

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: A452/2014

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

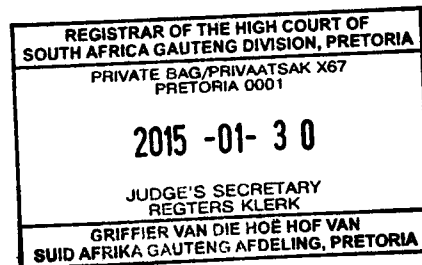
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.

(3) REVISED.

30/1/2015

DATE

SIGNATURE



In the matter between:

CONSTANT DE KLERK

APPELLANT

and

HENRI HOLZHYZEN

1st RESPONDENT

SA SECURITY DOGS CC t/a K9
SECURITY SOLUTIONS

2nd RESPONDENT

Coram: FABRICIUS J et HUGHES J

JUDGMENT

Delivered on: 29 January 2015

Heard on: 30 January 2015

HUGHES J

[1] This is an appeal against the judgment of the magistrate, B MATLHAPE, of the district Wonderboom in Pretoria. The magistrate dismissed the applicant's application to amend his particulars of claim on 2 June 2014.

[2] I do not propose to deal with the facts of the case as this has been dealt with in the lower courts judgment. However, I will set out herein after the sequence of event pertaining to the filing and serving of the document relevant to the issue at hand.

[3] Summons was issued by the appellant on 7 November 2013 and the respondents filed their notice of intention to oppose on 8 January 2014. The appellant caused a number of amendments to be served upon the respondent's which were later withdrawn. The amendment at issue is that dated 20 February 2014 which was served upon the respondents on 24 February 2014.

[4] Incidentally the action against the second respondent was withdrawn on 23 February 2014. Of importance is the fact that the first respondent served a notice in terms of Rule 55A (3) objecting to the amendment at issue on 7 March 2014.

[5] When the application came before the magistrate for her determination whether to allow the amendment or not, she ruled as follows:

"The court is of the opinion that the Applicant cannot succeed in his application to amend in that he seeks not only to introduce a new cause of action, but one which is bad in law. Furthermore, Applicant does not state in full particularity, what prejudice he will suffer should the amendment not be allowed. The court, after weighing prejudice against both parties, is of the opinion that the only party who will suffer prejudice if the amendment are (sic) allowed is the Respondent.

Order

It is ordered that Applicant's application for amendment is dismissed."

[6] At the hearing of this appeal the respondent raised the issue of the appellant having not filed security. However, a concession was forth coming from the respondent after it transpired that the appellant had tendered security. In the circumstances the issue of security falls away.

[7] A *point in limine* was raised by the respondent that the order granted by the magistrate was not appealable as it was an interlocutory order. On the other hand the appellant submitted that the order if fact amounted to a final order.

[8] The respondent argued that the appellant is allowed room to pursue the amendment in a different manner in order to attain the amendment. The argument of the respondent does not make sense since in the circumstances of this matter the order is indeed a final order as once the decision is given to grant or not to grant the amendment that is the end of the application to amend on the basis advanced by the appellant. One is not able to move another application to amend on the same fact and on the same basis as it has already been adjudicated upon. Thus only way forward would be to appeal and that is indicative of it being final. See **Swartz v Van der Walt t/a Sentraten 1998 (1) SA 53 (W)**. The *point in limine* must fail.

[9] Turning to deal with whether the amendment should have been granted or not it is prudent to quote Rule 55A(4):

"If an objection which complies with subrule (3) is delivered within the period referred to in subrule (2), the party wishing to amend may, within 10 days, lodge an application for leave to amend."

Rule 55 A (4) does not persist that an application to amend should be accompanied by an affidavit. I quote the commentary from **Jones and Buckle, The Civil Practice of the Magistrates Courts In South Africa Volume II The Rules**, Subrule (4): Lodge an application to amend"- *"It has been held that these words, as they appear in Uniform Rules of Court 28(4), could not in the context of an amendment, which by nature was an interlocutory application, denote an intention on the part of the legislator that the formal notice of motion procedure supported by an affidavit as contemplated in the Uniform Rules of Court 6 should be adopted. Consequently, such an application in the High Court practice must be brought on notice and not on notice of motion. It is submitted that, in view of the provisions of Rule 55(4)(a), an application for leave to amend in terms of this subrule must be brought on notice, supported by such affidavits as the case may require, and set down with appropriate*

notice". [My emphasis underlined]. See **Swartz v Van der Walt t/a Sentraten 1998 (1) SA 53 (W) at 57C.**

[10] In the circumstances the magistrate had a discretion to grant the amendment had she acted judicially and as stated in the previous paragraph there was no need to refuse the application to amend due to the fact that it was not accompanied by an affidavit.

[11] Regarding the introduction of a new cause of action I am at idem with the submissions advanced by Advocate Kruger as set out in his head of argument which are incorporated in this judgment.

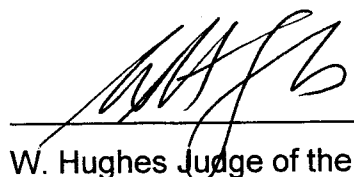
[12] Dealing with the issue of costs the appellant sought that there be no limitation of fees in respect of their costs. I do not see this request as unreasonable taking cognisance of the circumstances of this case and the fact that the matter had to be heard by this court.

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

[13.1] The appeal is upheld with costs.

[13.2] The order of the magistrate dated 2 June 2014 is set aside and is replaced with the following order:

"The applicant's amendment dated 20 February 2014 is duly granted with costs."



W. Hughes Judge of the High Court

I agree and it is so ordered



H. J. Fabricius Judge of the High Court

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