

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No.: A6/2013

In the appeal between:-

GMA FINANCE CC

Appellant

and

ELSIE LEONARD

First Respondent

C KARAMANOLIS & ASSOCIATES

Second Respondent

GOUS VERTUE & ASSOCIATES

Third Respondent

CORAM:

RAMPAI, AJP *et* ZIETSMAN, AJ

JUDGEMENT:

ZIETSMAN, AJ

HEARD ON:

3 JUNE 2013

DELIVERED ON:

13 JUNE 2013

- [1] This is an appeal emanating from a decision by the magistrate in terms of which the magistrate refused an application in terms of Magistrates' Court Rule 55A in which leave was sought by the plaintiff (applicant) to amend its particulars of claim in terms of a notice of amendment dated the 14th March 2012. The application was dismissed by the magistrates' court on the 5th September 2012.

- [2] This appeal revolves around mainly two issues being:
- 2.1 whether the magistrate was correct in her finding in refusing the application to amend the particulars of claim;
 - 2.2 whether the order made by the magistrate is susceptible to an appeal.
- [3] Before I deal with the issues referred to above, it is apposite to furnish the following background:
- 3.1 The appellant, who is the plaintiff in the magistrates' court issued summons against the respondents (being the defendants) under case number 30106/2010. The first defendant (first respondent) did not defend the matter and judgment by default was granted against the first defendant. The second and third defendants however defended the matter.
 - 3.2 In their plea, the second and third defendants raised a special plea, amongst others, that the plaintiff did not advance grounds upon which jurisdiction of the magistrates' court is based, and therefor the court has no jurisdiction.
 - 3.3 In replication, the plaintiff replied to the special plea, by averring that the third defendant is the owner of the second defendant, and that whereas the third

defendant's principal place of business is situated at 3 President Steyn Avenue, Westdene, Bloemfontein, Free State, and that whereas the second defendant carries on business in Kimberley, the second defendant constitutes a branch office of the third defendant, and therefore the magistrates' court, Bloemfontein has jurisdiction over the second and third defendants.

3.4 Whereas these averments in replication should have been made in the particulars of claim, the plaintiff gave notice to the second and third defendants of its intention to amend its particulars of claim by adding these averments in its particulars of claim.

3.5 The notice of amendment was met with a notice to oppose the amendment in terms of rule 55A on the basis that

“the proposed amendment would render the plaintiff's particulars of claim as being exculpable (sic) on the grounds that the summons – as amended – would oust this court's jurisdiction”.

3.6 After such notice to oppose was filed, the plaintiff made application to the magistrates' court in terms of rule 55A whereby it sought leave from the court to amend its particulars of claim in accordance with the aforesaid notice of amendment.

- 3.7 The aforesaid application was opposed by the second and third defendants, and in the opposing affidavit the deponent on behalf of the second and third defendants based their opposition on the following:

“I am not going to deal with each and every averment in the applicant’s founding affidavit, which must not be construed as an admission thereof in light of the fact that the opposition of the application is founded on a legal argument which will be orally presented in court.”

- 3.8 After the aforementioned application for leave to amend was argued before the magistrate, the magistrate dismissed the application on the 5th September 2012.

- 3.9 When reasons were furnished by the magistrate, the following was advanced in this regard:

“Looking at the proposed amendment paragraph 6, the amendment seeks to resolve the issue of jurisdiction over the second and third respondent which was never contained in the original particulars of claim. Now this court would have accepted that it did have jurisdiction in terms s28 of Act 32 of 1944 if the respondents simply delivered a plea is (sic) response to the summons and attached particulars of claim without objecting to jurisdiction and therefore by implication, consent to the court’s jurisdiction. This is not the case here however as the second and third respondents in their plea did the same objected to this court jurisdiction.

I thus align myself with the respondents' Head (sic) of Argument on page 6 – 8 and specifically paragraphs 11 – 14 and I am of the opinion that this amendment should not be allowed as it renders these proceedings excipiable as per the dicta in *De Klerk v Du Plessis, supra*. It is so that the general principle regarding costs is winning party is entitled to costs, however due to the fact that the court has found that the amendment will render the proceedings excipiable, it is thus also decided that costs should be adjudicated in the main action.”

3.10 It would therefore seem that the oral arguments advanced before the magistrate, by the second and third defendants, contained the argument that the amendment sought by the plaintiff would make the particulars of claim excipiable and on that basis the amendment should not be allowed.

- [4] During the appeal, the plaintiff (as appellant) argued that the aforesaid finding by the magistrate is clearly wrong and that the magistrate should have allowed the amendment in accordance with the application. It is furthermore clear that the word used in the notice of opposition to the notice of amendment, namely “exculpable” was meant to be excipiable. What is meant by the wording “... would oust this court’s jurisdiction” in the notice of opposition to the notice of amendment is all but clear. What the plaintiff sought in the notice of amendment and later the application for leave to amend, was to add grounds on which it could lead evidence to prove that the magistrates’ court in Bloemfontein has jurisdiction over the second and third defendants.

- [5] There is no basis on which the magistrate could find that the amendment sought would have the effect of an excipiable pleading nor is there any basis on which it could be argued that the amendment sought would “oust the court’s jurisdiction”. On the contrary the proposed amendment was designed to plead averments necessary to lay the foundation that the court *a quo* has jurisdiction to entertain the action. The underlying purpose was to confer and not to oust jurisdiction.
- [6] The finding by the magistrate is clearly wrong in that the amendment sought should have been allowed in the circumstances.
- [7] The second question, which is a much more difficult question in the circumstances, is whether the order made by the magistrate is susceptible to appeal. In this regard the following is of importance:

7.1 It was argued on behalf of the respondents that the application for leave to amend plaintiff’s particulars of claim, is an interlocutory application and that the order made by the magistrate was thus an interlocutory order. For that reason, the defendants argued that as a general proposition,

“... it is submitted to be trite that adjustment or order is susceptible to appeal if it is

(a) final in effect – i.e. unalterable by the court which made it;

- (b) definitive of the rights of the parties in that it grants definitive and distinct relief; and
- (c) dispositive of at least a substantial portion of the relief claimed in the main proceedings.”

7.2 Mr Grobler, on behalf of the defendants, relied upon the decision of **Jacobs and Others v Baumann NO and Others** 2009 (5) SA 432 (SCA) at p 436.

7.3 It was also argued on behalf of the defendants that in determining whether or not an order is final, consideration must be given not only to its form but also its effect. In this instance Mr Grobler referred us to **Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service**, 1996 (3) SA 1 (A) at p 10 and 11.

7.4 Counsel for the appellant, Mr De Jager, also referred us to the Appellate Division’s decision **Zweni v Minister of Law and Order** 1993 (1) SA 523 (AD). Mr De Jager also argued that the effect of the magistrate’s order in not allowing the amendment, would be that if the plaintiff would lead evidence during the trial that the magistrates’ court has jurisdiction, and the grounds upon which such evidence would be tendered, the defendants’ counsel would obviously object to such evidence on the basis that the particulars of claim do not cover the alleged jurisdictional grounds, and that the plaintiff would not be in a position to rely upon such jurisdictional grounds in reply. Inevitably, such

objection would be upheld, which would entail that the plaintiff would not be able to prove that the magistrates' court has jurisdiction, with the result that second and third defendants' special plea that the magistrates' court does not have jurisdiction, must be and would be upheld in the circumstances.

7.5 Although Mr De Jager conceded, correctly so, that the order made by the magistrate in refusing the amendment of the plaintiff's particulars of claim, is not an order deciding upon the question whether the magistrates' court has jurisdiction or not, the inevitable result of the interlocutory order, will be a decision that the magistrates' court does not have jurisdiction, unjustly so, because the magistrate would not have been in the position to receive evidence from the plaintiff's side that it indeed has the necessary jurisdiction in the circumstances.

7.6 As referred to above, it is not only the form, but also the effect of the order that must be considered to determine whether or not the order is a final one or not.

[8] As far as the arguments referred to above, and for purposes of our decision whether the order made by the magistrate is susceptible to appeal, the following is of importance:

8.1 It is clear, and it is also common cause, that the order made by the magistrate was an interlocutory order

refusing an amendment to the plaintiff's particulars of claim;

8.2 Such an order is in itself not a final order regarding the question whether the magistrates' court has jurisdiction over the matter or not. The effect of the order however, might, and in my opinion will bring about an injustice to the plaintiff, as it must be anticipated that the plaintiff would not be allowed during the presentation of his case, to elicit evidence or testimony, to prove the grounds of jurisdiction. It might be that the magistrate allows such evidence, even if objection is taken thereto by the defendants. It is however a fact that a reasonable apprehension exists that the magistrate will disallow such evidence if objected thereto by the defendants, for such evidence is not covered by the pleadings (in this case the particulars of claim). It will obviously also be argued by the defendants that the plaintiff cannot make out a case in reply.

8.3 Even if the magistrate allows the evidence tendered by plaintiff, notwithstanding objection thereto, this court of appeal will be (on probabilities) in future again be hearing another appeal against a ruling of the magistrate whichever way it may go. The loser, be it the plaintiff or the defendant, would probably take the magistrate's ruling on appeal.

8.4 With reference to the Appellate Division decisions referred to above, in **Zweni v Minister of Law and Order**, *supra*, and **Jacobs and Others v Baumann NO and Others**, *supra*, it is apposite to refer to a relatively recent Supreme Court of Appeal decision referred to in Harms: **Civil Procedure and Superior Court**, on p B-360(3) under footnote 9. The decision referred thereto is **Phillips v South African Reserve Bank**, thus far unreported matter only referred to as (2012) ZASCA 38 (29 March 2012) at par [26].

8.5 With reference to the aforementioned Supreme Court of Appeal decision Farlam JA, as part of the minority decision (although the majority did not take issue with this part of the judgment and in fact concurred therewith) discussed the question whether the order is appealable or not as follows:

“[24] Counsel for both respondents contended that the order was not appealable because it is not definitive of the rights of the parties and not the dispositive of at least a substantial portion of the relief claimed in the main proceedings. In this regard reliance was placed on what was said by this court in, *inter alia*, *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 536 B – C.

[25] It must be remembered, however, that, as Hefer JA said in *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) at 10 F, the passage in *Zweni*:

‘Does not purport to be exhaustive or to cast the relevant principles in stone.’

[26] The question of appealability in a case such as this, where a party seeks to attack on appeal an order made in judicial proceedings which have not yet terminated, was discussed by Nugent JA in a judgment with which the other members of the court concurred in *NDPP v King* 2010 (2) SACR 146 (SCA) at 166 E – 167 C (paras 50 – 51), where he said the following:

‘There will be few orders that significantly affect the rights of the parties concerned that will not be susceptible to correction by a court of appeal. In *Liberty Life Association of Africa Ltd v Niselow* (in another court), which was cited with approval by this court in *Beinash v Wixley* 1997 (3) SA 721 (SCA), I observed that when the question arises whether an order is appealable what is most often been asked is not whether the order is capable of being corrected, but rather whether it should be corrected in isolation and before the proceedings have run their full course. I said that two competing principles come into play when that question is asked. On the one hand justice would seem to require that every decision of the lower court should be capable not only of being corrected but of being corrected forthwith and before it has any consequences, while on the other hand the delay and inconvenience that might result if every decision is subject to appeal as and when it is made might itself defeat the attainment of justice.’

In this case it was said on behalf of Mr King that the order is not appealable because it is interlocutory. Whether that is its proper classification does not seem to me to be material. I pointed out in *Liberty Life* that while the

classification of the order might at one time have been considered to be determinative of whether it is susceptible to an appeal the **approach that has been taken by the courts in more recent times has been increasingly flexible and pragmatic. It has been directed more to doing what is appropriate in the particular circumstances than to elevating the distinction between orders that are appealable and those that are not one of principle. Even the features that were set in *Zweni v Minister of Law and Order* to be characteristic, in general, of orders that are appealable was later set by this court by *Moch v Nedtravel (Pty) Ltd* not to be exhaustive nor to cast relevant principles in stone. As appears from the decision in *Moch*, the fact that the order is not definitive of the rights about which the parties are contending in the main proceedings and does not dispose of any relief claimed in respect thereof, which was one of the features that was set in *Zweni* to generally identify an appealable order, is far from decisive.**

- [27] The matter was further discussed in two recent decisions of this court *Health Professions Council of South Africa v Emergency Medical Supplies and Training CC t/a EMS* 2010 (6) SA 469 (SCA) at 473 C – 475 E (paras 14 – 19) and *Government of RSA v Von Abo* 2011 (5) SA 262 (SCA) at 270 B – D (para 17), where Snyders JA (with whom the rest of the court concurred) said:
- ‘It is fair to say that there is no checklist of requirements. Several considerations need to be weighed up, including whether the relief granted was final in its effect, definitive of the rights of the parties, disposed of the substantial portion of the relief**

claimed, aspects of convenience, the time at which the issue is considered, delay, expedience, prejudice, the avoidance of piecemeal appeals and the attainment of justice.’”

- [9] In this instance, and although the order made by the magistrate can be argued, was not final in its effect, nor definitive of the rights of the parties and did not dispose of a substantial portion of the relief claimed, the further factors that must be taken into account in this instance, is convenience, the time at which the issue is considered, delay, expedience, prejudice, and the avoidance of piecemeal appeals, but most importantly the attainment of justice.
- [10] Where it is clear that the magistrate erred in her finding to dismiss the application to amend the plaintiff’s particulars of claim, it is a real and substantial argument that such refusal, might lead to an injustice insofar as the plaintiff could drastically be hampered to present evidence during the trial to prove its grounds for jurisdiction, which will have the effect that the defendants’ special plea might very well be upheld in the circumstances. It is also clear that the opposition to the application to amend was unreasonable and without substance.
- [11] Whereas our Supreme Court of Appeal in more recent times has been increasingly more flexible and pragmatic, I think

that in the circumstances of this matter, this court should also be much more flexible and pragmatic.

[12] On the aforesaid premises the appeal must succeed. It will be in the interest of justice that a clear wrong should be corrected in order to enable the parties to proceed with the hearing of the matter in the magistrates' court whilst all the relevant factors and evidence are taken into account in deciding upon the issues between the parties. In the circumstances I am inclined to uphold the appeal.

[13] Accordingly I make the following order:

13.1 The appeal succeeds with costs.

13.2 The magistrate's order dated the 5th September 2012 and which reads as follows

"Application hereby dismissed. Costs to be adjudicated in the main action"

is set aside and substituted with the order below:

13.3 **"Prayers 1 and 2 of the application in terms of rule 55A under case number 30106/2010 are granted."**

P. ZIETSMAN, AJ

I concur.

M.H. RAMPAL, AJP

On behalf of appellant:

Adv N.F. de Jager
Instructed by:
Van der Merwe & Associates
c/o Honey Attorneys
BLOEMFONTEIN

On behalf of second and
third respondents:

Adv S. Grobler
Instructed by:
Gous Vertue & Associates Inc
BLOEMFONTEIN

/spieterse