

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION : MTHATHA

CASE NO. CA & R 46/15

In the matter between:

NTOMBIKAYISE MDEDELWA

Appellant

And

ESKOM HOLDINGS SOC (PTY) LTD

Respondent

APPEAL JUDGMENT

GRIFFITHS, J:

[1] This matter is, to say the least, confusing. The appellant brought an urgent application before the magistrate, Lusikisiki, based on the *mandament van spolie*, for her electricity supply to be restored. An interim order was granted in terms of which the electricity was to be restored pending finalization of the matter and answering and replying affidavits were duly delivered. In the respondent's answering affidavit two points *in limine* were raised, these being to the effect that the lower court lacked territorial jurisdiction and the power to

grant the order as the appellant's cause of action was not, in effect, a *mandament van spolie*, but an application for specific performance based on a contract.

[2] The matter ultimately served before the magistrate and was fully argued by both parties. A well reasoned judgment was subsequently delivered by the magistrate which was later supplemented by further reasons. From both of these it emerges clearly that in the magistrate's view when the matter was argued before him the parties were in agreement that the entire matter would be argued, that is both the points *in limine* and the merits of the matter, and that he would thereafter reserve judgment on all these issues.

[3] The magistrate found in favour of the appellant on both points *in limine*. He then proceeded to consider the merits of the matter and found in favour of the respondent. He accordingly discharged the *rule nisi* with costs.

[4] On appeal it was contended on behalf of the appellant that the magistrate's aforementioned view was incorrect. According to the appellant, It was agreed between the parties that they would argue only the points *in limine* before the magistrate, that he would then give a ruling in due course on those points *in limine* and that, in the event that the points *in limine* were decided in favour of the appellant, the parties would revert to argue the merits of the matter. It seems, in the alternative, that the appellant maintains that despite the ultimate ruling in the matter, the magistrate ought to have given the appellant some sort of interim order for costs due to the fact that the appellant was successful on the points *in limine*. There has also been some argument put up with regard to the question of whether or not the matter is indeed appealable in that, so it is submitted, the judgment of the lower court was interlocutory in nature.

[5] When the matter was argued before us, Mr. Gagela, who appeared for the appellant, candidly conceded the question of costs. He however pursued the question relating to the magistrate's incorrect assumption with regard to the matters which were argued. However, when a number of interchanges between the legal representatives and the magistrate reflected in the transcribed record were pointed out to him, he indicated that he could not argue this question with much force.

[6] It seems to me that this matter must be decided quite simply on a determination as to whether or not the magistrate was correct or incorrect in accepting that the merits of the matter were indeed dealt with at the hearing. If the merits were not dealt with and only the points *in limine* were argued, then the question as to whether or not a ruling in that regard was appealable would only arise if indeed the magistrate had upheld such points in favour of the respondent and dismissed the application on that basis or on one or other of the points *in limine*.

[7] It seems to me to be quite clear upon a reading of the papers that the magistrate, as I have indicated at the outset of this judgment, dismissed the points *in limine*. He in fact discharged the *rule nisi* because he found against the appellant on the merits of her application. That is, of course, appealable. Accordingly, in my view the question of the appealability of the judgment is not in issue in this appeal.

[8] The magistrate, in his reasons, has made it quite clear that at no stage did either of the parties apply to separate the issues raised by the points *in limine* from the merits. In his supplementary reasons, prepared after the notice of appeal had been delivered, he took issue with the contention of the appellant that the parties had only argued the points *in limine*. He made it clear that

although he did not at that stage have a copy of the transcript of the proceedings, there were a number of telling indicators to fortify his understanding that the merits were argued as well as the points *in limine*. In this regard he mentioned the fact that the parties dealt with the main issue on the merits, namely the question as to whether or not the appellant was in arrears with her payments for electricity and/or had signed a deferred payment agreement in order to allow her to settle the arrear amounts due. A further telling indicator, in his view, was the fact that he had raised with the appellant's attorney the question as to whether or not the appellant had, in the interim and whilst the *rule nisi* was in force, paid the arrear amounts due. This was fully debated and the answers gleaned therefrom were used by the magistrate in formulating his judgment and his reasons therefor.

[9] Subsequent to his issuing the supplementary reasons for his judgment, the transcript was made available and is included in the appeal record. This transcript reveals that the appellant and respondents' attorneys argued the matter fully before the magistrate. At the outset of the proceedings there was no indication that the question of the points *in limine* and the merits were to be separated. Mr. Mjobo, who appeared in the court a quo for the appellant, stated at the outset that the matter was ready for argument and that as the respondent had raised the preliminary points *in limine*, it had been agreed that the respondent would commence. Mr. Dalasile, for the respondent, thereafter specifically asked the magistrate as to whether he required them to address on the points *in limine* and the merits. Unfortunately the magistrate did not give a very clear answer to that query but on a reading of the argument it becomes patently clear that the parties did address him on the merits as well. In fact, at some stage the following interchange took place between Mr. Mjobo and the magistrate:

"**Mr. Mjobo:** Your Worship, with the leave of the Court my learned friend has raised the – a new few issues which were not at all canvassed in the... argument. My learned friend appears to me to be now saying he wants to argue the merits of the application by...

Court: Thought we'd agreed the merits of the application both ways.

Mr. Mjobo: By making reference now to these invoices.

Court: Yes"

[10] It seems clear from this that even if Mr. Mjobo had misconstrued the procedure prior to that, it was made patently clear at that point that the merits were also to be argued. There are a number of other passages during the course of the submissions which make it clear that the merits were fully argued in addition to the preliminary points.

[11] I am accordingly satisfied that both the points *in limine* and the merits were argued by the parties before the court *a quo*. The magistrate, correctly in my view, concluded that on the merits there were indeed no merits in the appellant's case in that the appellant had signed the deferred payment agreement which, in itself, was a clear indication that the appellant had been in arrears in her payments to the respondent for electricity supplied.

[12] In all these circumstances the following order is made:

- 1. The appeal is dismissed;**
- 2. The appellant is ordered to pay the costs of the appeal.**

JUDGE OF THE HIGH COURT

MBENENGE, J. : I agree

JUDGE OF THE HIGH COURT

HEARD ON : 13 NOVEMBER 2015

DELIVERED ON : 26 NOVEMBER 2015

COUNSEL FOR APPELLANT : Mr Gagela

INSTRUCTED BY : Mduma Mjobo Attorneys

COUNSEL FOR RESPONDENT : Mr Mhambi

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