THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 200/2016

In the matter between:

CATHERINE CLARIS CILLIERS NO	**FIRST APPELLANT**
CATHERINE CLARIS CILLIERS	**SECOND APPELLANT**
DELIA DU TOIT NO	**THIRD APPELLANT**

and

EDWARD ELLIS	**FIRST RESPONDENT**
LISA ELLIS	**SECOND RESPONDENT**

Neutral citation: *Cilliers & others v Ellis & another* (200/2016) [2017] ZASCA 13 (17 March 2017)

Coram: Ponnan, Willis and Zondi JJA and Fourie and Nicholls AJJA

Heard: 7 March 2017

Delivered: 17 March 2017

Summary: Appeal : non-appealability of order : appellants not having *locus standi* to pursue the appeal : appeal dismissed.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Blommaert AJ sitting as court of first instance):

The appeal is dismissed with costs, which costs are to be borne, jointly and severally, by the deceased estates of Mr J R Cilliers and Mrs C C Cilliers.

JUDGMENT

Fourie AJA (Ponnan, Willis and Zondi JJA and Nicholls AJA concurring):

[1] In this appeal the appellants were confronted with two significant obstacles, namely whether: (a) the order appealed against is appealable; and (b) they have the necessary *locus standi* to pursue the appeal.

[2] The appeal, with the leave of the court a quo, is against the following order made by Blommaert AJ in the Western Cape Division of the High Court, Cape Town:

'79.1 Plaintiffs succeeds (*sic*) on the merits for such relief as he (*sic*) can prove.

(subject to paragraph 78 above).'

Paragraph 78 of the judgment reads thus:

'The issue of the remedies sought by plaintiff and the possible bar thereto as a result of plaintiff's earlier election of restitution in the urgent application, is also left over for later determination as belonging in my view more appropriately to the quantum issue.'

[3] Prior to the hearing of the appeal this court directed the parties, if the appeal were to be persisted in, to address the following issue:

'Can it be said that the above order is final in effect or definitive of the rights of the parties or that it disposes of any portion of the relief claimed and is thus appealable? Even if the order is indeed appealable, given that the proceedings are unterminated in the court a quo, will entertaining an appeal at this stage not conduce (or at least potentially conduce) to a proliferation of piecemeal appeals?'

The appellants persisted in the appeal and the parties filed supplementary heads of argument in response to address the query.

[4] In order to understand the context in which the order was made, it is necessary to briefly summarise the history of the litigation between the parties:
It commenced with the sale of a timber dwelling (the property) situated in Knysna, to the respondents, Mr and Mrs Ellis. The property was co-owned by Mr and Mrs Cilliers, but the former had passed away prior to the sale of the property. Mrs Cilliers and a local attorney, one Ms Delia du Toit (Du Toit), had been appointed as the co-executors of the estate of the late Mr Cilliers. Mrs Cilliers signed the deed of sale in her personal and representative capacity, while Du Toit signed the agreement of purchase and sale in her representative capacity. The respondents duly paid the agreed purchase price of R1.6 million and the property was registered in their joint names on 24 January 2011.

[5] Soon after taking occupation of the property, the respondents embarked upon extensive renovations during the course of which they allegedly discovered that the property suffered from material latent defects, which had not been disclosed to them. In fact, they contended that these defects had knowingly been concealed and that the sellers (in particular Mrs Cilliers) had fraudulently failed to apprise them of the defects. Therefore the respondents, after seeking legal and other expert advice, launched urgent proceedings as applicants in the court a quo seeking the following relief:

(a) That the sale of the property be cancelled.

(b) That, upon the restoration of the property, the purchase price of R1.6 million be repaid to the respondents.

[6] The respondents cited Mrs Cilliers in her representative and personal capacity as the first and second respondent respectively. In her answering affidavit in opposition to the application, Mrs Cilliers, inter alia, raised a defence of non-joinder, by virtue of the respondents' failure to join Du Toit, the co-executrix of the estate of the late Mr Cilliers, as a party to the application. However, in their replying affidavit the respondents attached a letter from Du Toit in which she consented to her joinder, whilst indicating that she would not oppose the application and that she abided the decision of the court.

[7] The application was initially heard by Louw J, who referred the matter to trial and ordered the filing of further pleadings. The respondents (as plaintiffs) filed a declaration to which Mrs Cilliers in her personal and representative capacity filed a plea. Du Toit, who was cited as the third defendant in the declaration, did not defend the action, filed no plea and, in accordance with her earlier indication, abided the decision of the court a quo.

[8] In their declaration the respondents did not (as originally in their application) limit the relief sought to the cancellation of the sale and restoration of the property and the purchase price, but rather applied a blunderbuss approach claiming the following:

'A. Cancellation of the agreement; and/or

B. Damages in the amount of R472 573,58 [representing transfer costs, building costs, expert reports and legal fees, rental for alternative accommodation and garden services]; and/or

C. Restitution by the parties, respectively, of the property and of the purchase price; alternatively

D. Reduction of the purchase price in the amount of R1 472 573,58 [representing R1 million payable for the structural correction of the house on the property and the aforesaid amount of R472 573,58] or in such amount as the court may determine.'

[9] In her plea, Mrs Cilliers (in her representative and personal capacity), inter alia, raised the defence that the respondents, having initially in their notice of motion elected to cancel the sale agreement and to claim restitution, were legally bound by the election and precluded from seeking alternative relief consequent upon the enforcement of the agreement. Differently put, it was contended that the respondents were legally precluded from approbating and reprobating.

[10] In the event, the matter proceeded to trial before Blommaert AJ. On the first day of the hearing, during the opening address, counsel for Mrs Cilliers recorded that the respondents should at that stage indicate whether they persisted with the alternative relief sought in their declaration, and, if so, a point of law should be argued as to whether the respondents could change their election or whether they were bound by their initial election and could only claim cancellation of the

agreement and restitution. The trial judge shared this view as appears from his following comment:

'. . . but I think we do need to know whether it is restitution or whether it is a reduction in purchase price or damages or whatever you want to.'

[11] Counsel for the respondents did not then respond to the trial judge's request, but during the morning of the second day of the trial he informed the court that he had taken instructions from the respondents and would 'during the course of this morning . . . put on record what it is that we're going for'. Counsel, however, did not honour this undertaking and the trial was, unfortunately, allowed to continue for another five days without any clarity being provided as to what specific relief was sought by the respondents. I should add that, during her cross-examination, the second respondent conceded that, by virtue of the extensive renovations done to the property, the respondents were no longer in a position to restore the property. She confirmed that this was a deliberate choice that they had made.

[12] A further unfortunate development in the trial was referred to by the trial judge at para 27 of the judgment, as follows:

'Fairly late in the proceedings, the parties sought an order separating the issues of merit of the dispute from the quantum. This request was granted by myself.'

There is no such order in the record of appeal, nor could we find any reference in the transcript of the proceedings indicating that any separation order was made in terms of Uniform rule 33(4). We have, however, been informed by counsel for the parties, both of whom appeared at the trial, that such an order was made, albeit in an informal manner.

[13] In *Absa Bank Ltd v Bernert* 2011 (3) SA 74 (SCA); [2010] ZASCA 36 para 21, this court stressed the importance of the proper application of rule 33(4) by a trial court, as follows:

'It is imperative at the start of a trial that there should be clarity on the questions that the court is being called upon to answer. Where issues are to be separated Rule 33(4) requires the court to make an order to that effect. If for no reason but to clarify matters for itself a court that is asked to separate issues must necessarily apply its mind to whether it is indeed

convenient that they be separated, and if so, the questions to be determined must be expressed in its order with clarity and precision.'

In *Denel (Edms) Bpk v Vorster* 2004 (4) SA 481 (SCA) para 3, this court sounded a warning that:

'. . . where the trial court is satisfied that it is proper to make such an order – and, in all cases, it must be so satisfied before it does so – it is the duty of that court to ensure that the issues to be tried are clearly circumscribed in its order so as to avoid confusion.'

[14] In the present matter there was no attempt by the trial judge to circumscribe or at least identify the issues relating to the 'merits' and this failure no doubt contributed to the unclear order that was made at the conclusion of the hearing. As recorded above, the court a quo concluded that the respondents succeeded on the merits 'for such relief as he [they] can prove'. By incorporating paragraph 78 of the judgment in the order, the trial judge made it clear that the relief (if any) to which the respondents may be entitled, would only be determined at the subsequent hearing of 'the quantum issue'. I should add that the failure of the respondents to indicate what specific relief they would be seeking no doubt contributed to this order being made.

Appealability of the order

[15] It is trite that, generally speaking, a judgment or order is susceptible to appeal if it has three attributes, namely:

'[T]he decision must be final in effect and not susceptible of alteration by the court of first instance; second, it must be definitive of the rights of the parties; and it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.'[1]

[16] As emphasised in *Makaleng*, these three attributes are not necessarily exhaustive. Even where a decision does not bear all the attributes of a final order it may nevertheless be appealable if some other worthy considerations are evident, including that the appeal would lead to a just and reasonable prompt solution of the

[1] *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 532I-533B. See also *Jacobs & others v Baumann NO & others* 2009 (5) SA 432 (SCA); [2009] ZASCA 43 para 9; *International Trade Administration Commission v Scaw South Africa (Pty) Ltd* 2012 (4) SA 618 (CC); [2010] ZACC 6 para 49; *South African Broadcasting Corporation Society Ltd & others v Democratic Alliance & others* 2016 (2) SA 522 (SCA); [2015] ZASCA 156 para 63-65 and *FirstRand Bank Limited t/a First National Bank v Makaleng* [2016] ZASCA 169 para 15.

real issues between the parties.[2] Furthermore, the interests of justice may be a paramount consideration in deciding whether a judgment is appealable.[3]

[17] It is immediately apparent that the order of the court a quo does not possess any of the attributes articulated in *Zweni*. It is not final in effect, as the final word as to the relief to which the respondents may be entitled, has not yet been spoken. Such relief, if any, will, according to the order, only be determined at the subsequent quantum hearing. This means that the order declaring that the respondents are successful on the merits, is susceptible to alteration by the trial court. The order is also not definitive of the rights of the parties as it does not grant any conclusive and distinct relief. Apart from this, the order does not finally dispose of any relief claimed by the respondents.

[18] A further consideration to be borne in mind, is that the proceedings in the court below are unterminated. Therefore, the question arises whether the entertaining of an appeal at this stage would not offend against the jurisprudence of this court, that the piecemeal appellate disposal of the issues in litigation should be avoided – particularly where, as in this matter, the order of the court a quo does not dispose of even a portion of the relief claimed.[4] What has to be stressed is that the factual findings of the court a quo in its judgment did not, in themselves, dispose of any relief claimed by the respondents, but were, as held in *Searle* at 301F-G, 'merely steps along the way towards the final conclusion and consequent order'. They do not at this stage of the litigation have any final effect.

[19] It follows that, if this court were to entertain the appeal at this stage, it would not be able to finally dispose of the issues relating to the merits. Therefore, when the court a quo finally determines the merits of the matter, either party may again be entitled to appeal. As was held in *Searle* at 302C, that would be squarely in conflict with the basic approach which generally shuns piecemeal appeals.

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[2] See *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) at 10F-11C.
[3] *Philani-Ma-Afrika & others v Mailula & others* 2010 (2) SA 573 (SCA); [2009] ZASCA 115 para 20 and *Nova Property Group Holdings Ltd & others v Cobbett & another* 2016 (4) SA 317 (SCA); [2016] ZASCA 63 para 8.
[4] See *Guardian National Insurance Company Ltd v Searle NO* 1999 (3) SA 296 (SCA) at 301B-E.

[20] In these circumstances, the order of the court a quo lacks the attributes of an appealable order and, in any event, an appeal would not lead to a final determination of any of the real issues between the parties. Nor has it been demonstrated that the interests of justice demand that the order be considered to be appealable.

Standing of the Appellants

[21] Mrs Cilliers in her representative and personal capacity and Du Toit in her representative capacity, sought and were granted leave to appeal the order of the court a quo, as the first, second and third appellants, respectively.

[22] As recorded above, Du Toit had abided the judgment of the court a quo and one is perplexed by the fact that she was granted leave to appeal the order. The decision of Du Toit to abide the judgment clearly constituted a peremption of the appeal. In *Hlatshwayo v Mare and Deas* 1912 AD 242 at 253, Solomon JA put it as follows:

'. . . under our law, by acquiescence in a judgment the right to appeal from it is perempted. And when once the appeal has been perempted, there is an end of the matter; there is no going back from that position.'

In regard to the question what is meant by a party acquiescing in a judgment, the learned judge of appeal added the following at 253:

'In my opinion the effect of the authorities on this subject is to show that when once a party to an action has done an act from which the only reasonable inference that can be drawn by the other party is that he accepts and abides by the judgment, and so intimates that he has no intention of challenging it, he is taken to have acquiesced in it.'[5]

[23] The conduct of Du Toit in abiding the judgment of the court a quo; not filing a plea and not participating in the trial, constitutes clear evidence of acquiescence resulting insofar as she is concerned in a peremption of the appeal against the order. It follows that Du Toit as the co-executrix in the estate of the late Mr Cilliers, had no *locus standi* to participate in this appeal as the third appellant.

[5] See too *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A) at 600A*; Natal Rugby Union v Gould* 1999 (1) SA 432 (SCA) at 443E-G and *Fick v Walter & another* 2005 (1) SA 475 (C) at 480-482.

[24] The matter has been further complicated by the unfortunate passing of Mrs Cilliers after the conclusion of the trial, but before the hearing of the appeal. On 11 January 2017 notice was given in terms of Uniform rule 15 that Mrs Cilliers in her personal capacity as the second appellant was substituted in the appeal by the executrix of her deceased estate. However, there has been no substitution of Mrs Cilliers in her representative capacity as the first appellant. As stated by the authors D E van Loggerenberg and E Bertelsmann *Erasmus: Superior Court Practice* 2 ed vol 2 at D1-200, where an executor dies, the legal interest in the suit passes, not to his or her estate, but to his or her successor in office as executor. See also *Chapman v Rock* 1915 EDL 33 at 35. Therefore, the estate of the late Mr Cilliers is not represented in the appeal, as Du Toit has no *locus standi* and her co-executrix, Mrs Cilliers, has passed away with no substitution of her successor in office (if any) having taken place.

[25] This is not the end of the sad tale. As recorded above, notice of the substitution of Mrs Cilliers in her personal capacity as the second appellant by the executrix of her deceased estate, was given in terms of rule 15. In so doing, the first proviso to rule 15(2) was overlooked, which states that, save with the leave of the court granted on such terms as to it may seem meet, no such notice shall be given after the commencement of the hearing of any opposed matter. The leave of the court a quo, or the leave of this court, was not sought prior to the filing of this notice in terms of rule 15. One can imagine that in the adjudication of an application of this nature matters such as the solvency of the relevant deceased estate, the provision of security and the possible adjournment of the proceedings may be relevant. Be that as it may, absent an application to court for the substitution of the executrix of the deceased estate of Mrs Cilliers, the purported substitution is irregular and the executrix has no *locus standi* to participate in this appeal. It follows therefore that there is simply no appellant herein with the necessary *locus standi* to pursue the appeal.

Conclusion

[26] For all the above reasons there is no proper appeal before this court. The appeal accordingly falls to be dismissed.

[27] With regard to costs, the first to third appellants persisted with the appeal without heeding the timely warning of this court that the order may not have been appealable. In addition, no consideration was given to the absence of legal standing to participate in the appeal. The respondents have been put to the expense of opposing an abortive appeal. In the circumstances, the appellants, or more accurately the estates of Mr and Mrs Cilliers, are to bear the costs of the appeal.

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

The appeal is dismissed with costs, which costs are to be borne, jointly and severally, by the deceased estates of Mr J R Cilliers and Mrs C C Cilliers.

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P B Fourie

Acting Judge of Appeal

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