

(Inlexso Innovative Legal Services) awb

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION HELD AT PRETORIA

CASE NO: 21567/2021

DATE: 2021-11-23

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES : NO
(3) REVISED

10 In the matter between

AFFINITY ENERGY TRADING (PTY) LTD

Applicant

and

SY RANA

Defendant

L T A – J U D G M E N T

CRUTCHFIELD, AJ:

- 20 [1] There is no appearance in this matter for either of the parties to the application, notwithstanding that the matter stood down for judgment at 09h00 this morning and that my secretary sent the digital link for the hearing to the representatives of the parties. I proceed with the judgment.

[2] This is an application for leave to appeal brought by the plaintiff against an order granted by me in respect of an interlocutory application on the unopposed motion roll on 15 September 2021, in terms of Rule 30 of the Uniform Rules of Court dated 22 July 2021. The defendant opposes the application for leave to appeal.

[3] The plaintiff in the application sought relief striking down an exception delivered by the defendant and granting a money judgment against the defendant. In effect, I was
10 tasked with determining if the exception delivered by the defendant was an irregular step.

[4] I granted the following order in respect of the application:

(1) Prayer 1 of the plaintiff's application that the defendant's exception be struck down as an irregular step in terms of Rule 30(2)(c) was dismissed with costs;

20 (2) Prayers 2 and 3 for a money judgment were postponed *sine die*.

[5] On 21 October 2021, I gave reasons for the order granted by me on the unopposed motion court roll. The plaintiff delivered an application for leave to appeal on

28 September 2021. The grounds for leave to appeal were the following:

- (1) The order granted by me is legally and factually unsustainable;
- (2) The Court failed to observe, as it ought to have done, that the "exception" delivered by the defendant was not signed by counsel or an attorney having right of appearance and was not a valid exception and could not stand in the way of the plaintiff's right to judgment.

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[6] On 11 November 2021, the plaintiff delivered an application to supplement the grounds for leave to appeal, the primary effect of which was to enlarge upon the grounds contained in the application for leave to appeal dated 28 September 2021.

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[7] The plaintiff, at the hearing of the application for leave to appeal before me, sought to rest his case on the heads of argument filed by the plaintiff in respect of the leave to appeal hearing. I refused to allow him to do so and required that he argue the application.

[8] The essence of the plaintiff's argument was that once a notice of bar is delivered, the opposing party, the defendant in this matter, is no longer vested with an option of filing an exception but is obliged to file a plea.

[9] The submission does not withstand scrutiny given *inter alia* the wording of Rule 26 that deals with notices of bar and requires that a party plead within the 5-day period of the bar.

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[10] Rule 26 requires a party to deliver a pleading prior to the expiration of the 5-day period that commences on the day following delivery of the notice of bar.

[11] The factor that the plaintiff's notice of bar in this matter called upon the defendant to deliver a plea is irrelevant given that Rule 26 calls for a pleading.

20 [12] The plaintiff's counsel conceded that an exception is a pleading but insisted that the defendant was not entitled to deliver an exception during the 5-day period of the bar and that the defendant was required to file a plea. This is notwithstanding that the issue was decided *inter alia* in *Hill No & Another v Brown* (3069/20) [2020] ZAWCHC 61 (3 July 2020) paras 5 and 8.

[13] The plaintiff's argument to the contrary is bad in law. I stated as much in the reasons granted by me on 21 October 2021. Notwithstanding, the plaintiff persisted with the application for leave to appeal and with this point.

[14] As regards the defendant's exception, the plaintiff conceded that it was not set down for hearing before me on the unopposed motion roll on 15 September 2021 but
10 persisted with the argument that I ought to have struck it down on the basis that it was not signed by counsel or an attorney having right of appearance in this Court. As stated by me in the reasons for the unopposed order granted by me, the plaintiff did not raise the point of signature of the exception in the unopposed application.

[15] The doctrine of legality requires, notwithstanding the plaintiff's view of the exception, that the exception be considered and determined by a properly constituted
20 court tasked with considering the exception and not that I simply strike it down in circumstances where it is not set down for hearing before me.

[16] The appropriate procedure, as indicated by me in the reasons, was for the plaintiff to set the exception down

for hearing in the event that the defendant failed to do so, not to proceed with this application for leave to appeal, as the plaintiff did.

[17] The plaintiff submitted that my order in respect of the unopposed application was final in effect given that I denied the exception. The submission is without merit as I declined to determine the exception as it was not set down for hearing before me. Thus, the order granted by me in respect of the unopposed application is not final in nature and is not capable of sustaining an appeal at this stage of the proceedings. I stated as much in the reasons given by me but the plaintiff persisted with this application for leave to appeal.

[18] The grounds for leave to appeal upon which the plaintiff placed reliance are devoid of merit. That being the case, the appeal has no reasonable prospect of success. Furthermore, there is no compelling reason why the appeal should be heard and the plaintiff did not rely on any such factor. See in this regard *Caratco (Pty) Limited v Independent Advisory Limited* 2020 (5) SA 35 (SCA).

[19] In the circumstances the application for leave to appeal must fail and I intend to grant an order accordingly. The

defendant claimed punitive costs of the application for leave to appeal on the attorney and client scale given that the issue of an exception being an appropriate response to a notice of bar has been decided by the cases referred to in the judgment of *Hill No & Another v Brown* referred to herein above. The plaintiff resisted the claim for punitive costs.

10 [20] Given the plaintiff's insistence on pursuing this application notwithstanding the reasons handed down by me on 21 October 2021, in circumstances where nothing novel or additional was raised by the plaintiff in this application for leave to appeal, I am minded to grant the costs of this application on the scale as between attorney and client.

[21] In the circumstances, I grant the following order:

(1) The application for leave to appeal is dismissed.

(2) The plaintiff is ordered to pay the cost of the

20 application for leave to appeal on the scale as between attorney and client.

The date of judgment is 23 November 2021. I hand down the judgment.

[Signature]

CRUTCHFIELD, AJ
 ACTING JUDGE OF THE HIGH COURT
 GAUTENG DIVISION, PRETORIA

Date of hearing: 22 November 2021

Date of deliverance: 23 November 2021

APPEARANCES

10 For the Applicant: Adv B.G Savvas
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