



THE SUPREME COURT OF

APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1274/2017

In the matter between:

DEPARTMENT: TRANSPORT, PROVINCE OF KWAZULU-NATAL APPELLANT

and

S RAMSARAN

FIRST RESPONDENT

J S NAIDOO

SECOND RESPONDENT

A S DE VILLIERS

THIRD RESPONDENT

R BUDHOO

FOURTH RESPONDENT

A M DIMBA

FIFTH RESPONDENT

M J MARSHALL

SIXTH RESPONDENT

V ANIRUDHRA

SEVENTH RESPONDENT

J JAGESSER

EIGHTH RESPONDENT

S P SOMI

NINTH RESPONDENT

Neutral citation: *Department: Transport, Province of KwaZulu-Natal v Ramsaran & others* (1274/2017) [2019] ZASCA 62 (23 May 2019)

Coram: Ponnann, Mathopo and Van Der Merwe JJA and Mokgohloa and Gorven AJJA

Heard: 2 May 2019

Delivered: 23 May 2019

Summary: Abandonment of judgment by respondents in terms of Uniform rule 41(2) – no tender of costs – appellant can recover costs by notice in terms of rule 41(1)(c) – costs of appeal – appellant only entitled to costs of appeal up to and including date of abandonment.

ORDER

On appeal from: KwaZulu-Natal Local Division of the High Court, Durban (Gyanda J sitting as court of first instance):

The appeal is dismissed with costs up to and including 6 August 2018 to be paid jointly and severally by the first, third, fourth, sixth and eighth respondents.

JUDGMENT

Ponnan JA (Mathopo and Van Der Merwe JJA and Mokgohloa and Gorven AJJA concurring):

[1] On 25 November 2014 a combined summons, which was signed by Lambert Attorneys Incorporated (Lambert Attorneys), a firm in private practice, issued out of the High Court, KwaZulu-Natal Local Division, Durban. The summons cited the appellant, the Department: Transport, Province of KwaZulu-Natal (the department), as the plaintiff and nine employees of the department as the defendants.¹ The particulars to the summons alleged that the defendants had been parties to a fraudulent scheme, thereby occasioning loss to the department in the total sum of R7 123 704.91. That loss was sought to be recovered by the department from the defendants in the action.²

[2] The summons was met on 3 March 2015 with a notice in terms of rule 7 of the Uniform Rules of Court, which read:

‘Kindly take notice that, having been advised of the provisions of item 12.7.2 of the Treasury Regulations 2005, promulgated in terms of the Public Finance Management Act 1 of 1999, it has come to the notice of the Defendants that the Plaintiff (even if the Plaintiff has been properly authorised to act as accounting officer as defined in Act 1 of 1999, which is not admitted), may not be authorised to instruct the attorneys acting in the matter, and accordingly that the attorneys may not be authorised to act in the matter. The Defendants accordingly, hereby notify the said attorneys that they are required to satisfy this Honourable Court that they are so authorised to act.

Take further notice that until such time as the attorneys have satisfied this Honourable Court that they are so authorised to act, they may no longer act on behalf of the Plaintiff and that proceedings

¹ The nine defendants are: S Ramsaran, JS Naidoo, AS De Villiers, R Budhoo, AM Dimba, MJ Marshall, V Anirudhra, J Jagesser and SP Somi.

² By notice dated 11 March 2015 the claim against the seventh and ninth defendants was withdrawn.

and judgment be accordingly postponed until such time as the attorneys satisfy the Court that they are authorised to act and have acted on behalf of the Plaintiff.'

[3] Not having received a response to the rule 7 notice, the first, third, fourth, sixth and eighth respondents (the respondents) applied on 22 June 2015 for an order:

'1. That the summons and action instituted under case number 13703/2014 be and is hereby set aside and declared a nullity.

2. That the costs of this application be borne:

i) by the Respondent, alternatively

ii) by the attorneys purporting to act for the Respondent in such event the costs to be borne *de bonis propriis*.'

[4] The department opposed the nullity application. On 4 December 2015 the court (per Gyanda J) issued the following order:

'The [department] is given 30 days from 4 December 2015 within which to file any amendment and/or affidavit rectifying or explaining the circumstances in which the Power of Attorney was granted and the instruction to prosecute the claim was issued'.

The respondents applied for leave to appeal the order of Gyanda J. The department took the view that the application for leave to appeal suspended the operation of the order and accordingly took no steps to comply with the order.

On 15 March 2016 the parties were advised by the court that the '30 days were counted from 4 December 2015'. On 29 March 2016, the department accordingly filed the further affidavits contemplated by the order of Gyanda J. Those affidavits, which were out of time, were not accompanied by an application for condonation. On 31 March 2016, when the matter next came before court, it was struck from the roll with the department being ordered to pay the costs of the hearing. Only then did the department apply for an order '[t]hat the 30-day period in paragraph 1 of the order handed down . . . on 4 December 2015 be extended to 76 days'.

[5] On 16 November 2016 the court delivered judgment in the nullity application. It stated that it was 'not disposed to granting the [department] condonation for the late filing of the affidavits'. It accordingly concluded:

'In these circumstances I grant an order in terms of paragraphs 1 and 2(1) of the notice of motion dated 4 June 2015. That is:

1. that the summons in the action instituted under case No. 13703/2014 be and is hereby set aside and declared a nullity;
2. that the costs of this application be borne by the respondent – that is, the plaintiff in the action.'

[6] The present appeal against that order is with the leave of Gyanda J. I entertain grave reservations as to whether: (a) even assuming that the department is not permitted in terms of the Treasury regulations 'to instruct attorneys to act in the matter or to take action by instituting proceedings independent of the state attorney' (as was asserted by the respondents in support of the nullity application) that, without more, would result in the nullity of the summons; and (b) such an order could issue absent the joinder of the State Attorney and relevant Ministers. However, it is not necessary for us to enter into those issues because during the pendency of the appeal, on 6 August 2018 the respondents' attorney served and filed a notice with the registrar of this court in terms of rule 41(2) of the Uniform Rules of Court abandoning the judgment of Gyanda J, 'save for the order of costs'.

[7] The department contends that the abandonment does not 'extinguish' the judgment of Gyanda J. That, however, is to misconceive the position. By abandoning the judgment, the respondents have removed the *lis* between the parties and conceded the relief that the department is entitled in law to seek from this court on appeal.³ We were nonetheless urged by counsel for the department to enter into the merits of the matter because, so the submission went, the reasoning of the court below remains extant. But, that is to approach the matter as if an appeal lies against the reasons for judgment. It

³ *Durban City Council v Kistan* 1972 (4) SA 465 (N) at 469H-470A; [1972] 4 All SA 465 (N) at 470-1.

does not.⁴ An appeal lies against the substantive order made by the court, which is the operative part of the judgment.⁵

[8] It was further contended that absent a tender for costs in the notice of abandonment the department had no other recourse but to persist in the appeal. Once again that is to misconceive the position. The abandonment was in terms of Uniform rule 41(2).⁶ According to that rule, read with rule 41(1)(c), if a notice of abandonment does not embody a consent to pay costs, the other party (in this case the department) may apply on notice for an order for costs.

[9] The appeal must accordingly fail. Costs of the appeal remain: Counsel was constrained to concede that the department is only entitled to costs up to and including the date of the abandonment. As it was put in *Bonthuys v Visser's Garage*:⁷

'The claimant seems to have two courses open to him to obtain these costs, i.e. (a) he may set the appeal down, not for argument on the merits, but for recovering costs due to him up to the date when he received the notice of abandonment, or (b) he may apply, on notice to the other

⁴ *Western Johannesburg Rent Board & another v Ursula Mansions (Pty) Ltd* 1948 (3) SA 353 (A); *Absa Bank Ltd v Mkhize & another*, *Absa Bank Ltd v Chetty*, *Absa Bank Ltd v Mliphha* [2013] ZASCA 139; [2014] 1 All SA 1 (SCA); 2014 (5) SA 16 (SCA) para 64; *Carter v Haworth* [2009] ZASCA 19; 2009 (5) SA 446 (SCA); [2009] 3 All SA 197 (SCA) para 12; *Atholl Developments (Pty) Ltd v Valuation Appeal Board for the City of Johannesburg & another* [2015] ZASCA 55 paras 8-10; *Neotel (Pty) Ltd v Telkom SA Soc Ltd & others* [2017] ZASCA 47 paras 15-24.

⁵ *Administrator, Cape & another v Ntshwaqela & others* 1990 (1) SA 705 (A) at 714I-715D; *SA Eagle Versekeringsmaatskappy Bpk. v Harford* [1992] ZASCA 42; 1992 (2) SA 786 (A); [1992] 2 All SA 73 (A) at 792C-D.

⁶ Uniform rule 41(2) reads:

'Any party in whose favour any decision or judgment has been given, may abandon such decision or judgment either in whole or in part by delivering notice thereof and such judgment or decision abandoned in part shall have effect subject to such abandonment. The provisions of sub-rule (1) relating to costs shall ***mutatis mutandis*** apply in the case of a notice delivered in terms of this sub-rule.'

Sub-rule (1) provides:

(a) A person instituting any proceedings may at any time before the matter has been set down and thereafter by consent of the parties or leave of the court withdraw such proceedings, in any of which events he shall deliver a notice of withdrawal and may embody in such notice a consent to pay costs; and the taxing master shall tax such costs on the request of the other party.

(b) A consent to pay costs referred to in paragraph (a) shall have the effect of an order of court for such costs.

(c) If no such consent to pay costs is embodied in the notice of withdrawal, the other party may apply to court on notice for an order for costs.'

⁷ *Bonthuys v Visser's Garage* 1950 (3) SA 130 (SWA) at 132H; [1950] 2 All SA 537 (SWA) at 539.

party, for an order from the Appeal Court granting him these costs, if the other party refuses to recognise his claim thereto, as is the case here.'

The second course seems the more logical (see SCA rule 11(1)(b);⁸ *Afriforum v Minister of Trade & others* [2013] ZASCA 184).

[10] In the result the appeal is dismissed with costs up to and including 6 August 2018 to be paid jointly and severally by the first, third, fourth, sixth and eighth respondents.

V M Ponnar
Judge of Appeal

⁸ SCA Rule 11(1)(b) provides:

'The President or the Court may mero motu, on request or on application—
give such directions in matters of practice, procedure and the disposal of any appeal, application or interlocutory matter as the President or the Court may consider just and expedient.'

APPEARANCES:

For the Appellant:

A A Gabriel SC (with her T Seery)

Instructed by:

Lambert Attorneys Inc., Richards Bay

Honey Attorneys, Bloemfontein