IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

704/93

WELLINGTON COURT SHAREBLOCK APPELLANT

and

CITY COUNCIL OF JOHANNESBURG RESPONDENT

705/93

AGAR PROPERTIES (PTY) LTD APPELLANT

and

CITY COUNCIL OF JOHANNESBURG RESPONDENT

CORAM: JOUBERT, BOTHA, NIENABER, VAN DEN HEEVER et OLIVIER JJA

HEARD: 8 MAY 1995

DELIVERED: 31 MAY 1995

JUDGMENT

/NIENABER JA

NIENABER JA:

There are two appeals before court. The first question is whether they should be. In each the appellant concerned appeals against the dismissal of an exception that the respondent's particulars of claim disclosed no cause of action. The exceptions were heard together, and so were the appeals, because the averments in the particulars of claim and the point in issue in the exception were essentially the same.

The respondent is an urban local authority duly constituted in terms of the Local Government Ordinance, 17 of 1939 (Transvaal). The two appellants are both private companies. Each owns an immovable property within the respondent's municipal jurisdiction, on which a block of flats had been erected. The respondent supplied the buildings with electricity, water and in the one case also with gas. In each set of particulars of claim it is alleged that

an agreement had come into existence between the respondent and the appellant concerned in terms of which the respondent would supply the building with electricity and water (and gas) for which the appellant would pay the respondent its "usual charge from time to time"; that the respondent duly supplied such commodities "in terms of and pursuant to the agreement"; and that a balance "calculated at the plaintiff's usual charge from time to time" remained due to the respondent. The particulars of claim, save for the reference to gas, concluded with an identical paragraph:

> "In the premises and by virtue of the agreement, and the provisions of Local Government Ordinance No. 17 of 1939, and the provisions of the aforementioned water and electricity by-laws the defendant is liable to the plaintiff for payment of the aforesaid amounts in respect of electricity, water and gas supplied at the property."

The nub of both exceptions is that the agreement as alleged does not conform to the formal and procedural requirements of the relevant by-laws for the conclusion of such an agreement; and that

being a creature of statute the respondent was in law unable to "deal with the subject matter in any other way, for example by common law agreement or resolution". The agreement, being ultra virus the relevant by-laws and regulations governing the supply of such commodities to consumers, could not, so it was averred, support a claim for payment. The particulars of claim accordingly lacked a sustainable cause of action.

The exceptions were heard by Eloff JP in the Witwatersrand Local Division. He was prepared to assume, for the sake of the argument, that the agreements were indeed ultra vires. But on the authority of a line of cases (Laing v Caledon Municipality (1909) 19 CTR 599; Bloemhof Village Council v Calder 1924 TPD 7; Barnard v Cilliers 1929 EDL 106; SA Hotels Ltd v City of Cape Town 1932 CPD 229; Morland v Niehuas 1973(1) SA 240 (C)) he held that

> "... where a local authority enters into a contract with a party

> which, by reason of legal requirements, is invalid, that party, on being sued for performance under the contract, and who received benefits in consequence thereof, cannot be heard to say the contract is invalid."

The party receiving such benefit, he added, quoting from Dönges

and Van Winsen, Municipal Law (2nd ed. 40), is estopped from

raising the defence that such contract or regulation was ultra vires.

He concluded:

> "I have given thought to the question whether a litigant may raise an estoppel by way of answer to an exception. The basic rule is that a party wishing to rely on an estoppel must allege and prove it, (Blackie Swart Argitekte v Van Heerden. 1986(1) SA 249 (AD) at 260 (I-J). I consider however, that it is open to a litigant in the position of the plaintiff in casu to counter an effort by means of an exception to rely on invalidity of a contract, by invoking the equitable remedy of estoppel. I believe the defendant is estopped from relying on the alleged invalidity of the contracts described in the particulars of claim."

In the result both exceptions were dismissed with costs. Leave to appeal to this court was

subsequently granted in both cases

by the court a quo.

When the matter was called in this court the only question debated, and on which judgment was reserved, was whether the order made was an appealable "judgment or order" for purposes of s 20 of the Supreme Court Act 59 of 1959 ("the Act").

This is an issue that has come before this Court not infrequently of late, most notably in Zweni v Minister of Law and Order 1993 (1) SA 523 (A). (See too Trope and Others v South African Reserve Bank 1993 (3) SA 264 (A); Caroluskraal Farms (Edms) Bpk v Eerste Nasionale Bank van Suider-Afrika Bpk 1994 (3) SA 407 (A); Trakman NO v Livshitz and Others 1995 (1) SA 282 (A); Jonas v Krok 1995 (1) SA 677 (A).)

The judgment in Zweni's case did not purport to lay down new law. It was an attempt to correlate and synthesize the current law in the light of the amendment to s 20 of Act 59 by s 7 of the Appeals Amendment Act 105 of 1982. What it does make plain is

that the appealability of any decision given during the course of proceedings is not contingent solely on the discretion of the trial judge in granting leave to appeal. To be appealable the decision primarily has to be a "judgment or order" (532F-G) and a judgment or order is a decision with certain attributes, the first of which is that it must be final in effect, that is to say, not susceptible of alteration by the court of first instance (532J; 535G). That was the very criterion, before the amendment to s 20 of the Act was introduced, for differentiating between interlocutory orders appealable as of right and simple interlocutory orders appealable only with leave (cf South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) SA 534 (A) 549G-H; South African Motor Industry Employers' Association v South African Bank of Athens Ltd 1980 (3) SA 91 (A) 96H-97A). It follows that the statutory reformation notwithstanding past cases still make good law (cf Van Streepen & Germs (Pty) Ltd v Transvaal

Provincial Administration 1987(4) SA 569 (A) 584D-E).

One such case was Blaauwbosch Diamonds Ltd v Union Government (Minister of Finance) 1915 AD 599. That, like the present, was an appeal brought before this court against the dismissal of an exception by the supreme court that a declaration disclosed no cause of action. It was held that the decision, not having the effect of a final or definitive sentence, was interlocutory and hence in order to be appealable required prior leave to appeal.

According to Innes CJ at 601:

> "... a convenient test was to inquire whether the final word in the suit had been spoken on the point; or, as put in another way, whether the order made was reparable at the final stage. And regarding this matter from that standpoint, one would say that an order dismissing an exception is not the final word in the suit on that point that it may always be repaired at the final stage. All the Court does is to refuse to set aside the declaration; the case proceeds; there is nothing to prevent the same law points being re-argued at the trial; and though the Court is hardly likely to change its mind there is no legal obstacle to its doing so upon a consideration of fresh

argument and further authority."

(See too MBA v .Southern Insurance Association Ltd 1981 (1) SA 122 (Tsk) 127E-H; Elida Gibbs (Pty) Ltd v Colgate Palmolive (Pty) Ltd (2) 1988 (2) SA 360 (W) 364F-G.)

Counsel for the appellants conceded that but for two considerations the reasoning in the Blaauwbosch Diamonds Ltd case supra was directly in point and thus conclusive of the present matter.

The first consideration mentioned was that Eloff JP in the dictum quoted earlier on estoppel made a finding of fact and that this finding was res judicata between the parties; hence this case did not fit into the niche of Blaauwbosch Diamonds Ltd supra.

I am unable to agree. Eloff JP was deciding an exception. He heard no evidence and consequently could make no findings, let alone a Ending which bound both the parties and the court itself.

The reference in the dictum to estoppel was no doubt an attempt to suggest a juristic rationale or analogy for the rule which he extracted from the cases cited and applied to dispose of the exception. It was a theorem about a rule of law, not a finding about a dispute of fact.

The second consideration mentioned by counsel for the appellants was that this court in recent years heard and disposed of appeals against an exception being dismissed for lack of a cause of action without querying their appealability. Examples cited were

1988 (3) SA 122 (A) and Proud Investments (Pty) Ltd v Lanchem International (Pty) Ltd 1991 (3) SA 738 (A). In neither of these matters was the spectre of appealability raised or considered. These cases accordingly cannot serve as authority for the proposition that the present appeals are properly before court. As was stated in the Blaauwbosch Diamonds Ltd case supra at 603:

> "It has been brought to our notice that on a former occasion an appeal from an order dismissing an exception was entertained by this Division without the special leave of the Court below. The point was apparently overlooked, and the matter dealt with per incuriam; that is no reason for now disregarding what was then unnoticed."

Neither of the considerations mentioned by counsel is convincing. But there is a third consideration which does deserve attention. It is a two-fold one. The first aspect of it is that the appellants were anxious to have the law point which is formulated in their exceptions tested in limine; and the respondent, as indeed the court a quo, co-operated by acceding to a procedure which was patently irregular. The second aspect is that in determining the appealability of a decision the emphasis is on effect rather than on form (Zweni v Minister of Law and Order supra 532H-I).

As far as form is concerned these exceptions, in a sense, are exceptional. For one thing it would appear as if they were only

taken after there had been a full exchange of pleadings, including a replication by the respondent to each appellant's plea. What these pleadings contain one does not know for it was expressly agreed between the parties that all the documents except for the particulars of claim and the exceptions be excluded from the papers before the court a quo. For another thing the court a quo was asked to augment the averments contained in the pleadings before it by having regard to extraneous material, more particularly the provisions of certain by-laws which in the ordinary course would require proof (cf Raad vir Kuratore vir Warmbad Plase v Bester 1954 (3) SA 71 (T); Serobe v Koppies Bantu Community School Board 1958 (2) SA 265 (O); Benator NO v Worcester Court (Pty) Ltd 1983 (4) SA 126 (C)). And finally Eloff JP short-circuited the whole procedure by assuming the correctness of the point taken on exception but refuting it with an alien one. The product is a hybrid procedure, part exception, part point in limine, part stated case.

What the court a quo, with respect, should have done was to grasp the nettle and decide the exception. If it decided instead of assumed that the point was good, the exceptions would have succeeded and the orders granted would doubtless have been appealable (cf Elgin Brown & Hamer (Pty) Ltd v Industrial Machinery Suppliers (Pty) Ltd 1993 (3) SA 424 (A)). The respondent, failing an appeal or an appeal failing, would then have been given leave to amend its particulars of claim (cf Group Five Building Ltd v Goverment of the Republic of South Africa 1993 (2) SA 593 (A) 602C-I). And if it did so by invoking the rule relied on by Eloff JP that would have highlighted the issue whether the rule was sound; if so, whether it was akin to estoppel; if so, whether it could be assimilated into the respondent's cause of action (cf Union Government v National Bank of South Africa Ltd 1921 AD 121 128); or whether there was not perhaps an entirely different rationale for the rule, such as enrichment. (Needless to say I

express no view on any of these postulates.) If, on the other hand, the point taken on exception was held to be bad the exceptions would have been dismissed on that ground and the decisions would not have been appealable, for the reasons stated in the Blaauwbosch Diamonds Ltd case supra.

But matters did not run that course. Even so, and notwithstanding the subversion of the point taken on exception and the other procedural innovations mentioned, the present proceedings remained, in form, in effect, and in the relief claimed, nothing more than exceptions that were dismissed. Had they been cast as stated cases in which the parties agreed that if the appellants' point failed judgment in an agreed sum would be entered in favour of the respondent and if it succeeded the respondent's claim would be dismissed, the ultimate decision, whichever way it went, would have been "a judgment or order" and as such appealable in principle: it would have been final in effect, definitive of the rights of the parties

and it would have disposed of the relief claimed in the main proceedings (cf Zweni's case supra 532J-533A). By way of contrast no relief was claimed in this case which would be definitive of the rights of the parties if the exceptions should fail. As such the present proceedings are not comparable to a separately adjudicated special plea which, even if dismissed, would dispose of a special defence which is unrelated to the merits of the main proceedings (cf Constantia Insurance Co. Ltd v Nohamba 1986 (3) SA 27 (A) 35E-36I; Caroluskraal Farms (Edms) Bpk v Eerste Nasionale Bank van Suider-Afrika Bpk 1994 (3) SA 407 (A) at 415B-416D). Nor is this the sort of case where it is incontrovertible on the papers that the ultimate relief claimed in the action, or a special defence which will be destructive of such relief (cf Makhoti v Minister of Police 1981 (1) SA 69 (A)), hinges solely on the point taken in the exception. Here, the exceptions having been dismissed, the actions are to continue to trial. Final relief will only follow if the respondent

proves the remainder of its cases against the two appellants. For the reasons stated in the Blaauwbosch Diamonds Limited judgment supra, the court of first instance would be at liberty if so minded or persuaded to reconsider the issues raised in the judgment of Eloff JP. His decision was not binding on the parties inter se or on the court itself. Whether the court a quo does so or not, the points raised in the exceptions will only become appealable once judgments have been pronounced one way or the other. In short, the mechanism chosen by the appellants and concurred in by the respondent to have the validity of the agreements tested as a preliminary issue by way of exception, suffers from the flaw that it would only have been appealable if the decisions went against the respondent.

The appeals must accordingly be struck off the roll. There was some debate whether the respondent, being a party to the abortive procedure before this court, should be mulcted in costs. It

is true that the respondent did not appreciate the significance of the non-appealability of the present proceedings until shortly before the hearing of the appeal. But as was rightly pointed out on its behalf the appellants, when the matter was raised, persisted in their argument that the appeals were properly before court. Even if the respondent had raised an objection at an earlier stage it does not follow that the appellants would have capitulated. I have not been persuaded that there is sufficient reason for departing from the usual rule that costs should follow the result.

Each of the two appeals is struck off the roll with costs including the costs of two counsel.

P M Nienaber Judge of Appeal Joubert JA) Botha JA) Concur Van den Heever JA) Olivier JA)