CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 42/03

THE MUNICIPALITY OF PLETTENBERG BAY Applicant

versus

VAN DYK & CO INC Respondent

Decided on : 24 November 2003

---

JUDGMENT

---

THE COURT:

[1] The applicant applies to this Court for leave to appeal against a judgment of the High Court in Cape Town ('the High Court') ordering the applicant to pay the respondent R69 684-74. The applicant failed to comply with rule 18(2)[1] before launching its application for leave to appeal. The respondent opposes the application and relies amongst other contentions on the applicant's failure to comply with rule

---

[1] Rule 18(2) of the Rules of the Constitutional Court provides:

> "A litigant who is aggrieved by the decision of a court and who wishes to appeal against it directly to the Court shall, within 15 days of the order against which the appeal is sought to be brought and after giving notice to the other party or parties concerned, apply to the court which gave the decision to certify that it is in the interests of justice for the matter to be brought directly to the Constitutional Court and that there is reason to believe that the Court may give leave to the appellant to note an appeal against the decision on such matter."

18(2). We called for written argument on this issue and, having considered the argument, concluded that the application for leave to appeal should be dismissed.

[2] Judgment was given by the High Court on a claim for services rendered by the respondent to the applicant. It is not disputed that the services were rendered, that the applicant accepted the benefits of such services, or that the charges made were reasonable. The applicant's defence is that the person who gave instructions to the respondent to render such services did not have authority to do so. The High Court held that such person had ostensible authority to bind the applicant and, basing itself on the rule in *Turquand*,[2] held that the applicant was estopped from denying authority. The High Court considered it unnecessary to deal with an alternative defence based on ratification.

[3] The applicant asserts that the contract that its employee entered into with the respondent was a nullity. It attaches weight in this regard to section 58(1) of the Municipal Ordinance 20 of 1974 (Cape) which requires a special resolution to be passed by the Council when it delegates powers to employees. There was no such resolution authorising the employee's actions in the present case and it was common cause that the employee concerned lacked actual authority to instruct the respondent to render professional services to the applicant.

---

[2] *Royal British Bank v Turquand* (1856) 119 E.R. 886 which is referred to with approval in *Mine Workers' Union v J J Prinsloo and Others* 1948 (3) SA 831 (A) 845 and *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 (2) SA 473 (A) 480.

[4] The applicant contends that in these circumstances, and in the setting of our Constitution, the doctrine of estoppel has no application, and that the rule in *Turquand* cannot be relied upon to render lawful that which in fact is unlawful. It also contends that the conduct of its employees and councillors relied on by the respondent did not give rise to an estoppel, or to ratification of the instructions given to the respondent.

[5] We express no opinion on the merits of the dispute between the applicant and the respondent. Although the issues are of substance, and no doubt of importance to all local authorities, the applicant has not complied with the rules of this Court concerning appeals which were in force at the time this application was brought.[3]

[6] Rules 18(2) and 18(6) required the applicant to apply for a certificate from the High Court as to whether or not the matter is one of substance on which a ruling by this Court is desirable, whether the evidence on record is sufficient to enable this Court to dispose of the matter, and whether there is a reasonable prospect that the appeal will succeed. The applicant failed to apply for a certificate.

[7] In its application for leave to appeal to this Court it seeks condonation of its failure to do so. The grounds on which it asks for condonation are that the High Court had refused its application for leave to appeal to the Supreme Court of Appeal, and that in the light of such decision, it was inevitable that the High Court would have provided a negative certificate. The applicant goes on to aver that in the

[3] Rule 18 has since been amended and with effect from 1 December 2003 a certificate from the High Court will no longer be required.

circumstances it would be a waste of time and money to follow the procedure prescribed by rule 18(2) and that its failure to do so should in these circumstances be condoned.

[8] The applicant has not established a case for condonation. It deliberately chose not to comply with rule 18(2) because it considered that the rule served no purpose in the circumstances of this case. We are not persuaded that compliance with the rule would have served no purpose. One of the matters that has to be certified by the High Court is whether or not the evidence is sufficient to enable this Court to dispose of the matter. The applicant avers that this can be done, but the respondent denies this. That is relevant to the question whether or not leave to appeal should be granted, and is a matter which would have been dealt with in a High Court certificate. Moreover, the respondent alleges in its answering affidavit that an argument based on the Constitution was not addressed in the High Court. The applicant in its replying affidavit says that "nowadays one cannot divorce oneself from the Constitution" and it has no doubt that the High Court decided the matter "against the backdrop of the Constitution, and took into account the spirit, purport and objects of the Bill of Rights which they were obliged to do in terms of section 39(2) of the Constitution".

[9] Had a certificate been applied for, the High Court would, however, have been obliged to address this dispute pertinently. Although there is reference in the judgment of the High Court to public law and the changed status of local authorities under our new constitutional order, it is not apparent from the judgment whether the

arguments raised by the applicant in the present application were advanced in the High Court and this Court does not have the benefit of the views of the High Court on those arguments.

[10] But apart from this, and more importantly, there are no good reasons why a deliberate non-compliance with a rule of court should be condoned. While the rule exists, it is the applicant's obligation to comply with its terms, and not to question its relevance and ignore it as being of no value.

[11] The applicant has referred to a number of cases in which this Court has condoned non-compliance with its rules. It is not necessary to deal with these cases in this judgment. Each depended upon its own facts. In none of these cases was leave to appeal granted in circumstances where there had been a conscious and deliberate decision not to comply with the rules.

[12] This is not a case in which there has been a serious infringement of a fundamental right. We are concerned here with a money judgment for services that were admittedly rendered and from which the applicant benefited. There was no obstacle in the way of the applicant's complying with rule 18(2), nor any urgency which required the applicant to launch its application without doing so. In the circumstances of this case there is no compelling reason for us to condone a deliberate decision by the applicant to ignore the rules of this Court, and we decline to do so.

[13] The respondent asks that the applicant be required to pay the costs of the application on the scale as between attorney and client. This is because of the deliberate non-compliance with the rules. We consider that it is sufficient to deny the application on those grounds, and to require the applicant to pay the costs of the application. There is no reason to penalise the applicant further through a special order as to costs. The application is accordingly dismissed with costs.

Chaskalson CJ, Langa DCJ, Ackermann J, Madala J, Mokgoro J, Moseneke J, Ngcobo J, O'Regan J; Sachs J and Yacoob J