THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 701/11
Reportable

In the matter between:

KHAYAKHULU NGQULA **APPELLANT**

and

SOUTH AFRICAN AIRWAYS (PTY) LIMITED **RESPONDENT**

Neutral citation: *Ngqula v South African Airways* (701/11) [2012] ZASCA 120 (19 September 2012)

Coram: HEHER, PONNAN AND WALLIS JJA

Heard: 10 September 2012

Delivered: 19 September 2012

Updated:

Summary: Practice – removal of proceedings – Interim Rationalisation of High Courts Act 41 of 2002, s 3 – non-appealability of order authorising removal – such order simple interlocutory order.

ORDER

On appeal from: South Gauteng High Court (Johannesburg) (Cassim AJ sitting as court of first instance):

1. The appeal is struck off the roll.
2. The appellant is to pay the costs including the costs of employing two counsel.

JUDGMENT

HEHER JA (PONNAN AND WALLIS JJA concurring):

[1] This purports to be an appeal against an order made by Cassim AJ in the South Gauteng High Court ('the SGHC'), acting in terms of s 3 of the Interim Rationalisation of the Jurisdiction of the High Courts Act 41 of 2001, which provides:

'(1) If any civil proceedings have been instituted in any High Court, and it appears to the Court concerned that such proceedings-

(a) should have been instituted in another High Court; or

(b) would be more conveniently or more appropriately heard or determined in another High Court,

the Court may, upon application by any part thereto and after hearing all other parties thereto, order such proceedings to be removed to that other High Court.

(2) An order for removal under subsection (1) must be transmitted to the registrar of the High Court to which the removal is ordered, and upon receipt of such order that Court may hear and determine the proceedings in question.'

[2] On the application of the present respondent, in the face of opposition from the appellant, the learned judge authorised the removal of the civil trial proceedings instituted by the respondent against the appellant in the SGHC to the North Gauteng High Court ('the NGHC') and ordered that the costs of the application be costs in the trial.

[3] When the matter was called in this Court we invited appellant's counsel to address us on the appealability of the order. For the reasons that follow we are satisfied that the order is not appealable and that the appeal should therefore be struck off the roll.

The background to the application

[4] The appellant was employed by the respondent as a director and its chief executive officer. The respondent issued two summonses against the appellant. In case no 27955/2010 it claimed payment of R26 581 794.77 arising out of alleged breaches of fiduciary duties deriving from his contract of service. In case no 30920/2010 it sued for payment of US $ 3 400 000 arising from a sponsorship agreement with one Cabrera, an Argentinian golfer, an amount which the appellant allegedly had no authority to spend, and a further R229 170 in unauthorised disbursements for which the respondent sought to hold the appellant liable.

[5] The appellant filed an exception to the first claim on the ground that the SGHC lacked jurisdiction. In the second case the same defence was raised by way of special plea. In both cases the alleged ouster of jurisdiction is founded in clause 25 of the appellant's service contract which reads:

'This agreement will be interpreted and applied in accordance with the laws of the Republic of South Africa. The parties irrevocably consent and submit solely to the jurisdiction of the High Court of the Republic of South Africa (Transvaal Provincial Division), or any successor thereto for the purpose of enforcing any of their rights in terms of this Agreement.'

The appellant sought dismissal of the respondent's claims on the basis that the clause vested the NGHC with exclusive jurisdiction to enforce the rights upon which the respondent relied.

[6] Before the exception and plea could be adjudicated, the respondent brought an application for removal of the actions to the NGHC under s 3(1)(b) of the Act. It did not concede that the clause operated as an ouster of the jurisdiction of the SGHC. Its approach, as stated in its founding affidavit was that 'it is . . . convenient and more appropriate that the proceedings be transferred to the [NGHC], in order to dispense with

the dilatory objection which will delay the determination of the real and main issues between the parties'.

[7] In its application the respondent put forward a number of reasons for the contention that clause 25 does not oust the jurisdiction of the SGHC. It likewise enunciated various factors said to support its reliance on sub para (b).

[8] The appellant opposed the removal. His stance was purely dilatory and tactical because the foundation of his objection was that the NGHC was the only court which could properly try the dispute on the merits.

[9] Of relevance to the argument of appellant's counsel in the appeal are the following statements made by the appellant in his answering affidavit:

'14. Fourthly, and in so far as the applicant concedes that it made a mistake in instituting the proceedings in the wrong Court, then the respondent cannot be deprived of the legitimate defence of prescription which has arisen, as a matter of law, due to that mistake. The Court has no discretion to reverse the application of the legal rule of prescription.

15. In so far as the Court admittedly does have the discretion to transfer proceedings, that discretion may not properly be exercised so as to prejudice a innocent party, such as the respondent.'

and

'I deny these allegations and more specially deny that I will suffer no prejudice should the proceedings be transferred, as I will have been deprived of a perfectly legitimate defence, which is dispositive of the entire action due to the applicant's unilateral mistake in interpreting its self-drafted and binding agreement.'

[10] The court a quo agreed with the respondent. The learned judge did not find it necessary to decide on the effect of clause 25, and so there was no decision that the SGHC did not in fact possess jurisdiction. The appellant's heads of argument suggest that such a decision was necessary because, if subpara (a) was applicable, resort could not be had to subpara (b). But this is untenable as each subparagraph provides an independent ground of removal.

Appealability

[11] With that introduction I revert to the question of whether an appeal against an order removing proceedings under s 3 can properly be entertained by this Court.

[12] The principles upon which appealability must be tested were, as is well-known, summarised in *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 531H-533F, subject to a certain degree of flexibility in particular cases: *Health Professions Council of South Africa v Emergency Medical Supplies and Training CC t/a EMS* 2010 (6) SA 457 (SCA) at para 15. For present purposes it will be sufficient to direct attention only to certain aspects that Harms JA identified as cardinal in *Zweni*.

[13] The first is the emphasis on whether an appeal will lead 'to a more expeditious and cost effective determination of the main dispute between the parties, and, as such will contribute to its final solution' (at 531I-532B). In direct opposition to this principle, far from directing his energies to resolving the main dispute – the alleged breach of fiduciary duties – the appellant employs the appeal in an attempt to avoid a determination of the merits by raising a defence of prescription to the claim if and when it is instituted in the NGHC.

[14] The second is the attention that must be paid to the effect rather than the form of an order in weighing its appealability. In the court a quo the order made was a practical pre-trial direction intended to overcome a technical objection – whether a good or bad objection matters not – and thereby to assist the parties to come to terms with the real dispute. Its predominant effect was as a procedural mechanism incidental and preparatory to that dispute. That being so, then it, seems to me, that the order properly falls into the category of 'simple interlocutory order' (*Zweni* at 532G-H).

[15] If, as *Zweni* held (at 532J), finality in effect is a necessary characteristic of an appealable order, an order for removal fails to make the grade. A procedural provision (such as s 3(1)) designed to bring the parties before a court capable of making a final pronouncement, carries the main dispute no further and provides no relief bearing on its determination. Although the order may not be susceptible of alteration by either the

referring court or the court to which the trial is referred, it has no final effect on the proceedings or on the rights of the parties – the court which will hear the matter simply becomes burdened with the obligation to try the dispute vice the referring court.

[16] The order of the referring court does not dispose of any portion of the relief claimed in the main proceedings (*Zweni* at 533A). Counsel for the appellant disputed this. The appellant intended to plead prescription to the claim (a 'spes', counsel conceded, and not a realised defence). Thus, counsel argued, the order is destructive of the appellant's rights and in that way finally disposes of a material defence to the action.

[17] I think the last-mentioned submission is fallacious. The purpose of s 3(1)(a) of the Act is to empower a court that does not have jurisdiction to remove proceedings to a court which will have jurisdiction. Before the Act came into being that was not possible if the SGHC did not have jurisdiction to entertain the main dispute when the summons was issued, cf *Road Accident Fund v Rampukar*; *Road Accident Fund v Gumede* 2008 (2) SA 534 (SCA) at 538I-539A.

[18] As such a removal is now permitted, it may follow that a party that is deprived of its right to object to the court's jurisdiction in consequence of the case being transferred to a court having jurisdiction, cannot complain of either the loss of its plea to the jurisdiction or the loss of any advantage that would otherwise flow from that plea being upheld, such as the acquisition of a defence of prescription if the plaintiff instituted action afresh. So viewed the legislation provides a means for overcoming challenges to the jurisdiction of the different high courts by treating such challenges as procedural in character. However, I do not rule out the possibility that, for the purposes of prescription, the institution of proceedings in a court not possessing jurisdiction may be regarded as ineffective to interrupt prescription. In such a case the transfer may properly be treated as if it were the commencement of a fresh action constituting an effective interruption. It is unnecessary to decide which, if either, is the correct approach. I raise the alternatives to illustrate that a party must take the law (and its consequences) as it finds them rather than rely on the consequences of the law that was.

[19] A second consideration is this: prescription must be tested if and when it is raised in a pleading. That has not happened. The court at the stage of a removal application should not be asked to undertake a hypothetical exercise of predicting prejudice, and to that end shut the applicant for removal out of procedural relief that is obviously both convenient and appropriate (subpara (b)) and, in addition, fulfils the purpose for which the statute is designed (subparas (a) and (b)), (the more so where removal accords with the pleaded defence on the contract, as here).

[20] For these reasons I conclude that a removal order under s 3 of the Act has none of the characteristics of an appealable order.

[21] Counsel for the appellant submitted that the appellant should not be mulcted in costs. The question of appealability, he argued, was raised by the court and not the opposing party. I do not agree. The appellant pursued an appeal without legal foundation for doing so and purely for the purpose of achieving a technical advantage in the litigation. Even if the respondent had not opposed the appeal it could not have been upheld. The respondent, on the other hand, was entitled to come prepared to defend itself on the merits of the appeal.

[22] That the losing party should bear the costs is in accord with a long history of similar approaches to costs orders when an appeal court itself raises the question of appealability: *Western Johannesburg Rent Board and Another v Ursula Mansions (Pty) Ltd* 1948 (3) SA 353(A); *Charugo Development Co (Pty) Ltd v Maree NO* 1973 (3) SA 759 (A) at 764G-H; *Wellington Court Shareblock v Johannesburg City Council*; *Agar Properties (Pty) Ltd v Johannesburg City Council* 1995 (3) SA 827 (A) at 835F-H. Counsel for the respondent apparently discussed the question of appealability with their attorney at the time of the application for leave to appeal and their considered judgment was that the objection would not succeed. I do not think that counsel should be criticised for not advising the court a quo of their reservations, as happened in *Kett v Afro-Adventures (Pty) Ltd* 1997 (1) SA 62 (A) at 67C-D.

[23] The following order is made:

1. The appeal is struck off the roll.

2. The appellant is to pay the costs including the costs of employing two counsel.

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J A HEHER
JUDGE OF APPEAL

APPEARANCES

APPELLANT:	G Farber SC (with him D C Mpofu)
	Billy Gundelfinger, Johannesburg
	McIntyre & Van der Post, Bloemfontein
RESPONDENT:	I V Maleka SC (with him T J B Bokaba SC)
	Edward Nathan Sonnenberg Inc, Johannesburg
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