Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No's: A 565/2013 & A 351/2014

In the matter between*:*

MATTCON CONSTRUCTION CC Appellant

And

E K First Respondent

J K Second Respondent

Court: Griesel *et* Cloete JJ

Heard: Friday, 12 September 2014

Delivered: Tuesday, 16 September 2014

JUDGMENT

CLOETE J:

Introduction

[1] The issues in this appeal are the following. First, whether the order of the magistrate dismissing the appellant's application in terms of rule 24(7) of the magistrate's court rules (*'the first order'*) is appealable. Second, if the first order is appealable, whether the noting of an appeal against the first order automatically suspended the further proceedings in the court *a quo* pending determination of the appeal. Third, if the noting of the appeal did not automatically suspend the further proceedings, whether the trial court correctly refused the appellant's subsequent application for a postponement of the trial (*'the second order'*). Fourth, whether the magistrate's court was competent to hear and dismiss the respondents' application to set aside the notices of appeal filed by the appellant in respect of the first and/or second orders (*'the third order'*). Fifth, whether the appellant's appeal against the third order is properly before us.

Background

[2] The parties have been embroiled in this litigation since January 2012 when the appellant, which is a building business, issued summons against the respondents for payment of R39 429.63, being monies allegedly owing contractually for renovations and alterations to their home in Durbanville. The respondents defended the action, contending that the appellant had failed to conduct the building work correctly, and filed a counterclaim for damages allegedly suffered as a result in the sum of R160 078. Each of the parties appointed an expert. The report of the respondents' expert, Mr Mitchell, was annexed to their claim in

reconvention filed on 16 October 2012. It is a comprehensive report detailing the apparent defects in the building work as well as the cost of remedying the defects in accordance with a calculation made by a quantity surveyor. Although that portion of the report which contains the quantity surveyor's calculations is not included in the appeal record, it is not disputed by the appellant that such calculations were before the court *a quo* when the first order was made, nor is it disputed that the relevant expert notice and summary (which are also absent from the record) had been filed timeously by the respondents.

[3] The appellant's notice and summary of its expert, Mr Nolan, was filed on approximately 19 March 2013. The summary reflects that on 26 February 2013 Mr Nolan had inspected the building work and had also had recourse to the report of Mr Mitchell. It contains Mr Nolan's opinions and records that he calculated the cost of the remedial work to be in a total sum of R5000, excluding however minor repairs in the form of replacing some tiles, repairs to a few steps, and completion of work to a corner of the wall in the main bedroom. Mr Nolan's calculation of the cost of the last mentioned remedial work is not reflected in his expert summary.

[4] The trial was initially set down for hearing by agreement on 18, 19 and 20 June 2013. The magistrate was ill and unable to hear the matter and it was thus postponed by agreement to 17 and 18 September 2013. On 16 July 2013 the appellant's attorney telephonically requested the respondents' attorney to obtain permission from his clients to conduct a further inspection of the building work.

This request was refused by the respondents on 23 July 2013 on the basis that the premises where the building work had been conducted had already been made available to the appellant in February 2013 for this purpose, and that no reasons had been provided for the need for a further inspection.

[5] On 1 August 2013 the appellant served a notice on the respondents in terms of rule 24(6) of the magistrate's court rules, formally requiring them to again make the building work available for inspection. The reason provided in the notice was that a quantity surveyor had been appointed by the appellant to calculate the extent and cost of the work conducted by the appellant itself. No mention was made of any need to check and/or quantify the remedial work detailed in the report of the respondents' expert, Mr Mitchell. The respondents again refused, contending that the appellant was in possession of its own building plans and quotations, that its expert had in any event already inspected and assessed the cost of the remedial work required, and that accordingly the quantity surveyor appointed by the appellant already had all of the necessary information and documentation at his disposal in order to compile a report.

[6] On 20 August 2013 the appellant launched an application in terms of rule 24(7)(b) of the magistrate's court rules to compel the respondents to again afford it access to the building work. The application was in the form of a notice unaccompanied by any supporting or other affidavit. Again, the purpose of the inspection was described as being to enable the appellant's quantity surveyor to furnish a report on the extent and cost of the appellant's work only. The

respondents filed a lengthy affidavit in opposition thereto. The application was ultimately heard on 30 August 2013 and was dismissed with costs. This is the first order.

[7] On 3 September 2013 the appellant noted an appeal against the first order. On 17 September 2013, being the first day of trial, the appellant applied for the postponement of the trial on the ground that an appeal against the first order was pending. The respondents opposed the application, contending that the first order, being of an interlocutory nature only, was not appealable. The trial court agreed with the respondents and on 18 September 2013 dismissed the appellant's application for a postponement with costs. This is the second order. The appellant's attorney thereupon withdrew. The trial proceeded in the appellant's absence. The magistrate granted absolution against the appellant and granted default judgment in favour of the respondents for the amount claimed in their claim in reconvention, together with costs (*'the order on the merits'*). The appellant has not appealed the order on the merits.

[8] On 19 September 2013 the appellant noted an appeal against the second order. This was substituted by an amended notice of appeal dated 7 October 2013. Two grounds are advanced in such notice, namely that: (a) the trial court erred in finding that the first order, not being appealable, did not automatically suspend the further proceedings in the court *a quo*; and (b) the trial court erred in finding that the appellant had failed to advance sufficient grounds for a postponement of the trial. However in reality the two grounds are essentially one ground, namely

that the trial court should have refused to allow the trial to proceed in light of the appeal which had been noted against the first order. This much is apparent from the two attacks levelled in the amended notice of appeal itself, which are that: (a) the first order was final in effect and thus appealable; and (b) it is accepted practice (so it was contended) that the noting of an appeal automatically suspends further proceedings, and that for this reason the trial should have been postponed.

[9] On 16 October 2013 the respondents filed a notice of objection to the amended notice of appeal in the magistrate's court, contending that it constituted an irregular step in terms of rule 60A(1) of those rules. The objection was essentially that the second order was premised on the first order, which was not in itself appealable. The appellant did not withdraw its amended notice of appeal and the respondents launched an application in the magistrate's court for the setting aside of the notice, together with the setting aside of the two precursors to that notice, namely the notices of appeal dated 3 September 2013 and 19 September 2013 respectively. The application was opposed by the appellant and the magistrate, after hearing argument, granted an order in favour of the respondents on 22 May 2014. This is the third order. On 12 June 2014 the appellant noted an appeal against the third order. The record of proceedings in respect of the third order (bearing a separate appeal case number) has been placed before us by the appellant, apparently for hearing simultaneously with the appeal against the second order.

Whether the first order was appealable

[10] There have been a number of decisions over the years dealing with the difficult issue of whether an order, whether or not its technical term is *'interlocutory'*, is appealable. For the sake of brevity, I will only refer to certain judgments of the Supreme Court of Appeal.

[11] In *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 532H-533C the court, referring to various authorities, held that it is the *effect* of the order which is the predominant consideration. In general, an order will only be appealable if: (a) it has final effect and cannot later be altered or amended by the court of first instance; (b) it finally determines the parties' rights; and (c) it disposes of at least a substantial portion of the relief in the main proceedings. The court held further that:

> *'The fact that a decision may cause a party an inconvenience or place him at a disadvantage in the litigation which nothing but an appeal can correct, is not taken into account in determining its appealability (*South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd *1977 (3) SA 534 (A) at 550D-H). To illustrate: the exclusion of certain evidence may hamper a party in proving his case. That party may notionally be able to prove it by adducing other evidence. In that event an incorrect exclusion would not necessarily have an effect on the final result. In deciding upon the admissibility of evidence a court is not called upon to speculate upon or divine (with or without the assistance of the parties) the ultimate effect of its decision on the course of the litigation. Should it appear at the conclusion of the matter that an incorrect ruling amounted to an irregularity which may have had a material effect on its outcome, the Court of appeal may, in adjudicating the "merits", set aside the final judgment on that ground and, in an appropriate case, remit it back to the trial Court (*Coopers

(South Africa) (Pty) Ltd v Deutsche Gesellschaft Für Schädlingsbekämpfung MBH *1976 (3) SA 352 (A);* Caxton Ltd and Others v Reeva Forman (Pty) Ltd and Another *1990 (3) SA 547 (A) at 566C-D).'*

[12] In *Health Professions Council of South Africa and Another v Emergency Medical Supplies and Training CC t/a EMS* 2010 (6) SA 469 (SCA) at para [15] the court, referring to *Zweni*, remarked that:

> *'There have been many glosses on the principle since. In* Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service [1996 (3) SA 1 (A) 10F-11C] *Hefer JA said that the three attributes were not cast in stone nor exhaustive. And in* Jacobs and Others v Baumann NO and Others [2009 (5) SA 432 (SCA) para 9] *this court reiterated the principle laid down in* Zweni*, that in considering whether an order is final one must have regard to its effect. But the court also stated that even if an order does not have all three attributes, it may be appealable if it disposes of any issue or part of an issue. Conversely, however, even if an order does have all three attributes it may not be appealable, because the determination of an issue in isolation from others in dispute may be undesirable and lead to a costly and inefficient proliferation of hearings.'*

[13] In *Government of the Republic of South Africa and Others v Von Abo* 2011 (5) SA 262 (SCA) it was held at paras [17] – [18] that:

> *'[17]… It is fair to say that there is no checklist of requirements. Several considerations need to be weighed up, including whether the relief granted was final in its effect, definitive of the rights of the parties, disposed of a substantial portion of the relief claimed, aspects of convenience, the time at which the issue is considered, delay, expedience, prejudice, the avoidance of piecemeal appeals and the attainment of justice. The appealability of the order was not argued in this court, hence I am reluctant to decide the peremption point on that basis alone.*

> *[18] However, it matters not whether the first order was appealable or whether the appeal had been perempted. As a matter of logic the second order arose from the first order and has no independent existence separate from the first order. As the second order was given in consequence of the first order, and would not nor could have been given if it were not for the first order, it follows that if the first order is wrong in law, the second order is legally untenable. Whether the appellants were ill-advised not to appeal against the first order, but rather to try and comply with it, should not have the unacceptable result that this court is held to a mistake of law by one of the parties. I can put it no better than Jansen JA in* Paddock Motors (Pty) Ltd v Igesund *1976 (3) SA 16 (A) at 23F:*
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> > *"(I)t would create an intolerable position if a Court were to be precluded from giving the right decision on accepted facts, merely because a party failed to raise a legal point, as a result of an error of law on his part…" '*

[See also *Phillips v South African Reserve Bank and Others* 2012 (7) BCLR 732 (SCA) at paras [24] – [27].]

[14] The appellant's argument is that the first order was final in effect because it was severely prejudiced thereby. The prejudice claimed is that the order precluded it from adducing expert evidence which it considered to be important to its case. If it had proceeded with the trial without leading that evidence, it could not have been seen to complain if at a later stage it was unsuccessful on the merits. It was therefore effectively denied the right to a fair trial.

[15] However when regard is had to *Zweni*, the appellant's argument cannot be sustained. Its very complaint has been found by the Supreme Court of Appeal to have no bearing on whether or not an order is appealable. Although *Zweni* was

decided before the advent of our Constitution, none of the post Constitution decisions to which I have referred have taken issue with this long-established principle. It thus still stands.

[16] Furthermore, the appellant cannot have it both ways. When confronted in the magistrate's court by its failure to support its rule 24(7) application on affidavit, its response was that this was not required because it was nothing more than a simple interlocutory application which did not fall within the purview of rule 55(1) of the magistrate's court rules. So simple was it apparently that the appellant did not even deem it necessary to have complied with rule 55(4)(a) which stipulates that:

> *'Interlocutory and other applications incidental to pending proceedings must be brought on notice, supported by affidavits if facts need to be placed before the court, and set down with appropriate notice.'*

[17] The appellant adopted this stance in the knowledge that the application would be opposed by the respondents; that its own claim was one based on contract for payment of an agreed amount; and that the purpose of its application, as set forth in both the notice of motion as well as the notice which preceded it, was to have the building work inspected again in order to quantify the value of its own work. On its own version, the value of its work had been contractually agreed in a specific sum. In addition, the appellant already had an expert in the form of Mr Nolan who had quantified the cost of remedial work, save for minor work which Mr Nolan himself had deemed unnecessary to cost. In these

circumstances, the issue of prejudice does not arise in the consideration of whether the first order was appealable. This is the only argument advanced on behalf of the appellant in relation to the first order.

[18] What is in any event clear is that the first order was not final in effect. It was nothing more than an interlocutory order which could have been revisited on application by the appellant before, or even during, the trial if the request for a further inspection in terms of rule 24(7) had been properly motivated. That the appellant chose not to do so cannot be laid at the door of the respondents. It also cannot be said that the first order disposed of a substantial portion of the relief claimed. The appellant could nonetheless have proceeded with the trial and relied on the expert evidence of Mr Nolan who, on its own version, had both inspected the building work and had insight into the report of Mr Mitchell prior to conducting his inspection as far back as February 2013. Put differently, the magistrate's dismissal of the rule 24(7) application was nothing more than an interim order based on certain specific grounds which it was open to the appellant to have amended or amplified between the date of the first order, being 30 August 2013, and the first day of the trial, being 17 September 2013.

[19] Given my finding that the first order is not appealable, it is not necessary to consider whether the noting of the appeal against that order automatically suspended the further proceedings in the court *a quo* pending determination of the appeal.

Whether the second order was correctly granted

[20] It is also not necessary to dwell on the merits of the appeal against the second order, given that, as I have said, the real ground of appeal is that the trial court should have granted the postponement because of the appeal which had been noted against the first order. The first order was not appealable, and accordingly whether or not an appeal had been noted was irrelevant. On the appellant's own version therefore no grounds had been advanced which would have justified the granting of the postponement.

Whether the magistrate's court was competent to determine the rule 60A(1) application

[21] Rule 51(3) of the magistrate's court rules provides that:

> *'An appeal may be noted within 20 days after the date of a judgment appealed against or within 20 days after the registrar or clerk of the court has supplied a copy of the judgment in writing to the party applying therefor, whichever period shall be the longer.'*

[22] Rule 51(3) must be read together with rule 60(5) of the magistrate's court rules, which stipulates that:

> *'Any time limit prescribed by these rules,* ***except the period prescribed in rule 51(3) and (6)***, *may at any time, whether before or after the expiry of the period limited, be extended –*
>
> *(a) by the written consent of the opposite party; and*

(b) if such consent is refused, then by the court on application and on such terms as to costs and otherwise as it may deem fit.'

[Emphasis supplied. The reference to *'the court'* is clearly a reference to the magistrate's court.]

[23] The respondents delivered their notice in terms of rule 60A(1) on 16 October 2013. The application itself was launched on 13 November 2013. Rule 60A(2)(c) stipulates that an application of this nature must be brought within 15 days of delivery of the notice. The 15 day period expired on 6 November 2013, and, as I have said, the application was only launched on 13 November 2013.

[24] Although the respondents sought condonation for their non-compliance with the time limits prescribed by the magistrate's court rules in respect of the appellant's notices of appeal dated 3 September 2013 and 19 September 2013, they did not seek condonation in respect of their failure to timeously launch the application to set aside the appellant's amended notice of appeal dated 7 October 2013.

[25] It is clear from a reading of rule 51(3) together with rule 60(5) that the magistrate's court has no power to extend the time limit for the noting of an appeal. The question which thus arises is whether the magistrate's court has the power to set aside a notice in which an appeal has been timeously (but erroneously) noted.

[26] Section 84 of the Magistrate's Court Act 32 of 1944 (as amended) provides that:

> *'Every party so appealing shall do so within the period and in the manner prescribed by the rules; but* ***the court of appeal*** *may in any case extend such period.'*
>
> [Emphasis supplied.]

[27] In *Cloete Bros (Pty) Ltd v Harding* 1954 (3) SA 565 (O) at 566G the court, referring to *Parker, Wood & Co v Bradman* 1925 TPD 640, held that the word *'appealing'* in s 84 refers not only to the noting of an appeal, but also to the prosecution thereof. A *'court of appeal'* is defined in s 1 of the Magistrate's Court Act as meaning the High Court to which an appeal lies from the magistrate's court.

[28] Accordingly, any steps taken in respect of the prosecution of an appeal after it has been noted in the magistrate's court are governed, not by the magistrate's court which is a creature of statute, but by the High Court.

[29] Section 173 of the Constitution provides *inter alia* that the Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process. The magistrate's court is not included in s 173.

[30] Having regard to the aforegoing, one is compelled to conclude that, once an appeal has been noted in the magistrate's court, all further proceedings relating to that appeal fall within the exclusive jurisdiction of the High Court as the court of

appeal. Indeed, it would be anomalous if a magistrate's court, having no power to extend the period for the noting of an appeal against its own order, nonetheless retains the power to set aside the selfsame notice (of appeal) as an irregular step. In addition, the magistrate's court has no power to determine whether or not an appeal may be noted against any of its orders. The noting of an appeal in the magistrate's court is an automatic right afforded to a litigant if an order of that court is indeed appealable.

[31] It thus follows that the magistrate's court was not competent to have entertained the respondents' application in terms of rule 60A(1), and the third order would thus fall to be set aside. Therefore, apart from the issue of whether the first order was appealable (which I have found it was not), as a court of appeal we indeed have jurisdiction to have entertained the appeal against the second order. It also follows that the appellant's appeal against the third order was unnecessary and it is therefore simply struck from the roll.

[32] It is common cause that the appeal against the first order was not prosecuted timeously. The appellant's belated application for condonation for the late prosecution of its appeal against the first order is so vague and unsatisfactory that it is not capable of being determined on any merits, and thus falls to be dismissed.

Costs

[33] The respondents have sought a punitive costs order against the appellant and his attorney. In the exercise of my discretion I am of the view that punitive costs are not warranted.

Conclusion

[34] In the result I propose the following order:

'1. The appeal under case number A 565/2013 is dismissed with costs, including the costs attendant upon the appellant's abortive application for condonation.

2. The appeal under case number A 351/2014 is struck from the roll.'

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J I CLOETE

GRIESEL J

I agree.

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B M GRIESEL