REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2022/9895

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

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A. FRIEDMAN 23 NOVEMBER 2023

In the matter between:

AUCKLAND PARK THEOLOGICAL SEMINARY Applicant

and

WAMJAY HOLDING INVESTMENTS (PTY) LTD Respondent

In re:

WAMJAY HOLDING INVESTMENTS (PTY) LTD Applicant

and

AUCKLAND PARK THEOLOGICAL SEMINARY Respondent

JUDGMENT
(LEAVE TO APPEAL)

FRIEDMAN AJ

[1] On 2 October 2023, I handed down judgment in a dispute between the above-mentioned parties relating to a contract of cession concluded by them in 2011. I do not intend to repeat below anything which I said in that

judgment ("**the merits judgment**"). In the unlikely event that anyone other than the parties is interested in this judgment, it is necessary to read it together with the merits judgment for it to make sense. The merits judgment may be found at 2023 JDR 3700 (GJ). In the discussion below, I describe the parties as ATS and Wamjay, as I did in the merits judgment. I also use the same description as in the merits judgment for the University of Johannesburg – i.e., "**the University**".

[2] On 23 October 2023, ATS filed an application for leave to appeal the whole of my judgment and order. I do not intend to list all of the grounds on which leave was sought. On consideration of the application for leave to appeal, I took the strong initial view that leave should be granted. Leaving aside, for the moment, the grounds listed in ATS's application, the core issue is this: if the prescription defence had been upheld, then Wamjay's claim would have been dismissed and ATS would not have been ordered to pay anything to Wamjay. In my view, it is self-evident that ATS has reasonable prospects of convincing an appellate court that I was wrong to dismiss the prescription claim. The fact that I agonised about the prescription issue for longer than I would have liked (it ultimately took me 6 months to hand down the judgment) is perhaps irrelevant. No doubt each party takes the view that no agonising was necessary and that the answer is clear. But, I mention my agonising to demonstrate that I, for one, found the issues complicated and sometimes novel, and I can see the merit in both sides of the argument. In other words, it is certainly arguable that the debt was due as envisaged by section 12(1) of the Prescription Act as soon as the University cancelled the long lease; because, since it was lawfully entitled to do so (as the Constitutional Court has told us), the cession was a nullity from the outset. (This was ATS's main point in the prescription argument which was presented to me.) I stand by my reasoning in the merits judgment on the issue of prescription and have not changed my mind about what I said there. But undoubtedly, ATS has a right to take the matter further and has a reasonable prospect in succeeding in overturning my order.

[3] Because I was so strongly minded to grant leave, and because I did not want to see more time and costs wasted, I wrote to the parties to express my prima facie views. My intention was to see if full argument in the application for leave to appeal could be curtailed, without inhibiting Wamjay from arguing the merits of the application for leave to appeal should it wish to do so. To cut a long story short, both parties responded to my note by recording that they agreed that leave to appeal to the Supreme Court of Appeal should be granted. On this basis, an oral hearing (and written argument) was avoided.

[4] In order to avoid any confusion going forward, I wish to address certain issues – if nothing else, to assist the Supreme Court of Appeal in understanding the basis on which I have granted leave to appeal:

4.1 I believe that the core issue, as it relates to the prescription defence, is when the debt became due as envisaged in section 12(1) of the Prescription Act. On that issue, there is a reasonable prospect that the SCA will take a different view to what is reflected in the merits judgment, and uphold the appeal.

4.2 In the application for leave to appeal, ATS also criticises me for raising the issue of the warranty against eviction (and the related issues which I considered to be relevant to the application of section 12(1) of the Prescription Act to this case) because the parties did not argue this point. It is not just a symptom of being thin-skinned that I mention this. It goes to the issue of appealability because, if I decided a matter which was not pleaded (for instance), this might be a self-standing basis for an appeal. I therefore address it in slightly more detail below. Either way, since ATS has reasonable prospects on the prescription issue, leave to appeal should be granted for that reason alone.

4.3 ATS also says that it has reasonable prospects of success on the merits because it says that I was wrong not to find that there were irresolvable disputes of fact on the papers. Here, I am less convinced that ATS has prospects of success. However, both parties' affidavits could best be described as cursory and there is at least a prospect that the SCA will take a different view to me on that issue.

[5] On the accusation that I was wrong to refer to the warranty against eviction because it was not argued:

5.1 As authority for this proposition, ATS relies on *Kauesa v Minister of Home Affairs* 1996 (4) SA 965 (NmS) at 973I to 974C.

5.2 My understanding of *Kauesa* (having considered both the decision a quo and the judgment of the Supreme Court of Namibia on which ATS relies) is that the court a quo raised various issues and expressed views on these, even though they were not argued. This is what led the Supreme Court to make the remarks at 473I to 474C of the reported judgment. The issues which the court a quo decided but which were not argued fell, in my view, broadly into three categories: first, those which should not have been raised *mero*

motu (ie, of the court's own accord) because they related to issues which ought to have been pleaded; second, those which should not have been decided because the parties expressly disavowed reliance on them; and third, those which should not have been raised *mero motu* and decided because they were not necessary for the resolution of the case.

5.3 In paragraph 11.3 of the replying affidavit, Wamjay said the following: "ATS's debt to Wamjay only became 'due' once the Cession Agreement was found to be inoperable, which was in June 2021, after the Constitutional Court handed down its judgment." As I explained in the merits judgment, Wamjay was entitled to deal with prescription only in reply. And this statement in paragraph 11.3 of the replying affidavit makes clear that Wamjay pleaded that the debt which ATS owed to it only became due, as contemplated in section 12(1) of the Prescription Act, after the Constitutional Court handed down its judgment. Its failure, there, to mention section 12(1) is not relevant – in my view, the point was sufficiently pleaded.

5.4 If that is accepted, then the only question is this: was I precluded from considering issues of law which I considered relevant to the proper interpretation of section 12(1) if those legal submissions were not made by the parties (at least without calling for supplementary submissions)? And to go further, could the SCA overturn my judgment on this basis?

5.5 In my view, *Kauesa* did not intend to go so far as to say that every law point not argued cannot be decided without hearing the parties first.

5.6 *Kauesa* is a Namibian case and has been followed by the SCA on a few occasions.[1] However, I could find no reliance by the SCA on the judgment in circumstances directly analogous to the present case.

5.7 The leading case on this issue in South African law is *Fischer v Ramahlele* 2014 (4) SA 614 (SCA) ("***Ramahlele***"). My reading of paragraphs 13 to 15 of the judgment is that the cardinal rule is that courts should not of their own accord raise issues which are not raised in pleadings or affidavits. So, to use the present case as an analogy, if Wamjay had not pleaded (via its replying affidavit) that the debt had become due only after the Constitutional Court's decision (thus bringing the scope and application of section 12(1)

[1] See, for example, GN v JN 2017 (1) SA 342 (SCA); Welkom Municipality v Masureik and Herman T/A Lotus Corporation 1997 (3) SA 363 (SCA) at 371

into play), then *Ramahlele* would have been a barrier to me raising that issue of my own accord.

5.8 However, in this case, we have the statement in paragraph 11.3 of the replying affidavit to which I have already referred. We then have the argument advanced by *Mr Alli* in his heads of argument (to which I referred in paragraphs 12 and 13 of the merits judgment) that Wamjay did not have a complete cause of action until after the Constitutional Court, in substance, ordered the registration of the long lease to be set aside. A major focus of *Mr Alli's* heads of argument was on the issue of when Wamjay could be said to have had a complete cause of action. So, ATS's ground of appeal amounts to saying that because Wamjay argued that the debt only became due in 2021 for reason X (the registration of the long lease) and I found that it only became due in 2021 for reason Y (the reasoning in the merits judgment relating to the warranty against eviction), my order cannot stand.

5.9 I have two reasons for being concerned about whether this is correct. In the first place, I am not convinced that *Ramahlele* intended to put such a tight pair of handcuffs onto our courts. *Ramahlele* has been affirmed and followed in many cases, and I do not read any of the subsequent cases as employing such handcuffs either.[2] Where an issue is squarely pleaded and argued, but the Court considers the correct legal position to be based on different legal reasoning, can its decision be overturned simply because neither party raised that reasoning? This would surely lead to the undesirable consequence that the correct legal outcome would often not be reached because of the way particular parties chose to argue particular cases.

5.10 There is a subtle but important difference between the two scenarios which I have sketched. The philosophical reason for Courts not being permitted to go wider than the pleadings relates to the "nature of civil litigation in our adversarial system" as explained by the SCA in *Ramahlele*. But the need to find the correct legal outcome on issues squarely pleaded means that courts will sometimes have to adopt legal reasoning not raised by the parties.

[2] I have used the Jutastat noter-up function to find and read all of the decisions of the Constitutional Court and SCA which have considered *Ramahlele*. I do not intend to list all of those judgments here. In my view, each of them is distinguishable from the approach which I followed in the merits judgment. I have not conducted a similar exercise in respect of decisions of the High Court. But, since this matter is going to the SCA, that strikes me as unnecessary for present purposes.

5.11 This brings me to the second issue. ATS makes the point in its application for leave to appeal that, in the circumstances of this case, I should have asked the parties for supplementary submissions on the warranty against eviction point. This criticism is fairly made, and I agree that it would have been desirable for me to do so. I perhaps would not go so far as to say that I was obliged to do so, but I may be wrong about that. Either way, though, the issue is this: when the SCA considers what to do in this matter, it will be considering an appeal against, and not a review of, my judgment. I accept that in a rare case, a fundamental failure of fairness might vitiate proceedings in the High Court even if the order made by the Court in those proceedings is legally correct. I am not aware of any examples, but this is at least arguably possible, taking into account section 34 of Constitution and the bedrock principle of fairness on which the entire South African legal order is based. But short of such a gross failure of natural justice, the issue on appeal must surely be whether my legal reasoning – on a pleaded point – is right or wrong. I cannot see how a failure to ask for further submissions can turn correct legal reasoning into incorrect legal reasoning, in circumstances where both parties had a full opportunity to argue the section 12(1) point. Of course, my legal reasoning might not have been correct. But that then brings us back to where I started – i.e., the issue is whether I was right or wrong, and not whether I ought to have called for further submissions.

5.12 In short, it seems to me that it is always desirable for a court to obtain as much input from the parties as possible – we all benefit from more opportunities to be dissuaded from a course of action, and not less. But where an issue has squarely been raised – in this case, the reach of section 12(1) of the Prescription Act – and the court considers the parties to have made legal submissions which do not cover the full ambit of what is necessary to decide the pleaded point, it seems to me that a failure to call for further legal submissions cannot, simply on its own, vitiate the judgment.

5.13 But, on this point too, there is a reasonable prospect that everything which I have said in this paragraph is wrong. This is yet another reason why ATS is correct that it has reasonable prospects of success on appeal. For the sake of clarity, I record that nothing said in this judgment is intended to preclude ATS from raising any of the grounds of appeal, listed in its application for leave to appeal, in the appeal to be heard by the SCA in due course (even assuming I have any power in this regard in the first place).

[6] For all of these reasons, the parties were, with respect, quite correct to agree that leave to appeal should be granted. In my view, given the nature of the disputes, they were also correct to agree that the SCA should hear the appeal.

[7] I hope that the very commendable and practical way in which the parties addressed the application for leave to appeal renders any costs order which I might make *de minimus*. In any event, I intend to make the usual order: ie, that the costs of the application for leave to appeal are to be costs in the appeal.

[8] I accordingly make the following:

1. Leave to appeal to the Supreme Court of Appeal is granted to the Auckland Park Theological Seminary (respondent in the decision *a quo* and applicant for leave to appeal) against the whole of my judgment and order dated 2 October 2023 under case number 2022/9895.

2. The costs of the application for leave to appeal shall be costs in the appeal.

A. FRIEDMAN
Acting Judge of the High Court
Gauteng Division, Johannesburg

Delivered: This judgment was prepared and authored by the Judge whose name is reflected above and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter. The date for hand down is deemed to be **23 November 2023**.

Heard:	(Decided on the papers)
Judgment:	23 November 2023

Appearances:

For Applicant:	No appearance
Attorneys for the Applicant:	Hirshowitz Van der Westhuizen Inc.
For Respondent:	No appearance
Attorneys for Respondent:	SLH Inc