Judge of the High Court
27 May 2009