



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not reportable

Case No: 592/18

In the matter between:

CROCKERY GLADSTONE FARM

APPELLANT

and

RAINBOW FARMS (PTY) LTD

RESPONDENT

Neutral Citation: *Crockery Gladstone Farm v Rainbow Farms (Pty) Ltd*
(592/18) [2019] ZASCA 61 (20 May 2019)

Coram: Tshiqi, Mbha and Mathopo JJA and Davis and Weiner
AJJA

Heard: 20 May 2019

Delivered: 20 May 2019

Summary: Civil procedure – the grant of an application for rescission of judgment is not appealable – order of the Full court granting rescission order upheld.

ORDER

On appeal from: The Limpopo Division of the High Court, Polokwane (Makgoba JP with Kganyago JA and Sikhwari AJA) sitting as court of appeal):
The appeal is dismissed with costs.

JUDGMENT

Mathopo JA (Tshiqi and Mbha JJA and Davis and Weiner AJJA concurring):

[1] In this appeal counsel were, at the outset of the hearing, asked to address the court on the preliminary question whether the order of the Full Court, Limpopo Division of the High Court, Polokwane (Makgoba JP with Kganyago J and Sikhwari AJ concurring) is appealable or not.

[2] The issue arises against the backdrop of a default judgment granted by Phatudi J on 2 August 2016. The common cause facts are that on the date the default judgment was granted, the appellant and respondent were engaged in settlement negotiations. The respondent had served and filed its notice to oppose but held back the filing of the answering affidavit pending settlement negotiations. A day before the hearing the respondent's attorneys were advised by the appellant's attorneys that they were still awaiting their client's instructions. Regarding the appearance the next day, they were assured that

they should not worry, as this 'would be sorted out'. The appellant's attorneys did not revert to the respondent's attorneys. On 2 August 2016, the respondent's attorneys tried to contact the appellant's attorneys telephonically on several occasions and out of caution the respondent's attorneys briefed counsel to ask for a postponement as they were still awaiting the appellant's client's instructions on the offer. When the matter came before Phatudi J, he was not advised of the settlement discussions and he refused the application for a postponement and granted default judgment against the respondent. Counsel for respondent nonetheless informed the court that he had been informed that by agreement between the parties' respective attorneys, the matter was to be postponed. A subsequent application for rescission of the judgment before Muller J was dismissed with costs on the erroneous basis that Phatudi J's judgment was not a default judgment.

[3] On appeal to the Full Court, the order of Muller J was set aside and the respondent was given an opportunity to file the answering affidavit. In its well-reasoned judgment the Full Court correctly held that had the settlement negotiations been disclosed to the court of first instance (Phatudi J), he would not have granted the default judgment. In my view, once the Full Court made a finding that the material facts were not disclosed, then it follows that the judgment had been erroneously sought or granted. As counsel for the respondent submitted, it is not so much whether the agreement was purportedly terminated or not. That issue is still to be determined once the parties have filed the necessary papers.

[4] I now turn to the question whether the order of the Full Court is appealable or not. On the test articulated by this Court in *Zweni v The Minister of Law and Order* 1993 (1) SA 523 (A), the order is not appealable if it has the following attributes (a) not final in effect and is open to alteration by the court below; (b) not definitive of the rights of the parties; and (c) does not have the effect of disposing of a substantial portion of the relief claimed. See also *SA Informal Traders Forum v City of Johannesburg* 2014 (4) SA 971 (CC).

[5] In this matter the appellant's claim remained intact. Nothing has been decided about it. All that has happened, is that the respondent has been afforded an opportunity of answering it. The Full Court's order is interlocutory and does not cause the appellants any irreparable harm or preclude it from obtaining some relief in the future. It has no direct effect on the final issue relating to the purported termination of the agreement and neither does it dispose of any portion of the appellant's claim. It is accordingly not appealable and the appeal must be dismissed on this ground alone.

[6] It remains to consider whether the Full Court's order mulcting the appellant with the costs of the rescission application and the costs of appeal before it, is appealable. Courts should and ought not to decide issues of academic interest only. That much is trite. In *Radio Pretoria v Chairman, Independent Communications Authority of SA* 2005 (1) SA 47 (SCA) [also reported at [2004] 4 All SA 19 (SCA) – Ed], this Court expressed its disquiet about the proliferation of appeals that had no prospect of being heard on the

merits, as the order sought would have no practical effect. Section 16(2)(a)(i) provides that 'When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone'. The argument advanced by the appellant is that the judgment of the Full Court is predicated on wrong facts and legal principles, with the result that it exercised its discretion wrongly. The simple answer to this argument is that, in the light of the failure by the appellant's attorneys to revert to the respondent's attorneys, it was necessary for the respondent's attorneys to brief counsel to appear before Phatudi J and ask for a postponement. The respondent's attorney had to safeguard his client's interests. I find it astonishing that the appellant's attorneys failed to bring to their counsel's attention and the court, that the parties were still engaged in settlement negotiations and that the respondent's attorneys had enquired repeatedly whether they had received instructions or not.

[7] In my view, if counsel for the appellant had been appraised of the developments as an officer of court, I have my reservations that he would have proceeded with the matter on an unopposed basis and obtained default judgment against the respondent. If Phatudi J had been informed of the pending settlement negotiations, he would not have insisted on a substantive application for a postponement and granted default judgment. The respondent's attorneys were thus fully justified to approach Muller J to seek rescission of the judgment. The failure by the appellant's attorneys to furnish counsel with proper instructions must be deprecated. The Full Court exercised its discretion

properly. Absent any misdirection this Court cannot interfere with the proper exercise of that discretion. It follows that the costs order was correctly made.

[8] In the circumstances the following order is made:

The appeal is dismissed with costs.

R S Mathopo
Judge of Appeal

APPEARANCES:

For appellant: M E Manala
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Mahowa Incorporated, Polokwane
Phatshoane Henney Attorneys, Bloemfontein

For respondent: M B Pitman
Instructed by:
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