

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Appeal No.: A118/2015

In the appeal between:-

SUSANNA ISABELLA DU PLESSIS

Appellant

And

ALBERTUS JOHANNES ERASMUS

Respondent

CORAM: VAN ZYL J *et* OPPERMAN, AJ

HEARD ON: 7 DECEMBER 2015

DELIVERED ON: 24 MARCH 2016

JUDGMENT

Opperman, AJ

- [1] This is an appeal against an order of the District Court. The succinct and trite facts in introduction are that the respondent (Erasmus) sold cattle to the appellant (Du Plessis) for R240 000.00¹ following an oral agreement. A subsequent written agreement² was drafted and signed. The payment did not

¹ See Paragraph 31.

² Exhibit C of the record *a quo*.

happen and the respondent repossessed the cattle. Both parties claimed breach of contract in the court *a quo*. The claim (by Erasmus) was for the payment of the amount of R22 094.34 plus interest and costs. The merits of the claim was disputed (by Du Plessis) with a counterclaim of R27 475.57 plus interest and costs. The claims are for peripheral expenditures to have remedied and limited the consequences of the breach.

Separation of actions

[2] No formal application or formal order for separation of merits and quantum in the proceedings *a quo* occurred. Perusal of the evidence points to an ambiguity as to whether one or the other or both were dealt with during the trial.

[3] During the hearing of the appeal a conclusion on separation could also not be reached. The appeal was noted on the merits according to paragraph 1.1 of the Notice of Appeal. In paragraph 1.3 of the same notice as drafted by Mr. van Wyk, the appellant protested the fact that the claim was granted without proof of the quantum. The record shows a different story:

“Mnr. van Rooyen: Dit is die saak vir die eiser op die meriete, Edelagbare.³

Mnr van Wyk: En wat die teeneis aanbetref is daar ooreengekom dat wat die quantum aanbetref dit oor sal staan vir latere beregting. As dit die Hof mag behaag.⁴”

³ Transcript of record court *a quo*: Volume 1, page 119 at 15.

⁴ Transcript of record court *a quo*: Volume 2, page 165 at 3.

[4] The hearing stood down and council contacted the instructing attorneys involved in the trial. Council conceded after consultation that merits and quantum were separated by agreement. They further agreed that the court order may be interpreted to be for both. The wording of the order coupled with the pleadings support this. The order reads:⁵

“1. The Applicant’s claim succeeds with costs.
2. The Respondents claim is dismissed with costs.”

[5] The above is relevant because a finding that the defendant is liable to the plaintiff without a determination of quantum is not appealable. See **Jordaan v Bloemfontein TLA** 2004 (3) SA 371 (SCA), **Steenkamp v SABC** 2002 (1) SA 625 (SCA), **Zweni v Minister of Law and Order of the RSA** 1993 (1) SA 523 (A) and **Lucky Arthur Ndlovu v Santam Limited** (550/2003) [2005] ZASCA 41 (13 May 2005).

[6] The quirk is that when the court was first approached merits and quantum were still in dispute, council agreed to separate before the hearing and the court order was on both. Is the matter appealable on this quandary of events? The escapade does not end here.

Judgment

[7] Although the matter *a quo* was remanded for judgment such was never handed down and the proceedings were concluded with the order on 17 December 2014.⁶ The absence of any

⁵ ‘1. Die Eiser se eis slaag soos versoek met koste.

2. Die Verweerder se eis word met koste van die hand gewys.’

⁶ Transcript of record court *a quo*: Volume 2, page 219.

reasons in terms of Rule 51(8)⁷ exacerbates the already prevailing muddle.

- [8] It is imperative to pause and deal with the difference between ‘judgment’, ‘an order/final judgment’ and ‘reasons for judgment’ in appeals.
- [9] According to Harms AJA⁸ the word ‘judgment’ has two meanings, firstly the reasoning of the judicial officer (known to the American jurists as ‘opinion’) and secondly, ‘the pronouncement of a disposition’ upon relief claimed in a trial action. Thus; opinion and finding. Rule 51(1) demands a judgment in writing that shows the facts found to be proven and reasons for judgment. In **Securiforce CC v Ruiters 2012 (4) SA 252 (NCK)** at 259E to 260D it was stated that a judgment must be a proper judgment. Terse reasons for judgment will not suffice.⁹
- [10] According to MM Corbett, in ‘Writing a Judgment’, *The South African Law Journal* 115 (1998) at 116 a judgment comprises the following elements; an introductory section, a setting out of facts proven, the law and the issues, applying the law to the facts proven, determining the relief and finally, the order of the court.

⁷ *Magistrate’s Court Rules*. All references to rules will be in terms of the *Magistrate’s Court Rules* unless otherwise stated.

⁸ *Zweni v Minister of Law and Order of the RSA* 1993 (1) SA 523 (A).

⁹ *Regent Insurance Co Ltd v Maseko* [2000] 3 All SA 83 (W).

- [11] An order issued by a court is to direct a party or participant in a case to take a certain action.¹⁰ Corbett put it as part of a judgment and as a decree ending the judgment. The Lawgiver in sections 48 and 83 of the *Magistrate's Court Act 32 of 1944*, (the Act) defines 'order' and 'final judgment' in synonym for purpose of appeal. In the Zweni-case on 532J-533A it was found that an order or judgment that is final has three attributes: First, the decision must be final in effect and not susceptible to alteration by the court that made it; second, it must be definitive of the rights of the parties; and third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the proceedings.
- [12] Rule 51(8) entitles a magistrate, in spite of a judgment wherein reasons were given, to give further reasons specifically dealing with any ground of appeal. These are the 'reasons for judgment' for purpose of an appeal.
- [13] Notice of Appeal was lodged on 23 December 2014.¹¹ Disconcertingly, the presiding officer that did not hand down any judgment on the order, stated on 5 January 2015 that: 'No further reasons are given with regard to the judgment.' There was no judgment in the first place to make sense of the: 'No further reasons...'¹²

¹⁰ [www.thefreedictionary.com/court+order\(23/12/2015\)](http://www.thefreedictionary.com/court+order(23/12/2015))
[www.merriamWebster.com/dictionary/court%20order\(23/12/2015\)](http://www.merriamWebster.com/dictionary/court%20order(23/12/2015))

¹¹ Transcript of record court *a quo*: Volume 2, page 220.

¹² Transcript of record court *a quo*: Volume 2, page 223.

[14] After the appeal was already placed on the roll in the High Court, the appellant, realizing the lacuna, requested reasons from the magistrate. It is not clear whether this was in terms of Rule 51(1) or Rule 51(8). It is presumed to be in terms of Rule 51(1) because the magistrate did not deal with the facts specified in the notice of appeal. The request should have been made before the noting of the appeal and within 10 days after judgment. The judicial officer had to, within 15 days of this, hand down to the clerk of the court a judgment in writing which shall become part of the record showing the facts he or she found to be proved and his or her reasons for judgment. On 29 October 2015, more than 10 months after the appeal was noted, the magistrate stated in a document that:¹³

“Die feite deur die Hof bevind as bewese is die volgende:

1. Die bedoeling dat die finale betaaldatum vir die beeste 31 Maart 2012 wou wees is bewys.
2. Dit is baie duidelik dat die Verweerder nie finansieël in staat was om op daardie datum te betaal nie want daar is getuig dat daar slegs 'n bedrag van R100 000-00 (Eenhonderd duisend) rand beskikbaar is.
3. Die verweerder het ten spyte van die ooreenkoms later aangebied om slegs 'n gedeelte van die getal beeste te neem en daardeur is ook duidelik bewys dat die ooreenkoms soos aangegaan nie aan voldoen sou word nie.
4. Die skuldbewys (bewysstuk C) soos aangegaan tussen die partye dui duidelik aan wat die onderskeie partye se regte en verpligtinge sal wees in geval van verbreking van die ooreenkoms, derhalwe was die Eiser geregtig om te eis soos tans voor die Hof en slaag sy eis. Wat die teeneis betref is dit

¹³ Heads of Argument: Appellant.

ook duidelik uit die skuldbewys dat die Verweerder geen teen-eis teen die Eiser het nie.”

- [15] The document was submitted to this court as part of the Heads of Arguments of the appellant on 16 November 2015. None of the above is identifiable in the prescribed procedures of law and seems to be a self-constructed creation between the appellant and the magistrate. It is procedurally wrong and illegal.
- [16] The respondent did not object to the document forming part of the record of the appeal but criticized the content as being worthless. The statement may be correct; the above is neither a proper judgment as defined above, nor in terms of Rule 51(1). It is not reasons in terms of Rule 51(8). It is also not of much value to the court of appeal.
- [17] The question was posed earlier whether the appeal may proceed? Council for the appellant, argued for the consideration of the merits and final adjudication of the case by this court. The rationale of the contention is that it is the best way to serve justice; it will lead to the just, speedy and inexpensive settlement of the case in the interest of both parties. The solution to lie in section 87(d) of the Act which states the same.
- [18] Farlam JA ruled in paragraph [16] of the Jordaan-case that the power conferred on the court of appeal by section 87(d) of the

Act does not extent to doing something to a non-appealable order to make it appealable.

[19] The principle grounds of appeal in the Notice of Appeal on the credibility findings or presumed credibility findings of the court *a quo*, cannot be addressed before the predicaments of law that emerged during the hearing of the appeal, are unravelled and adjudicated. A miscarriage of justice will only be condoned and inflamed.

[20] The facts remain that:

1. The Magistrate did not give judgment; he just made the order. The Magistrate did not supply proper and timeous reasons for judgment. The argument from council for the respondent was: No judgment, no reasons, no legal finding, no legal order.
2. The appeal is premature and unfair towards the respondent due to the non-existence of a judgment or reasons therefor. Proper access to justice in the appeal cannot follow.
3. The Magistrate erred by making an order on the merits and quantum whereas the evidence was on merits only. It is an illegal and erroneous order.
4. The matter is not appealable as a consequence of the separation of issues.

[21] I apologise for the song and dance; the case demands it. Since the dawn of democracy in 1994 there has not been, is not at this time and will not be in future, a case in any court of this country that is not deserving of judgment that is founded on

defensible reasons. The judicial authority within the triad of government and as represented by the courts will be grossly ineffective if shorn of decrees bereft of adequate reasons in sustenance thereof. The right to access to courts, the independence of the judiciary and accountability of the courts, will be illusory. Trials and hearings will be moot and futile. Democracy will fail.

[22] Section 34 of the *Constitution of the Republic of South Africa, 1996* (the Constitution) orders the right of access to courts:

“Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”

Allied to this is judicial independence in sections 165(1) to (4) which states:

- “(1) The judicial authority of the Republic is vested in the courts.
- (2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
- (3) No person or organ of state may interfere with the functioning of the courts.
- (4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.”

Sections 195(1)(f) and (2) of the Constitution demands that the conduct of all organs of state be transparent, accountable and

responsive. Self-evidently this must also apply to judicial officers.

[23] Bosielo JA¹⁴ imparted that undoubtedly section 165(1) gives the courts the power to exercise judicial authority. These are awesome powers which must be exercised with caution, restraint and responsibility. This is accomplished by way of reasoned judgments and it is crucial that such be furnished in public and in open court. This allows the public to use their democratic rights to comment or criticise the judgments of our courts. Such engagement will no doubt serve to engender and enhance the confidence and faith of the public in the judicial system. See **S v Mathebula** 2012 (1) SACR 374 (SCA), **S v Mokela** 2012 (1) SACR 431 (SCA) at paras 11-13. In addition, the furnishing of reasons serves another important objective of demonstrating to interested parties that a judicial officer has applied his/her mind to the issues which were put before him/her and therefore the judgment is not arbitrary.

[24] This critical role was voiced by the RT Hon Sir Harry Gibbs:¹⁵

“... it is of particular importance that the parties to the litigation – and the public – should be convinced that justice has been done, or at least that an honest, careful and conscientious effort has been made

¹⁴ 15 July 2013: South African Judicial Training Institute: Judgment Writing For Aspirant Judges, Polokwane, *Judgment Writing*.
<https://www.google.com/search?q=bosielo+judgment+writing&ie=utf-8&oe=utf-8> on 5 Jan 2016.

¹⁵ Sir Harry Gibbs, *Judgment Writing*, Paper delivered at the Judges' Conference 19 January 1993.
<https://www.google.com/search?q=Sir+Harry+Gibbs%2C+Judgment+Writing%2C+Paper+delivered+at+the+Judges%27+Conference+19+January+1993&ie=utf-8&oe=utf-8> on 5 Jan 2016.

to do justice; in any particular case the delivery of reasons is part of the process which has that end in view.”

- [25] Rule 51(1) dictates that judgment in writing *shall* be handed down. Rule 51(8) demands that reasons for judgment *must*; it is not optional, be furnished. Inferior courts are creatures of statute and the magistrate transgressed the Act.¹⁶
- [26] The Constitution was defied in the District Court; a purpose of judgment in writing is to enable the parties to a dispute legal access to the court of appeal. The dispute to be taken on appeal was not defined. The so-called lines of battle were not drawn for purpose of appeal.¹⁷ The court was not responsive. The dispute in the court *a quo* was not addressed and resolved due to the erroneous order. There are costs implication for both parties and finalization in litigation cannot be achieved. It is a collapse of justice.
- [27] The logical consequence following from this is that any judgment concerning the impediments caused by the court *a quo* have been overtaken by litigation and hence will referral to the court *a quo* to salvage the situation, be without any practical effect or significance. The damage was done. Any further delay in the adjudication of the case will cause an added embarrassment to the administration of justice. Justice further delayed will be justice denied.

¹⁶ *Regent Insurance Co Ltd v Maseko* 2000 (3) SA 983 (W) and *Raubex Construction h/a Raumix v Armist Wholesalers* 1998 (3) SA 116 (O).

¹⁷ Section 34 of the Constitution. *Snyman v Crous* 1980 (4) SA 42 (O) at 45D.

- [28] What distinguishes this case from the **Steenkamp, Jordaan and Zweni**-cases is that although erroneous, the magistrate did decide on merits and quantum. It has the effect of final judgment and therefore we can entertain the appeal.
- [29] The court of appeal may- (a) confirm, vary or reverse the judgment appealed from, as justice may require; (b) if the record does not furnish sufficient evidence or information for the determination of the appeal, remit the matter to the court from which the appeal is brought, with instructions in regard to the taking of further evidence or the setting out of further information.¹⁸
- [30] Justice requires and law permits that this court rules on the merits of the claims. The record does not furnish sufficient evidence or information to rule on quantum and it was also not the case of either of the parties during trial. Quantum will still have to be adjudicated by the court *a quo*.

The merits

- [31] The respondent has been the owner of an Nguni stud since 1994. During the time of doing business with the appellant he was in the process of reducing said stud. At that time he kept

¹⁸ Section 87 of the *Magistrates Court Act 32 of 1944*.

The court of appeal may-

- (a) confirm, vary or reverse the judgment appealed from, as justice may require;
- (b) if the record does not furnish sufficient evidence or information for the determination of the appeal, remit the matter to the court from which the appeal is brought, with instructions in regard to the taking of further evidence or the setting out of further information;
- (c) order the parties or either of them to produce at some convenient time in the court of appeal such further proof as shall to it seem necessary or desirable; or
- (d) take any other course which may lead to the just, speedy and as much as may be inexpensive settlement of the case; and
- (e) make such order as to costs as justice may require

the best of the cattle but deregistered it to limit expenditures. On the 1st of September 2011 the appellant and her family selected the stock they wished to buy from this herd. The stock was delivered immediately. On the 16th of January 2012 it was described in an Acknowledgment of Debt between the parties as: 'sold and delivered.'

Date of payment

- [32] The respondent maintained that the R240 000-00 was to be paid on delivery and not conditional of re-registration as stud animals. It is not clear from any evidence if the payment was supposed to be on 1 September 2011 and whether delivery occurred on this date. There is confusion in the pleadings and the evidence of the respondent. In any way; the day of delivery and 1 September came and went. According to the respondent the date was extended to 1 December 2011. This date also went by without payment. In the meanwhile the re-registration process has started. Inspection for this purpose by the relevant institution was to be in May 2012.
- [33] According to the appellant payment was only due on 31 March 2012 and after re-registration; never on delivery or any other date.
- [34] On the 16th of January 2012 the Acknowledgment of Debt was drafted by the legal representative of the respondent and signed by the parties. Herein the appellant declares that she acknowledges the debt of R240 000-00, VAT excluded, for goods sold and delivered unconditionally. The mentioned

amount shall carry interest at 15% per annum from 1 September 2011 until payment. The capital shall be payable on or before 31 March 2012. If the appellant is in default on the due date of payment the respondent may repossess the cattle plus increase. The costs of transport for repossession will be for the account of the appellant. The appellant waived legal exceptions *non causa debiti*¹⁹ and *errore calculi*; the meaning thereof to be known to the appellant.

The sufficiency of the Acknowledgment of Debt (AoD)

[35] First of all; the waiver of the *non causa debiti* on the 16th of January 2012 in the AoD proves the claim of the respondent without any doubt. Further; purely on the other terms of the AoD the appellant was legally obliged to pay the capital and unconditionally so, on 31 March.

The issue of re-registration as condition for payment

[36] The re-registration argument is rejected. The appellant's case on this issue is false.

1. The undisputed fact is that she knew she acquired quality stock that was de-registered. It must be remembered that it was a case of re-registration and not new registration. The cattle was stud material. Re-registration was a formality.
2. The above is supported by the fact that there was an undisputed offer to buy some of the cattle without prove of

¹⁹ *Non causa debiti* means that the debtor cannot plead that there was no cause of debt.

registration when it came to light that the full amount was not going to be paid.

3. She knew inspection for this purpose was only in May 2012 after 31 March 2012, but agreed the date of payment to be 31 March.
4. Significant is that nowhere and never was a cut-off date for re-registration contracted. If re-registration was the intention and condition of payment, the contract could not have gone without this date. Absence of this proves absence of such a condition.
5. The issue was never raised before 31 March and before the appellant had to pay. Had this been a bone of contention it could have been raised during the signing of the AoD but was not. It was not made part of the agreement.
6. It was not raised during the telephonic conversation with the husband of the appellant that will be discussed later.
7. Again, the reason why it was not mentioned in any agreement or communication is that this was not a condition for payment. The appellant knew that the stock is stud and she does not have to be concerned about the quality. This was confirmed by the *bona fides* of the respondent when he replaced some stock before the dispute arose and to ensure quality.

The issue of the 15% interest

- [37] Dovetailing with the lack of credibility in the appellant's case on re-registration is the fact that interest suddenly became an issue. With the interest-objection came the grazing-agreement,

the cross-bred story and the date of loading-of-the-cattle dispute. None was voiced until litigation started.

- [38] The grazing-objection entails an agreement that other cattle of the respondent will be put on the appellant's veld and interest will then not be claimed on the R240 000-00 capital. It is common cause that the grazing-agreement was not implemented and thereafter the AoD happened. Interest was now consulted and agreed upon. The interest came about because the capital was not paid from the start and on delivery. The appellant realised this, hence no objection to the terms of the AoD that interest be calculated back to 1 September.

The issue of mixed-bred calves

- [39] The fact that the cows were in calf from an Angus bull and not a stud Nguni was claimed in the pleadings as justification for non-payment. For some unknown reason this allegation was withdrawn and explained away as a miscommunication between client and attorney. This reflects badly on the trustworthiness of the appellant's case, especially so after all the flipping by the appellant in the rest of the case.

The loading of the cattle on 30 March

- [40] The undisputed conversations between the husband and the respondent that occurred on Monday the 26th of March and the subsequent days, tips the case against the appellant. The husband stated that they cannot pay the total amount because the property deal that should have generated the money did not go through. He gave the respondent permission to load on 30

March notwithstanding the agreement for the 31st of March. On the appellants own version they did not object to the loading of the cattle. The cattle even stood in the kraal when the trucks arrived; ready to be loaded. The objections only came when litigation started.

The respondent stated unequivocally that he would not have loaded if he did not have the said permission. His adherence to contract and law is corroborated by the fact that he studied the AoD before he refused the offer of the husband to buy some of the cattle; he was vigilant to respect the contract. The trucks were only available on the Friday and the respondent had to do what he could to minimise his risks. His version is accepted.

- [41] Whether the repossession date was 30 or 31 March is on the above, of no significance. It is hours that would not have made a difference to the fact that the contract was not going to be honoured by the appellant. On the version of the appellant she was not going to pay the monies on the 31st.

The transfer of risk

- [42] Part of the claim of the respondent is the loss suffered for the cow that died in the possession of the appellant; the repossession was short of one cow. The counterclaim²⁰ of the appellant proves that she accepted the risk for the goods sold and delivered. She claimed for vaccination of the cattle and marking as her property. If the risk was still on the respondent he would have carried the responsibility and costs for

²⁰ Transcript of record court *a quo*: Volume 1, page 12.

vaccination. The terms of the AoD confirmed that she accepted risk. On the merits she was correctly held accountable for the loss.

The costs of the transportation of the cattle

[43] The merits of this issue is obvious in terms of the AoD. The claim was correctly granted by the court *a quo*.

The costs for the re-registration of the cattle

[44] The persistent illegal conduct of the appellant caused the costs for the re-registration of the cattle to end up as a loss to the account of the respondent. The claim was also correctly granted by the court *a quo*.

ORDER

1. The appeal is dismissed, with costs.
2. The main orders of the District Court dated 17 December 2014 is set aside and replaced with the following:
 - 2.1 In the main claim:
 - 2.1.1 The defendant is to be held liable for such damages as may be proven by the plaintiff; alternatively agreed upon between the parties.
 - 2.1.2 The defendant is to pay the costs of the plaintiff to date.
 - 2.2 The counterclaim is dismissed, with costs.
3. The Registrar must send a copy of this judgment to the Chief Magistrate for the Kroonstad district.

M. OPPERMAN, AJ

I concur.

C. VAN ZYL, J

On behalf of the appellant: Adv. CD Pienaar
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On behalf of the respondent: Adv. B. Knoetze SC
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