IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

Case No: AR455/2012

In the matter between:

JARED SMITH Appellant

and

FLANS MOTORS CC

Trading as FLANAGANS PANEL BEATERS Respondent

APPEAL JUDGMENT

Delivered on 08 October 2013

Vahed J:

[1] The appellant was sued by the respondent in the Magistrate's Court for the district of Durban for the balance of the cost of repairs to his motor vehicle effected by the respondent. The claim was based on contract, and, in the alternative, on enrichment. The parties were agreed that the issues be separated and in terms of Rule 29(4) of the Magistrate's Court Rules the learned magistrate *a quo* directed that the issue of liability be determined first. At the conclusion of the trial on liability the Court *a quo* found against the appellant and determined that he was liable to

compensate the respondent for the damages suffered by it. He was also ordered to pay the respondent's costs. The appellant appeals against that finding and order.

[2] The relevant facts are briefly as set out hereunder.

[3] The appellant was the owner of a Renault motor-vehicle which was insured in terms of a short-term insurance policy underwritten by Santam Insurance ("Santam"). On a Friday during July 2007 (the appellant could not recall the date) the vehicle was involved in a collision which resulted in body and perhaps also mechanical damage being sustained by it. It was not capable of being driven. The appellant described his vehicle as being "quite badly damaged".

[4] At the instance of the insurers, or alternatively brokers representing it, the vehicle was towed to the respondent's premises for a quotation setting out the necessary repairs to be prepared,for assessment, and for it to be repaired thereafter once all the necessary administrative and other preliminaries had been attended to. It is common cause that the appellant did not accompany the vehicle to the respondent's premises and it is also common cause that at no material time did he attend at those premises.

[5] In the court *a quo* the respondent tendered the evidence of two witnesses. They were Shaun Flanagan and his father Patrick Shaun Flanagan. I shall refer to them as "Shaun" and "Patrick" respectively.

[6] Shaun testified that he was employed by the respondent as a service advisor. He personally received the appellant's vehicle when it was brought there by the tow truck and he attended to the inspection of the vehicle and the preparation of the quotation relevant to its repair. After the quotation had been prepared the vehicle was inspected by an assessor appointed by the insurers who also examined the quotation prepared by Shaun. In that process the quotation was reviewed. The assessor determined that the amount of R34165,15 would be acceptable to the insurer as the cost of repairs but also indicated that that assessment had been performed on a "without prejudice" basis because the insurer still had to furnish its authorisation in order for the respondent to proceed with repairs.

[7] Shaun also testified that although in the ordinary course of business the respondent would not proceed to repair a vehicle unless and until the insurer had furnished its authorisation, in this case he proceeded to permit the respondent to continue with repairs pending the receipt of that authorisation. He said that he knew that there was a problem between the appellant and the insurers but was confident that that problem would be resolved before long and that authorisation would follow thereafter. There was a suggestion made by him during his evidence in chief that he had also furnished a copy of the quotation to the appellant and that he had also discussed the matter with the appellant but that suggestion was soon dispelled during his cross-examination. The upshot of his evidence was that he firmly believed that the problem between the appellant and the insurer would be resolved and that in due course authorisation for the repairs would be received from the insurers.

[8] After the vehicle had been repaired Shaun made contact with the appellant, delivered the vehicle to him at his place of employment, and obtained payment from him of an amount of R2 596,24 which represented the first amount payable (the excess) by the appellant in terms of the policy of assurance. I pause to mention that the quantum of the excess had been determined by the assessor, when he examined the vehicle and assessed the quotation, as being 5% of the repair cost.

[9] Patrick testified that he was the respondent's managing member and that he only became involved after the vehicle had been repaired. He dealt with administrative matters, which in the present case involved him trying to recover the balance of the repair cost due to the respondent after payment by the appellant of the excess. He discovered that the insurers had repudiated the claim under the policy of insurance due to non-payment of premiums and thereafter sought to recover the balance due to the respondent from the appellant directly. Clearly he contributed nothing to the facts upon which this case must be decided.

[10] The appellant testified in his defence. He recounted the introductory matters that I have dealt with above and confirmed that apart from the time when the repaired vehicle was delivered to him and when he made payment of the excess, he had no interaction whatsoever with the respondent. When the collision occurred and when he first made contact with the insurer there had been a problem with the debit order process by which his insurance premiums were collected from him on a monthly basis. At the time of the collision his monthly insurance premium payments were one month in arrears because a debit order had been rejected by his bank, presumably due to insufficient funds being available to meet that debit order.

Arrangements for a double debit to be made at the end of that month were not fulfilled, the reason therefor being irrelevant for present purposes. In the final analysis, the appellant's insurance premiums had not been paid with the result that his policy of insurance had lapsed and the claim lodged by him as a result of the collision had been repudiated.

[11] The appellant did not pay the repair costs demanded of him (apart from the excess already paid) and in due course he was sued by the respondent. The respondent originally based its claim purely in contract alleging that an agreement had been concluded between Shaun, representing the respondent, and the appellant acting in person. It contended that an agreement had been concluded the effect of which the appellant would pay for the repair costs. By subsequent amendment the respondent introduced an alternative claim contending, in the event of the claim in contract failing for any reason, that the appellant was indebted to it because he had become enriched at the respondent's expense.

[12] In his judgment the learned magistrate *a quo*apparently found for the respondent as claimed, and went further to find that enrichment was alsoestablished. He found both Shaun and Patrick to be impressive witnesses and accepted their evidence. He found the appellant's evidence to be improbable.

[13] On appeal the appellant contended that the learned magistrate was wrong when he found that a contract had been proved and was also wrong in finding that a claim based on enrichment had been established by the respondent. I will deal with both these contentions later in this judgment.

[14] In the resisting the appeal Mr *Camp*, who appeared for the respondent, contended that the decision of the court a quo was not appealable at this stage. In doing so he relied principally on the decision in *Steenkampvs South African Broadcasting Corporation* 2002 (1) SA 625 (SCA). There it was held as follows:

'[7] Counsel who argued the appeal in this Court were requested beforehand to prepare argument on the question of appealability. Additional heads of argument were then delivered and on the day of the appeal counsel were afforded an opportunity also to argue the merits of the appeal.

[8] Appeals from magistrates' courts are governed by the provisions of s 83 of the Magistrates' Courts Act 32 of 1944. Section 83*(b)* provides that a party to any civil suit or proceeding in the magistrate's court may appeal to a Provincial or Local Division of the High Court having jurisdiction against 'any rule or order made in such suit or proceeding and having the effect of a final judgment . . .'. To be appealable then, a magistrate's ruling or order must have the effect of a final judgment.

[9] In considering this issue the Court *a quo* was faced with two conflicting decisions, *SantamBpk v Van Niekerk*1998 (2) SA 342 (C), where Conradie J (Ngcobo J concurring) held that the magistrate's finding on liability alone is not appealable, and *Raubex Construction h/a Raumix v Armist Wholesalers (Pty) Ltd*1998 (3) SA 116 (O), where Van Coppenhagen J (with whom Cillié J concurred) held that such a finding is appealable. The Court *a quo* aligned itself with the decision in the *Raubex Construction* case.

[10] Two more judgments on the issue have since appeared. In *Keet v De Klerk*2000 (1) SA 927 (T), Southwood J (Kruger J concurring) came to the same conclusion as Conradie J in the *Santam* case, while in *Hendrikus Erasmus Cloete v MbaleCladwin Botha*, an as yet unreported judgment of the Orange Free State Division (appeal no 137/2000 delivered on 29 March 2001), the Full Court effectively overruled the decision in *Raubex Construction*.

[11] Both Southwood J in *Keet v De Klerk* and Malherbe JP in *Cloete v Botha* referred in their respective judgments to *Durban's Water Wonderland (Pty) Ltd v Botha and Another*1999 (1) SA 982 (A), a decision of this Court of which the Court *a quo* and counsel

who appeared before it were obviously unaware. In that case the following was said (at 992G - I):

"In terms of s 83*(b)* of the Magistrates' Courts Act 32 of 1944 any ''rule'' or ''order'', to be appealable, has to have ''the effect of a final judgment''. The difficulty that arises in relation to the kind of order considered in the *Santam* and *Raubex Construction* cases is that it does not finally dispose of any portion of the relief claimed (cf*Van Streepen& Germs (Pty) Ltd v Transvaal Provincial Administration*1987 (4) SA 569 (A) at 585F - G); nor can an order of this kind be regarded as a declaratory order since a magistrate has no jurisdiction to make such an order. (Compare *SA Eagle VersekeringsmaatskappyBpk v Harford*1992 (2) SA 786 (A) at 792H.)"

[12] Counsel for the respondent contended that what was said in the *Durban's Water Wonderland* case about the appealability of the magistrate's finding was *obiter* and that *Raubex Construction*was correctly decided. Counsel conceded that the magistrate's finding in favour of the plaintiff on the issue of liability only cannot be a declaratory order since a magistrate has no competence to issue a declaratory order. He argued accordingly that the emphasis should be on the effect of such an order and because the order is final in its effect, in the sense that it cannot be altered by the magistrate, it is appealable. It is true that what was said in *Durban's Water Wonderland* concerning the appealability of a magistrate's order on the issue of liability only is an *obiter dictum*, but this Court will not lightly depart from a view previously expressed by it, particularly by five of its members sitting together, even if expressed *obiter*. As will appear below I am not persuaded that this Court should depart from that view.

[13] In the course of his judgment in the *Raubex Construction* case Van Coppenhagen J refers to a number of decisions of this Court which deal with the appealability of orders or rulings of the High Court in terms of s 20(1) of the Supreme Court Act 59 of 1959. A comprehensive re-examination of those decisions will serve no purpose. But one of them is *Zweni v Minister of Law and Order*1993 (1) SA 523 (A), where the following was said (at 532J - 533A):

"8. A ''judgment or order'' is a decision which, as a general principle, has three attributes, first, 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 (*Van Streepen& Germs (Pty) Ltd* case *supra* at 586I - 587B; *Marsay v Dilley*1992 (3) SA 944 (A) at 962C - F)."

Van Coppenhagen J then says (in *Raubex Construction* at 123G - 124B):

"Ditkomvir my as logiesvoordat die woorde ''order'' en ''judgment'' soosdit in art 83*(b)* van die Wet op Landdroshowe 32 van 1944 voorkom, dieselfdebetekenis het as diédeur Harms AR in die

*Zweni*saak*supra*aan die woorde in art 20(1) van die Hooggeregshofwet 59 van 1959 toegeskryf. Daar is moontlik 'n enkeleverskil en wel in dermatedat art 1 van die Wet op Landdroshowe 'n "bevel" of "order" gelykstelaan 'n vonnis.

Die bevindingwatdeur die landdrosgeboekstaaf is ten opsigte van die geskilpuntwatvirberegtinggedien het is in effekfinaal en nieonderhewigaanveranderingdeur die landdrosnie. Die bevinding het ook die effekdat finale uitsluitselgegee is ten aansien van die applikant se aanspreeklikheidomskadevoergoeding, sonderom die bedragdaarvantekwantifiseer, tebetaal. Dat die bevindingook 'n substansiëledeel van die aansprake van die eiser - in die sin dat die eiseraanspreeklikheid van verweerder as deel van syskuldgrondmoesbewys het - in die aksieafgehandel het, spreekfeitlikvanself. Die bevinding van die landdros, alhoewelnie elegant geformuleernie, behoortmynsinsiens as 'n bevel wat die effek van 'n finale vonnis het, soosbedoel in art 83*(b)* van die Wet op Landdroshowe 32 van 1944 aangemerkte word. As sulks kan teen die bevel van die landdrosgeappelleer word."

This reasoning was followed by the Court *a quo* in the present matter.

[14] The fundamental flaw in the reasoning of Van Coppenhagen J in the *Raubex Construction* case is this. This Court did not hold in *Zweni* that a finding by a Superior Court in favour of a plaintiff on the question of liability, where the merits and *quantum* were separated, is a 'judgment or order' as envisaged by s 20(1) of the Supreme Court Act. Quite to the contrary, this Court held in *SA Eagle Versekeringsmaatskappy Bpk v Harford* 1992 (2) SA 786 (A) at 792H that such a finding 'in wese 'n verklarende bevel is en datdit 'n appelleerbareuitspraak of bevel daarstelomdat die bevinding 'n finale en beslissendeeffek op die gedingtussen die partyegehad het'. What makes the finding appealable is not merely the fact that it is final and definitive of the issue of liability, but also because it is in essence a declaratory order. At 791D - E of the *Harford* judgment the following was said:

"Die Verhoorhof het bevinddat die appellant aanspreeklik was, en, hoewel die skadenogniebepaal was nie, "gave judgment for plaintiff with costs". Watvermoedelikgebeurhet, is dat 'n bevel met die effek van 'n verklarende bevel dat die appellant aanspreeklik was, gemaak is. Immers, 'n bevel watvireksekusievatbaar was, kondit, in die afwesigheid van 'n bepaling van die skade, nieweesnie."

And (at 792C - D):

"Die stellingdat die eiser se eis op die merietetoegestaan is, maaknie sin nieaangesiendaarnie 'n eis ten aansien van die meriete was nie, maar 'n eisterbetaling van skadevergoeding. . . . Die bevel is die operatiewedeel van die uitspraak; dit is waarteengeappelleerkan word en ditis waaropeksekusiegehef word."

[15] The third attribute of a decision, for it to be a 'judgment or order' as envisaged in s 20(1) of the Supreme Court Act, is that 'it must have the effect of disposing of at least a substantial

portion *of the relief claimed* in the main proceedings' (*Zweni (supra* at 532J - 533A)). (My emphasis.) The relief claimed in the main action *in casu* is for payment of damages in the sum of R56 751,15 and interest thereon, with costs (compare the *Harford* case *supra* at 792C - D). No substantial portion of that relief has been disposed of. The appellant cannot execute on the magistrate's finding. Consequently, such finding cannot be said to be ''n bevel wat die effek van 'n finale vonnis het'. And, as was said in the *Santam* and *Durban's Water Wonderland* cases, a magistrate's order in favour of a plaintiff in respect of the issue of liability cannot be viewed as a declaratory order since the magistrate has no jurisdiction to issue a declaratory order.

[16] It follows that the *Raubex Construction* case (and consequently the present matter in the Court *a quo*) was wrongly decided. A magistrate's order in favour of a plaintiff on the issue of liability where that issue and the issue of *quantum* have been separated in terms of Rule 29(4) of the Magistrates' Courts Rules is not appealable.'

[15] Ms *Northmore*, who appeared for the appellant in the appeal, argued that that point was bad. She said so because, so she contended, the magistrate had made a positive finding that the contract contended for had been proved. That being the case there was nothing more to be achieved at the so-called quantum leg of the trial, and accordingly the learned magistrate delivered a final judgment which was appealable.

[16] It is so that during the course of his judgment the learned magistrate said the following:

"I conclude therefore, based on the conclusion and made with regards to the telephonic conversation between [Shaun] and the [appellant] immediately before the repairs were done, that the probability is that the [respondent] did give the [appellant] the mandate to proceed with the repairs, favour the [respondent]."

[17] However, upon a careful consideration of the learned magistrate's judgment, I cannot find an instance where it can be said that he arrived at a firm conclusion concerning the telephone call he referred to. Admittedly, he did say that he was "... extremely impressed with [Shaun] and [Patrick] as witnesses". In addition, he did go on to say the following:

"I am of the view that it is highly improbable, given the circumstances of this case, that the [respondent] would have assumed the repairs on the [appellant's] motor vehicle, knowing that the insurer had not given it authority to do so, without first consulting with the [appellant]."

[18] Against that, the learned magistrate concluded his judgment with the following order (I repeat it verbatim below):

"The defendant is liable to the plaintiff for damages it [the plaintiff] incurred as a result of effecting repairs to the motor vehicle prescribed (sic) as Renault Clio 1.4 RT with registration letters and numbers ND 440 775 duelling July/August 2007."

[19] In my view, a finding of liability for DAMAGES, as against a background where no specific finding with regard to the crucial telephone conversation was made, points conclusively to the fact that the learned magistrate did not find the contract to have been proved.

[20] In the result it is my view that the point *in limine* with regard to appealability is good.

[21] In any event, and if there remains any merit in Ms *Northmore's* point, I would still hold that the matter is not appealable. In *Jordaan v Bloemfontein Transitional Local Council* 2004 (3) SA 371 (SCA) the court was dealing with an

appeal concerning appealability in similar circumstances. However in that matter there was first an appeal to a Full Bench of the Provincial Division. Prior to the Full Bench appeal, in correspondence, and in heads or argument in that Court *quantum* was conceded. The Supreme Court of Appeal held:

'[15] On the appealability point [counsel] referred to the decision of this Court in *Steenkamp v South African Broadcasting Corporation*2002 (1) SA 625 (SCA), in which it was held that a magistrate's order on the issue of liability only, where that issue has been separated from the issue of *quantum* in terms of Rule 29(4) of the Magistrates' Courts Rules, was not appealable. He submitted that the principle laid down in that case still applies in this matter, despite the first defendant's concession by letter and in its counsel's heads of argument before the Court *a quo*, and that the first defendant should have waited until the magistrate gave judgment against it before appealing.

[16] In my view this contention is correct. Section 83*(b)*, the provisions of which were considered by this Court in *Steenkamp v South African Broadcasting Corporation* (*supra*), provides that a party to any civil suit or proceeding in a magistrate's court may appeal to the Provincial or Local Division of the High Court having jurisdiction against 'any rule or order made in such suit or proceedings and having the effect of a final judgment'. The finding made by the magistrate in this case was, on the authority of the *Steenkamp* decision, not a rule or order having the effect of a final judgment and the first defendant's concession regarding the *quantum* of the plaintiff's claim did not convert it into such a rule or order. The Court *a quo's* reliance on the decision in *Durban City Council v Kistan (supra*) was misplaced. In my view it misread the judgment in that case because the abandonment of the costs order under consideration there was by notice and was held at (469H) to be one made under s 83 of the Act. Reference was made (at 469D - G) to *Scrooby v Engelbrecht* 1940 TPD 100 where it was pointed out that abandonments can take place under s 83 as well as outside the section. Where an abandonment of a judgment takes place outside the section and the party so abandoning undertakes not to take the objection of *res judicata* in further proceedings on the same cause of action it was envisaged that an appeal against the judgment so abandoned could proceed, but it was said (at 105) that the Court in the exercise of its discretion would probably refuse the appellant his costs of appeal. In other words an abandonment of a judgment 'outside the section' does not render the judgment non-appealable as the Court *a quo* appears to have thought. I also do not think that the power conferred on the Court of appeal by s 87*(d)* of the Act 'to take any other course which may lead to the just, speedy and as much as may be inexpensive settlement of the case' extends to doing something to a non-appealable order to make it appealable. In the circumstances I am of the view that the Court *a quo's* decision that the magistrate's finding in this case was appealable was incorrect and that it should have made no order in the case save for an order that the first defendant should pay the costs.'

[22] It will be appreciated that in *Jordaan's* case, notwithstanding the concession on *quantum*, something more was still required before the magistrate's

judgment could be considered to be appealable. That “something more” was the magistrate making a specific order on the *quantum*. Once that was done finality would be achieved. That also would make the judgment one in respect of which execution could be levied, which is also one of the hallmarks of a final judgment.

[23] In the present matter the Order made by the learned magistrate was not capable of being the subject of execution. Here too something more was needed before the respondent could levy execution; ie. judgment on the *quantum*.

[24] On that authority, the present appellant ought to have waited until the court *a quo* granted final judgment against it on the *quantum* before lodging his appeal.

[25] If I am wrong in that regard I, in any event, proceed to consider the question of enrichment.

[26] There is no doubt in my mind that during the evidence led in the court below it was clear that Shaun proceeded to allow the respondent to undertake the repairs to the appellant’s vehicle because he assumed that the problem between the appellant and his insurer would be resolved. In no uncertain terms he indicated that he was confident that ultimately he would get payment from the insurer. More than once during cross-examination he indicated that he believed that the insurance company would effect payment.

[27] That Shaun was mistaken in that regard is clear. The only question is whether his mistake is excusable in the circumstances. In the court *a quo* reliance was placed on the case of *McCarthy Retail Ltd vsShortdistance Carriers CC* 2001 (3) SA 482 (SCA) which found favour with the learned magistrate.

[28] Very recently enrichment has again received the attention of the Supreme Court of Appeal in *Capricorn Home Owners vsPotgieter* (752/2012) [2013] ZASCA 116 (19 September 2013) where the following was said:

'[20] This brings me to the question of enrichment which was said by counsel for the first respondent to be the ground upon which reliance is placed by his client for the recovery of the erroneous payment. The general requirements underlying all enrichment actions are that (a) the defendant must be enriched; (b) the plaintiff must be impoverished; (c) the defendant's enrichment must be at the expense of the plaintiff and (d) the enrichment must be without cause (*sine*causa) ie unjustified. See *McCarthy Retail Ltd v Shortdistance Carriers CC*2001 (3) SA 482 (SCA) at 496E. There can be no question that the appellant in this case has been enriched. The first respondent has been impoverished. The appellant's estate has been increased by the amount erroneously transferred and this increase has been at the expense of the first respondent. No justification for it has been established. Someone who has paid a sum of money or transferred property to another erroneously believing that it was due to that person, when in fact it was not due, is entitled to recover the sum of money or the property, see *Wille's Principles of South African Law* 9 ed (2007) at 1058.

[21] The *condictioindebiti* is available provided that the mistake (whether of fact or law) was excusable. (See *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue* [1991] ZASCA 163**;** 1992 (4) SA 202 (A) at 203H; *ABSA Bank Ltd v Leech & others NNO* 2001 (4) SA 132(SCA) para 8.)...'

[29] Only requirement (d) is in issue in this case and Ms *Northmore* argues that Shaun's conduct was not excusable. I do not agree. It is true that the respondent did not have authorisation. It is true also that Shaun was misguided when he thought that the insurer would pay in due course. However, in my view his conduct is

excusable. The vehicle was brought to the respondent's premises as a result of the intervention of the insurer and, at the behest of the insurer, an assessor attended upon the respondent's premises and assessed the vehicle on a without prejudice basis, the only formality outstanding being the insurers authorisation of repairs. While Shaun's conduct was foolish it was not such that it can be contended that it non-suits a plaintiff in an enrichment action.

[30] I accordingly find also that the respondent has established all the requirements for enrichment against the appellant.

[31] The appeal is dismissed with costs.

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Vahed J

I agree:

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Nkosi J

It is so ordered:

_____
Vahed J

CASE INFORMATION

Date of Hearing: 02 September 2013

Date of Judgment: 08 October 2013

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