

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: 2681/2006

In the case between:

PEGMA THIRTEEN INVESTMENTS (PTY) LTD Applicant

and

FREE STATE DEVELOPMENT CORPORATION Defendant

JUDGMENT: RAMPAL, J

HEARD ON: 5 DECEMBER 2008

DELIVERED ON: 19 DECEMBER 2008

[1] This is an application for leave to appeal. It is directed at the order I made on the 18 September 2008 upholding the defendant's special plea. The plaintiff's notice of appeal for leave to appeal was duly filed on the 7th October 2008. The application is opposed.

[2] After hearing argument on Friday the 5th December 2008 I reserved judgement. I indicated that my decision and the

reasons underlying it would follow. This then is my decision. I refer to the parties as in the main action.

[3] The plaintiff instituted an action against the defendant. The action is defended. The defendant filed its plea. Simultaneously the defendant also filed its special plea. The essence of the amended special plea was that the defendant was an organ of state entitled to be given a prior notice of intended legal proceedings in terms of section 3(1), Act, No. 40 of 2002. The plaintiff did not give section 3(2) to the defendant. It contended that the defendant was not an organ of state, and therefore, not entitled to such a prior notice. In the end I found in favour of the defendant. It is that order which precipitated these current proceedings.

[4] The issue which arises in the case is whether the order whereby I upheld the special plea is appealable or not. Mr. Pammenter contended that it was whereas Mr. Van der Walt contended that it was not. This is the first important issue. The second issue relates to the merits.

- [5] Erasmus: Superior Court Practice at A1-40/44 discusses section 20 of the Supreme Court Act, No. 59 of 1959. The author points out that under this section leave to appeal was granted, among others, where a special plea raised by the defendant was dismissed – see paragraph 3 on p.A1-45.

In **CONSTANTIA INSURANCE CO LTD v NOHAMBA**

1986 (3) SA 27 AD at p. 36 Galgut JA (as he then was) said the following about the effects of an order dismissing the defendant's special plea:

“... the defendant asked for separate and distinct relief. KROON AJ's judgment is a rejection of the relief sought by defendant. Its effect is a dismissal of the special plea and an order that the "main action" only proceeds. His decision, as far as the trial was concerned, was final and not interlocutory. To now hold that his failure to end his judgment with the words "The special plea is dismissed" means that there is no judgment or order and therefore his decision is not appealable, would in my view be indefensible.”

- [5] In **VAN NIEKER AND ANOTHER v VAN NIEKERK AND ANOTHER** 2008 (1) SA 76 SCA at paragraph 3 Van Heerden JA had this to say about the test for appealability:

“[3] In *Zweni v Minister of Law and Order* (1993 (1) SA 523 (A) at 531H - 533E), Harms AJA embarked on 'a brief exposition and a critical review of some of the general propositions commonly (and sometimes loosely) advanced in the decided cases' before summarising the following 'three attributes' of an appealable judgment or order (at 532J - 533A):

(F)irst, the decision must be final in effect and not susceptible of alteration by the Court of first instance; second, it must be definitive of the rights of the parties; and, third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.”

- [6] The question as to when a court decision is interlocutory and thus not appealable, or final and thus appealable is intrinsically difficult – **CRONSHAW AND ANOTHER v COIN SECURITY GROUP (PTY) LTD** 1996 (3) SA 686 (AD) at 690 D – E per Schutz JA.

The critical question as to precisely which judgment, orders or rulings are appealable to a court with appellate jurisdiction continues to present persisting complexity.

MINISTER OF SAFETY AND SECURITY AND ANOTHER v HAMILTON 2001 (3) SA 50 (SCA) paragraph 4 at 52B per Cameron JA.

The appealability test as formulated in Zweni's case, although easy to state, is by no means always easy to apply. **VAN NIEKERK AND ANOTHER** *supra*, paragraph 5 at 771 per Van Heerden JA.

Indeed the issue as to when an order is appealable and when not, is a very complex question. Satisfactory outcomes are hard to predict. This case is no exception.

- [7] Ordinarily the relief of a special plea affords an expeditious end to a dispute if it good in law. Its practical effect is that the main action can proceed no further. An order with such adverse impact on the main dispute is usually final and, therefore, appealable. It speeds up a litigation process and

leads to a final determination of a side show without a need to have the real issues in the main dispute explored and adjudicated. This reasoning is conversely implicit in Constantia's case *supra*.

- [8] The first attribute of an appealable order is that it must be final in effect and not susceptible of alteration by the court of first instance. Put differently, the court which made the decision must have no judicial power to reconsider such decision. In legal parlance, such court must be *functus officio*.

Both counsels in this matter are *ad idem* that, in this sense, my order has final effect. Therefore, it is appealable.

- [9] The second attribute of an appealable order is that it must be definitive of the rights of the parties. In the instant case, the plaintiff, the party that is now applying for leave to appeal, has already filed an applicant to have its failure to give the required notice to the defendant condoned. The condonation application was filed long before the

defendant's special plea was adjudicated. Prior to the order relating the special plea, the plaintiff had already filed an application for leave to enrol its condonation application, again, should the defendant's special plea be successful.

At one stage the plaintiff wanted to have the adjudication of the defendant's special plea held over pending the outcome of its application for condonation – vide paragraph (f) of plaintiff's amended replication, p. 57, record.

- [10] The history of this condonation application has to be narrated. This is how it all came about. The defendant amended its original plea. The amended plea incorporated a special plea. That it was an organ of state. The plaintiff respondent to the amended plea by way of replication denying the defendant's allegation that the defendant was an organ of state. Shortly after the delivery of the replication, the plaintiff amended its replication. In its amended replication the plaintiff pertinently prayed that the plaintiff's condonation application must be decided first. It sounded like putting the card before the horses.

[11] In view of those facts, counsel for the defendant submitted that the order in respect of which the plaintiff sought leave to appeal was not definitive of the rights of the parties and, therefore, the order was unappealable. On behalf of the plaintiff's counsel submitted that the pending condonation application was irrelevant in considering whether or not to grant leave to appeal. Mr. Pammenter, heavily relying on the appellate decision in **CONSTANTIA INSURANCE CO LTD v NOHAMBA** *supra* contended that I needed to look no further than the order pertaining to the special plea in order to determine whether such order defined the rights of the parties. So considered, counsel continued, the order was final and thus appealable.

[12] The case of Constantia is distinguishable. In that case unlike in the instant case, there was no unfinished business in the court of first instance for the litigants involved. In the instant case the law has not yet run its due high court process. Although the special plea order, has defined the rights of the parties its definitiveness is not of a permanent

nature. Such rights may still be redefined through a condonation process in this same court and not through an appeal process at a higher level of adjudication.

[13] There are two possible scenarios to consider as regards the condonation application. If the plaintiff's condonation application succeeds, the plaintiff will have no reason to go on appeal. The rights of the plaintiff that were adversely affected by the special plea order, may still be redefined and reversed. A decision on the condonation application will be permanently definitive of the rights of the parties. The effect of a successful application for condonation will be that the main action should proceed. It will effectively restore the plaintiff's right unless the defendant decides to appeal. Should the defendant want to go on appeal such a decision would indeed be appealable. There would be absolutely no other remedy available to the defendant.

[14] If the plaintiff's condonation application fails, the plaintiff will have all the reason to go on appeal. The rights of the plaintiff already adversely affected by the special plea order

would not be restored but would be permanently denied in the court of first instance. Such a definitive decision of rights would be appealable. The plaintiff would have absolutely no other remedial avenue open in this court.

- [15] Should leave to appeal be granted to the plaintiff at this juncture an untenable situation might arise. There will be two court adjudication processes pending in two different courts. Should the plaintiff's appeal be dismissed by the appellate court, the plaintiff will turn back to this court of first instance to pursue the condonation application. The general rule of appeal procedure is that such piecemeal consideration of cases is impermissible. Paragraph 6 **VAN NIEKERK AND ANOTHER v VAN NIEKERK AND ANOTHER** *supra*, per Van Heerden JA:

“[6] In considering the question of appealability, the underlying consideration is that it is undesirable to have a piecemeal appellate disposal of the issues in litigation and that it is advisable to limit appeals to certain 'orders'. (See, eg, Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd 1948

(1) SA 839 (A) at 866 - 71; Guardian National Insurance Co Ltd v Searle NO 1999 (3) SA 296 (SCA) at 301B - D.)”

[16] It is crystally clear that the plaintiff will not abide by the outcome of the appeal. The plaintiff wants to go up on appeal first but also wants to keep the condonation application alive down here as a fall-back plan in case its appeal fails. In these circumstances I cannot see how an appeal, if leave to appeal is granted at this early stage, will necessarily lead to a more expeditious and cost-effective final determination of the special and collateral dispute, let alone the main dispute between the parties and decisively contributed to its final solution (**PRIDAY t/a PRIDE PAVING v RUBIN** 1992 (3) SA 542 (CPD) at 548H - I, which was quoted with approval in Zweni *supra* at 532A.

[17] It must be stressed that this is not a case of a plaintiff or litigant who initially wanted to bring a condonation application but later decided to abandon or withdraw it in order to have the defendant's special plea decided on appeal once and for good. What the plaintiff really wants is

firstly to drag the defendant to the court with appellate jurisdiction in connection with the special plea order. Secondly, if such an appeal fails, to drag the defendant back to this court of first instance in connection with the condonation application. Thirdly, if such an application fails, to drag the defendant once again to the court with appellate jurisdiction in connection with the condonation application. This clearly demonstrates piecemeal disposal of disputes by way of an appeal procedure. Such an fragmented appellate procedure is not only expensive but also inexpedient to all concerned including the two courts. In the instant case I can find virtually nothing to justify the procedure the plaintiff seeks to embark upon.

- [18] Quite often the balance of practical convenience dictates that the case as a whole be brought to its logical conclusion at the first level of its adjudication process and that the whole case then be taken on appeal. **TAKE AND SAVE TRADING CC AND OTHERS v STANDARD BANK OF SA LTD** 2004 (4) SA 1 (SCA), paragraph 4.

“... there are still sound grounds for a basic approach which avoids the piecemeal appellate disposal of the issues in litigation. It is unnecessarily expensive and generally it is desirable, for obvious reasons, that such issues be resolved by the same Court and at one and the same time.”

GUARDIAN NATIONAL INSURANCE CO LTD v SEARLE

NO 1999 (3) SA 296 (SCA) at 301 B – C per Howie JA.

- [19] The plaintiff's condonation application is therefore one of the relevant factors to be taken into account, together with others, in considering whether or not the order I made in connection with the defendant's special plea was definitive of the rights of the parties. In my view the court is entitled to look beyond the order it made in connection with the defendant's special plea in order to ascertain whether such order has a definitive attribute. As I see it, whatever definitive attribute the order might have had was substantively eroded by the plaintiff's unwavering and serious determination to pursue its condonation application. On the facts, I have come to the conclusion the order was

not definitive. An indefinite order is not appealable, Zweni *supra*.

[20] The third attribute of an appealable order is that it must have the effect of disposing of at least a substantial portion of the relief claimed in the main process. I do not wish to labour this aspect of the enquiry. Suffice to say on the facts before me and in view of the conclusion I have reached in respect of the second attribute, it becomes academic to consider the third attribute. This is so because an order is appealable provided it is shown to have all three attributes of appealability. If one of the three attributes is not proven, as in this case, then the order is not appealable.

[21] For the reasons advanced in this judgment I have come to the conclusion that it would be premature at this juncture to grant the plaintiff leave to appeal against the order. The plaintiff's application for condonation is still on track. Therefore, the plaintiff is at liberty to prosecute the condonation application to its logical conclusion in this

court. The avenue of appeal is not currently open to the plaintiff but remains available. Should such condonation application fail, the court order relative to such condonation application shall have permanently definitive impact on the rights of the respective parties. It shall also have dispositive effects on the entire main dispute.

[22] In the circumstances I am inclined to refuse leave to appeal. However, it does not follow from my inclination that the plaintiff's leave to appeal falls to be dismissed. I deem it unwise and inappropriate to do so, given the peculiar circumstances of the case. The plaintiff's current application for leave to appeal is premature. No need to consider it on the merits now. I would, therefore let it stand over for the time being. It will be heard, if needs be, after its condonation application has been adjudicated upon.

[23] Now only one aspect remains – the costs. The plaintiff brought this matter to court. The defendant opposed the matter. In the final analysis my ruling favours the defendant. Since it has emerged a successful party the

defendant is entitled to the fruits of its success. The plaintiff has to be saddled with the inevitable burden of paying the defendant's wasted costs occasioned by this premature and abortive application.

[24] Accordingly I make the following order:

24.1 The plaintiff's application for leave to appeal stands over for adjudication after the hearing of its pending application for condonation.

24.2 The order pertaining to the defendant's special plea is currently not appealable.

24.3 The plaintiff is directed to pay the defendant's taxed costs relating to this application for leave to appeal.

M. H. RAMPAL, J

On behalf of the plaintiff:

Adv. C. J. Pammenter SC

Instructed by:
Naudes
BLOEMFONTEIN

On behalf of the defendant:

Adv. D. J. van der Walt
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