IN THE HIGH COURT OF SOUTH AFRICA **REPORTABLE**

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case Number: A739/2010

In the matter between:

RAVFIN 1 (PTY) LTD Appellant

v

THE DUNES PARTNERSHIP Respondent

Court: P B Fourie J *et* J I Cloete AJ

Heard: 9 September 2011

Delivered: 14 September 2011

JUDGMENT

CLOETE AJ:

Introduction

[1] This is an appeal from the magistrate's court against an order on an issue which the parties agreed would be dealt with as a special plea, namely whether that court has jurisdiction to adjudicate the dispute between them. The court *a quo* found that it did not have jurisdiction.

[2] The appellant has also brought two applications for condonation, both of which are opposed by the respondent. These are considered below.

Background

[3] The appellant instituted action against the respondent in the magistrate's court for the district of Knysna in respect of various claims relating to the payment of estate agent's commission. The appellant alleged that the court *a quo* had jurisdiction to hear the matter on the following grounds:

3.1 the respondent chose a *domicilium citandi et executandi* within the court's area of jurisdiction; alternatively that

3.2 the cause of action arose within the court's area of jurisdiction; and further alternatively that

3.3 the respondent *'is doing business within the area of jurisdiction'* of that court.

[4] The respondent contended that the court *a quo* did not have jurisdiction on any of the aforementioned grounds, although as set out below this contention is belied in part by the respondent's own pleadings.

[5] The record reflects that the appellant did not seriously pursue its allegations that the court *a quo* had jurisdiction because the respondent had chosen a *domicilium citandi et executandi* within that area or that the cause of action arose within that area. The evidence and argument centred around whether the court *a quo* had jurisdiction on the basis that the respondent was carrying on business within that area.

[6] In paragraph 2 of the particulars of claim the respondent is cited as follows:

'The defendant is THE DUNES PARTNERSHIP, a firm conducting business at inter alia *Keurboomstrand, Plettenberg Bay...'* (emphasis supplied).

This allegation was admitted by the respondent.

[7] A similar allegation is found at paragraph 3.3 of the particulars of claim, namely that the respondent is *'doing business'* within the area of jurisdiction of that court. This allegation was denied by the respondent, notwithstanding its prior admission in respect of paragraph 2 of the particulars of claim.

[8] The latter admission was neither withdrawn nor was any application made to withdraw it. Accordingly when the matter was heard in the court *a quo* the presiding magistrate was confronted with a pleading in which the respondent simultaneously admitted and denied substantially the same averment. To exacerbate matters, the respondent in its counterclaim repeated the averment contained in paragraph 2 of the particulars of claim *'as if incorporated herein'* and proceeded to allege that *'The plaintiff has consented in writing to the jurisdiction of the above Honourable Court in writing* (sic) *on 5 November 2007'.*

[9] In his judgment the magistrate dealt with the contradictions in the respondent's pleadings as follows:

'Alhoewel die verweerder hierdie paragraaf (i.e. paragraph 2) *erken en herhaal in sy teeneis, dien daarop gelet te word dat hierdie paragraaf slegs beweer dat die verweerder onder andere besigheid in Plettenbergbaai bedryf. Paragraaf 3 van die besonderhede van vordering, wat handel met die vestiging van jurisdiksie word*

uitdruklik deur die verweerder in paragraaf 3 van sy pleit ontken. Hierdie argument van die eiser gaan derhalwe nie op nie.'

[10] The magistrate considered the evidence and concluded that because the respondent's permanent place of business was allegedly in Stellenbosch the court *a quo* lacked jurisdiction.

Applications for condonation

[11] Before dealing with the merits of the appeal it is necessary to consider the appellant's two applications for condonation. In what follows hereunder reference to the rules is to the uniform rules of this court.

[12] The first application relates to non-compliance with rule 50(4)(a) as to the period within which the appellant should have applied for a date for the hearing of the appeal, coupled with a prayer that the appeal be reinstated. (It should be mentioned that the latter portion of the relief sought was introduced during argument and was not opposed by the respondent. The amendment sought was thus granted.)

[13] The second application relates to non-compliance with rule 50(9) as to the time period within which the appellant should have filed its heads of argument. The impression that I gained when the matter was argued was that the respondent's opposition focussed on the application for condonation for non-compliance with rule 50(4), and that not much turned on the application for condonation for non-compliance with rule 50(9).

[14] The affidavits filed show the following:

14.1 The direct cause of the delay in failing to prosecute the appeal timeously was the negligence of the appellant's instructing attorneys. Judgment was delivered on 11 September 2009. Following upon delivery of reasons for judgment on 9 October 2009 and the appellant's notice of appeal on 6 November 2009 the appellant only applied to the registrar for a date for the hearing of the appeal on 2 December 2010, i.e. more than a year after the noting thereof.

14.2 This notwithstanding the appellant intended to prosecute the appeal throughout. This is evidenced by the steps taken by its attorneys in relation to transcription of the record and the events surrounding the postponement of the initial date allocated for the appeal in June 2011.

14.3 Despite the unacceptable delay, the respondent (albeit with express reservation of its rights) co-operated in arranging a new date for the appeal when it had to be postponed at the instance of the appellant in June 2011.

14.4 The reason why the appellant's heads of argument were filed 6 court days late was because counsel briefed for this purpose did not draft them timeously (despite his instructions to do so) and new counsel had to be instructed at a very late stage for this purpose.

[15] Rule 50(1) provides that an appeal to the High Court against the decision of a magistrate in a civil matter shall be prosecuted within 60 days after the noting of such appeal and unless so prosecuted it shall be deemed to have lapsed.

[16] Rule 50(4)(a) provides that the appellant shall within 40 days of noting the

appeal apply to the registrar in writing upon notice to the other party for the allocation of a date for the hearing of the appeal. Rule 50(4)(b) provides that in the absence of such an application the respondent may prior to the expiration of the 60 day period apply for a date for the hearing. It is common cause that the respondent did not take any such step.

[17] Our courts have refrained from attempting to formulate any comprehensive definition of what constitutes good or sufficient cause for the granting of condonation of procedural shortcomings in appeals. Any attempt to do so would merely hamper the exercise of a discretion which has purposely been made very extensive and which it is highly desirable not to abridge. The overriding consideration is that the matter rests in the judicial discretion of the court, to be exercised with regard to all the circumstances of the case: see Erasmus *Superior Court Practice* at B1-360.

[18] In *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as* Amicus Curiae*)* 2008 (2) SA 472 (CC) at 477A-B the Constitutional Court set out the principles upon which a court exercises its discretion in matters of this nature as follows:

'This court has held that the standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to grant condonation depends upon the facts and circumstances of each case. Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success.'

[19] Although courts are loath to penalise a blameless litigant on account of his

attorney's negligence, there is a limit beyond which a litigant cannot escape the result of his attorney's lack of diligence since to hold otherwise might have a disastrous effect upon the observance of the rules of court. The attorney after all is the representative whom the litigant has chosen for himself: see *Saloojee and Another NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 141C and *Reinecke v Incorporated General Insurances Limited* 1974 (2) SA 84 (A) at 92F.

[20] The respondent contends that the appellant's disregard for the time periods laid down is so gross that irrespective of the merits of the appeal this court should exercise its discretion against the appellant. In support of this contention the respondent relies on *Ferreira v Ntshingila* 1990 (4) SA 271 (A).

[21] In the *Ferreira* case not only were the appellant's attorneys responsible for an unexplained delay of almost a year in attending to the application for leave to appeal, there were further delays of some 7 months in filing the notice of appeal, the record of the proceedings was only lodged a year thereafter, and the required security a year after that. Accordingly, the entire process took almost 4 years. In addition the court commented that *'although there was gross negligence on the part of the defendant's attorney, the defendant himself was not entirely blameless. He knew, from the warnings given to him by his attorney, what the position was, but he appears to have shown scant regard to such warnings'* (at 281H).

[22] The appellant's counsel in that case (correctly) conceded that the appellant's attorney had been grossly negligent in the handling of the matter. He submitted however that the merits of the appeal were so strong that the condonation sought

should be granted.

[23] Having considered the particular facts of that case, the court found that *'As far as the prospects of success on appeal are concerned, the appeal in the present case would not appear to be without merit. However, where the non-observance of the Rules has been as flagrant and as gross as in the present case the application should not be granted, whatever the prospects of success might be'* (at 281J-282A).

[24] In the *Ferreira* case the cumulative effect of the appellant's transgressions in prosecuting his appeal were far more serious than is the case here. Although there is merit in the respondent's contention that the appellant has not provided an entirely satisfactory explanation for whatever delays have occurred, it appears clear that these delays were through no fault of the appellant itself. And it seems to me that this is not a case where an inordinate delay has induced a reasonable belief on the part of the respondent that the unsuccessful appellant has accepted the finality of the order of the court *a quo*. If that were the case, the respondent would no doubt have vigorously objected to co-operating in any way in the postponement of the hearing of the appeal in June 2011.

[25] In any event, the appellant's saving grace is its prospects of success on appeal. For reasons which follow it is my view that the magistrate was wrong in finding that the court *a quo* lacked jurisdiction to adjudicate the parties' dispute. To penalise the blameless appellant for the negligence of its attorneys will mean that the appellant is non-suited because its claims have by now prescribed. In the particular circumstances of this matter this would not be in the interests of justice. There can be no prejudice to

the respondent whose counterclaim against the appellant can still be pursued. Understandably the respondent may wish to obtain a tactical advantage, but that does not equate to prejudice.

[26] It is thus my view that both applications for condonation should be granted, but I intend to make an appropriate costs order against the appellant's instructing attorneys as a mark of this court's displeasure.

Merits of the appeal

[27] Jurisdictional requirements are set out in s 28 of the Magistrate's Court Act No 32 of 1944 (*'the Act'*).

[28] The relevant portions of s 28(1) of the Act are as follows:

'28 Jurisdiction in respect of persons

(1) Saving any other jurisdiction assigned to a court by this Act or by any other law, the persons in respect of whom the court shall, subject to subsection (1A), have jurisdiction shall be the following and no other:

(a) Any person who resides, carries on business or is employed within the district or regional division;

(b) Any partnership which has business premises situated or any member whereof resides within the district or regional division.

(emphasis supplied. S 28(1A) is not applicable in this case.)

[29] The evidence in the court *a quo* was that the respondent is a partnership. A partnership correctly falls under the category of *'persons'* for purposes of s28(1) of the Act, since a partnership is not a legal entity distinct from the individual partners who constitute it: see *inter alia Ex-TRTC United Workers Front and Others v Premier,*

Eastern Cape Province 2010 (2) SA 114 (ECB) at 120D-E. Furthermore the definition of *'person'* in s 2 of the Interpretation Act No 33 of 1957 includes *'any body of persons corporate or unincorporate'*. By parity of reasoning, it is thus open to a party to assert that a magistrate's court has jurisdiction over a partnership, either in terms of s 28(1)(a) or s 28(1)(b). In the present case the appellant relied on s 28(1)(b).

[30] In the court *a quo* neither of the parties dealt with the meaning of *'business premises'* in s 28(1)(b) and it appears that they accepted that if it was established that the respondent conducted business in that area the court *a quo* would have jurisdiction to adjudicate upon the dispute between them.

[31] A person may carry on business in more than one district at a time: see *Cape Town Municipality v Clarensville (Pty) Ltd* 1974 (2) SA 138 (C) at 151F-152B. Similarly, a partnership may carry on business in more than one district at a time. There is no requirement in s 28(1)(a) of the Act that jurisdiction is only founded where a person (or partnership) has its permanent place of business situated within the area of jurisdiction of the magistrate's court concerned, which seems to have been the finding of the court *a quo*.

[32] In the *Cape Town Municipality* case (*supra*) the court considered the meaning of *'business'* and *'carrying on'* a business. Baker J accepted at 148B-C that a business means *'almost anything which is an occupation, as distinguished from a pleasure – anything which is an occupation or duty which requires attention is a business'* (referring to *Rolls v Miller* (1884) 27 Ch.D. 71 (CA) at page 88). As to the meaning of *'carrying on'* a business the court found that a degree of continuity is necessary and

that normally an isolated transaction does not constitute carrying on a business (at 149A). Baker J concluded that *'Thus to constitute a business there must be either (i) an act of selling or supplying something plus an intention at that stage to continue selling or supplying as and when opportunity offers for as long as is thought desirable; or (ii) a series of acts of selling or supplying in circumstances from which this intention can be inferred.'* (This case was overruled on appeal, but not on this point.)

[33] That having been said, there is no general test as to whether a person carries on business in a particular district. The cases reflect that the operations of the person concerned must in each case be examined to see what the business (if any) is, and when that is known the place or district in which the business is carried on can be determined.

[34] It is accordingly necessary to examine the evidence of the only witness, Mr Calitz (who was called on behalf of the respondent), in order to determine whether the respondent indeed carried on business in that area of jurisdiction at the time when the appellant instituted action, i.e. when the summons commencing action was served on the respondent: see *Mills v Starwell Finance (Pty) Ltd* 1981 (3) SA 84 (N) at 89B-90H.

[35] In the present case, the evidence of Mr Calitz can be summarised as follows. The respondent is a partnership between the Jan Johannes Calitz Family Trust and the Deon van Wyk Family Trust. The respondent was formed for the specific purpose of establishing a residential and commercial development within the court *a quo*'s area of jurisdiction, consisting *inter alia* of 98 residential erven, a hotel and a restaurant. Messrs Calitz and Van Wyk who respectively represented the two trusts in partnership

travelled to the Plettenberg Bay area on a weekly basis over an extended period, spanning, it would appear, almost 4 years.

[36] Although some of the administration of the respondent took place in Stellenbosch through a separate entity, PMG Africa (Pty) Ltd (in which both trusts had an interest), the respondent's activities were not limited to the building work associated with the development. They also included the marketing activities which are a necessary prerequisite to a development of such a scale, the selling of the erven and the transfer of the erven into the names of the purchasers by attorneys appointed for this purpose in the same magisterial area. As the building work took place within the court *a quo*'s area of jurisdiction, it can also be accepted that prospective purchasers were introduced to their erven in that area in order for them to view same if not to negotiate the purchase thereof. And in addition the evidence of Mr Calitz was that the respondent was still the owner of the property under development and that the respondent was still actively marketing the development.

[37] Having regard to the relevant authorities and the above facts, it is difficult to reach a conclusion other than that at the time when the appellant instituted action against the respondent, the latter was conducting business within the area of jurisdiction of the court *a quo* as envisaged in s 28(1)(a) of the Act. The magistrate was thus wrong in reaching the conclusion which he did.

[38] I accordingly propose the following order:

1. **The appeal succeeds with costs, save (a) for the costs attendant upon the appellant's application for condonation in respect of its non-compliance with rule 50(4)(a), which costs shall be borne by the**

appellant's instructing attorneys Hugo & Ngwenya Incorporated; and (b) the costs attendant upon the appellant's application for condonation in terms of rule 50(9) which shall be borne by the appellant;

2. **The order made by the court *a quo* on 11 September 2009 is set aside and substituted with the following order:**
   a) **The defendant's special plea of non-jurisdiction is dismissed;**
   b) **The trial shall proceed on a date to be arranged by the parties with the Clerk of the Court;**
   c) **Costs shall be costs in the cause.**

J I CLOETE

FOURIE J: I agree. It is so ordered.

P B FOURIE