

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)**

CASE NO. 4036/2018

In the matter between:

SAFINTRA SOUTH AFRICA (PTY) LTD

Applicant / Defendant

and

MARK PRINCE

Respondent / Plaintiff

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

MBENENGE JP:

[1] This application served before me in terms of section 17(2)(a) of the Superior Courts Act 10 of 2013¹, the judge² who granted the impugned order having been no longer readily available.

[2] The facts of this case are fairly simple. The respondent³, who had been a machine operator in the applicant's fabrication factory, launched action proceedings on 9 March 2009 seeking to recover, from the applicant⁴, damages in the sum of R2 910 000. The claim is alleged to have arisen from an incident which occurred on

¹ The section provides that leave to appeal maybe granted by the judge or judges against whose decision an appeal is to be made or, if not readily available, by any other judge or judges of the same court or Division.

² The judge who granted the impugned order was Mageza AJ.

³ The plaintiff in the action from which this application arises (the main action).

⁴ The defendant in the main action.

or about 11 November 2013 and during which the respondent sustained an injury whilst operating one of the applicant's metal fabrication machines; the respondent's left hand was crushed after having been caught and trapped by rollers of the machine whilst the respondent was manually feeding metal sheet into the corrugated machine.

[3] The applicant excepted to the respondent's particulars of claim contending that it lacked averments necessary to sustain a cause of action against the applicant, more particularly in that *"in terms of section 35(1) of the Compensation for Occupation Injuries and Diseases Act 130 of 1993⁵ no action shall lie by the employee for the recovery of damages in respect of any occupational injury or disease resulting in the disablement or death of such employee against such employee's employer."*

[4] The exception was heard on 6 June 2017. On that date the court⁶ issued an order upholding the exception with costs, and directing the respondent to amend his particulars of claim *"within ten (10) days [from 6 June 2017]."* No reasons for the order were furnished, and none were sought by any one of the parties.

[5] From a perusal of the relevant pleadings, the respondent delivered amended particulars of claim purporting to remove the applicant's cause of complaint. The quantum of the claim was increased to R5 100 000. The respondent also embarked upon a constitutional attack on sections 35 and 44 of COIDA, lamenting that in certain respects the sections are inconsistent with employees' constitutional rights, and that they fell to be declared unconstitutional and invalid. The prayer in the amended particulars of claim is, however, bereft of the constitutional challenge.

⁵ Compensation for Occupation Injuries and Diseases Act 130 of 1993 (COIDA).

⁶ Per Renqe AJ.

[6] The delivery of the amended particulars of claim once again attracted the delivery of an exception from the applicant's camp. The applicant reiterated its stance that, having regard to section 35(1) of COIDA, the amended particulars of claim lacked averments necessary to sustain a cause of action.

[7] The second exception came before court on 22 February 2018, when the court⁷ upheld the exception and dismissed the action. Before handing down the order, the judge is on record as having remarked:

"COURT Alright, What I'm going to do is ... I will provide reasons later in relation to the matter. What I'm going to do is ... hand down an order for this matter to be finalised because in principle I think we are all aware (indistinct) *JOOSTE*. All of us and there is nothing more than that, that we are going to essentially be persuaded by. And the order that I'm going to make and the reasons which will follow in due course."

[8] The pledge to hand down reasons for the order was never fulfilled, resulting in the respondent, on 09 March 2018, seeking to be furnished with the reasons. The reasons, dated 23 June 2019, were eventually furnished. According to the applicant's heads, the reasons were brought to the attention of the applicant's camp on or about 02 July 2019, approximately one year and four months after the impugned order had been granted.

[9] The last paragraph of the reasons reads:

"On the day of the hearing, due possibly to pressure of the numerous opposed matters on the roll for the two days in question, I handed down an order which but, in hindsight I should in fact have allowed the plaintiff an opportunity to suitably amend its particulars with costs in the cause. I once more extend my sincere apologies for the delay in finalising this matter and the regrettable background facts involved. In the circumstances **the exception is upheld.**

⁷ Per Mageza AJ.

Plaintiff is ordered to suitably amend its particulars and remove the cause of complaint within 15 (fifteen) days of receipt of this order. Costs are to be costs in the cause.” (Own emphasis)

[10] From a reading of the above quoted excerpt, it is plain that the reasons embody a purported order, which is a far-cry from that initially granted. The amendments introduced by the order namely, granting the respondent leave to amend and pronouncing that costs be in the cause, constituted a substantial and material alteration, not justified by any lawful dispensation. The judge became *functus officio* on 22 February 2018 upon handing down the order he did. Nor could the variation have been justified under any one of the dispensations provided for by rule 42 of the Uniform Rules of Court.

[11] It is trite law that once a court has duly pronounced a final judgment or order, the matter is *res judicata*, and it has itself no authority to correct, alter or supplement it.⁸ The reason is that it is *functus officio*; its jurisdiction in the case having been fully and finally exercised, its authority over the subject matter has ceased.⁹

[12] In light of the trite legal position alluded above, there is no doubt in my mind that this application meets the threshold.¹⁰

⁸ Herbstein and Van Winsen, *The Civil Practice of the Supreme Court of South Africa* (5th edition) vol 1 p926

⁹ *Firestone South Africa (Pty) Ltd vs Gentiruco* 1977(4) SA 298(A) at 306 F-G; also see *Gobo Gcora Construction and Project and two Others v Nelson Mandela Bay Municipality and Others* [2019] JOL 42078 (case no. 992/16), reportable, but as yet unreported judgment by Van Zyl DJP delivered on 16 April 2019; also see *Zondi v Member of the Executive Council for Traditional and Local Government Affairs* ZACC 18; 2006 (3) SA 1 (CC); 2006 (3) BCLR 423 (CC) at para [27], where it was held:

“Under common law the general rule is that a judge has no authority to amend his or her own final order. The rationale for this principle is two-fold. In the first place a judge who has given a final order is *functus officio*. Once a judge has fully exercised his or her jurisdiction, his or her authority over the subject matter ceases. The other equally important consideration is the public interest in bringing litigation to finality. The parties must be assured that once an order of court has been made, it is final and they can arrange the affairs in accordance with that order.”

¹⁰ The test is whether another court **would** come to a different conclusion. See *South African Breweries (Pty) Ltd (“SAB”) v The Commissioner of South African Revenue Services (“SARS”)* (case

[13] It is regrettable that the reasons for the impugned order were not furnished within a reasonable time in relation to an issue of law, dispositive of the case. In terms of note 9 (ii) to article 9 of the Code of Judicial Conduct adopted in terms of section 12 of the Judicial Service Commission Act 9 of 1994 a number of decisions do not necessarily require reasons¹¹ because the reasons are usually self-evident. The note goes further to state that if reasons in such cases are later reasonably required, they must be given within a reasonable time.

[14] It is incumbent upon a judge to give judgment promptly and without undue delay, and litigants are entitled to judgment as soon as reasonably possible.¹² This principle applies *a fortiori* to the furnishing of reasons. The instant matter demonstrates the complications associated with giving brief reasons and undertaking to provide full reasons later or when requested to do so. In relation to that the Honourable then Chief Justice Corbett remarked:

“The practice referred to (that is, an immediate order, reasons later) leaves no room for afterthought or changing one’s mind about the case. You should follow it only when you are convinced that no amount of subsequent consideration or research, and more particularly the actual writing of the reasons can possibly lead one to a different conclusion.

Another disadvantage of the practice of giving an order, reasons later, is the delay which often occurs in the furnishing of those reasons. I think that sometimes there is a feeling that parties have their order and there is no urgency about the reasons. This is the first step down the slippery slope of procrastination, which is part of the law’s notorious delay. My advice is that you treat such reasons with the same urgency and expedition as you devote to your ordinary reserved judgment, if anything, they should enjoy priority. There is nothing worse than allowing a matter to become stale; to lose one’s grasp of the case and one’s recollection of the reasons which prompted the order. Moreover, the parties are still just as interested in the reasons despite the order having been granted; and further proceedings may be

number 3234/15, an unreported judgment of the Gauteng Division, Pretoria by Hughes J, delivered on 23 March 2017), at para 5.

¹¹ For example unopposed cases and interlocutory rulings.

¹² *Botha v White* [2003] All SA 362 (T); also see *Pharmaceutical Society of SA & Others v Minister of Health & Another; New Clicks SA (Pty) Ltd v Tshabalala-Msimang N.O. & Another* [2005] 1 All SA 326 (SCA); 2005 (3) SA 238 (SCA).

contemplated, which could depend on the reasons and the way in which they are formulated.”¹³

[15] The cautioning remarks by the former Chief Justice were not heeded in this matter, with the result that with the passage of time the judge became tempted to change his mind about the case.¹⁴ Add to this, the fact that a possible appeal which had been contemplated by the respondent against the initial order depended on the reasons, the issuing of which was delayed.¹⁵

[16] Here is why I say the central issue of law emerging from a reading of the papers could and should have been dealt with at the outset. Section 35 has stood constitutional muster.¹⁶ It is not conceivable that on the pleaded facts the respondent could seek compensation outside of COIDA. I do not see how the attack on section 44 of COIDA will advance the respondent's case. These are matters for consideration at another stage. No more need thus be said on the merits.

[17] The application must succeed. There is no reason why the usual cost order should not be made namely, that costs be in the appeal.

[18] Consequently-

(a) The applicant is granted leave to appeal to the Full Court of this Division against the order dated 23 June 2019 in so far as it grants

¹³ The Honourable MM Corbett 'Writing a Judgment' (1998) 115 SALJ 116 at page 118. See also *National Director of Public Prosecutions v Naidoo & Others* ZASCA 143; 2011 (1) SACR 336 (SCA); [2011] 2 All SA 410 (SCA) at para 20.

¹⁴ Especially if one has regard to the earlier comment he made when granting the impugned order that in light of *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening)* [1998] ZACC 18; 1999 (2) SA 1 (CC); 1999 (2) BCLR 139 (CC) (*Jooste*) there was nothing to be "persuaded by".

¹⁵ At the hearing of the matter I was informed, somewhat tentatively, by Mr *Khumalo* who appeared for the respondent, that the respondent had always been bent on appealing the initial order.

¹⁶ *Jooste* above n 14.

the respondent leave to amend the amended particulars of claim and directs that costs be in the cause.

- (b) The costs of the application for leave to appeal shall stand over for determination by the court hearing the appeal.

S M MBENENGE

JUDGE PRESIDENT OF THE HIGH COURT

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Date heard : 25 September 2019

Date delivered : 8 October 2019