



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 67/11

No Precedential Significance

In the matter between:

Douglas Edward Barrows

Appellant

and

Ian David Benning

Respondent

Neutral citation: *Barrows v Benning* (67/11) [2012] ZASCA 10 (2012)

Coram: MTHIYANE DP, BRAND, CLOETE, SNYDERS AND
MAJIEDT JJA

Heard: 28 February 2012

Delivered: 14 March 2012

Summary: Jurisdiction – nature of claim

ORDER

On appeal from: North Gauteng High Court, Pretoria (Raulinga J sitting as court of first instance).

- 1 The amendment is granted.
- 2 The order made by the court below is set aside.
- 3 The respondent is to pay the appellant's costs of the proceedings in the court below, including the costs of two counsel where employed.
- 4 The respondent is to pay the appellant's costs of appeal, including the costs of two counsel where employed.

JUDGMENT

SNYDERS JA (Mthiyane DP, Brand, Cloete and Majiedt JJA concurring):

[1] The North Gauteng High Court, Pretoria, (Raulinga J) was asked, in terms of Uniform rule 33(4), to determine a preliminary issue which arose from the pleadings, namely whether the court had jurisdiction to entertain the respondent's claim. It concluded that it had jurisdiction and consequently dismissed the appellant's plea in this regard. It subsequently granted the appellant leave to appeal.

[2] No evidence was led before the court below and the matter was decided on the facts pleaded by the respondent in his particulars of claim. During November 2006 and at Irene, Gauteng, within the jurisdiction of the court below, the respondent, an incola of the court, orally agreed with the appellant, a peregrinus of South Africa, resident in the United Kingdom, for the latter to procure five per cent of the issued shares in a company incorporated in Mauritius, and transfer same to the respondent (the share promise agreement). The respondent issued summons claiming the delivery of shares, alternatively and in the event of the appellant failing to deliver the shares, payment of the value of the shares, estimated at the time of the summons at the equivalent Rand value of R64 million. The respondent served his summons on the appellant whilst the latter was temporarily in South Africa.

[3] Jurisdiction is the power of a court to adjudicate upon, determine and dispose of a matter. It is a territorial power that derives from the creation of courts of law by a sovereign authority with power only within the territory of that sovereign. A court has jurisdiction when, within its territory, it has sufficient authority over a defendant to be able to enforce its orders.¹ Put in different words the court must have the power not only to take cognisance of a suit, but also to give effect to its judgment.² These rules come from the Roman law, were taken over by Roman-Dutch law and adopted into our law. Even in the most recent cases on jurisdiction this Court applied the doctrine of effectiveness as a criterion for the existence of jurisdiction.³ It was therefore not surprising that the argument foreshadowed in the respondent's heads of argument that 'the focus on the empty concept of effectiveness' should be reduced and that it should be recognised that 'what in effect happens is that the court exercises a discretion (once a ratio jurisdictionis exists or there has been submission, attachment or perhaps service) to decline to exercise its jurisdiction on grounds of convenience', was not strenuously persisted with. Instead, the focus during the hearing was on the nature of the relief claimed and its influence on the question of jurisdiction.

[4] Counsel for the appellant conceded, rightly so in view of the decision in *BID Industrial* referred to in footnote 3 above, that if the respondent only claimed a monetary order of payment of the value of the shares, the court below would undoubtedly have had jurisdiction to determine the matter. On the other hand, counsel for the respondent conceded, also rightly so in terms of the law as it stands, that the court below would not have had jurisdiction to grant a mandatory interdict against a peregrinus of South Africa for the procurement of shares in a foreign company. However, the parties differed fundamentally on the identification of the respondent's claim as contained in

1 *Schlimmer v Executrix in Estate of Rising* 1904 TH 108 at 111.

2 *Steytler NO v Fitzgerald* 1911 AD 295 at 346.

3 *Metlika Trading Ltd & others v Commissioner, South African Revenue Service* 2005 (3) SA 1 (SCA) para 36; *Gallo Africa Ltd & others v Sting Music (Pty) Ltd & others* 2010 (6) SA 329 (SCA) paras 6 and 10 and *BID Industrial Holdings (Pty) Ltd v Strang & another (Minister of Justice and Constitutional Development, Third Party)* 2008 (3) SA 355 (SCA) paras 24, 39, 41, 55, 56 and 57.

his particulars of claim.

[5] On behalf of the appellant it was contended that the respondent seeks a double-barrelled remedy recognised in *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A) at 470E, a mandatory interdict and an alternative claim for damages which is dependant on an election by the respondent to cancel the share promise agreement, which is not part of the particulars of claim and which still has to be made.⁴ Thus the jurisdiction a court may have on the monetary claim once the election is made, the share promise agreement cancelled and the value of the shares claimed, would only exist then and in relation to that claim and could not be applied to the first remedy, the interdict.

[6] On behalf of the respondent it was contended that the particulars of claim does not support the construction of a double-barrelled remedy, but payment of money as surrogate for specific performance. The argument was that this construction of the particulars of claim is to be favoured because cancellation of the share promise agreement is not claimed.

[7] The full consequence of the respondent's construction of the particulars of claim was not explored, as, before the conclusion of the argument, an amendment to the particulars of claim was sought. The effect of the amendment is to remove the claim for delivery of shares and confine the claim to one for damages following upon and flowing from the cancellation of the share promise agreement. With the application for an amendment a tender was made for the costs of and occasioned by the amendment, which are to include the costs of the proceedings for the determination of jurisdiction in the court below and the costs on appeal; and all costs tendered include the costs of two counsel where employed. For record purposes I record the wording of the amendment supplied in handwritten format:

⁴ The passage referred to reads: 'A procedural practice has, however, grown up in our Courts which permits a plaintiff-seller to elect to pursue the first of these rights, i.e., to demand implementation of the agreement and obtain judgment therefor, but further permits him in the same action to ask the Court, should the defendant fail to comply with the Court's judgment for implementation of the agreement, to set aside the agreement and grant consequential relief. This has been described in the Courts as the "double-barrelled" remedy.'

- '1 Delete paragraph 15.
- 2 Replace paragraph 15 with:
"The plaintiff hereby cancels the share promise agreement."
- 3 Add paragraph 17:
"The plaintiff suffered damages in the said amount which flow naturally from the breach."
- 4 Delete prayer 1.
- 5 Delete the word "Alternatively" in prayer 2.
- 6 Replace "payment" with "Payment" in prayer 2.'

[8] The appellant had no objection to the amendment being granted. The effect of the amendment is that the reason for the proceedings in the court below and on appeal, has fallen away, and the costs order in the court below has now been countered by a tender for the same costs. In order to avoid the conflict between an order of this Court made on the basis of the respondent's tender and the order of the court below if it is allowed to stand, the order of the court below is to be set aside.

[9] Consequently the following order is made:

- 1 The amendment is granted.
- 2 The order made by the court below is set aside.
- 3 The respondent is to pay the appellant's costs of the proceedings in the court below, including the costs of two counsel where employed.
- 4 The respondent is to pay the appellant's costs of appeal, including the costs of two counsel where employed.

S SNYDERS
Judge of Appeal

APPEARANCES:

For the Appellant: P J van Blerk SC
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For the Respondent: P F Louw SC (with him T Dalrymple)
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