

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 4423/2008

In the matter between:-

YOLISWA EUNICE MLENZANA

Plaintiff

and

GOODRICK & FRANKLIN INC

Defendant

HEARD ON:

6 DECEMBER 2012

JUDGMENT BY:

RAMPAL, J

DELIVERED ON:

7 FEBRUARY 2013

- [1] These proceedings concerned an application for leave to appeal. The applicant was aggrieved by the judgment I gave and the order I made in favour of the respondent at the end of the civil hearing. The application was vigorously opposed.
- [2] In the action proceedings the applicant was cited as the defendant and the respondent as the plaintiff. *Brevitas causa* I shall refer to the parties as in convention.
- [3] At the commencement of the hearing the issues of liability were separated from the issues of quantum. By agreement *inter partes* I made a separation order in terms of rule 33(4). The trial then commenced. The parties presented their

evidence on the merits. In due course I made a determination in favour of the plaintiff.

- [4] The judgment concerning issues of liability was delivered on 14 July 2011. The order flowing from the judgment was couched in the following words:

“Accordingly I find that the defendant is liable to the plaintiff for such damages, as may be proved or agreed, plus costs.”

That then completed the first phase of these civil proceedings.

- [5] As regards the second phase of these civil proceedings, I am given to understand that the question of quantum has since been extra-curially negotiated and privately disposed of. The settlement was subsequently made an order of the court by my brother Moloi J on 23 October 2012.

“IT IS ORDERED THAT: (By agreement)

1. The defendant shall pay a sum of **R432 500-00 (FOUR HUNDRED AND THIRTY TWO THOUSAND RAND FIVE HUNDRED)** to the plaintiff’s attorneys for plaintiff’s damages within 14 (fourteen) days from the date of this order;
2. The defendant pay (sic) the costs of suit to date.”

- [6] In view of such mutual settlement, the issues of quantum will no longer have to be judicially adjudicated. It follows, therefore, that the need to embark upon the second phase of these proceedings has since fallen away. The 14 day period

as contemplated in the aforesaid court order expired on 12 November 2012. Notwithstanding the expiry of the date on which the debt became due and payable, the defendant failed to honour the aforesaid court order.

[7] On 7 November 2012 the defendant filed an application in terms of section 20 Supreme Court Act 59 of 1959 read together with Rule 49 Uniform Court Rules for leave to appeal to the full bench against the whole of my judgment which was delivered on 14 July 2011.

[8] The defendant's application was set down for argument on Thursday 6 December 2012. The plaintiff opposed the application. Before me appeared Mr Van Rhyn SC and Mr Dutton on behalf of the defendant and the plaintiff respectively. Having heard argument for and against the grant of leave to appeal, I summarily made the following order *ex tempore*:

"IT IS ORDERED THAT:

1. The application for leave to appeal is refused.
2. The applicant is ordered to pay the costs of the application."

[9] On 12 December 2012 the defendant filed a written request for my reasons in support of the aforesaid order whereby I dismissed the application for leave to appeal.

"Dear Sir / Madam

APPLICATION FOR LEAVE TO APPEAL: YE MLENZANA //
GOODRICK & FRANKLIN INC.

We refer to the abovementioned matter and the application for leave to appeal that was dismissed on 6 December 2012.

We kindly request reasons for the aforementioned order.

Kind Regards,

W LE ROUX

GOODRICK & FRANKLIN INC"

This judgment is my attempt to comply with the defendant's request.

- [10] Still on 12 December 2012 the plaintiff drew up a writ. The next day the registrar issued the writ.

"TO: THE DEPUTY SHERIFF

YOUR ARE HEREBY DIRECTED to attach and take into execution movable goods of the Defendant (Road Accident Fund), and of the same to cause to be realized by public auction the sum of R432 500-00 plus interest thereon at the rate of 15,5% fourteen days from 23 October 2012 recovered by order of this Court dated 23 October 2012 in the abovementioned case, and also all other costs and charges in the said case to be hereafter duly taxed according to law, besides all your costs thereby incurred.

AND RETURN this Writ with what you have done thereupon."

- [11] I reckon the foregoing historical background gives an accurate and useful exposition of important historical events which followed the milestone of 14 July 2011.

- [12] It has to be kept in mind that the first phase, as well as the second phase of these action proceedings, were completed on

14 July 2011 as regards issues of liability and 23 October 2012 as regards issues of quantum.

[13] As already pointed out earlier, the defendant now seeks to take the matter on appeal. I have to stress that the current application for leave to appeal concerns the merits only and not the quantum. This much is apparent, firstly, from the fact that the plaintiff's claim has been quantified and settled and secondly, from the fact that none of the grounds of appeal relates to issues of quantum – *vide* notice of this application filed on 7 November 2012.

[14] Mr Dutton took a preliminary point *in limine* on 6 December 2012. On behalf of the plaintiff counsel principally submitted that the defendant's application had been hopelessly brought out of time. Accordingly, he urged me to dismiss it with costs.

Mr Van Rhyn, counsel for defendant, made no submission to the contrary as far as the particular legal point was concerned. However he addressed me at length on the merits. To the merits I shall revert, it needs be.

[15] An application for leave to appeal must be made and grounds thereof must be furnished within fifteen days after the date of the court sought to be appealed against (*vide* rule 49(1)(b) Uniform Court Rules). The rule reads:

“(b) When leave to appeal is required and it has not been requested at the time of the judgment or order, application for such

leave shall be made and the grounds therefor shall be furnished within fifteen days after the date of the order appealed against: Provided that when the reasons or the full reasons for the court's order are given on a later date than the date of the order, such application may be made within fifteen days after such later date: Provided further that the court may, upon good cause shown, extend the aforementioned periods of fifteen days."

[16] The 15 day period, as contemplated in the rule, expired on Thursday 4 August 2011. During that period there was no application filed by the defendant for leave to appeal.

[17] Where, as in this instance, the issues of quantum have been separated from the issues of liability and the latter class of issues separately adjudicated first and judgment given on the latter issues only, the judgment so given is immediately appealable in terms of section 20(1) of Supreme Court Act 59 of 1959. This is so because a court order on the merits of a case has a final and decisive effect on that first phase or aspect of proceedings - **DAVID HERSCH ORGANISATION (PTY) LTD AND ANOTHER v ABSA INSURANCE BROKERS (PTY) LTD** 1998 (4) SA 783 (T); **SA EAGLE VERSEKERINGSMAATSKAPPY BPK v HARFORD** 1992 (2) SA 786 (A).

[18] In this matter, July 14, 2011 was a milestone date. The separate judgment in respect of the issues of liability was handed down on that day. The defendant was required to bring the application for leave to appeal with 15 court days from July 14, 2011. The defendant's unencumbered

procedural right lapsed on Thursday 4 August 2011. The defendant failed to exercise its right before 5 August 2011. Instead the defendant filed an abortive application on 7 November 2012 in an endeavour to exercise a right that no longer existed.

[19] The application was, therefore, filed some 481 calendar days after the date of the judgment (14 July 2011) and some 459 calendar days after the expiry date of its automatic right. Whichever way one looks at the matter, those were considerable delays.

[20] The defendant is no ordinary litigant but rather a group of lawyers. This is the one side of the coin. The other side of the coin is that the plaintiff is a poor widow and a domestic worker whose husband died at Bethal on 22 June 2004, almost eight years ago as a result of the bodily injuries he sustained in a road accident. Previously she was the defendant's client. Her third party claim against the Road Accident Fund became prescribed on account of the defendant's remissness.

[21] The defendant's right to apply for leave to appeal was extinguished by the effluxion of time long time ago. The extinction notwithstanding, the defendant was not remediless. As from 5 August 2011, the defendant automatically acquired another procedural right to seek leave to go on appeal. The defendant was entitled to bring a separate but substantive application to have its lateness condoned.

- [22] Together with its application for leave to appeal, the defendant was required by procedural law to lodge a formal application for condonation to fully explain to all concerned the circumstances which led to its failure to exercise its automatic right in terms of the rule. There was virtually no explanation of any sort. The defendant approached the court as if it was still business as usual. However, the defendant again failed to apply for condonation for the late filing of the current application. The failure was yet another breach of the rules.
- [23] The result of all this is that I do not have any clue about the reasons for the inordinate initial delay of 15 days or the inordinately long subsequent delay of 459 days from 5 August 2011 to 6 December 2012. What can one make out of the way in which the defendant has gone about this application?
- [24] The court order per Moloi J obliged the defendant to pay the plaintiff's claim within 14 days from the date of the order. Such period expired on 12 November 2012. The application was made six days before the period stated in the order was due to expire.
- [25] Herbstein & Van Winsen: **The Civil Practice of the Superior Courts in South Africa**, second edition 20 comment about the purpose of the rules:

"Purpose of Rules of Court

The rules of court, which constitute the procedural machinery of the courts, are intended to expedite the business of the courts.

Consequently they will be interpreted and applied in a spirit which will facilitate the work of the courts and enable litigants to resolve their differences in as speedy and inexpensive a manner as possible. No doubt parties and their legal advisers should not be encouraged to become slack in the observance of the rules, which are an important element in the machinery for the administration of justice. But on the other hand technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits.”

[26] One thing is very clear to me. The manner in which the defendant has conducted itself since my judgment, is not intended to expedite but rather to retard the finalisation of this matter. The business of the courts is adversely affected and the objective of speedy and inexpensive resolution of civil disputes is defeated when the rules of court are flagrantly disregarded as has been done in this matter. I cannot ignore what is going on in this application and what has gone on during the course of the main trial. To do so would not only encourage litigants and their lawyers in general, to become slack and remissive in the observance of the rules, but would perpetuate hardship in this particular matter. The conduct of the defendant has already caused a great deal of prejudice to the plaintiff.

[27] The entire proceedings in this matter were characterised by application after application and objection after objection. None of them had any merits. All of them were based on flimsy reasons. They were deliberately calculated to interfere

with the expeditions and inexpensive resolution of the dispute. The current application demonstrates the point very well. The plaintiff has endured great prejudice and I find myself unable to tolerate her hardship to continue any further. The actions of the defendant created the perception that there is no serious and honest intention here to go on appeal. I have a strong suspicion that the whole exercise is a scheme, disguised as an application for leave to appeal, to drag the matter as long and as much as possible.

[28] It is my considered opinion that if I were to grant the defendant leave to appeal, my decision would be injudicious and be compatible with proper exercise of my basic mandate as a judge, which is to see to it that justice is done between man and man.

[29] I am persuaded by Mr Dutton's principal submission that my judgment was a final decision and the relative order was instantly appealable - **VAN STREEPEN & GERMS (PTY) LTD v TRANSVAAL PROVINCIAL ADMINISTRATION** 1987 (4) SA 569 (A) at 583 H – I per Corbett JA, as he then was.

[30] The defendant's automatic right to apply for leave to appeal evaporated into thin air months ago. On 5 August 2011 that avenue was locked. On 6 December 2012, the defendant came to court, empty handed. The door remained locked. There was no key given to me by the defendant to unlock the door, let the defendant in and hear the matter. I would, in the

circumstances, uphold the preliminary point. In my view the point was well taken.

[31] In view of the conclusion I have reached, I cannot consider the argument presented by Mr Van Rhyn in support of the alleged grounds of appeal. The legal position was simply that there was logically no valid application for leave to appeal before. What was presented to me, disguised as such, was a misguided and irregular process which deserved to be struck off, rather than be dismissed. That, however, is now water under the bridge.

[32] Those then are the reasons for the order I made on 6 December 2012 whereby:

32.1 The applicant's purported application for leave to appeal was dismissed.

32.2 The applicant was directed to pay the costs of such an application.

M.H. RAMPAL, J

On behalf of plaintiff: Adv I T Dutton
Instructed by:
Nonxuba Attorneys
BLOEMFONTEIN

On behalf of respondent: Adv A J R van Rhyn SC
Instructed by:
Goodrick & Franklin
BLOEMFONTEIN