



Republic of South Africa
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 11108/2013

In the matter between:

JOHANNES GIDEON FRANCOIS VAN DER MERWE

First Appellant
(First Respondent in
court *a quo*)

LAMPAC CC t/a PACKAGING WORLD

Second Appellant
(Second Respondent in
court *a quo*)

v

ASTRAPAK LIMITED

First Respondent
(First Applicant in
court *a quo*)

ASTRAPAK MANUFACTURING HOLDINGS (PTY) LTD

t/a KNILAM SAFLITE PACKAGING

Second Respondent
(Second Applicant in
court *a quo*)

Court: Justice Ndita, Justice Le Grange *et* Justice Cloete

Heard: 14 March 2014

Delivered: 28 March 2014

JUDGMENT

CLOETE J:

Introduction:

- [1] This matter came before us as an automatic appeal in terms of s 18(4)(ii) of the Superior Courts Act 10 of 2013 (*‘the new Act’*) against an order granted by Davis J on 4 December 2013 (*‘the interim execution order’*), which put into effect his previous order of 28 October 2013 pending the finalisation of the appeal against the last-mentioned order. For the sake of convenience the parties will be referred to herein as they were in the court *a quo*.
- [2] The background is as follows. On 12 July 2013 the applicants launched an urgent application (*‘the initial application’*) to interdict and restrain the first respondent from being employed by the second respondent, or in any other similar capacity, in breach of a restraint of trade agreement for a period of 18 months from 5 December 2012. Similar relief was sought against the second respondent which had employed the first respondent.

- [3] The initial application was opposed. On 28 October 2013 Davis J granted the relief sought by the applicants together with an order that the first respondent bear the costs thereof.
- [4] On 11 November 2013 the respondents filed a notice of application for leave to appeal against the order. On 14 November 2013 the applicants launched an application in terms of rule 49(11) of the uniform rules of court (*'the counter-application'*) for the interim execution order.
- [5] Both the application for leave to appeal and counter-application were opposed, and were argued simultaneously before Davis J on 4 December 2013. He granted the respondents leave to appeal, but also granted the interim execution order. He further ordered that the costs of both applications would be costs in the appeal.
- [6] On 6 January 2014 the respondents noted an appeal to the full bench of this division against the interim execution order, purportedly in terms of s 18(4)(ii) of the new Act. The aforementioned subsection is a new provision which did not appear in the previous Supreme Court Act 59 of 1959 (*'the old Act'*).
- [7] The subsection provides that, where a court implements the operation of its order pending an appeal, the aggrieved party has an automatic right of appeal to the next highest court. It was as a consequence of the foregoing that the matter came before us.

The issues:

- [8] The question that arises is whether the respondents were entitled to rely upon s 18(4)(ii) in noting and prosecuting the appeal. Two issues arise from this question. The first is whether an appeal of this nature can be brought in proceedings which commenced on motion as opposed to by way of action. The second is what is meant by '*pending proceedings*' in s 52 of the new Act.

Applicability to appeals in respect of proceedings commenced on motion:

- [9] S 52 of the new Act provides that-

'52. Pending proceedings when Act commences

- (1) Subject to section 27, proceedings pending in any court at the commencement of this Act, must be continued and concluded as if this Act had not been passed.*
- (2) Proceedings must, for the purposes of this section, be deemed to be pending if, at the commencement of this Act, a summons had been issued but judgment had not been passed.*
- (3) Subsections (1) and (2) are also applicable, with the changes required by the context, in respect of proceedings pending on the date when a notice contemplated in section 50(2) comes into operation.'*

[S 27 and s 50(2) of the new Act are not relevant for present purposes.]

- [10] The new Act came into operation on 23 August 2013, that is, after the initial application had been instituted on 12 July 2013, but before Davis J had handed down judgment on 28 October 2013. Although s 52(2) refers to a '*summons*'

having been issued, and ‘*summons*’ is not defined in the new Act, it is my view that for the reasons that follow, it must have been the intention of the legislature that the aforementioned subsection would apply equally to proceedings instituted by way of motion.

[11] The relevant provisions of s 1 of the new Act are as follows:

1. Definitions

In this Act, unless the context otherwise indicates---

*“**appeal**” in Chapter 5, does not include an appeal in a matter regulated in terms of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), or in terms of any other criminal procedural law...*

*“**plaintiff**” includes any applicant or other party who seeks relief in civil proceedings;’*

[12] A “plaintiff” thus includes ‘*any applicant who seeks relief in civil proceedings*’. An applicant is a person or entity instituting proceedings by way of motion. Further, “appeal” is defined for purposes of chapter 5 of the new Act (which includes s 18) as excluding appeals governed by Act 51 of 1977 or any other criminal procedural law. It is uncertain how criminal appeals previously governed by the old Act are to be dealt with, given the repeal of the old Act in its entirety. This however is not relevant to the issues before us. The effect is that all other appeals are subject to s 18, and thus included are appeals which had their origin in motion proceedings.

[13] This interpretation is consistent with two of the established presumptions relating to the interpretation of statutes. The first is that statutes should be construed so

as not to sanction discrimination and inequality. The second is that where more than one interpretation of a provision is possible, the most just and equitable interpretation should be preferred: see *LAWSA* 2nd ed vol 25 part I at 321 para 334. In addition, and as held by the Supreme Court of Appeal in *Hoban v Absa Bank Ltd t/a United Bank and Others* 1999 (2) SA 1036 (SCA) at para [20]:

“Context” includes the entire enactment in which the word or words in contention appear...

As remarked by E Cameron in Joubert (ed) The Law of South Africa vol 27 at 207 para 229,

“... context does no more than reflect legislative meaning which in turn is capable of being expressed only through words in context”.

Meaning of ‘pending proceedings’:

[14] The phrase *‘pending proceedings’* is accorded a particular meaning in s 52 of the new Act. This is that in all cases where proceedings had been instituted but judgment had not yet been passed on the date of commencement of the new Act, such proceedings are deemed to be pending proceedings which must be continued and concluded in accordance with the old Act.

[15] The counter-application resulting in the interim execution order of 4 December 2013 followed from *‘pending proceedings’* as defined in terms of s 52(2). It is self-evident that the counter-application was only launched because of the respondent’s application for leave to appeal the order of 28 October 2013. If no such application for leave to appeal had been brought, the order of 28 October 2013 would not automatically have been suspended.

- [16] The respondents contend that the application for leave to appeal and counter-application constituted new proceedings which were thus not '*pending*' when the new Act came into effect. They rely on various authorities in support of their contention that s 18 of the new Act is thus applicable to this appeal. In my view, all are distinguishable from the present matter.
- [17] The first authority relied upon is *Vermaak and Others v Minister of Water and Environmental Affairs of the Republic of South Africa and Others* 2013 JDR 2088 (ECP). In that case the court was dealing with an application for leave to appeal launched on the date of commencement of the new Act, where the judgments which were sought to be appealed against had been delivered on 19 March 2013 and 1 August 2013 respectively, i.e. before the commencement thereof. There were thus no proceedings pending within the meaning of s 52 when the new Act came into operation, and the court was entitled to deal with the application for leave to appeal under the new Act.
- [18] The second authority relied upon is *South African Land Arrangements CC and Others v Nedbank Ltd* (A28/13) [2013] ZAWCHC 162 (29 October 2013). In that case leave to appeal was sought against an order of a full bench sitting as a court of appeal from a decision in the magistrate's court handed down prior to the commencement of the new Act. The full bench handed down judgment on 19 September 2013. The court found, in accordance with s 16(1)(b) thereof, that it had no jurisdiction to entertain an application for leave to appeal its order.

[19] The third authority relied upon is *Absa Bank Ltd v Mkhize and Another; Absa Bank Ltd v Chetty; Absa Bank Ltd v Mlipha* (716/12) [2013] ZASCA 139. In that case judgment in the court *a quo* was delivered on 6 July 2012. The appeal to the Supreme Court of Appeal was heard on 22 August 2013, the day before the new Act came into operation. The majority of the court did not specifically deal with this aspect, but the minority held in para [23] at fn [15] that it was bound by the provisions of the old Act, as the appeal proceedings were pending at the time that the new Act came into operation. From this it may be gleaned that it was the view of the minority that proceedings, for purposes of s 52 of the new Act, are deemed to be pending until finalised or concluded on appeal.

[20] In *Minister of Health and Others v Treatment Action Campaign and Others (No. 1)* 2002 (5) SA 703 (CC) the Constitutional Court dealt with an application for leave to appeal against an interim execution order pending an appeal. At para [11] the court held that:

‘Moreover, as has been indicated above, an order to execute pending an appeal is an interlocutory order. As such, it is an order which may be varied by the court which granted it in the light of changed circumstances. To the extent, therefore, that a litigant considers that new circumstances have arisen which would impact upon the court’s decision to order execution pending appeal, the litigant may approach that court once again to seek a variation or, where appropriate, clarification of the order.’

[21] In the *Treatment Action Campaign* case the court was obviously not dealing with the new Act, and in particular, s 18 as read with s 52 thereof. However, the quoted portion of the judgment highlights the nature of an order to execute

pending appeal, namely that it is an interlocutory order, albeit that it is not one pending judgment of a court of first instance but rather one pending an appeal.

- [22] Herbstein and Van Winsen: *The Civil Practice of the High Courts of South Africa* 5th ed vol 2 at 1204 define an interlocutory order as:

‘an order granted by a court at an intermediate stage in the course of litigation, settling or giving directions with regard to some preliminary or procedural question that has arisen in the dispute between the parties.’

- [23] In *Pretoria City Council v Meerlust Investments (Pty) Ltd* 1962 (1) SA 321 (AD) the court was called upon to interpret the meaning of the words *‘to proceed to the final end and determination thereof’* contained in a resolution authorising an attorney to represent one of the parties. The court held at 326E-G that the attorney had been authorised to note an appeal but that a further mandate was required for the appeal to be prosecuted in the higher court. It must immediately be pointed out however that the court was dealing with the position which previously pertained, namely when attorneys could only institute and finalise actions or applications on behalf of their clients when the client had provided a power of attorney to that effect, and it was in that context that the court held as it did.

- [24] In *F. O. Kollberg (Pty) Ltd v Atkinson’s Motors Ltd* 1970 (1) SA 660 (CPD) the court, in considering the meaning of a *‘final judgment’* for purposes of rule 8(11) of the uniform rules of court held at 662F-H that:

'I do not think that the expression "final judgment" by itself excludes the possibility of rescission or variation. Judgments which might appropriately be called final in a particular context may nevertheless be subject to appeal, review or rescission under the common law or under the Rules of Court. In my view the exact effect of the adjective "final" when applied to a judgment must in all cases be determined in its context in accordance with ordinary principles of construction before any conclusion could be reached as to the applicability of a provision such as Rule of Court 27.'

- [25] A further indication that proceedings are not necessarily concluded upon the handing down of a judgment by a court of first instance is to be found in *Els v Weideman* 2011 (2) SA 126 (SCA) at para [34] where the court held that:

'[34] I do not agree that, because contempt proceedings are a continuation of an already instituted proceeding or "no more than a step in the execution of a judgment" (James v Lunden), the judgment must be enforced in the court which granted the original order. When a party leaves a High Court with an order in his favour (not obtained ex parte) those proceedings have been effectually completed (subject to appeal or, in the case of an interim order, its confirmation).'

(my emphasis)

- [26] Having regard to these authorities as well as the definition of '*pending proceedings*' in s 52, I am compelled to conclude that the interim execution order formed a continuation of proceedings pending for purposes of the applicability or otherwise of the new Act. As such any appeal proceedings arising therefrom fell to be concluded '*as if [the new] Act had not been passed*'.

Conclusion:

[27] It is for these reasons that I am of the view that the respondents' appeal is not properly before this court.

[28] In the result the following order is made:

The appeal is struck from the roll with costs.

We concur.

J I CLOETE

Judge of the High Court

T C NDITA

Judge of the High Court

A LE GRANGE

Judge of the High Court