REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: A360/2006

DATE: 3 NOVEMBER 2006

In the matter between:

GASANT ABARDER Appellant

and

ASTRAL OPERATIONS LTD

t/a COUNTY FAIR First Respondent

GRANT TWIGG Second Respondent

ASSOCIATED TRADE UNION OF

SOUTH AFRICAN WORKERS Third Respondent

J U D G M E N T

FOURIE, J:

First respondent is the plaintiff in an action instituted in the Cape Town Magistrate's Court against second and third respondents, as first and second defendants respectively, in which first respondent claims damages in the sum of R100 000 allegedly suffered when it was defamed by second respondent while acting within the course and scope of his employment

with third respondent. For the sake of convenience, the three respondents are referred to as in the Court *a quo*.

In its particulars of claim plaintiff, *inter alia*, alleges that first defendant made certain defamatory remarks of and concerning plaintiff to one Gasant Abarder, a professional journalist and news editor of a newspaper known as "The Daily Voice". The said Abarder is the appellant in the present appeal.

Plaintiff called appellant as a witness at the trial of the action to testify in regard to the alleged defamatory remarks made in his presence by first defendant. To this end, plaintiff had served a subpoena *duces tecum* on appellant to appear as a witness, as provided in section 51 of the Magistrates' Courts Act, No. 31 of 1944 ("the Act").

The subpoena required appellant, *inter alia*, to testify on 8 March 2006 in respect of all matters within his knowledge relating to plaintiff's civil claim against defendants.

When appellant was called to testify he took the oath, but an attorney appearing on his behalf, Mr Louw, then advised the magistrate that appellant refused to answer questions and that

he would lead evidence to justify his refusal. In a nutshell, appellant refused to testify on the ground that journalists in a civil trial enjoy a general immunity from testifying, *qua* journalist, unless they are called as a witness of "last resort". In this regard evidence was presented to the effect that when the alleged defamatory statements were made by first defendant, appellant and approximately 100 other people present at a meeting, heard first defendant making the defamatory statements. Appellant accordingly maintained that as the evidence required by plaintiff could reasonably and easily be obtained from the other witnesses and no attempts to obtain such evidence from the other witnesses have been made by plaintiff, appellant was entitled to refuse to answer questions.

After hearing argument in this regard, the magistrate ruled that appellant was obliged to answer questions put to him. He accordingly rejected the claim of appellant that he should only be called as a witness of last resort. The trial of the matter was then postponed and has not subsequently continued as appellant had noted an appeal against this order of the magistrate. Appellant in due course prosecuted the appeal which is opposed by plaintiff. There is no appearance for

defendants, but first defendant has indicated that he wishes the appeal to proceed and that he abides the decision of the Court.

Heads of argument have been filed on behalf of appellant and plaintiff and they are respectively represented by Mr Butler assisted by Ms Cowen, and Mr Goddard assisted by Mr Hinds.

Upon reading the record of the appeal, my Brother and I considered it necessary to request counsel to address us at the hearing of the appeal on the question whether appellant has the right to appeal the order made by the magistrate. Our request was prompted by section 83 of the Act, which provides that a party to any civil suit or proceeding in a Magistrate's Court may appeal to the High Court having jurisdiction to hear the appeal against (a) any judgment of the nature described in section 48; (b) any rule or order made in such suit or proceeding and having the effect of a final judgment, including any order under Chapter (ix) (which deals with execution) and any order as to costs; and (c) in certain circumstances, a decision over-ruling an exception.

Our concern was whether the requirements for an appeal to the

High Court in terms of section 83 of the Act, were met in this instance. Mr Butler responded by providing us with supplementary heads of argument in which it is submitted that the requirements of section 83 of the Act are met and that appellant has the right to appeal the order of the magistrate. Mr Goddard informed the Court that although plaintiff believes that in the interests of justice it would be prudent for the appeal to be heard, it abides the decision of the Court on the issue of the appealability of the magistrate's order.

What has to be determined, firstly, is whether appellant is, or was, a party to any civil suit or proceeding in the court *a quo* and, if so, whether the order made by the magistrate is a judgment, order or ruling of the nature set out in sub-sections (a), (b) or (c) of section 83 of the Act.

It was held in Collier v Redler & Another 1923 AD 640 at 651, that the word "suit" is synonymous with the word "action". As stated in Myers v Benoni Municipality 1913 TPD 632 at 635, a civil suit or action is a dispute between two litigants which is initiated by an ordinary summons in which the one litigant cites the other before a Magistrate's Court or other court.

It is clear that appellant is not, and has never been, a party to a civil suit or action in the court *a quo*. The pending action is between plaintiff and defendants and appellant has no interest in the subject matter of that dispute.

The question therefore is whether appellant is or was a party to "any civil proceedings" in the court *a quo*. The phrase "any civil proceedings" has been judicially interpreted, in particular in regard to the use thereof in section 20 of the Supreme Court Act No. 59 of 1959. The accepted view seems to be that the phrase bears a wide meaning and that it refers to any civil proceedings whatsoever. (See Prokureursorde Oranje Vrystaat v Louw 1989(1) SA 310 (O), approved in Middelberg v Prokureursorde, Transvaal 2001(2) SA 865 (SCA). See also Erasmus: Superior Court Practice at A1-46).

Mr Butler submitted that the enquiry which followed upon appellant's refusal to answer questions and which resulted in the order of the magistrate that appellant is obliged to answer questions, constituted a civil proceeding within the meaning of section 83 of the Act. In this regard he pointed to the fact that evidence was led on appellant's behalf, at the conclusion of which both the attorney for appellant and counsel for plaintiff

addressed the Court, and this was followed by the magistrate's reasons and order. He further submitted that appellant was a party to these proceedings, as he was the party subpoenaed; it was at his behest that the proceedings under section 51 of the Act were conducted and he is the party who is directly affected by the order granted by the magistrate.

In my view, these submissions of Mr Butler do not take proper account of the purpose of section 83 of the Act and the nature of civil proceedings which may be instituted in the Magistrate's Court. I am of the opinion that on a proper construction of section 83 of the Act, the judgment or order which a party wishes to appeal against in a civil suit or proceeding, has to be a judgment delivered or order made in a civil suit or proceeding for which provision is made in the Act.

The Magistrate's Court is a creature of statute and there are only two ways in which a prospective litigant can institute civil proceedings (in the wide sense of the word) against another party in the Magistrate's Court. That is by the issuing of a summons or by bringing an application on notice of motion. In regard to applications, it should be borne in mind

that procedure by way of application in the Magistrate's Court is limited to those cases specifically laid down in the Act. (See Jones & Buckle: The Civil Practice of the Magistrates' Courts of South Africa (9th ed.) Vol. 2 at 55-2)

It follows, in my view, that the phrase "any civil suit or proceeding" in section 83 of the Act should be interpreted to mean a civil action instituted by the issuing of a summons or a civil proceeding instituted by utilising application procedure by means of a notice of motion and, if necessary, supporting affidavits. It also follows, in my view, that it is only a party to such an action or application which has the right to appeal an order made in such proceedings.

It is common cause, as I have already mentioned, that appellant is not a party to any action or application instituted in the Court *a quo*. His attendance as a witness was secured by means of a subpoena. The fact that a dispute had arisen as to whether he is legally obliged to answer questions or not, does not, in my view, convert that dispute or the manner in which it is resolved by the magistrate, into a civil suit or proceeding which entitles appellant to appeal the order of the magistrate.

I do find support for this view in the same work of Jones & Buckle, Volume 1, page 344 where the learned authors comment as follows on the meaning of the phrase "to any civil suit or proceeding" in section 83 of the Act:

> "A civil suit or proceeding can be initiated in the Magistrate's Court in one of two ways; by way of summons or by way of application on notice of motion. Only orders given in such proceedings are appealable in terms of this section".

The learned authors also refer to the case of E Castignani (Pty) Ltd v Claude Neon Lights Ltd 1969(4) SA 462 (O) in which Smuts, J, with whom Klopper, J concurred, said the following in regard to section 83 of the Act:

> "Dit blyk hieruit dat dit slegs 'n vonnis in 'n “siviele geding” of “siviele verrigting” is waarteen geappelleer kan word. Dit is vanselfsprekend dat dit ‘n siviele geding of siviele verrigting, waarvoor voorsiening gemaak is in Wet 32 van 1944, moet wees. Dit is deel van die *onus* wat op die appellant rus om te toon dat die bevel waarteen hy wil appelleer 'n bevel is wat gemaak is in so 'n siviele

> geding of siviele verrigting. Daar is net twee maniere waarop prospektiewe litigante siviele gedinge of verrigtinge in die Landdroshof kan instel teen hulle teenpartye; die een is by wyse van 'n dagvaarding en die ander is by wyse van 'n aansoek met kennis aan die partye teen wie regshulp gevra word"

I respectfully agree with this interpretation of section 83 of the Act. (See also Myers v Benoni Municipality 1913 TPD 632 at 635)

I further hold the view that logic and practical considerations dictate that section 83 of the Act should not cover the proceedings (in the wide sense) in which appellant was involved in the court *a quo*. The issue which appellant wishes to have adjudicated by this Court is the alleged infringement of his constitutional right to freedom of expression which has nothing at all to do with the issues to be decided in the action between plaintiff and defendants. If a witness were to be afforded a right of appeal in such circumstances, it would mean that the trial in which he or she is to testify, has to be suspended pending the preparation of an appeal record and

the hearing of the appeal, which could take a year or more to be heard.

Why should the parties to the action now be put to this disadvantage to enable an appeal to be heard on an issue which is in effect a personal claim by an outsider, i.e. the appellant, that he should only be called as a witness of "last resort". It is, in my view, obvious that the correct procedure to be followed by a witness in the position of appellant is to approach the High Court for an order reviewing and setting aside the order made by the magistrate and/or seeking a *mandamus* or a declarator on the ground that his constitutional rights have been infringed by the magistrate. If necessary, such an application can be brought as a matter of urgency to ensure that there is a minimum of delay in finalising the trial of the action in the Magistrate's Court.

In Herbstein & Van Winsen: The Civil Practice of the Supreme Court of South Africa (4th ed.) page 934, the following is said in this regard:

> "Where the course of the proceedings is affected by matters not germane to the issue between the parties, as when a witness of his own motion claims

privilege, the matter is one for review and not appeal".

The learned authors refer to the case of Le Roux v Montgomery 1918 TPD 447 in support of their view. I respectfully associate myself with this view of the learned authors.

I therefore conclude that appellant is not, and has never been, a party to any civil suit or proceeding in the court *a quo* as envisaged in section 83 of the Act, which would entitle him to appeal this order of the magistrate. In view of this finding, it is not necessary for me to deal with the second requirement of section 83 which, in the instant matter, is whether the magistrate's order has the effect of a final judgment. It would suffice to say that it appears to me that the magistrate's order does not have the character of a final judgment as it does not have a final and definitive effect on an issue in the main action between plaintiff and defendants.

I wish to stress that my finding that the order of the magistrate is not appealable, does not leave the appellant without a remedy. As I have already stated, his obvious and speedy

remedy would have been an application for review and/or for a *mandamus* or a declarator, in which he could have asked this Court to set aside the magistrate's order and for an order directing that he is not obliged to answer questions.

It follows, in my view, that the interpretation which I have given to section 83 of the Act, does not violate appellant's constitutional rights as suggested by Mr Butler, as he has always had, and still has, the right to approach this Court for an order protecting him against an infringement of his constitutional rights.

It follows from what I have said, that the appeal cannot be entertained. In regard to costs, Mr Butler submitted that as plaintiff has consented to the appeal being heard, it should not be regarded as a successful party in the event of the Court finding that the magistrate's order is not appealable. I do not agree. The fact of the matter is that appellant noted an appeal which is opposed by plaintiff. A decision that the order of the magistrate is not appealable means that plaintiff is successful. The fact that plaintiff may have been amenable to having the appeal heard on its merits, cannot, in my opinion, be described as blameworthy conduct justifying the Court to deprive plaintiff

of its costs. I am further of the view that this matter justified the employment of two counsel.

In the result, the following order is made:

1. The appeal is struck off the roll.
2. Appellant is ordered to pay first respondent's costs, including the costs consequent upon the employment of two counsel.

_____

FOURIE, J

DLODLO, J: I agree.

_____

DLODLO, J

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: A360/2006

DATE: 3 NOVEMBER 2006

In the matter between:

GASANT ABARDER Appellant

and

ASTRAL OPERATIONS LTD

t/a COUNTY FAIR First Respondent

GRANT TWIGG Second Respondent

ASSOCIATED TRADE UNION OF

SOUTH AFRICAN WORKERS Third Respondent

Advocate for Appellant	:	Adv.John C Butler
	:	Adv. S Cowen
Advocate for Respondents	:	Adv. S C Goddard
		Adv. C R Hinds
Attorney for Appellant	:	Mr. JF Louw of Lionel Murray Schwormstedt & Louw
Attorney for Respondents	:	Hofmeyr Herbstein & Gihwala Inc.
Date of hearing	:	3 November 2006
Date of Judgment	:	3 November 2006