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G.P.-S.12136—1952-3—2,000. U.D.J. 219.

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(Cape Provincial Division).
Provinsiale Afdeling).

Appeal in Civil Case.
Appèl in Siviele Saak.

TROPICAL (Commercial (Pty) Ltd. *Appellant,*

versus

Textiles Products Ltd. *Respondent.*

Appellant's Attorney / *Prokureur vir Appellant* C. Reis

Respondent's Attorney / *Prokureur vir Respondent*

Appellant's Advocate / *Advokaat vir Appellant*

Respondent's Advocate / *Advokaat vir Respondent*

Set down for hearing on / *Op die rol geplaas vir verhoor op*

(SR.1)

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the matter between :

TROPICAL (Commercial & Industrial) LIMITED Appellant

&

PLYWOOD PRODUCTS, LIMITED Respondent

CORAM :- Centlivres C.J., Hoexter, Steyn, de Villiers et Brink JJ.A.

Heard : 7th, 8th & 9th November 1955. Delivered : 17-11-55

J U D G M E N T

CENTLIVRES C.J. :- The appellant, to which I shall refer as the defendant, was sued by the respondent (plaintiff) in the High Court of Southern Rhodesia for damages arising from an alleged failure to deliver timber in terms of a contract between the parties. The defendant denied that it had broken its contract. On the second day of the trial the following entry was made on the record :-

" Parties' Counsel agreed as follows : In the event of the plaintiff satisfying the Court that there has been a breach of contract by the defendant, the Court proposes, in terms of Section 24 (c) of the Arbitration Act, Chapter 13, to order that the following issues of fact be tried before an arbitrator :-

(a) The cost to the plaintiff of manufacturing, for

" the purpose of sale to the public, plywood and plywood products from the quantity of peeler logs which the Court finds has been short-delivered to the plaintiff in terms of the contract ; for the purpose of determining such costs the contract price of the logs shall be included ;

(b) the probable price that the plaintiff would have realised on the sale of the products processed from such peeler logs ; and

(c) any other matter which the Court, at the conclusion of the trial, may deem to be relevant in determining the quantum of damages.

Mr. Lloyd (counsel for the defendant) asked the Court to decide on whether or not any damage was suffered.

The Court stated that it was not prepared to do so, and that it could not do so without itself deciding (a) and (b) of the above terms of reference to arbitration. "

The trial Court delivered a judgment in which it held that the defendant had committed a breach of contract ; that there was a possibility that the plaintiff had suffered damages ; that such damages should be estimated on the basis of loss of profits and that the plaintiff was not entitled to claim in addition thereto damages on the ground that it had to maintain its factory operations during the term of the contract in spite of having no timber with which to manufacture plywood and plywood products. Having delivered this judgment, the Court adjourned in order to give the parties an opportunity of agreeing upon the terms of

reference to arbitration under Sec. 24(c) of the Arbitration Act (Chapter 13). The parties agreed to the terms of reference which were embodied in an order of court whereby it was ordered :-

" 1. That the question as to what damage, if any, was sustained by the Plaintiff Company as the result of the Defendant Company's failure to deliver timber in terms of the contract between the parties be tried before an Arbitrator.

2. That in trying such issue :

(a) The said Arbitrator will accept -

(i) That regular deliveries under the contract commenced on April 19th, 1952

(ii) That the Defendant Company's breach of contract consisted in its failure to deliver 18 truck loads of 1100 cubic feet each.....

(b) The said Arbitrator will attempt to ascertain:

(i) What the cost would have been to the Plaintiff Company of producing plywood and plywood products from the said timber had such timber been delivered in accordance with the contract. In Ascertaining what such cost would have been the Arbitrator will take proper account of all overhead expenditure, including overheads of a constant nature, which would have

" been incurred in relation to the said timber under the contract, as well as any other matter which the Arbitrator may consider pertinent.

(ii) The prices at which the Plaintiff would have sold such plywood and plywood products manufactured from the said timber. In ascertaining such prices the Arbitrator will take proper account of the availability of markets to the Plaintiff for such products.

3. (a) That the said Arbitrator shall have all the powers of an Arbitrator acting pursuant to a submission.

(b) That the said Arbitrator shall report back to this Court within three months or within such extended time as the parties may agree to or as the Court may allow.

(c) That the costs of this reference be costs in the cause. "

After referring the matter to arbitration, the learned trial judge went on to say : "The findings of the arbitrator "will be referred back to me and then final judgment will be "delivered..... Counsel will be afforded an opportunity of "addressing me again.....on the general issue of damages... "..... The matter will therefore now stand down pending the "receipt of the arbitrator's report. "

After the order of court was issued, it was ordered by the trial judge that "Special leave to appeal and cross appeal

"be and is hereby granted in terms of Sec. 5(c) of the Admin-
"istration of Justice (Appeals) Act, (Chapter 10)."

When the appeal was called Mr. Pollak, who appeared for the ~~respondent~~ plaintiff, submitted that the appeal should be struck off the roll on the ground that there was no judgment or order of the High Court of Southern Rhodesia within the meaning of Sec. 2 of Act 18 of 1931 which corresponds to Sec. 5 of the Administration of Justice (Appeals) Act of Southern Rhodesia. That section provides that in civil matters appeals shall be heard by the Appellate Division :

(a) from any judgment or order of the High Court (not being a judgment or order falling within paragraph (b)) which is final or definitive either in form or in effect, when the amount or value in dispute exceeds one hundred pounds exclusive of costs ;

(b) from any judgment given or order made by the High Court on appeal from an inferior court if the Appellate Division has granted special leave to appeal ; and

(c) from any judgment or order not falling within paragraph (a) and (b), in so far as the Court which or judge who gave such judgment or made such order has granted special leave to appeal therefrom. "

Mr. Pollak contended that what the High Court in effect did was to save itself the tedious task of investigating accounts and to obtain assistance and advice thereon from an expert whose report would, in terms of Sec. 26 of the Arbit-

ration Act, become equivalent to a finding of fact by the Court, unless it is set aside by the Court. In other words the trial Court adjourned the case for evidence on the question of damages to be given before an arbitrator who had to make certain findings. In support of his contention counsel relied on a number of decisions of this Court.

In Dickinson and Another v Fisher's Executors (1914 A.D. 424) the respondents applied to a Provincial Division to make an umpire's award a rule of court. At the hearing before that Division the respondents consented to a deed of partnership (which was mentioned in the award) being referred to but objected to reference being made to any other documents or evidence. That Division held that "the objector must be limited in any "reference to the evidence before the umpire to the contract of "partnership itself." The Provincial Division granted leave to appeal to the Appellate Division. The applicants then applied for leave to file the record after the lapse of three months allowed by the Rules of Court. The application was refused on the ground that the trial Court had given a ruling and not an order and that it was therefore not a matter in which leave to appeal could be granted by the trial Court. Innes A.C.J. said on pp. 427 and 428 :-

" Every decision or ruling of a court during the progress of a suit does not amount to an order. That term implies that there must be a distinct application by one of the parties for definite relief. The relief prayed for may be small, as in an application for a discovery order, or it may be of great importance, but the Court must be duly asked to grant some definite and distinct relief, before its decision upon the matter can properly be called an order. A trial Court is sometimes called upon to decide questions which come up during the progress of a case, but in regard to which its decisions would clearly not be orders. A dispute may arise, for instance, as to the right to begin : the Court decides it, and the hearing proceeds. But that decision, thought it may be of considerable practical importance, is not an order from which an appeal could under any circumstances lie, apart from the final decision on the merits. So also in a case like the present. The parties differed as to what portion of the evidence (which was all in Court) could properly be referred to in support of the applicant's contention that the award was bad. The Court gave its ruling on the point. But that was not an order in the legal sense ; it decided no definite application for relief, for none had been made ; it was a mere direction to the parties with regard to the lines upon which their contention upon the merits should proceed. "

Dickinson's case was applied in Union Govenrnment v Naidoo (1916 A.D. 50) where an application before a Provincial Division was postponed for further evidence after a ruling had been given that that Division had authority to go into the question whether a warrant of deportation had been legally issued. In

that case Innes C.J. said on p. 52 :-

" When the enquiry is resumed the judge may decide in favour of the present applicants on the facts ; or he may possibly, though very improbably, revise his view of the law upon further argument. But if he does neither ; if he finds against the applicants on the law and the facts, and grants the relief prayed for, it will then be competent for them to appeal and to raise every point upon which they now wish to rely. The fact is that the present application is for leave to appeal not against the order of the learned judge - for he has made none - but against his reasons. It is entirely premature, and must at this stage be refused. "

Dickinson's case was also applied in Nxaba v Nxaba (1926 A.D. 392) and Umfolozi Co-operative Sugar Planters Limited v South African Sugar Association (1938 A.D. 87). See too Great Fish River Irrigation Board v Southey (1928 A.D. 113 at p. 121).

In South African Railways and Harbours v Edwards (1930 A.D. 3) this Court heard an appeal where the parties had agreed that the question of liability of the defendant should first be decided by the trial court and failing agreement as to the amount of damages, evidence on that issue would be heard later. The trial Court decided that the defendant was liable and it appealed against that decision before the amount

of damages had been settled. But that case is of no assistance to defendant in the present case, as the point of appealability was not raised either by the Court or counsel.

In Shacklock v Shacklock (1949 (1) S.A. 91) Dickinson's case and the cases following it were distinguished in that in Shacklock's case an order of court had been issued declaring the rights of the parties and the part of the order appealed against had all the attributes of a final order. Vide p. 98. In the present case no order was made by the trial judge declaring the rights of the parties and no relief was granted or refused. The findings made by him in the course of his judgment are not final in the sense that there is nothing in law to prevent him from revising those findings when the matter again comes before him. Cf. Blaauwbosch Diamonds Limited v Union Government (1915 A.D. 599 at p. 601) and Union Government v Naidoo (supra). In principle there does not appear to me to be any difference between a preliminary finding of fact and a preliminary ruling on a point of law. No authority was quoted to us - and I know of none - to show that an interim judgment on the facts, such as was given in this case, is final or definitive in respect of findings of fact. It is clear from the terms of the trial judge's judgment that he has not yet said

the final word in the case. Hence the judgment is not "final or "definitive either in form or effect" within the meaning of Sec. 2(a) of Act 18 of 1931. Consequently no appeal lies as of right.

The next question is whether the order made by the trial judge is such a "judgment or order" as is referred to in Sec. 2(c) of the Act in respect of which special leave to appeal may be granted by a trial court. If this question were res nova I would have had no hesitation in answering it in the affirmative as regards the present case. Here the trial court issued an order which, prima facie, fell within the terms of Sec. 2(c) and such an order, one would have thought, would be appealable with the special leave of that court. The legislature must have had in mind that many orders issued during the course of a trial case would fall within the terms of Sec. 2(c) and it enacted that such orders should be appealable only with the special leave of the court or judge who made the order. In stipulating for special leave the Legislature left the matter in the discretion of the court or judge concerned in the confident belief that special leave to appeal would be granted only in appropriate cases.

In England the words "judgment or order" in Sec. 27(1) of

15 and 16 Geo 5 C 49 have been given a wide connotation. In re Yates' Settlement Trusts (1954 (1) A.E.R. 619) where a judge of first instance adjourned the hearing of a case pending the decision of the House of Lords in another case it was held that the Court of Appeal had jurisdiction to entertain an appeal from the order adjourning the case.

In view, however, of the decisions of this Court my own view ~~counts for nothing~~ cannot prevail. It is clear from those decisions that this Court has placed a restricted meaning on the words "judgment or order" which occur in statutes dealing with the right of appeal. We were not invited by defendant's counsel to re-consider those decisions and, even if we had been so invited, this is not a case where I would be justified in preferring my own view to the view expressed by a number of different judges in a series of decisions. I must, therefore, apply those decisions to the present case. As the order made by the trial judge "decided no definite application for "relief" and was merely a direction as to the manner in which the case should proceed, it was not an order in the legal sense, vide Dickinson's case (supra). Not being an order in the legal sense, it was not an order which fell within the meaning of the words "judgment or order" in Sec. 2(c) of the Act. For these reasons I am constrained to hold that the appeal and cross appeal must be struck off the roll, but of the same

time I think that I ought to say that Parliament may well consider whether legislation should not be passed in order to give a wider meaning to the words "judgment or order" occurring in statutes dealing with the right of appeal. Similar legislation was enacted in Sec. 106 of Act 46 of 1935 when a wider meaning was given to the words "civil case", "civil suit" and "civil action" than had been given to these words by this Court. See Minister of Labour v Building Workers' Industrial Union, (1939 A.D. 328 at p.331). I do not think that it can be said that in the present case an appeal to this Court on the issues of fact and law decided by the High Court is to be deprecated. Had this case been appealable after leave granted and had this Court upheld the contentions of the defendant that would have been an end of the matter and the costs involved in referring the question of damages to an arbitrator would have been saved. This Court has in the past per incuriam, where the point of appealability was not raised, heard an appeal in a case where the trial court had not yet said the final word. See South African Railways and Harbours v Edwards (supra). The appeal at that stage of that case was a convenient method of obtaining an authoritative ruling on the point of law which was involved in that case and yet, if the Court's attention had been drawn to its previous decisions, that method could not have been used.

There remains the question of costs. It appears from an agreed statement put in from the Bar that when defendant's counsel told plaintiff's counsel that defendant was going to appeal, plaintiff's counsel asked him whether he had considered whether an appeal lay at that stage. He said he had and was satisfied. Plaintiff's counsel did not go into the authorities but either then or later suggested to defendant's counsel that to put the matter beyond doubt it was advisable to get the leave of the Court. It appears from this statement that plaintiff's counsel must have been under the mistaken impression that if leave were granted (as it was) the matter would be appealable. On October 21st 1955, the plaintiff's attorneys wrote a letter to the defendant's attorneys contending, on counsel's advice, that the judgment in question was not a "judgment or order" within the meaning of the Act and that in consequence no appeal lay. To this letter the defendant's attorneys replied to the effect that they disagreed. In the letter from the plaintiff's attorneys it is stated that "so far as the cross-appeal is concerned, it "will only be persisted in by the respondent if the Appellate "Division holds that it is in fact competent for the parties to "appeal at this stage. "

In Western Johannesburg Rent Board v Ursula Mansions (Pty.)

Limited (1948 (3) S.A. 353) this Court had occasion to consider what would be an appropriate order as to costs when an appeal is struck from the roll. In that case the Court mero motu raised the question whether the appeal had been properly noted and, having held that it was not, it struck the appeal off the roll with costs. In making the order as to costs it followed Nxaba v Nxaba (supra) and Stevenson v MacIver (1922 A.D. 413). The Court's attention was not drawn, in the Rent Board case, to the order as to costs made in Union Goverrnment v Naidoo (supra at p. 52) where Innes C.J. said "As both parties have mistaken the "position, there will be no order as to costs." In that case, however, the costs of the respondent must have been trivial, as there was no appearance for him in Court.

Up to a late stage in the present case it appears that both parties mistook the position and it was not until October 21st that the plaintiff's attorneys notified the defendant's attorneys that the plaintiff would object in limine to the hearing of the appeal. By that time the major costs of appeal must have been incurred by both sides, the record having been lodged with the Registrar on August 15th and notice of set down having been given on August 31st. It is reasonable to assume from the letter of October 21st that by that time counsel had

already been briefed for the appeal. None of the cases purport to lay down a hard and fast rule in a matter such as this nor can they be said to deprive the Court of its inherent discretion to make such an order as to costs as may be just in the circumstances of any particular case. Cf. Estate Maree v Redelinghuis (1943 A.D. 547 at pp. 557 and 558). The defendant persisted in maintaining that the matter was appealable and as the Court did not feel able to give a decision on the preliminary point at once it heard argument on the merits and the argument in the whole case lasted two and a half days. This is a factor which must be taken into account.

In all the circumstances I think the fairest order will be that the appeal and cross-appeal should be struck off the roll and that there should be no order as to costs, save that the defendant is to pay the costs of hearing on the second and third days.

Hoexter J.A
Steyn J.A
de Villiers J.A
Brink J.A
} concur