

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)



Case number: 78757/2014

Heard on: 20 June 2019

Date of judgment: 26 June 2019

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHERS JUDGES: YES/~~NO~~
(3) REVISED
26/6/19
DATE SIGNATURE

In the matter between:

TRUSTCO GROUP INTERNATIONAL (PTY) LTD

First Applicant

TRUSTCO FINANCIAL SERVICES (PTY) LTD

Second Applicant

TRUSTCO MOBILE MAURITIUS (PTY) LTD

Third Applicant

TRUSTCO GROUP HOLDINGS LTD

Fourth Applicant

and

HAHN & HAHN INC

Respondent

JUDGMENT

SWANEPOEL AJ:

INTRODUCTION

[1] On 24 October 2014 applicants instituted action against respondent (a firm of attorneys) for unspecified damages arising from alleged professional negligence. Applicants' case is, simply put, that they contracted with respondent to ensure that first applicant's patent, which was alleged to have been of full force and effect during 2011, would not lapse. In order to do so, applicants allege, respondent was obliged to pay annual renewal fees timeously, and if the patent had lapsed, to see to its restoration. Applicants allege a number of grounds of negligence which, so they say, resulted in the patent lapsing, and having lapsed, not being restored.

[2] The action was issued out of this court. Respondent then excepted to the particulars of claim on two grounds, the only one relevant to this application being the complaint that this court did not have jurisdiction over the matter, by virtue of the provisions of section 18 (1) of the Patents Act, Act 57 of 1978, which reserves disputes "relating to any matter under this Act" (the Patents Act) for determination by the commissioner of patents.

[3] The exception was enrolled before De Vos J, who ruled that the High Court had jurisdiction to hear the matter. His view was that the claim concerned issues of fact, in other words, whether respondent had been negligent, and merely a

patent was peripherally relevant, did not make it into a matter under the Patents Act. The exception was therefore dismissed.

[4] Respondent again raised the question of jurisdiction in a special plea, alleging the exact same complaint, that this Court did not have jurisdiction to hear the matter by virtue of the provisions of section 18 (1) of the Patents Act. Applicant seeks in this application:

- 4.1 To separate out for determination the special plea;
- 4.2 An order dismissing the special plea;
- 4.3 Costs.

[5] The parties have agreed to the separation of the jurisdiction question, and that it be determined by this Court separately as a special plea. Applicants take the view that the special plea is in essence the same issue that was raised by respondent as an exception. If that were the case, applicant argues, then the matter has been decided and is *res judicata*. If respondent were to take the jurisdiction point further, it would have to appeal the decision of De Vos J. (I must add that both parties agree that the decision of De Vos J is appealable.)

[6] Respondent has argued that the judgment of De Vos J was a nullity. The argument is that this court does not have jurisdiction to hear matters relating to patents, and having found that this court in fact has jurisdiction in the matter, De Vos J usurped for himself powers which he did not have.

[7] I was referred to two matters wherein the orders were found to be a nullity. The first, ***The Master of the High Court v Motala NO 2012 (3) SA 325 (SCA)*** concerned an order granted in the North Gauteng High Court. The learned judge made an order placing a company under provisional judicial management, and having done so, appointing specific persons as judicial managers. Section 429 of the Companies Act, Act 61 of 1973 reserved the authority to appoint a judicial manager for the Master of the High Court, and ***Motala*** held that the court cannot appoint whomever it deems fit as judicial manager. Ponnann JA held (at 333 B to C) that:

“The learned judge usurped for himself a power that he did not have. That power had been expressly left to the Master by the Act. His order was therefore a nullity. In acting as he did, Kruger AJ served to defeat the provisions of a statutory enactment. It is after all a fundamental principle of our law that a thing done contrary to a direct prohibition of law is void and of no force and effect.”

[8] The second matter, ***City of Johannesburg v Changing Tides 74 (Pty) Ltd and others*** concerned an eviction application by Changing Tides, for the eviction of a number of residents from a building in the city. The difficulty facing the court *a quo* was that it did not have sufficient information regarding the occupants of the building, and it consequently made an order that the sheriff of court was to enter the building and was to compile a schedule of information regarding the occupiers and their personal circumstances.

[9] The particular part of the order directing the sheriff to prepare schedules was criticised on appeal on the grounds that the functions of the sheriff were specifically prescribed by statute, and that making schedules of persons and of their circumstances was not one of the prescribed functions. Wallis JA held that:

“That part of the order was accordingly improvidently sought and erroneously granted. It is therefore a nullity.”

[10] The question is whether De Vos J usurped a power that he did not have by deciding that this Court had jurisdiction in this particular matter.

[11] This Court’s jurisdiction is derived from section 21 of the Superior Courts Act, Act 10 of 2013:

“21 Persons over whom and matters in relation to which Divisions have jurisdiction

(1) A Division has jurisdiction over all persons residing or being in, and in relation to all causes of action arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to the law take cognisance, and has the power-

(a)

(b)

(c) In its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such

person cannot claim any relief consequential upon the determination.”

[12] The meaning of this section (and its forebears for that matter), has been interpreted as intending only to convey that the jurisdiction of the High Court is to be found in the common law. (***See: Gallo Africa Ltd and others v Sting Music (Pty) Ltd and others 2010 (6) SA 329 (SCA)***) It is also trite that a High Court has the inherent power to regulate its own process. These courts have on numerous occasions been called upon to determine whether they have jurisdiction in a matter. Therefore, when De Vos J ruled that this Court has jurisdiction to hear the matter, he was exercising an authority that these Courts have been clothed with by virtue not only of the Superior Courts Act, 2013, but also by virtue of the common law.

[13] In contrast, in the ***Motala*** and ***Changing Tides*** matters (*supra*), the presiding officer was clothing himself with authority that he did not have, on the one hand by appointing a judicial manager when it was the Master’s prerogative to do so, and on the other hand ordering the sheriff to do things outside of his legislated authority.

[14] The further question, whether the judgment of De Vos J was sound or not, is not for this Court to decide. The parties agree that the decision is appealable, and should respondent take issue with the judgment, it should appeal.

[15] Having found that De Vos J’s judgment was not a nullity, it falls to be decided whether the judgment was in fact appealable, and whether it is *res judicata*. The general rule is that the dismissal of an exception is not appealable.

In ***Blaauwbosch Diamonds Ltd v Union Government (Minister of Finance)*** 1915 AD 599 at 601 it was stated that the test was whether the final word had been spoken on the particular point. In order for a judgment or order to be appealable it requires three attributes:

15.1 The order should be final in effect and not susceptible to alteration by the court of first instance;

15.2 The order should be definitive of the rights of the parties;

15.3 The order should have the effect of disposing of at least a substantial portion of the relief claimed.

(See: ***Guardian National Insurance Co Ltd v Searle NO 1999 (3) SA 296 (SCA)***)

[16] I was pointed to the *dictum* by Nienaber JA in ***Minister of Safety and Security and another v Hamilton 2001 (3) SA 50 (SCA) at 55 G*** that:

"The rule is that the dismissal of an exception is not appealable to this Court, save perhaps in that rare category of case (of which this case, on any reading is not one) where the issue in question is presented in form as an exception but the procedure in substance and effect is a stated case."

[17] In ***Du Toit v Ackerman 1962 (2) SA 581 (A)*** while relying on the authority of ***Steytler NO v Fitzgerald 1911 AD 295*** the dismissal of an exception on the

grounds that the court did not have jurisdiction was found to be a final judgment and consequently appealable:

“Na my mening moet die afwysing van hierdie eksepsie volgens ons geldende reg as ‘n finale uitspraak oor die betrokke geskilpunt in die geding beskou te word.”

[18] The dismissal of an exception based on lack of jurisdiction is therefore appealable. This particular case also has to be distinguished from cases where, for example, exception is taken based upon prescription, where later evidence may cure what seems initially to be a stumbling block. In this matter the pleadings are what they are, and this court either has jurisdiction on the papers as they stand, or it does not. Later developments in the case cannot affect the outcome of the matter in regard to jurisdiction.

[19] For the foregoing reasons I am of the view that the judgment of De Vos J was final in respect of the jurisdiction point, was definitive of the parties rights as to the forum in which the matter is to be decided, and resolved a substantial part of the matter, being the special plea.

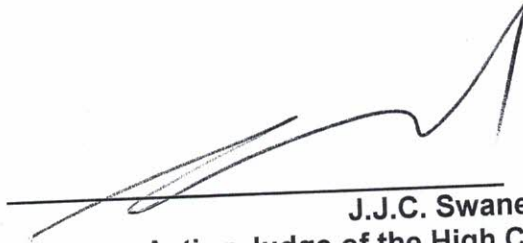
[20] This matter seems to be one of those, as counsel for applicant correctly, in my view argued, where the point *in limine* was presented as an exception, whilst in truth it was a stated case on the jurisdiction of the Court. In my view therefore, the judgment of De Vos J was final, appealable and renders the jurisdiction point *res iudicata*.

[21] In the circumstances I make the following order:

21.1 In terms of rule 33 (4) the special plea is separated from the remainder of the issues by agreement between the parties;

21.2 Respondent's special plea is dismissed;

21.3 Respondent shall pay the costs of the application, including the costs of two counsel.



J.J.C. Swanepoel
Acting Judge of the High Court,
Gauteng Division, Pretoria

Counsel for Applicants:

Adv K W Luderitz SC

Adv K Iles

Attorney for Applicants:

Adams & Adams

Counsel for Respondent:

Adv R Michau SC

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Attorney for Respondent:

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