IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE

CASE NOS: 6/99
95/99

In the matter between:

MINISTER OF SAFETY AND SECURITY	First appellant
JUDORA SPANGENBERG	Second appellant

and

IAN GORDON BRYN HAMILTON	Respondent

BEFORE: Smalberger ADCJ, Nienaber, Marais, Cameron and Navsa JJA

HEARD: Tuesday 20 February 2001

DELIVERED: Monday 19 March 2001

An order dismissing an exception to a pleading on the ground that it is inappropriate to decide the issues by way of exception is not appealable

JUDGMENT

CAMERON JA:

[1] This case raises, again, the regrettably recurrent issue whether the dismissal of an exception is appealable. The respondent (to whom I

refer as “the plaintiff”) has sued the two appellants (“the defendants”) for damages arising from a shooting incident that rendered him a tetraplegic. His particulars of claim allege that police officials in the first defendant’s employ, in breach of a duty owed the public, including himself, acted negligently in granting his assailant a licence for the firearm she later used to shoot and injure him. He alleges that the second defendant, a clinical psychologist treating his assailant, in similar breach negligently failed to refer her for psychiatric treatment and possible committal to an institution. He asserts that he suffered damage in consequence of the defendants’ conduct.

[2] To these averments, which the plaintiff amended and sought leave to amend yet further, the defendants each excepted. Hlophe J heard the exceptions and the plaintiff’s application to amend. He granted the latter. The former he dismissed on the ground that it was inappropriate to decide the issues by way of exception. However — despite the plaintiff’s opposition on the ground that the order was not susceptible to appeal — Hlophe ADJP granted both defendants leave to appeal to this Court. I return later to the propriety of his order in doing so.

[3] When the appeal was called, this Court raised the question whether the order in the form that Hlophe J granted it was appealable; and reserved judgment on the matter.

[4] This Court’s jurisdiction to hear appeals is not untrammelled, and the question which judgments, orders and rulings are appealable to it has presented persisting complexity. The Court’s powers in this regard are sourced in statute, read now in the light of applicable provisions of the Constitution. Though section 168(3) of the Constitution provides without qualification that this Court may decide “appeals in any matter”, this must obviously be read in the light of the Supreme Court Act, 59 of 1959. Section 20(1) of that Act contemplates that an appeal lies from a “judgment or order” of a provincial or local division, while section 21(1)

confers on this Court jurisdiction to hear and determine an appeal from "any decision" of a provincial or local division not conferred on it in section 20(1). The inter-relation between these provisions has been explained in *van Streepen & Germs (Pty) Ltd v Transvaal Provincial Administration* 1987 (4) SA 569 (A) 584E-F and *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) 7J-8D. This Court's construction of the provisions in question has recently been summarised as precluding appeals except where —

> "the judicial decisions in question, whether referred to as judgments, orders, rulings or declarations, had three attributes. First, they were final in effect and not susceptible of alteration by the court of first instance. Secondly, they were definitive of the rights of the parties, for example, because they granted definite and distinct relief. Thirdly, they had the effect of disposing of at least a substantial portion of the relief claimed."

(*Guardian National Insurance Co Ltd v Searle NO* 1999 (3) SA 296 (SCA) 301B-D.)

[5] The disposal of exceptions has presented particular problems in relation to these criteria. An exception on the ground that a pleading discloses no cause of action or defence strikes at the root of the entire claim or defence, since it charges that "the pleading objected to, taken as it stands, is legally invalid for its purpose" (per Innes JA in *Salzmann v Holmes* 1914 AD 152 at 156). Such an exception if successful thus disposes with finality of a claim or defence, and an order upholding it is therefore appealable (see the observation of de Villiers CJ in *Henderson and Another v Hanekom* (1903) 20 SC 586 at 590; *Steytler NO v Fitzgerald* 1911 AD 295; and *Blaauwbosch Diamonds Ltd v Union Government (Minister of Finance)* 1915 AD 599 at 602).

[6] This Court has on a number of occasions in effect held that the

dismissal of an exception does not have the attributes set out in the *Guardian National* case. (See *Blaauwbosch Diamonds Ltd v Union Government (Minister of Finance)* (above); *Wellington Court Shareblock v Johannesburg City Council* 1995 (3) SA 827 (A); *Kett v Afro Adventures (Pty) Ltd and Another* 1997 (1) SA 62 (A).) 4

[7] In a number of other cases, by contrast, this Court has without more entertained appeals against the dismissal of an exception (instances include *Dharumpal Transport (Pty) Ltd v Dharumpal* 1956 (1) SA 700 (A); *Sandton Town Council v Erf 89 Sandown Extension 2 (Pty) Ltd* 1988 (3) SA 122 (A); *Proud Investments (Pty) Ltd v Lanchem International (Pty) Ltd* 1991 (3) SA 738 (A); *Lewis v Oneanate (Pty) Ltd and Another* 1992 (4) SA 811 (A); *Minister of Law and Order v Kadir* 1995 (1) SA 303 (A)). In the latter group of cases, the appeal was in certain instances dismissed; in others it was upheld. In none was there allusion to what in the *Wellington Court Shareblock* case Nienaber JA called "the spectre of appealability" (at 833H). This led Nienaber JA to conclude that this Court in countenancing the appeals in the *Sandton Town Council* and *Proud Investments* cases had acted in error (*per incuriam*), and that those decisions could accordingly not serve as authority for the proposition that an appeal against the dismissal of an exception could properly be entertained (833G-H).

[8] Counsel for the second defendant invited us to overrule the decisions in paragraph 6 above. It is, however, well established that this Court will depart from a previous decision only when satisfied that it is clearly wrong, and then only with great circumspection (*Bloemfontein Town Council v Richter* 1938 AD 195 at 231-232; *Ellispark Stadion Bpk v Minister van Justisie* 1990 (1) SA 1038 (A) at 1051G-H; *Robin*

Consolidated Industries Ltd v CIR 1997 (3) SA 654 (SCA) 666F-I). In determining the appeal there is in my view no need to revisit the latest decisions of this Court on the question of the appealability of an order dismissing an exception. This is because the plaintiff has from the outset asserted that he proposes to lead evidence at the trial in support of his assertion that the defendants owed him a legal duty in regard to the manner in which he was injured; and Hlophe J upheld his entitlement to do so. Hlophe J dismissed the exception on the basis that without hearing all the evidence in the matter it would be inappropriate for him to determine whether the legal duty on which the plaintiff relies exists or does not exist.

[9] In the present matter, the defendants' complaint is not that Hlophe J wrongly held that there was a legal duty in the circumstances set out in the particulars of claim, and hence that he disposed of the issue incorrectly. Their complaint is in effect that they were wrongly denied the opportunity of establishing, at this early stage of the proceedings, that there was no duty at all. Counsel for the second defendant urged us to determine that the legal duty on which the plaintiff relies does not exist. This is neither feasible nor proper. The decision of the Court below that the matter had to go to trial precluded it from deciding the issue that the second defendant wishes to bring on appeal, namely the merits of the exception's challenge to the legal foundation of the claim. The Court's ruling deferred the very determination the excipients sought to obtain, with the result that there is no "judgment or order" to appeal against.

[10] Despite some widely-expressed remarks in the judgment of Hlophe J, to which counsel for the appellants drew our attention, it is evident that the Judge did not determine the matter on the basis that the legal duty in question existed or did not exist. He therefore refrained from considering and deciding the questions relevant to the exception, including the legal sufficiency of the claim. The order in the form he gave it is therefore not appealable.

[11] This disposes of the matter. But it is necessary to make some

observations about the proceedings in the Court below after the defendants' exceptions were dismissed. Despite the plaintiff's opposition on the grounds set out above, the learned judge granted the first defendant leave to appeal. In doing so, he did not deal with the objection the plaintiff advanced. By that stage, the second defendant had on the advice of her counsel concluded that the order was in fact not appealable, and had withdrawn the notice of appeal she initially lodged. Hlophe J's grant of leave to appeal to the first defendant however precipitated a re-application on her part, which the plaintiff then opposed on the basis that her right of appeal had become perempted. In later granting also the second defendant leave to appeal, Hlophe J for the first time dealt with the plaintiff's objection. He did not discuss or attempt to deal with the decisions of this Court regarding the appealability of an exception, none of which provided authority for the order he granted. He stated merely that the authorities on which the plaintiff relied did not indicate that leave should never be granted at all "no matter what the circumstances". 6

[12] This was a regrettable approach. It has never been suggested that an order deferring consideration of the merits of an exception to trial on the basis that it would be inappropriate to deal with it earlier is appealable. This is the basis on which Hlophe J should have dealt with the matter. Had he done so, he would have refused leave to appeal, and the costly elaboration of these proceedings, and the time they have wasted, would have been avoided.

[13] Notwithstanding the events in the Court below, counsel for both appellants accepted that the proper order in the event of this conclusion is that the matter should be struck from the roll with costs, the defendants being ordered jointly and severally to pay the plaintiff's costs.

[14] The appeal is struck from the roll with costs. The appellants are ordered jointly and severally to pay the respondent's costs.

E CAMERON

JUDGE OF APPEAL

MARAIS JA)
) CONCUR
NAVSA JA)