

IN THE HIGH COURT OF SOUTH AFRICA

Reportable

[EASTERN CAPE LOCAL DIVISION, MTHATHA]

CASE NO: CA&R42/13

Heard on: 04/02/2016

Delivered on: 31/03/2016

In the matter between:

NOMBUYISELO AGNES MTSHAYENI

Applicant

And

EASTERN CAPE DEVELOPMENT CORPORATION

Respondent

In re: the matter between:

NOMBUYISELO AGNES MTSHAYENI

Appellant

And

EASTERN CAPE DEVELOPMENT CORPORATION

Respondent

JUDGMENT

NHLANGULELA DJP:

[1] Having entertained the matter on appeal to us arising from the magistrate of Butterworth at the instance of the applicant and decided it in favour of the respondent, two processes followed. The first was an application for leave to appeal that we granted in the terms that the appeal be heard by the Full Bench of this court instead of the Supreme Court of Appeal. The next process is the application brought in terms of Rule 42 of the uniform rules of this court at the instance of the applicant seeking the correction of the order such that an order be made referring the appeal to the Supreme Court of Appeal in terms of s 20 (4)(b) of the Supreme Court Act 59 of 1959 (hereinafter referred to as “the old Act”). Incorporated in such application is a counter application brought at the instance of the respondent for a declarator that this Court has no jurisdiction to entertain the application for leave as sought by the applicant. These applications are hereinafter referred to as “the application” purely for the purposes of convenience.

[2] The basis of the application is that the order made was premised on a mistake common to the parties within the ambit of Rule 42 (1)(c); to the extent that the provisions of s 20 (4)(b) of the old Act enjoined the court to

make an order referring the appeal to the Supreme Court of Appeal. It is indeed so that on the reading of s 20 (4)(b) the High Court sitting as a court of appeal from the magistrates' court had power to grant leave to appeal to either the Full Bench or Supreme Court of Appeal.

[3] The provisions of s 20 (4) of the old Act read as follows:

- “4. No appeal shall lie against a judgment or order of the Court of a Provincial or Local Division in any civil proceedings or against any judgment or order of that Court given on appeal to it except –
- (a) in the case of a judgment or order given in any civil proceedings by the Full Court of such a division on appeal to it in terms of ss (3), with the special leave of the Appellate Division;
 - (b) in any other case, with the leave of the Court against whose judgment or order the appeal is to be made or, where such leave has been refused, with the leave of the Appellant Division.”

(The underlining is mine for emphasis).

[4] The application is opposed by the respondent on the basis that the provisions of s 16 (1)(b) of the Superior Courts Act 10 of 2013 (hereinafter referred to as the new Act) replaced the provisions of s 20 (4)(b) of the old Act pursuant to the repealing thereof in entirety, with effect from the commencement of the new Act on 23 August 2010. The provisions of s 16 (1)(b) of the new Act read as follows:

“(1) Subject to section 15 (1), the Constitution
and any other law -

(a) ...

(b) an appeal against any decision of a Division on
appeal to it, lies to the Supreme Court of Appeal
upon special leave having been granted by that
court or the Supreme Court of Appeal...”.

(The underlining is mine for emphasis).

[5] Therefore, the issue for decision is whether in light of the provisions of s 16 (1)(b) of the new Act this Court sitting as an appeal court did have the power to entertain an application for leave to appeal.

[6] The parties were busy with the appeal at the time when the new Act came into operation. The origin of the appeal goes back to the summons that was issued in the magistrates' court by the respondent against the applicant on 08 March 2012. The respondent claimed payment of R129 170,83 and some unqualified damages based on an alleged breach of a lease agreement. On 30 November 2012 the magistrate granted summary judgment against which the applicant appealed to this Court constituted of two judges. The appeal was unsuccessful, judgment having been handed down on 28 November 2013. In pursuit of a further appeal, the applicant brought an application for leave to appeal which was decided on 01 September 2014. As already stated, that application was duly granted ostensibly in terms of the provisions of s 20 (4)(b) of the old Act, *albeit* at the time that the provisions of s 16 (1)(b) of the new Act were operational. It was unfortunate that during the hearing of that application neither of the parties pointed out that s 20 (4) of the old Act had been substituted by s 16 (1)(b) of the new Act. It was discovered for the first time during preparations for arguments of the appeal in the Full Bench that the provisions of s 16 (1)(b) provide to the effect that an appeal from a judgment of two judges of the High Court lies directly to the Supreme Court of Appeal on special leave. Having withdrawn the matter from the roll of hearing and consent to do so having been obtained from the parties, I

encouraged the parties to either abandon the judgment of 01 September 2014 to pave the way for this matter to be pursued in terms of s 16 (1)(b) or bring an application to vary the order to obviate the need of involving the Full Bench. A considerable period of time was taken by the parties to exercise their choices until the matter was finally brought back to court on application in terms of Rule 42.

[7] In the application for a variation order, *Mr Nkubungu*, for the applicant, submitted that the provisions of s 52 of the new Act created an exception to the new rule in s 16 (1)(b) that all appeals from the appeal courts of the High Courts lie to the Supreme Court of Appeal on special leave. He argued that this case falls under the exception. The provisions of s 52 read:

- “(1) Subject to section 27, proceedings pending in any court at the commencement of this Act, must be continued and concluded as if this Act had not been passed”
- (2) Proceedings must, for the purposes of this section, be deemed to be pending if, at the commencement of this Act, a summons had

been issued but judgment had not been passed.”

[8] *Mr Nkubungu* contended that s 12 (2)(c) of the Interpretation Act 33 of 1957 and the case of the *Minister of Public Works v Haffejee NO* 1996 (3) SA 745 (A) of 755 C-G give force to his submission that the provisions of s 20 (4)(b) of the old Act continue to apply despite the fact that the old Act had been repealed. He contended further that in this case s 16 (1)(b) will, if applied, offend the presumption against statutory retrospectivity to the prejudice of the applicant’s vested rights in terms of s 20 (4)(b).

[9] Recourse to the facts of the case of *Haffejee* will help towards appreciating counsel’s arguments. On 20 April 1986 a property vesting in the respondent (*Haffejee NO*) had been expropriated in terms of s 13 (1) of the Development Trust and Land Act 18 of 1936 read with the provisions of the Expropriation Act 63 of 1975 (the Act) in exchange for an offer of compensation in the sum of R20 500,00 subject to respondent, if he rejected the offer, exercising its legal right to apply for a determination of the amount of compensation within 8 months to a compensation court or High Court clothed with jurisdiction to grant compensation. The

respondent rejected the amount offered but failed to approach any of the courts, resulting in the offer being deemed accepted in terms of s 10 (5) of the Act. On 01 May 1992 the Legislature abolished the compensation court. However, the offer had been extended to 20 August 1992. Notwithstanding the abolishment, on 06 August 1992 the respondent lodged an application for compensation in the compensation court, but which had been substituted by an ordinary provincial or Local Division of the High Court. The appellant, in turn, brought an application for an order nullifying the respondent's application on the basis that the respondent had been deemed to have accepted the offer long before the abolishment of the compensation court. It was contended on behalf of the respondent that the amending Act did not apply retro-actively to take away the respondent's rights to apply for a determination of compensation in the compensation court that had vested to him in terms of the Act. The High Court found for the respondent. On appeal to the Supreme Court of Appeal the decision of the High Court was reversed on the grounds, that *inter alia*, that the amending Act was a purely procedural provision which did not impact upon respondent's existing rights and obligations that were still capable of enforcement by recourse to the provincial or local division of the High Court.

[10] On a point that is relevant to the issue (s) of the present matter the Supreme Court of Appeal in *Haffejee* said the following at 755 C-D:

“As we have already seen, the common law recognises no vested right in procedure *simpliciter*. See *Curtis's* case *supra* at 319. Were it otherwise, no procedural amendment would apply to cases or causes of action arising before their commencement and that is certainly not the law. Most procedural provisions regulating the institution and conduct of litigious proceedings have a cost implication and many have a tactical implication. Yet that has never in the past been regarded as imparting to them a special character taking them out of the realm of purely procedural provisions and subjecting them to the presumption against legislative interference with vested rights. I see no good reason to commence doing so now. To label procedural provisions instead as conferrers of privileges does nothing, in my view, to improve their claim to be regarded as anything more than what they truly and essentially are, namely purely procedural provisions designed to regulate the institution and conduct of litigious proceedings. So much for the common law.

The same applies, in my view, to s 12(2)(c) and (e) of the Interpretation Act which reads:

'(2) Where a law repeals any other law, then unless the contrary intention appears, the repeal shall not -

(a) . . .

(b) . . .

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed; or

(d) . . .

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, forfeiture or punishment as is in this subsection mentioned, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been passed.'"

[11] The submissions made by *Mr Hobbs*, for the respondent, is that since s 20 (4) of the old Act is a procedural provision the applicant cannot be said to have had vested rights, neither do such rights arise from the special leave procedure created in s 16 (1)(b) of the new Act, the applicant's right to appeal to the Supreme Court having been preserved by the Legislature under both the old Act and the new Act. Counsel placed

reliance on the case of *Poswa v President Of The Republic of South Africa and Others* 2015 (2) SA 127 (GJ) at 148, para [71].

[12] As it is stated in the case of *Haffejee, supra*, an amending law which is purely procedural in nature does not offend the principle of statutory retrospectivity as it is not a conferer of vested legal rights. For this reason it does not appear to me that the case of *Haffejee* supports the case advanced on behalf of the applicant on the issue that s 16 (1)(b) of the new Act does not apply to her appeal matter. The case of *Poswa, supra*, gives expression to the same legal principle as adumbrated in the case of *Haffejee*. And both cases seems to me to be anchored on the seminal statements of Miller JA in the case of *Euromarine International of Mauren v The Ship Berg And Others* 1986 (2) SA 700 (A) at 709H – 710H, which read:

“The general principles which should guide the Court when considering whether a statutory provision is to apply not only to future matters but also to those which existed prior to its coming into operation, have been frequently discussed by our Courts, but perhaps nowhere more fully than in *Curtis v Johannesburg Municipality* 1906 TS 308, when each of the members of the Court discussed the principles involved.

"The general rule", said INNES CJ, was that "in the absence of express provision to the contrary, statutes should be considered as affecting future matters only; and more especially that they should, if possible, be so interpreted as not to take away rights actually vested at the time of their promulgation".

(At 311.) Side by side with that "rule" was the recognition that any law regulating legal procedure must, where applicable, govern the procedure "in every suit which comes to trial after the date of its promulgation" (at 312). SMITH J (at 319) was disposed to say that it did "not follow of necessity" that because a statute dealt with procedure it was to be treated as retrospective in its operation. The learned Judge reminded those who might read what he had to say that in the case of "every statute, whether dealing with procedure or not, the intention of the Legislature had to be ascertained and no general rule applicable to all statutes" could be laid down. MASON J (at 325) observed that the manner in which an action was to be brought was governed by "the law for the time being in force" and was "not a vested right attached to the contract or obligation at the time of its creation". But, added the learned Judge, the "rule" (ie regarding procedural matters)

"can only be justified as a general maxim upon the understanding that the parties concerned are able to adopt and to apply to their vested rights the existing procedure..."

Of course, some of the observations made in the judgments in the *Curtis* case were prompted or moulded by a consideration of the nature of the particular enactment with which the case was concerned - it was a statute of limitation of actions which required actions to be brought within six months of the time when the causes of such actions arose. But what is clear from the several judgments is that primarily, in every case, the inquiry must be into the language of the enactment and the purpose and intent of the Legislature which emerges therefrom. This was also the approach of Lord BRIGHTMAN in *Yew Bon Tew v Kenderaan Bas Mara* [1982] 3 All ER 833 (PC) at 836:

"Apart from the provisions of the interpretation statutes, there is at common law a *prima facie* rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used. A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already past. There is however said to be an exception in the case of a statute which is purely procedural, because no person has a

vested right in any particular course of procedure, but only a right to prosecute or defend a suit according to the rules for the conduct of an action for the time being prescribed.

But these expressions 'retrospective' and 'procedural', though useful in a particular context, are equivocal and therefore can be misleading. A statute which is retrospective in relation to one aspect of a case (eg because it applies to a pre-statute cause of action) may at the same time be prospective in relation to another aspect of the same case (eg because it applies only to the post-statute commencement of proceedings to enforce that cause of action); and an Act which is procedural in one sense may in particular circumstances do far more than regulate the course of proceedings, because it may, on one interpretation, revive or destroy the cause of action itself.

Whether a statute is to be construed in a retrospective sense, and if so to what extent, depends on the intention of the Legislature as expressed in the wording of the statute, having regard to the normal canons of construction and to the relevant provisions of any interpretation statute."

[13] The Constitutional Court in *Veldman v Director of Public Prosecutions, Witwatersrand Local Division* 2007 (3) SA 2010 (CC) gives the stamp of approval to the principles as stated in the cases of *Haffejee* and

Poswa with regard to the manner in which the presumption against statutory retrospectivity has been interpreted and applied by our courts over many years. In adding the constitutional law flavour *Makgoro J* had the following to say at 224, para [26]:

“Generally, legislation is not to be interpreted to extinguish existing rights and obligations. This is so unless the statute provides otherwise or its language clearly shows such a meaning. That legislation will affect only future matters and not take away existing rights is basic to notions of fairness and justice which are integral to the rule of law, a foundational principle of our Constitution. Also central to the rule of law is the principle of legality which requires that law must be certain, clear and stable. Legislative enactments are intended to 'give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed.’”

[14] It must follow, therefore, that the provisions of s 52 of the new Act ought to be interpreted together with and/or in the context of s 16 (1)(b) with due regard to the basic notions fairness and justice to the applicant, and taking into account the administrative purpose which the subsection was designed to serve for the courts.

[15] On the consideration of the principle stated in the cases of *Haffejee, Poswa and Veldman* that the intention of the legislature must be ascertained from the language used in the statute, there is no room for interpreting the words “proceedings pending” in s 52 (1) as being a reference to this case because summons had been issued and judgment had been passed in the magistrates’ court in this matter before 23 August 2013. In my view the submission made on behalf of the applicant that the present matter is the pending proceedings by reason that summons were issued and judgment not passed by the magistrate can only result in a bifurcated interpretation, that the legal uncertainty could not have been intended by the Legislature.

[16] Further reasons show clearly that legal uncertainty could not have been intended. In the first place, the summary judgment that was passed by the magistrate on 30 November 2012 remains a judgment, envisaged in s 52 of the new Act as defined in the case of *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 532I – 532B. And it matters not that such judgement is the subject of appeal that is pending finalization by the Supreme Court of Appeal in due course.

[17] The historical background to s 20 (4)(b) of the old Act is the second reason why the contention that there is no judgment on the summons is preposterous.

[18] A search for an answer to the workload presented by a deluge of unmeritorious appeals to the Appellate Division became the focal point in the *Hoexter Commission Of Enquiry Into The Structure And Functioning Of The Courts*. The Enquiry's recommendation that there should be "a limitation of the right of appeal" in all cases culminated in the passing of the Appeals Amendment Act 105 of 1982 that led to the introduction of the appeal procedure in terms of s 20 (4)(b) of the old Act. The case of *Westinghouse Brake & Equipment v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (SCA) at 562 – 563 deals with the history as well as the manner in which s 20 (4) applies. It is stated in the case of *Numsa And Others v Fry's Metals (Pty) Ltd* 2005 (5) SA 433 (SCA) at 450 A that the reason for the introduction of the special leave procedure in s 20 (4) was to protect the Supreme Court of Appeal against appeals that have no *merit*. A similar statement was made in the case of *Pharmaceutical Society Of South Africa and Another NNO v Tshabalala-Msimang and Another NNO* 2005 (3) SA 238 (SCA) at 254B that the object of s 20 (4) was to protect the Supreme

Court of Appeal against baseless appeals by limiting appeals to those that have reasonable prospect of appeal. The noble legislative aim behind s 20 (4) shows ineluctably to have been advanced further in s 16 (1)(b) by doing away with a need to apply for leave in preference for the special leave of the Supreme Court of Appeal on all appeals against the judgments of the High Courts sitting as a court of appeal; consisted of more than one judge.

[19] Consequently, this Court sitting as an appeal court did not have jurisdiction to entertain an application for leave to appeal. That said, it becomes clear that the application in terms of Rule 42, and the application for leave to appeal are ill-conceived.

[20] In deciding the issue of costs the Court will take into account that it will be unfair to saddle the Supreme Court of Appeal with the task of determining the costs incurred in applications for leave to appeal and the interlocutory application in terms of Rule 42 including the counter-application, the reason simply being that the parties ought to have known that leave in this case is regulated in terms of s 16 (1)(b) of the new Act. The finding that a declaratory order is competent does trigger a consideration of costs towards the Rule 42 application. Each of the

applications under Rule 42 and the counter application were resisted, and the applicant's loss on both scores must be matched with an appropriate award of costs in favour of the respondent as a successful party. I cannot find a reason for exonerating the applicant from paying costs which she could have earned had she won the legal battles.

[21] In the result the following order shall issue:

- 1. The application in terms of Rule 42 be and is hereby dismissed.**
- 2. The counter-application succeeds.**
- 3. The application for leave to appeal be and is hereby dismissed.**
- 4. The applicant/appellant to pay the costs of the applications.**

Z.M. NHLANGULELA

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

I agree:

B. MAJIKI

JUDGE OF THE HIGH COURT

For the applicant : Mr M. H. Nkubungu of
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