



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

CASE NO: 56238/2016

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE ☒ YES ☐ NO
(2)	OF INTEREST TO OTHERS JUDGES: YES/NO
(3)	REVISED
3/2/2017	<i>[Signature]</i>
DATE	SIGNATURE

3/2/2017

In the matter between:

RAMMUTLANA BOELIE SEKGALA

Plaintiff

and

STEVE'S AUTO CLINIC (PTY) LTD

1st Defendant

STEVE'S AUTO CLINIC KYALAMI (PTY) LTD

2nd Defendant

MARINUS DU PREEZ KUYL

3rd Defendant

ANDRE VISSER

4th Defendant

ROELOFF FREDERICK BOTHA

5th Defendant

STEPHEN PAUL BOTHA

6th Defendant

JUDGMENT

Carrim AJ

Introduction

- [1] This is an application for leave to be granted against my refusal to grant summary judgment in favour of the plaintiff.

- [2] The plaintiff, Mr Sekgala is unrepresented. He argued the application for summary judgment as well as this application for leave to appeal himself. Due to the fact that the plaintiff is a lay litigant I deemed it appropriate to set out the background to this matter in some detail.

Background

- [3] The core facts of this case are that the plaintiff bought a second hand Jeep ("the vehicle") and took it to Steve's Auto Clinic Kyalami (Pty) Ltd (the second defendant) for repairs during February 2013. I will refer to the second defendant as Steve's for ease of convenience. There is some doubt as to whether the first defendant in fact exists, a matter which is elaborated on later in my judgment.
- [4] Steve's provided the plaintiff with a quotation to rebuild the vehicle's engine for R55 000.00 the price being subject to revision after the engine was stripped. Further work was done on the vehicle, including the replacement of the prop-shaft, the battery, servicing of the alternator, replacement of the water-pump and clutch kit, an inspection service and the installation of a boot lock.
- [5] On 10 April 2013, the plaintiff paid the cost of repairs to date being R 82 500.00 and on 26 April 2013 he paid a further R3 420.00. He took possession of the vehicle but returned it on 3 May 2013 on the basis, as appears only from email correspondence that the "CHECK ENGINE" light was back on the dashboard and that he was not confident doing any long distance driving until the problem had been resolved.
- [6] Sometime in July 2013 Steve's advised the plaintiff that it was not able to fix the problem and that it might be best that he contact a company called American SUV in Centurion for assistance as they specialise in these types of vehicles. Plaintiff being upset about this demanded a refund of the total amount of R85 920.00. He advised Steve's that he would approach the National Consumer Commission or the courts to enforce his rights in the event that he did not receive the refund.
- [7] The plaintiff then issued summons against first to sixth defendants on 16 July 2016 claiming the amount of R85 920.00, together with interest thereon.

- [8] The defendants filed a notice of intention to defend on 26 July 2016.
- [9] The plaintiff launched an application for summary judgment in terms of Rule 32 (1) on 16 August 2016 and relied on his particulars of claim in his affidavit in support of the summary judgment application. The matter was set down for hearing on 19 September 2016. The defendants filed an opposing affidavit on 15 September 2016 via email at 2.13 pm, some two hours later than provided for in Rule 32 (3).
- [10] At the hearing of the summary judgment application, the defendants' representative sought condonation of the late filing of the opposing affidavit after the plaintiff raised a complaint about it. Plaintiff was insistent that an application for condonation ought to be brought formally and that the defendant should seek a postponement of the matter to do this. After hearing the parties, I granted condonation in light of the fact that the opposing affidavit was filed a mere two hours late, the plaintiff being aware prior to the hearing that the matter would be opposed and to avoid any inconvenience and costs occasioned by a postponement.¹
- [11] After hearing both parties I dismissed the application, effectively granting the defendants leave to defend the main action but made no order as to costs.
- [12] In his application papers for leave to appeal, the plaintiff complained that reasons were not furnished for my order. None were requested by him. Nevertheless the reasons for my refusal to grant summary judgment become abundantly clear further on when I assess the merits of this application.

Application for leave to appeal

- [13] The plaintiff's main grounds for seeking leave to appeal were that the application for summary judgment was in compliance with all the requirements of Rule 32 (1) and that condonation ought not to have been granted to the defendant. He was entitled to an order granting him summary judgment on this basis alone. Further grounds advanced by him, seemingly, were that he was not afforded a fair hearing as the defendant ought to have brought a formal

¹ See also 13.23 Practice Manual of the North Gauteng High Court.

condonation application or an application to postpone the summary judgment application.

- [14] The defendants, represented by Mr Geach SC, raised a point *in limine* in opposition to the application for leave to appeal. Mr Geach argued that the refusal to grant summary judgment is not appealable due to the fact that it is interlocutory in nature. In support of this he relied upon the seminal case of *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) where the Court held that "*generally speaking a non-appealable decision (ruling) is a decision which is not final (because the court of first instance is entitled to alter it) nor definitive of the rights of parties nor has the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings*".²
- [15] This, he stated, was confirmed in *Polliack & Co Ltd v Pennick* 1936 TPD 167. In the recent case of *Kgatlhe v Metcash Trading Ltd* 2004 (6) SA 410 (T) an appeal against the refusal to grant summary judgment was allowed but only because it concerned an order of security for costs. Even in that case, the full bench (at para 416) observed that "*If the Court a quo had simply refused summary judgment that would, of course, not have been appealable*".
- [16] His view was that on this basis alone the application ought to be dismissed, with costs.
- [17] The plaintiff conceded that the refusal to grant summary judgment is interlocutory in nature but argued that the common law as stated in *Zweni* had developed to such an extent that interlocutory orders were appealable in exceptional circumstances or in the interests of justice. In support of this contention, he relied on the constitutional cases of *National Treasury & Others v Opposition to Urban Tolling Alliance & Others*³ and in *South African Informal Traders & Others v City of Johannesburg & Others*.⁴
- [18] Mr Geach in reply submitted, without more, that there were no exceptional circumstances present in this case that warranted granting leave to appeal.

² 531H-533F.

³ [2012] ZACC 18.

⁴ [2014] ZACC 8.

Assessment

- [19] A refusal to grant summary judgment, unlike a decision to grant summary judgment, is indeed a decision (whether it is referred to as a ruling or an order) that is not final. It is neither definitive of the rights of the parties nor does it have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings. If this was viewed through the lens of *Zweni* as argued by the defendants then a refusal to grant summary judgment would not be appealable.
- [20] However the common law since *Zweni* has developed in accordance with constitutional principles.
- [21] In *South African Informal Traders & Others v City of Johannesburg & Others* Moseneke ACJ (as he was then) in considering whether the Constitutional Court ought to hear an appeal against an interim order of the South Gauteng High Court,⁵ relied upon the provisions of section 167 (6) of the Constitution and concluded that the Constitutional Court has a wide appellate jurisdiction on constitutional matters.⁶ Provided a dispute related to a constitutional matter there was no general rule that prevented that Court from hearing an appeal against an interlocutory decision such as the refusal of an interim interdict. Thus the first criteria for consideration would be whether or not the dispute raised a constitutional matter. However even if the dispute raised a constitutional matter an interlocutory decision would be appealable only if the interests of justice so demand.⁷ Thus the Court would not hear an appeal against an interlocutory order without more, especially because such decision is open to reconsideration by the court that had granted it and "[d]oing so would be an exception".⁸
- [22] In summary, the Constitutional Court while acknowledging that it has a wide appellate jurisdiction, has stated that it would only exercise it in relation to interlocutory orders (in disputes where a constitutional matter is raised) in

⁵ The court had to also consider whether it would hear a direct appeal on an urgent basis but this is not relevant for purposes of this decision.

⁶ Para 17.

⁷ Para 17.

⁸ Ibid.

exceptional circumstances and only when the interests of justice so demand. In making the assessment whether the interests of justice demand that the Court should hear an appeal against an interim order, the Court would have regard to and weigh carefully all the relevant circumstances of a case and these would vary from case to case.⁹

[23] In paragraph 20 of that judgement the Court listed a collection of factors that it has developed as a guideline to assist in assessing whether the interests of justice demand that it exercise its appellate jurisdiction in relation to interlocutory orders some of which include-

- 23.1. The kind and importance of the constitutional issue raised;
- 23.2. whether irreparable harm would result if leave to appeal was not granted;
- 23.3. whether the interim order has a final effect or disposes of a substantial portion of relief sought in a pending review;
- 23.4. whether there are prospects of success in the pending review; and
- 23.5. whether allowing the appeal would lead to piecemeal adjudication and prolong the litigation or lead to the wasteful use of judicial resources or legal costs.

[24] While in that matter the Constitutional Court was concerned about its appellate jurisdiction in a dispute that raised serious constitutional questions, the guidance provided by the SCA in *Nova Property Group Holdings v Cobbett*,¹⁰ enjoins us to consider the interests of justice when considering whether an appeal against an interlocutory order ought to be granted. In that case the SCA stated that the test in *Zweni* should be looked through a constitutional lens and that the interests of justice ought to be a paramount consideration when deciding whether an interlocutory order is appealable. When considering the interests of justice however, each case must be decided on its own facts.¹¹

[25] In *Nova*, the court relying on s17 (1) of the Superior Courts Act decided to grant the appeal in relation to the discovery of documents, on the basis that there

⁹ Para 20.

¹⁰ [2016] ZASCA 63.

¹¹ Para 8.

were four conflicting judgments on the proper interpretation of s26 (2) of the Companies Act, the matter raised a constitutional issue and that the appeal would lead to a just and prompt resolution of the real issues between the parties.¹²

[26] Section 17 (1) of the Superior Courts Act provides-

(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that —

(i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard,

including conflicting judgments on the matter under consideration;

[27] The provisions of both s17 (1) (i) and (ii) are factors that would certainly fall within the rubric of the interests of justice approach as outlined by the Constitutional Court and the SCA in *Nova* in relation to interlocutory orders.

[28] Turning to the facts of this case and having regard to the guidance provided by the Constitutional Court and the SCA, it is patently clear from the papers that this dispute raises no constitutional issue and the plaintiff has not argued that it does. There are no conflicting judgments in relation to a matter of statutory interpretation. Furthermore, no irreparable harm has been caused to the plaintiff by the order refusing him summary judgment simply because he is not precluded from persisting with his claim in the main proceedings.

[29] In my view the only two relevant factors when assessing the interests of justice test, on the facts of this case, would be first to consider whether the plaintiff has reasonable prospects of success on appeal, and second whether allowing the appeal would lead to piecemeal adjudication and prolong the litigation or lead to wasteful use of judicial resources or legal costs.

[30] I turn to consider these below.

¹² Para 10.

[31] It bears emphasis that this matter concerns a dispute between two private parties in relation to repairs done on a second hand motor vehicle, namely a Jeep SUV.

[32] To provide context, I summarise the plaintiff's particulars here. Plaintiff's claim is articulated as three causes of action:

32.1. The first is described as a repudiation by the defendant of the contract between it and the plaintiff in terms of which it was agreed that Steve's would fix the plaintiff's vehicle in respect of excessive smoking and grinding noises, that upon successful completion of the repairs to the vehicle the defence would demand from plaintiff payment of an amount of R55 000.00 and that upon demand for payment of R55 000.00 plaintiff will be obliged to pay the defendant. On plaintiff's version the car was not fixed, Steve's had repudiated the contract and plaintiff has suffered damages in the amount of R85 920,00

32.2. The second cause of action, offered as an alternative claim to the first but against the second to sixth defendants, appears to relate to fraudulent misrepresentation. Plaintiff claims that the first defendant was not a validly registered company with CIPC and that its use of the name Steve's Auto Clinic (Pty) Ltd was unlawful. Moreover as it was not a juristic person the warranty that it offered at the bottom of its invoice was invalid. It is further alleged that the first and second defendant's names are confusingly similar and that the third to sixth defendants, being the directors of the second defendant, are *prima facie* responsible for the confusion. This confusion was done with the intention of misleading the unsuspecting public one of which was the plaintiff.

32.3. The third ground, offered as a "second case" is articulated as a case concerning VAT fraud. Here it is alleged that the first defendant is using Steve's VAT number fraudulently. The third to sixth defendants have therefore conducted the affairs of the first and second defendant recklessly and/or fraudulently in contravention of the Companies Act 71 of 2008 and therefore personally jointly and severally liable for the plaintiff's claim.

[33] Rule 32(1) states:

(1) Where the defendant has delivered notice of intention to defend, the plaintiff may apply to court for summary judgment on each of such claims in the summons as is only-

- (a) on a liquid document;*
- (b) for a liquidated amount in money;*
- (c) for delivery of specified movable property; or*
- (d) for ejectment; together with any claim for interest and costs.*

[34] The plaintiff claims that the amount of R85 9200.00 is a liquidated amount for purposes of this Rule. He relies on three documents in support of this claim. The quotation of R55 000,00 (dated 7 February 2013) related to an "engine rebuild". The subsequent invoice dated 8 February 2013 for R82 500.00 details the supply and fit of a reconditioned engine and then a number of other items such as a front prop-shaft, a diesel pump, a recon injector, a battery, an alternator, a water-pump and a clutch kit. A further invoice dated 25 April 2013 for R3 420.00 relates to a first inspection service and the installation of a boot lock.

[35] A claim contemplated in Rule 32(1) (b) is liquidated if it is contained in a liquid document, if it is admitted or if the monetary value thereof has been ascertained or is susceptible of prompt ascertainment.¹³ None of the documents relied upon by the plaintiff are liquid documents in the nature of negotiable instruments, bills of exchange, cheques or promissory notes. More importantly they do not serve to support the claim that the defendants are liable to the plaintiff for the payment of the amount of R85 920.00. Instead they support only the inference that the plaintiff is liable for the amounts listed in those invoices. Based on these documents the amount claimed by the plaintiff is not liquidated.

[36] Is the liquidated amount capable of being promptly ascertained? The only allegation made by the plaintiff is that the vehicle was not repaired as was agreed between him and Steve's. The document he attaches in support of this is a copy of an email dated 2 May 2013 sent by the plaintiff to the branch manager of the second defendant, in which he complains that the "CHECK

¹³ Van Niekerk et al *Summary Judgement: A Practical Guide* 1998 Butterworths 3-5.

ENGINE" light was back on and that he was concerned about this. Nothing more is alleged or attached by the plaintiff to assist the Court to ascertain which of the many items listed in the three invoices put up by him relate to this problem. Nor does he explain which of the parts provided by Steve's (such as the battery, the diesel pump, the water-pump, the prop-shaft, the boot lock) are in themselves defective so as to justify his claim of R85 920.00.

- [37] The plaintiff has not attached any confirmatory documentation, either in the form of an assessment by American SUV who specialise in this type of vehicle (and to whom he was referred to by Steve's) or a quote by another reputable motor repair firm, to elucidate in which respects the vehicle was not fixed and in support of the inference that the defendants were liable for this failure.
- [38] The amount therefore cannot be promptly ascertained without the adducing of further evidence.
- [39] Furthermore the terms of the alleged contract between him and Steve's were not *ex facie* the documents absolutely clear. Evidence would have to be adduced as to whether the contract between him and Steve's was limited to rebuild the engine (as contemplated in the quotation dated 7 February 2013) or whether it extended to rebuilding of the entire car as suggested by the invoices dated 8 February 2013 and 25 April 2013.
- [40] In summary the plaintiff's own papers in support of the application for summary judgment did not comply with the requirements of Rule 32 (1). His application was not based on a liquid document, nor was it for a liquidated amount. Furthermore the amount claimed was not capable of prompt ascertainment. Accordingly the summary judgment application was not brought validly and was likely to have failed, irrespective of whether defendants had a *bona fide* defence or not.
- [41] The facts above serve to support the conclusion that the plaintiff would not have reasonable prospects of success on appeal. This conclusion is further supported by the fact that the defendants in their opposing affidavit did indeed demonstrate that they have a *bona fide* defence. Once there is a showing of a

bona fide defence by a defendant the plaintiff is not entitled to summary judgement.¹⁴

- [42] In their opposing affidavit the defendants put up facts which suggest that the resolution of the dispute between the parties would require further evidence to be adduced. In paragraphs 15 – 17 of the opposing affidavit, the defendants explain the items listed on the invoice dated 8 February 2013 for R82 500.00. The first item for R53 240.00 was the supply and fit of a reconditioned engine in accordance with the quotation given to the plaintiff on 7 February 2013. The remaining items (items 3-10) on this invoice related to the additional work that was done for the plaintiff and do not form part of the supply and fit of the reconditioned engine at all. The last invoice was for a service done on the car and the installation of a boot lock at the request of the plaintiff. In relation to the "CHECK ENGINE" problem, the plaintiff was advised to approach American SUV Centurion directly because Steve's would have in any event sent the vehicle to them.
- [43] The defendants also raised a number of points *in limine*. The first is that the plaintiff has no *locus standi*, the second that the plaintiff's particulars of claims are excipiable, the third that the plaintiff is in the wrong forum (the matter should be transferred to the Magistrate's Court due to the fact that the amount claimed is within the jurisdiction of that court) and fourth that there is an inherent fatal contradiction in the different claims (cases/grounds) alleged by the plaintiff.
- [44] In relation to the first point *in limine* the defendants point to the fact that the plaintiff had lodged a complaint with the National Consumer Commission (NCC) who has already approached them. The relevant documents sent by the investigation division of the NCC are attached to the opposing affidavit. That process is still underway. The defendants allege that because the plaintiff has elected to approach the NCC, he is not entitled to approach this court

¹⁴ *Mirage v Barclays National Bank* 1976 (1) 418 AD and *Breitenbach v Fiat SA* 1976 (2) SA 226 (T) at 228 A-B.

unless he has exhausted all other remedies available to him in national legislation as provided for in section 69 of the Consumer Protection Act.¹⁵ No explanation was provided by the plaintiff as to whether he has exhausted his other remedies through the NCC or the relevant industry ombudsman. Notably, as appears from the NCC papers attached to the opposing affidavit, Steve's has repeatedly requested that the plaintiff identify in which respects the vehicle has not been repaired so as to enable them to seek to rectify any defect that may fall within the warranty offered by them. On the defendants version that information to date has not been provided.

[45] Thus the plaintiff's claims as alleged in his particulars of claim stand to be challenged by the defendants and they do indeed have a *bona fide* defence.

[46] In relation to plaintiff's second and third grounds, these can hardly be said to fall within the ambit of Rule 32 (1).¹⁶ In any event the documents put up by the plaintiff, namely the three invoices, upon which he relies for his damages claim in respect of these further grounds do not support a claim for a liquidated amount for purposes of Rule 32 (1).

[47] As far as the status of the first defendant is concerned, Mr Stefan Botha on behalf of the defendants explains that the entity cited as the second defendant Steve's Auto Clinic Kyalami (Pty) Ltd often uses the shortened name Steve's Auto Clinic or Steve's Auto Clinic (Pty) Ltd (cited as the first defendant) on its documents. As such Steve's Auto Clinic (Pty) Ltd does not exist.¹⁷

Conclusion

[48] In conclusion, the plaintiff's application in terms of Rule 32 (1) was defective and the defendants were able to show that that they had a *bona fide* defence. In light of this, the plaintiffs prospects of success on appeal would be weak if not entirely absent. It would therefore not be in the interests of justice to grant the plaintiff leave to appeal. Allowing the appeal would only lead to piecemeal

¹⁵ Act 68 of 2008

¹⁶ See in general Van Niekerk et al *Summary Judgement: A Practical Guide* 1998 Butterworths.

¹⁷ Results of a CIPC search conducted by the defendants were attached in support of the fact that there is only one registered entity namely Steve's Auto Clinic Kyalami (Pty) Ltd.

adjudication and would result in a wasteful use of judicial resources and unnecessary legal costs.

- [49] The plaintiff is not precluded from litigating the matter further and enjoying access to the Courts to pursue his claims.

Costs

- [50] Having concluded that the application ought to be dismissed, I turn now to consider the issue of costs. The general principle is that costs follow the suit. Mr Geach argued that costs should be awarded on the High Court scale.

- [51] A successful litigant ought not to be deprived of any of its costs.¹⁸ At the same time the issue of costs are at the discretion of the Court.¹⁹

- [52] Although the plaintiff has less costly remedies available to him and he might have served himself better by pursuing these, I take into account that the plaintiff is unrepresented and that the magnitude of this case hardly warranted the appearance of senior counsel.

Order

- [53] The application for leave to appeal is accordingly dismissed with costs, such costs to be on the Magistrate's Court scale.

DATED AT 3 FEBRUARY 2017

Y CARRIM

Acting Judge of the High Court
Gauteng North, Pretoria

Date of Hearing: 7 December 2016.
Judgment delivered on: 3 February 2017.

APPEARANCES:

For the plaintiff: Appeared in person.

For the defendant: Adv B P Geach SC instructed by Rina Rheeden Attorneys.

¹⁸ *Feinstein & another v Taylor* 1962 (2) SA 54 (W) at 56B-C.