



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2010/16410

(1)	REPORTABLE: YES / ☒ NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: ☒
DATE 21.5.2012	
SIGNATURE	

In the matter between:

CHAO: HLE HWA

Applicant/Defendant

and

GOMES: RICARDO MAURICO

Respondent/Plaintiff

J U D G M E N T

LAMONT J:

[1] There are two applications before me today.

- 1.1 An application for leave to appeal against an order which I made on 19th August 2010 granting provisional sentence against the applicant.
- 1.2 An application for condonation for the late filing of the notice of application for leave to appeal.

[2] At the time I gave the judgment granting provisional sentence against the applicant to whom I refer as the defendant there was no recording system due to a strike. For that reason the judgment cannot be reproduced.

[3] I propose very tersely to indicate the reasons why I gave judgment originally. The respondent to whom I refer as the plaintiff sued the defendant by way of provisional sentence. The summons demanded payment of the amount claimed on the basis that it was due to the plaintiff under an acknowledgment of debt contained in two documents which were annexed. In the first of the two documents it appears that the defendant received the sum claimed by the plaintiff from the defendant currently as payment for the sale of an immovable property. In the second document styled 'Settlement' certain amounts are to be paid. The relevant paragraph reads:

'19/2/10 Close of business R1, 875 000 payment for loan cash bank cheque ...'

The second document is signed by two persons one of whom was the witness for the defendant in the first document. The other of whom is 'Chris Woodman (sign Richardson Attorney)';

[4] I held that the documents constituted a liquid undertaking by the defendant to pay the sum of R1, 875 000 to the plaintiff. I accordingly granted judgment in favour of the plaintiff.

[5] During March 2011 the defendant delivered a notice of application for leave to appeal. On 29th June 2011 the defendant delivered an application for condonation for the late filing of the notice of application for leave to appeal.

[6] In the application for leave to appeal the defendant set out grounds attacking the judgment on the basis that:

- 6.1 the annexures to the provisional sentence summons did not constitute a liquid document;
- 6.2 the second document was not signed by the defendant;
- 6.3 the court had a discretion to refuse provisional sentence.

[7] In the application for condonation the defendant explained that the application for leave to appeal was late as the attorneys who had previously represented the defendant were in some way connected to the plaintiff and that she had not received objective and independent advice. The defendant had only during January 2011 obtained a copy of the court file whereafter the notice of appointment of attorneys was delivered and a transcript of the judgment sought. The attempts to procure the judgment were unsuccessful. Subsequently, counsel for the defendant without the assistance of the judgment settled the application for leave to appeal. In the affidavit the defendant sets out that:

- 7.1 she received an amount of some R1,8 million from the plaintiff which had to be paid back and also that there was a settlement.
- 7.2 pursuant to the settlement further monies were paid by the defendant to the plaintiff (some R360 000).
- 7.3 the agreement contained within the first document attached to the provisional sentence summons was a simulated transaction concluded in an attempt to avoid the application of the National Credit Act.
- 7.4 the signatory to the second document was not authorised by her and had signed the document without her knowledge.

[8] When counsel for the defendant first appeared at the hearing I indicated to him that I had relied on the authority of *Brvik v Lang* 1999 (3) SA

984 when I had given judgment and that there was a judgment in the Supreme Court of Appeal which had held that no appeal lay against the granting of provisional sentence.

[9] I afforded the defendant an opportunity to consider its position and postponed the application until today.

[10] In order to succeed with the application for condonation the defendant must show good cause. The elements of good cause include an explanation for the delay and prospects of success in the appeal. There is direct authority that a provisional sentence order is not appealable. See *Counterpoint Furnishers CC v S M Fraser/ta Salica* [2012] ZASCA 7. It does not avail the defendant to contend that the document on which provisional sentence was granted is clearly not liquid. See *Counterpoint Furnishers (supra)* paragraphs [5] and [6].

[12] The defendant submitted that as the provisional sentence order had become final in terms of the Rules it was a final judgment finally determining issues between the plaintiff and the defendant. The defendant relied on the authority *Osman's Spice Works CC v Corporate International (Pty) Limited* 2005 (6) SA 494 (W) at 499C-D and the cases referred to therein. The time period contained within Rule 8(11) can be extended as will appear from what is set out below. The fact that this is possible emphasises the provisional nature of the judgment. I am in any event bound by the authority of the Supreme Court of Appeal and follow that authority.

[11] The appeal is doomed to failure and accordingly condonation should, in my view, not be granted.

[12] The defendant submitted that as it had sought further and/or alternative relief in the notice of motion in which condonation was sought it was entitled

to seek an extension of the time period contained within Rule 8(11) of the Uniform Rules of Court. Originally the defendant sought relief without any amendment to the notice of motion relying on the further relief prayer alone. Later it, presumably recognising the difficulty it faced, sought an appropriate amendment to the notice of motion.

Rule 8(11) of the Uniform Rules of Court provides:

'8(11) A defendant entitled and wishing to enter into the principal case shall within two months of the grant of provisional sentence, deliver notice of his intention to do so, in which event the summons shall be deemed to be a combined summons and he shall deliver a plea within 10 days thereafter. Failing such notice or such plea the provisional sentence shall *ipso facto* become a final judgment and the security given by the plaintiff shall lapse.'

Rule 27 of the Uniform Rules of Court provides:

'27(1) In the absence of agreement between the parties, the court may upon application on notice and on good cause shown, make an order extending or abridging any time prescribed by these rules or by an order of court or fixed by an order extending or abridging any time for doing any acts or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet.'

The Full Bench of the Transvaal Provincial Division held in *Kemp v Booyesen* 1979 (4) SA 34 (TPD) that the wording of Rule of Court 27 empowered a court to condone the failure to give notice (and thereafter to plead) within the two month period.

[13] If the relief claimed was properly claimed a court could make an order in appropriate circumstances.

[14] The question of the meaning of the words 'further and/or alternative relief' have been considered previously. The words have been held to be mere surplusage. Notwithstanding this authority a prayer containing the words and seeking relief in accordance with them is invariably inserted in every civil process issued as if some magic attached to the words. The authority is *Johannesburg City Council v Bruma Thirty-Two (Pty) Ltd* 1984 (4) SA 87 (T) in which it was held that :-

'The applicant's counsel misconceived his position in thinking that the original notice of motion could possibly suffice. This was probably based on a mistaken view of the effect of the prayer for alternative relief. The law regarding the necessity for an appropriate amendment of the claim under such circumstances and the limits of a prayer for alternative relief, is contained in the following passage from the judgment of Tindall JA in *Queensland Insurance Co Ltd v Banque Commerciale Africaine* 1946 AD 272 at 286:

'In regard to the judgment for £2 450, in my opinion, the plaintiff was not entitled to claim it on the action as framed. The action is based on the policy; the claim for £2 450 is based on the compromise arising from the acceptance of the tender in the alternative pleas. The prayer for alternative relief does not help the plaintiff over the difficulty. It is unnecessary to consider whether the practice of including such a prayer is derived from the Roman-Dutch or the English practice. In the Roman-Dutch practice according to Van Leeuwen RDL5.15.8, this prayer (the so-called clause salutare asking for such other relief as the court may deem best for the plaintiff) is of such effect that every right to which the plaintiff may in any way be entitled upon the allegations in his claim, is thereby considered to be included in the prayer. See also Voet 2.13.13 and Van der Linden Jud Pract 2.3.7 vol 1 at 147. The effect of the prayer for 'such further or other relief as the nature of the case might require' in the English practice seems to be the same. See *Cargill v Bower* 10 ChD502 at 508, in which Fry LJ pointed out that the prayer for alternative relief is limited by the

statement of fact in the declaration and by the terms of the express claim, and that a plaintiff cannot get, under the prayer for alternative relief, anything that is inconsistent with those two things.

The fact, however, that the plaintiff could not properly get judgment for £2 450 on his action as framed does not necessarily entitle the defendant to have the judgment set aside. Mr Horwitz contended that if an application for an amendment of the declaration had been made at the trial, the learned judge should have and would have granted it, and he asked that, if this court upheld the defendant's point based on the form of the action, it should now allow the necessary amendment. The terms of the reasons of Blackwell J in addition to what I have stated above, also lead one to infer that the point that the form of the action disentitled the plaintiff from getting judgment for £2 450 was not taken before him. Be that as it may, I can find nothing in his reasons which bears out the argument on behalf of the defendant that, if an amendment had been applied for, the learned judge would have refused it. And I think that in the interests of justice this court should now allow the necessary amendment, which would take the form of an alternative claim alleging that, if the chemicals in question were not harmless, but dangerous and liable to catch fire spontaneously, and in consequence the policy was voidable and the defendant elected to avoid it, any concealment or misrepresentation by the plaintiff as to the nature of the goods insured was innocent and the plaintiff is entitled to a refund of the premium paid; and a prayer for judgment for £2 450. It seems to me that such an alternative claim would validly have been included in the original declaration.'

In *Hirschowitz v Hirschowitz* 1965 (3) SA 407 (W) at 409 Vieyra J applied these principles to motion proceedings.

'The prayer for alternative relief is to my mind, in modern practice, redundant and mere verbiage. What ever the court can validly be asked to order on papers as framed, can still be asked without its presence. It does not enlarge in any way "the terms of the express claim", as pointed out by Tindall JA (op cit).'

In National Stadium South Africa (Pty) Ltd and Others v Firststrand Bank Ltd 2011 (2) SA 157 (SCA) it was held that:-

'The court below justified its approach on the ground that in joining the managers in the proceedings and supporting them the City became a co-wrongdoer and had to be restrained. This, however, does not dispense with the required prayer for relief against the City. The court also relied on the prayer for alternative relief. It erred because this superfluous prayer does not entitle a court to grant relief that is inconsistent with the factual statements and the terms of the express claim...'

[15] The application for relief based on an un-amended notice of Motion must fail.

[16] The defendant's counsel moved for an amendment to claim appropriate relief.

[17] The amendment is sought at an extremely late stage with very little notice to the plaintiff. The plaintiff has not been afforded an opportunity of filing an appropriate answer to the affidavit filed by the defendant dealing with the position on the basis of an amended notice of motion. The relief claimed in the notice of motion as amended is completely at variance with the relief currently claimed and is dependant upon a different cause of action. Two courses are available for me to follow. I could allow the amendment grant a postponement and afford the plaintiff an opportunity of dealing with the application on the basis of the amended notice of motion. I could refuse the amendment and the defendant would then be free to take whatever further steps it wishes. The prejudice the plaintiff suffers if the latter course is followed is that the proceedings are not finalised. The prejudice the defendant

suffers if I follow the first course is that it must bring a fresh application. It appears to me that the interests of justice dictate that the prejudice which the plaintiff suffers in the event of a postponement should not be permitted. There is no effect on costs as the defendant will have been substantially unsuccessful in all the matters before me and will have to pay costs. I accordingly decline to amend the notice of motion as sought by the defendant.

[18] In my view appropriate orders in the matter are the following:

- 18.1 The application for condonation for the late filing of the notice of appeal is dismissed with costs.
- 18.2 The application to amend the notice of motion in that said application is dismissed with costs.
- 18.3 The application for leave to appeal is dismissed with costs.

C G LAMONT
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

APPEARANCES:

For Appellant:

EJ Ferreira

For Respondent

GM Ameer

Instructed by:

Lawley Shein

Johannesburg

Date of hearing:

16 May 2012

Date of judgment:

21 May 2012

Instructed by:
 Lindeque & van Heerden
 Boksburg