REPUBLIC OF SOUTH AFRICA

HIGH COURT OF SOUTH AFRICA

(GAUTENG PROVINCIAL DIVISION, PRETORIA)

CASE NO: A616/2017

CASE NO: 10619/2010

In the matter between:

ANDRE PRETORIUS Appellant

and

JOHANNES JACOBUS OELOFSEN N.O First Respondent

COSTAS FOUROUCLAS Second Respondent

REASONS

HUGHES, J

[1] On 13 October 2017 I delivered a judgment having been tasked to make a determination on a special plea of prescription raised by the respondents. The special plea was dismissed with costs. The respondents sought leave to appeal and were granted leave to the full court of this division. The full court dismissed the respondents' appeal with costs.

[2] The applicant now, by way of an application in terms of Rule 42(1)(b) of the Uniform Rules of Court seeks to vary my order of 13 October 2017; seeking to include

as paragraph 4 that 'the first and second defendants be ordered to jointly pay to the plaintiff an amount of R639 133.79, being damages and interest thereon at a rate of 15.5% per annum calculated from 17 January 2007 to date of payment. Further, the applicant sought costs for the application. At the commencement of the application the applicant placed on record that it had abandoned the alternative relief sought in the notice of motion.

[3] Rule 42(1)(b) of the Uniform Rules of Court which states:

'42 (1) The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:

…

(b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission.'

[4] On 29 July 2014 the parties appeared before Tuchten J seeking a separation of the issues in terms of Rule 33. Tuchten J refused to grant such order and ruled that the matter proceed in one go. At those proceedings Mr Meyer for the applicant made the following remark, the relevance thereof is apparent later in this ruling:

'MR. MEYER: M'Lord, this is very interesting news, but upon the papers as they stand between the experts, there is an issue: Was there a landslip? Subsidence? Or un-workmanlike manner? The work done in un-workmanlike manner? All those, are still disputes. It Is not just one issue that we are talking about.'

[5] The applicant contended that during the course of pre-trial preparation to the run up of the trial which was heard by me, the parties agreed that the matter would only proceed on two aspects, namely, prescription and the issue of whether there was a partnership. According to Mr Meyer for the applicant his understanding was that the parties had resolved not to proceed with the merits or quantum as these had been conceded by the respondents having agreed to only proceed on the two issues. Hence, when he made his opening statement on the first day of the trial before me notably the parties advised that the only issue that was left for my determination was that of prescription as the partnership issue had dissipated. The applicant contended that once a determination on prescription was made in their favour I ought to have made an order in terms of the quantum amount claimed.

[6] On the other hand, the respondents argue that at no stage whatsoever was there a concession of the merits and the quantum of the applicant's claim. Mr Stevens for the first respondent pointed out that on the applicant's own version as voiced by Mr Meyer above,[1] issues of the un-workmanlike manner pertaining to merits still needed to be proven by the applicant at the trial. Pertinently, Mr Stevens pointed out that the applicant at the trial did not even ask for judgment on the merits and the quantum as the applicant failed to lead such evidence.

[7] Mr Heyns SC, for the second respondent, echoed the same sentiment as Mr Stevens and went on to point out that at no stage did the respondents abandon their submissions in their pleas even though it was agreed that the special plea of prescription be dealt with initially. Further, as the matter was one of damages, and unliquidated amount, it was incumbent of the applicant to prove these damages claimed. Mr Heyns SC place reliance of the reasoning set out in *Baliso v First Rand Bank Ltd t/a Wesbank*[2]:

'In terms of our civil procedure, default judgment for a debt or liquidated demand is granted on an acceptance of the allegations as set out in the summons, without any evidence. Where the claim is not for a debt or liquidated demand, the court may, after hearing evidence, grant judgment. This is usually only evidence on the amount of unliquidated damages.**[13]** The reason for not hearing evidence on the other factual allegations made in the summons or particulars of claim is that, because the claim is not opposed, it may be accepted that those allegations are admitted or not disputed.[3]

[8] The crux of the applicant's reliance on rule 42(1)(b) was that I omitted to grant an order for the quantum of their claim in light of the fact that the parties had advised the court that the only issue for determination was that of prescription. In the circumstances the applicant contended that I had a discretion to substitute the order I had made by inserting an order for the quantum amount prayed in the amended notice of motion.

---

[1] Para 4.
[2] *Baliso v First Rand Bank Ltd t/a Wesbank* 2017 (1) SA 292 (CC).
[3] Ibid para 12, footnote 13-see rule 31(2)(a) of the Uniform Rules of Court.

[9] Mr Heyns SC argued that at no stage had the respondents conceded the merits and the quantum of the applicant's case and thus, the omission was not of the courts doing but rather that of the applicant's representation of its case at trial. It was the applicant who omitted to present evidence to prove its merits and quantum of its case. Simply put, the applicant bore the onus to prove his case and he had failed to do so.

[10] Telling in this matter is the opening address by the applicant's representative; the applicant is *dominus litis* and dictates the way forward for the presentation of their case to the court. Mr Meyer guided this court as regards what I ought to determine, that which I ought to consider and what not to consider:

'…So what is before Your Ladyship at the moment is but for that, M'ady the merits as set out in the various pleas that is files and the particulars of claim. It really does not concern the court at this stage because we are not really going into the merits of what is really wrong with the foundations and with everything. We will deal with the question of prescription, when a reasonable man would have known. I say that, M'lord because in the replication filed on behalf of the Plaintiff, …... So M'Lady the case before Your Ladyship really pertains to the prescription noted in those two Section 11, [indistinct] prescription period and Section 12 that is the interruption of prescription as a result of no knowledge of the identity of the debtor and of the facts from the debt arise.'[4]

[11] Evidently the judgment and the order of this court dealt with that determination of prescription sought by the applicant:

'[2] … For purposes of these proceedings, the parties have agreed that I need not deal with the issue of the existence of the partnership and the merits, however, I am tasked to make a determination, in light of the evidence to be adduced on the issue of prescription.'[5]

[12] As a result, there is no omission on the part of this court and no basis for a substitution to be made to the order of this court. This court cannot go out of the parameters set out by the applicant who was *dominis litis*. The relief sought by the applicant at this stage was not the relief sought at the trial.

[13] Consequently, I make the following order:

---

[4] Record of proceedings on Case line at 007-122-123.

[5] My Judgment at para 2.

(a) The application is dismissed with costs.

W. Hughes

Judge of the High Court, Pretoria

Virtually Heard: 15 September 2021

Electronically Delivered: 17 September 2021

Appearances:

For the Appellant: Adv. G. Meyer

Instructed by: Fluxmans Associate

For the 1st Respondent: Adv. B. Stevens

Instructed by: Suzette Lourens Attorneys

For the 2nd Respondent: Adv. G.F Heyns SC

Instructed by: Krugel Heinsen Inc