

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSKEI DIVISION)

Case : 1110/2006

Heard:

Delivered:

In the matter between

MOHAMMED I. TILLY t/a TILLY'S BUS SERVICE

APPLICANT

and

MJ MPHUTI t/a TSEPOS BUS SERVICE & ORS

RESPONDENT

JUDGMENT

NDUNA AJ

1. This is an application for leave to appeal against the judgment delivered on 07 March 2007 ("order") in terms of which I upheld the first to the third respondent's point *in limine* that the applicant has failed to establish amongst other a clear right resulting in the dismissal of the latter's application with costs.
2. At the hearing this application, Mr Zilwa appearing on behalf of the applicant, informed the court that the applicant's notice of application for leave to appeal filed on 02 April 2007 has been

amended by the amended notice dated 11th April 2007 (“amended notice”), the latter document being the basis for the application. He further confirmed that the only ground the order is being challenged is the finding that appellant has failed to prove a ‘clear right’, as lack of jurisdiction, being additional ground for dismissal of applicant’s case, was conceded to at hearing of the matter.

3. The application is opposed by the second to the third respondents on the merits and further, the following points in *limine* have been raised:-

(a) Non compliance of the amended notice to appeal with the requirement of **Rule 49 (3)** of the Uniform Rules.

(b) Non compliance with **Rule 28** in respect of fully amended notice of application for leave to appeal.

Before dealing with the merits of the application, I need first deal with the points *in*

limine.

5. *Non compliance with provision of **Rule 49 (3)**.*

Both counsel for the respondents are *ad idem* that applicant’s notice is flawed in that it did not specify the finding of fact and/or

the rule of law appealed against as required by **Rule 49(3)**. It is further contended that as these provisions are peremptory, failure to comply with them is a fatal defect. As authority for this proposition reliance was placed on **Sogono v Minister of Law Order 1996 (4) SA 384 (E)**. I cannot agree with this submission. Reading of this sub – rule makes it abundantly clear that it refers to a Notice of Appeal and not to a notice of application for leave to appeal. Application for leave to appeal and specifically one not made at the time the judgment or order was granted, is regulated by **Rule 49 (1) (b)** which does not contain the requisites of specifying whether the appeal is against the finding of fact and or the rule of law. The argument advanced is thus non sustainable and consequently this point *in limine* is dismissed.

6. Non compliance with provision of **Rule 28**

It is submitted on behalf of the respondents that it was irregular for the applicant to have merely filed the amended notice without adhering to procedure set out in **Rule 28** as the notice qualifies as a document in terms of this Rule. In response thereto, it was submitted that **Rule 28** being only applicable to pleadings has no

relevance to amendment of notice. I am of the view that, for the purposes of this judgment, it is not necessary to make a finding on whether the notice is a document as envisaged in **Rule 28** with compliance with procedures set down therein required. This view is informed on the main by the fact that the respondents, regarding the steps taken as being irregular, should have availed themselves of the **Rule 30** route. Further, no arguments have been advanced that allowing the notice to stand would cause prejudice and or injustice to the respondents and I can find none. In the absence of any such prejudice and or injustice to the respondents and in the exercise of my discretion, I am allowing the notice to stand thus dismissing this point *in limine* as well.

7. I now turn to deal with the merits of the application. Mr Zilwa argued that the court misdirected itself firstly by stating of its judgment that applicant's case has been that concurrence was not necessary for inter provincial transportation whereas in fact the applicant's version was that such concurrence was necessary but that such certificate concurrence ("certificate") is passed between the various provincial boards and with applicant not laying its hand

thereon. Based on the non handling of such certificate by the applicant it was thus not reasonable of the respondents to request the applicant to produce such. It is further his submission that the issuing of a transport permit (permit) which transverse the provinces, is *ipso facto* proof that the certificate has been issued relieving applicant of the burden of proof. It is further submitted that account of the long standing dealings and or relationships, between applicant and the respondents, with the latter not raising the question of concurrence certificate establishes the applicants locus standi.

8. In gainsaying these submissions, on behalf of the respondents, it is submitted that the issue of the permit cannot *ipso facto* be proof that the certificate had been issued and/ or exists. It is further submitted that in the face of challenge of the issue and/or existence of the certificate, a duty was cast on the applicant to prove existence of such and that the applicant cannot simply hide behind being not physically in the possession of the concurrence certificate as it could have availed itself of the discovery process provided for in the **Rule 25 (12)**.

9. What Mr Zilwas submission amounts to is that the respondents have by their conduct impliedly abandoned their rights they now seek to assert against the applicant thus vesting the applicant with the powers to bring an interdict against the respondents in the

manner sought. It set procedure that a defence of waiver must be pleaded, and only in exceptional circumstances will a Court consider such a plea without it being properly pleaded. See in this regard **Montese Township and Investment Corp (Pty) LTD v Gouws NO 1965 (4) St 373 (A)** and **Road Accident Fund v Mothupi 2000 (4) St 38 (SCA)**. The waiver was never raised in applicant's paper and no exceptional circumstances have been advanced why I should consider such at this late stage of the proceedings. It is also doubtful whether there can be waiver of a statutory requirement.

10. When I made the order, I was well alert to the applicant's history of dealing with the respondents. I reasoned however that despite such the language employed in section _____ of Act _____ renders the permit ineffective if no certificate for the undertaking of a journey transversing two provinces has been issued. Reasoning in this manner, I came to the conclusion that when granting of the concurrence certificate was being denied, challenged by the very authority that should have issued it, it was incumbent upon the applicant to produce such a view I still hold.

I am thus of the view that the applicant has not made out a case for reasonable prospect of success if appeal is allowed. In the circumstances, leave to appeal is denied.

**N. NDUNA
ACTING JUDGE
HIGH COURT
TRANSKEI DIVISION**

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