

2/6/17



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Not reportable

Not of interest to other Judges

CASE NO: 76306/2015

In the matter between:

SOUTH AFRICAN REVENUE SERVICES

Applicant

and

SELLO JULIUS MALEMA

Respondent

Heard: 29 May 2017

Judgment: 2 June 2017

Coram: Makgoka, J

Summary: Practice and procedure – Order referring application to trial – Rule 6(5)(g) of the Uniform Rules of Court – exercise of discretion - Appealability of such order – sections 16 and 17 of the Superior Court Act of 2013 – interests of justice.

J U D G M E N T

MAKGOKA, J

[1] This is an application for leave to appeal. The applicant, the Commissioner for the South African Revenue Service (SARS), who was the respondent in the main application, seeks leave to appeal against an order of this court referring an application for trial. The application for leave to appeal is opposed by the respondent, Mr Julius Sello Malema (Mr Malema), the applicant in the main application.

[2] The application comes under peculiar and extra-ordinary circumstances. The judge who heard the main application, and whose order is sought to be appealed against, Justice Jansen, has since resigned as a judge and was therefore unavailable to hear the application for leave to appeal. For the purpose of this judgment, I shall refer to her as if she is still a judge.

[3] The background facts can briefly be stated as follows. On 26 May 2014 Mr Malema entered into a compromise agreement with SARS as envisaged in terms of s 200 of the Tax Administration Act 28 of 2011 (the Act). He performed in terms of the compromise. Subsequently, on 5 February 2015 SARS informed Mr Malema that it is not bound to the compromise agreement because he had allegedly failed to make a full and frank disclosure to it.¹

[4] As a result of the stance adopted by SARS, Mr Malema launched an application for an order declaring the compromise agreement binding on SARS. The application was heard by Ms Justice Jansen on 2 February 2016. Judgment was delivered on 29 April 2016 in terms of which the following order was made:

1. The matter is referred to trial.
2. The Applicant's notice of motion stands as the simple summons and the Respondent's notice of intention to oppose stands as a notice of intention to defend.

¹ Section 205 of the Act tabulates circumstances in which SARS may set aside or avoid a compromise. It sets certain jurisdictional requirements. Of importance, if the taxpayer made a material misrepresentation leading to the compromise or committed any breach of a material nature regarding the compromise, as envisaged in the Act, SARS is not bound to the compromise.

3. The Applicant is directed to file his declaration within 30 days of this court order.
4. Thereafter the Uniform Rules of Court regarding the filing of pleadings and all processes and procedures shall apply.
5. The costs incurred to date are costs in the action, which costs include the costs consequent upon the employment of two counsel.

[5] SARS, aggrieved with this order, delivered its notice of application for leave to appeal on 23 May 2016. It seeks leave to appeal to the Supreme Court of Appeal, alternatively to the full court of this Division. Several grounds of appeal are stated in the notice of application for leave to appeal. Most of the grounds relate to what SARS considers to be 'findings' by the court on some disputed facts. There is also a complaint that the court had misconstrued the dispute between the parties.

[6] These grounds clearly seek to challenge the court's statements in the course of the judgment. But that it is impermissible, as the statements were made obiter. Therefore, the complaint in respect of them can be disposed of summarily with a short and trite answer. An appeal does not lie against the reasons for judgment, but against the substantive order made by a court. See *Western Johannesburg Rent Board and Another v Ursula Mansions (Pty) Ltd* 1948 (3) SA 353 (A) at 355; *True Motives 84 (Pty) Ltd v Mahdi and Another* 2009 (4) SA 153 (SCA) para 35; *Jacobs & another v Baumann NO* [2009] ZASCA 43; 2009 (5) SA 432 para 9.

[7] The upshot of SARS' application for leave to appeal, however, is that on the papers before it, the court should have found that SARS was not bound to the compromise agreement, and dismissed the application. In particular, it was stated that the court erred in failing to make a determination on the interpretation of s 205 of the Act. It is argued that had it done so, it would have found that on the objective interpretation of the section, Mr Malema's alleged non-disclosure, misstatements and failure to keep his tax affairs up to date, constituted a breach of the compromise agreement and consequently, SARS was not bound to it.

[8] The common law test in an application for leave to appeal has always been whether there are reasonable prospects that another court, given the same set of

facts, might arrive to a different conclusion. That test has been codified by s 17(1)(a)(i) and (ii) of the Superior Court Act 10 of 2013, in terms of which leave to appeal may only be given where a judge is of the opinion that the appeal would have reasonable prospect of success, or that there is some compelling reason why the appeal should be heard.

[9] In the present application, the main, and dispositive, issue is whether the order by Justice Jansen referring the application to trial is appealable. I shall revert to this aspect later. I must first consider the framework under which orders such as the one in the present case, are governed. Referral of an application to trial is governed by Rule 6(5)(g) of the Uniform Rules of Court, which provides:

‘Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as to it seems meet with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the foregoing, it may direct that oral evidence be heard on specific issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for him or any other person to be subpoenaed to appear and be examined and cross examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.’

[10] From the text of the rule, it is plain that the court enjoys a discretion, which must of course, be exercised judiciously. Whether in a particular case the discretion has been properly exercised, regard must be had to the facts of each case and the reasoning underpinning the decision. Rule 6(5)(g) should be considered also in light of s 173 of the Constitution of the Republic of South Africa, 1996, in terms of which this court, among others, has an inherent right to regulate its own procedures.

[11] In the present case, in her judgment, Justice Jansen gave a lengthy and detailed exposition of the bases on which SARS alleged Mr Malema had made misstatements and non-disclosures to it, and Mr Malema's reply to the allegations. Under the heading ‘Referral to trial’ the learned judge stated:

[71] At the hearing, the applicant's advocate requested that not only the issue of the Bendor Property, but the entire application be referred to trial because of the factual disputes in the application.

[72] In addition to the issue of the Bendor Property, which this court is not in a position to decide on affidavit, the other issues, which gave rise to SARS declaring that it is no longer bound by the compromise agreement, are equally difficult to decide on the conflicting versions set out in the affidavits. Even though SARS seeks to argue that it is merely a matter of interpretation it cannot be discounted that the information available to the parties and the reasons and facts upon which they entered into the compromise agreement may be relevant....

[74] The less said about the correct legal interpretation of section 205, at this stage, the better. Whether the respondent's or the applicant's interpretation of the compromise agreement is correct, cross-examination in respect of the parties' knowledge of the facts and the circumstances attendant upon the compromise being entered into will bring clarity to matters of great importance to all the parties. Cross-examination may even demonstrate that SARS would in any event have entered into the compromise agreement had it been aware of all the facts which SARS contends the applicant did not disclose or disclosed inaccurately or incompletely – or prove the exact opposite.'

[12] I turn now to the appealability of the order. The lodestar as to whether a particular decision is appealable remains *Zweni v Minister of Law and Order of the Republic of South Africa* 1993 (1) SA 523 (A). After a scholarly exposition of earlier authorities and distilling their effect, Harms AJA formulated the test as follows at 536A-C:

'In the light of these tests and in view of the fact that a ruling is the antithesis of a judgment or order, it appears to me 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 the parties nor has the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings'.

[13] However, the *Zweni* attributes are not cast in stone, as observed in *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) at 10F-11C. Even where a decision does not bear all these attributes it may nevertheless be

appealable if some other considerations are evident, including that the appeal would lead to a just and reasonable prompt resolution of the real issue between the parties.

[14] Almost two decades after *Zweni*, the Supreme Court of Appeal in *Philani-Ma-Afrika v Mailula* 2010 (2) SA 573 (SCA) adapted the general principles on the appealability of interim orders, and concluded that what is of paramount importance in deciding whether a judgment is appealable is the interests of justice. That approach received the imprimatur of the Constitutional Court in *Intl Trade Administration Commission v SCAW SA (Pty) Ltd* 2012 (4) SA 618 (CC). The Constitutional Court at para 52, observed that the Supreme Court of Appeal had, in *Philani-Ma-Afrika*, adapted the general principles to accord with the equitable and the more context-sensitive standard of the interests of justice favoured by the Constitution.

[15] In *Absa Bank Limited v Mkhize and two similar matters* [2013] ZASCA 139; 2014 (5) SA 16 (SCA) the high court, not being satisfied with the service effected by Absa in a foreclosure matter, had postponed the application and directed that certain further steps be taken. The majority held that the order amounted to no more than a direction before the main action could be entered into, as to the manner in which the matter should proceed.

[16] Recently in *Nova Property Group Holdings Limited v Cobbett & others* [2016] ZASCA 63; 2016 (4) SA 317 (SCA), the Supreme Court of Appeal explained how the notion of the interests of justice could influence the appealability of a decision:

'[9] It is well established that in deciding what is in the interests of justice, each case has to be considered in light of its own facts. The considerations that serve the interests of justice, such as that the appeal will traverse matters of significant importance which pit the rights of privacy and dignity on the one hand, against those of access to information and freedom of expression on the other hand, certainly loom large before us. However, the most compelling, in my view, is that a consideration of the merits of the appeal will necessarily involve a resolution of the seemingly conflicting decisions in *La Lucia Sands Share Block Ltd & others v Barkhan & others* 2010 (6) SA 421 (SCA) and *Bayoglu v Manngwe Mining (Pty)* 2012 JDR 1902 (GNP) on the one hand, and *Basson v On-Point Engineers (Pty) Ltd* 2012

JDR 2126 (GNP) and *M & G Centre for Investigative Journalism NPC v CSR-E Loco Supply* case number 23477/2013 (8 November 2013) on the other.'

[17] In the present case, Mr *Gauntlett* SC, lead counsel for SARS, quite correctly, disavowed any direct reliance on the *Zweni* attributes, it being common cause that the impugned order:

- (a) is not final;
- (b) is not definitive of the rights of the parties;
- (c) does not dispose of at least a substantial portion of the relief claimed.

[18] Counsel, instead, relied on the rubric of the 'interests of justice' developed in *Philani-Ma-Afrika* and explained in *Nova Property*, for the argument that the order is appealable. In this regard, Mr *Gauntlett* submitted that the court had made a preliminary interpretation of s 205, by for example, suggesting a subjective element to it, and had therefore 'half-cooked' the issue for the trial court, thereby hamstringing it. For that reason, and given that there has not been a prior interpretation of this important section, it was in the interests of justice that leave should be granted for either the Supreme Court of Appeal or a full court to give an authoritative view on it.

[19] I disagree with this submission, for two reasons. First, the factual premise of this proposition is not correct. The learned judge did not express any firm views on the construction of s 205. She pointed to divergent and possible interpretations of the section. She then expressed doubt on the correctness of one adopted by SARS, in particular, whether the non-disclosures and inaccuracies had to be intentional for purpose of avoiding a compromise agreement.

[20] Second, this argument goes against the very basis of SARS' main ground of appeal. As stated earlier, the overriding complaint by SARS in its notice of application for leave to appeal is that the court erred in failing to make a determination on the interpretation of s 205. Indeed the learned judge did not do, consciously so, it appears. She was particularly careful to steer from that exercise,

as pointed out in para [11] above. This is borne out by the penultimate paragraph of the judgment:

[90] This court does not wish to bind the court hearing the trial and does not express an opinion on which interpretation of section 205 of the TTA is accurate. These issues will be clarified when evidence is led regarding the rationale for SARS entering into a compromise agreement and later adopting the stance that it is not bound by it.'

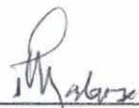
[21] In my view, there is nothing in the present case which warrants the attention of an appellate court at this stage. Unlike what the court considered in *Nova Property* - the desirability of harmonising conflicting decisions – nothing has been determined yet, either through factual finding or an interpretation of s 205 of the Act. The court exercised a discretion accorded to it by rule 6(5)(g) of the Uniform Rules of Court by referring the matter to trial. There is no suggestion that such discretion was exercised capriciously or upon a wrong principle. The order is not definitive of any issue between the parties, and is merely a preparatory one for the determination of the real dispute between the parties, namely, whether in the context of s 205 of the Act, SARS was bound to the compromise agreement it concluded with Mr Malema.

[22] What is more, I am not persuaded that an appeal would lead to a just and prompt resolution of that dispute. It might well be that SARS is inconvenienced due to the fact that some of the people who were involved in the conclusion of the compromise agreement are no longer in its employ. But, as held in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 550D-H) the fact that a decision (such as the impugned order) may cause a party an inconvenience or place him at a disadvantage in the litigation which nothing but an appeal can correct, is not taken into account in determining its appealability.

[23] In all circumstances, I conclude that there are no compelling reasons why the appeal should be heard. It is not in the interests of justice to do so. In the result the application for leave to appeal falls to fail. With regard to costs, both parties have employed two counsel throughout, including in this application. Costs of two counsel are therefore warranted.

[24] In the result the following order is made:

1. The application by the applicant (Commissioner for the South African Revenue Services) for leave to appeal against the order of 29 April 2016, is dismissed with costs, such costs to include costs consequent upon employment of two counsel.


for TM Makgoka
Judge of the High Court

APPEARANCES:

For the Applicant:

JJ Gauntlett SC (with HGA Snyman SC)
Instructed by:
MacRobert Inc., Pretoria

For the Respondent:

PF Louw SC (with L. Sigogo)
Instructed by:
Tumi Mokoena Inc., Polokwane
Bernhard Van der Hoven, Pretoria