THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 245/2017

In the matter between

JOHN WALKER POOLS **APPLICANT**

and

CONSOLIDATED AONE TRADE & INVEST 6 (PTY) LTD (IN LIQUIDATION) **FIRST RESPONDENT**

IMPERIAL CROWN TRADING (PTY) LTD (IN LIQUIDATION) **SECOND RESPONDENT**

Neutral citation: *John Walker Pools v Consolidated Aone Trade & Invest 6 (Pty) Ltd (in liquidation) & another* (245/2017) [2018] ZASCA 012 (8 March 2018)

Coram: Shongwe ADP, Willis and Mocumie JJA and Mothle and Rogers AJJA

Heard: 23 February 2018

Delivered: 8 March 2018

Summary: Application for leave to appeal – whether proposed appeal would have any practical effect or result – such to be determined without reference to costs, save under exceptional circumstances – appeal in this case would have no practical effect because applicant's alleged right of occupation in ejectment proceedings expired in September 2017 – no exceptional circumstances justifying appeal on costs.

Costs - application for leave to appeal – proposed appeal becoming moot during pendency of application in Supreme Court of Appeal – duty of litigants to make reasonable proposals inter se on costs to avoid need for court's intervention – appropriate in present case to consider merits of application to determine costs – proposed appeal enjoying no prospects of success on merits – applicant ordered to pay costs.

ORDER

Application for leave to appeal from: KwaZulu-Natal Division, Pietermaritzburg (Steyn J sitting as court of first instance):

The application for leave to appeal is dismissed with costs.

JUDGMENT

Rogers AJA (Shongwe ADP, Willis and Mocumie JJA and Mothle AJA concurring)

[1] This is an application for leave to appeal which has been referred to open court for argument. I shall refer to the applicant, John Walker Pools, as JWP; the first respondent, Consolidated Aone Trade & Invest 6 (Pty) Ltd (in liquidation) as CAT; and the second respondent, Imperial Crown Trading (Pty) Ltd (in liquidation), as ICT. The order of the court a quo was for the eviction of JWP, at CAT's instance, from shop premises in Ballito Bay Mall (the Mall) plus costs. The court a quo dismissed JWP's application for leave to appeal. JWP applied to this court for leave to appeal and it is this application which is now before us.

[2] At the commencement of the hearing before us the presiding judge raised with the applicant's counsel whether the proposed appeal had not become moot. Subject to the question of mootness, the test we must apply is not whether JWP's proposed appeal should succeed but whether there are reasonable prospects of success in the proposed appeal. The active parties before us were JWP and CAT.

[3] To understand the question of mootness, I must provide some brief background. CAT's application for eviction was based on an allegation that it was the owner of the premises and that JWP was in unlawful occupation of the premises.

This sufficed to place on JWP the onus of setting up a right of occupation.[1] JWP's defence was that it was entitled to occupy the shop by virtue of an alleged lease with ICT. In his first answering affidavit, the deponent on behalf of JWP, Mr Dharman Rajoo, the sole proprietor of the business, did not attach a copy of the lease. In its replying affidavit the deponent for CAT contended that the answering affidavit did not disclose a defence because the lease was not attached and no particulars thereof were furnished. CAT alleged, further, that since ICT's right to occupy the premises had been terminated, any rights JWP might have against ICT did not give it a defence against CAT.

[4] In a supplementary answering affidavit Mr Rajoo attached the lease, explaining why he had not been able to do so earlier. The attached document purported to be a lease between ICT and JWP for the period October 2012 to September 2017.

[5] The matter came before Steyn J on 16 August 2016. JWP failed to file heads of argument. Mr Rajoo appeared in person. He told the judge that his attorneys had withdrawn the previous week and that his new attorney was not available on that day. The court a quo refused a postponement and granted the eviction order.

[6] The application in this court does not raise, as a ground of appeal, that the court a quo wrongly refused the postponement or that JWP should be permitted to adduce further evidence on appeal. In the circumstances, facts and documents in the application for leave which were not before the court a quo must be disregarded in assessing whether JWP has reasonable prospects of success.

[7] The question of mootness arises from the fact that JWP's alleged entitlement to occupy the premises terminated at the end of September 2017. We were told from the bar that JWP did not then vacate the premises and that, as was the case when the eviction application was launched, it has persisted in its failure to pay rent. Be that as it may, it is clear that a decision on appeal would have no practical effect or result because, at best for JWP, an appeal court might find that it was entitled to

[1] *Chetty v Naidoo* 1974 (3) SA 13 (A) at 20A-E; *Airports Company South Africa Soc Limited v Airports Bookshops (Pty) Limited t/a Exclusive Books* [2016] ZASCA 129; 2017 (3) SA 128 (SCA) para 24.

occupy the premises until the end of September 2017, a question which is now academic.

[8] Counsel for JWP conceded that the only practical effect which an appeal order would have was in relation to costs. In terms of s 16(2)(a)(ii) of the Superior Courts Act 10 of 2013, the question whether a decision would have practical effect or result is, save under exceptional circumstances, to be determined without reference to any consideration of costs. The costs referred to in this provision are the costs incurred in the court against whose decision the appellant or would-be appellant is seeking to appeal, not the costs in the appellate court. The section is concerned with the decision of the court a quo and the circumstances in which an appeal against the decision of that court can be dismissed without an enquiry into the merits. If the costs incurred in the court a quo court were very substantial, this might constitute an exceptional circumstance leading to the conclusion that a reversal of that court's decision would have practical effect.[2]

[9] In the present case there are no exceptional circumstances which make it just for an appellate court to reassess the costs order made by the court a quo against JWP. In the circumstances, leave to appeal must be refused.

[10] The remaining question is what to do about the costs of the application in this court. Where an appeal or proposed appeal has become moot by the time leave to appeal is first sought, it will generally be appropriate to order the appellant or would-be appellant to pay costs, since the proposed appeal was stillborn from the outset. Different considerations apply where the appeal or proposed appeal becomes moot at a later time. The appellant or would-be appellant may consider that the appeal had good merits and that it should not be mulcted in costs for the period up to the date on which the appeal became moot. The other party may hold a different view. As a general rule, litigants and their legal representatives are under a duty, where an appeal or proposed appeal becomes moot during the pendency of appellate proceedings, to contribute to the efficient use of judicial resources by making sensible proposals so that an appellate court's intervention is not needed. If a

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[2] See, eg, *Oudebaaskraal (Edms) Bpk & andere v Jansen van Vuuren & andere* 2001 (2) SA 806 (SCA) at 812D-E.

reasonable proposal by one of the litigants is rejected by the other, this would play an important part in the appropriate costs order. Apart from taking a realistic view on prospects of success, litigants should take into account, among other factors, the extent of the costs already incurred; the additional costs that will be incurred if the appellate proceedings are not promptly terminated; the size of the appeal record; and the likely time it would take an appellate court to form a view on the merits of the moot appeal. There must be a proper sense of proportion when incurring costs and calling upon judicial resources.

[11] In the present case JWP applied to the court a quo for leave to appeal by way of an application dated 14 September 2016. The application for leave was argued in the court a quo on 14 February 2017 and refused on the same day. The application in this court was brought on 15 March 2017. Following the filing of answering and replying papers, two judges of this court on 15 May 2017 directed that the application be argued in open court. The appeal only became moot at the end of September 2017. Substantial costs had by then been incurred. The record is short (a single volume) and it is a matter of no great difficulty to form a view on the merits. If in October 2017 JWP had withdrawn its application for leave to appeal and tendered costs, that would no doubt have been acceptable to CAT. If JWP had withdrawn its application without tendering costs, CAT would almost certainly have rejected the withdrawal. Solely for the purpose of arriving at a just order on costs, I shall briefly discuss the merits to demonstrate why such a rejection would have been reasonable.

[12] In my view JWP's opposing papers in the eviction application did not disclose a defence. JWP did not dispute that CAT was the owner of the premises. JWP did not allege facts to show that a lease with ICT gave JWP any right of occupation as against the owner.

[13] Counsel for JWP submitted that the facts showing that JWP's lease with ICT gave it a right of occupation against CAT appeared sufficiently from CAT's founding papers. As background to the facts on which counsel relied, it is necessary to mention that CAT was placed in provisional liquidation on 19 September 2013 and in final liquidation on 20 March 2014; and that ICT, which by October 2013 was in

business rescue, was placed in provisional liquidation on 22 November 2013 and in final liquidation on 17 January 2014. The facts alleged in CAT's founding papers pertaining to ICT (which were not denied in JWP's answering papers) were:
(i) that on 8 October 2013 CAT's provisional liquidators wrote to the attorneys acting for ICT and for its business rescue practitioner, terminating 'the agreement that ICT relied on for its occupation of the Mall and its right to let premises in the Mall to tenants';
(ii) that on 9 October 2013 CAT's provisional liquidators addressed a further letter to the said attorneys, terminating 'the sale agreement which was purportedly concluded' between CAT and ICT and in terms whereof ICT had purchased two sections in the sectional title scheme proposed to be established in respect of the Mall and terminating 'any other occupation agreement which placed ICT in occupation of the Mall';
(iii) that on 29 October 2014 the attorneys acting for CAT's provisional liquidators wrote to ICT's provisional liquidators, terminating 'any agreements existing between' ICT and CAT 'regarding the occupation, letting out or sale of the Mall, including but not limited to the sale agreement dated 1 December 2009';
(iv) that, in the premises, 'any right which ICT had to conclude agreements of lease with tenants of the Mall and any right which ICT had to continue to act as landlord and give occupation and possession of premises at the Mall to tenants' were terminated by 9 October 2013, alternatively by 29 October 2014.

[14] Counsel for JWP argued that these facts showed that there was an 'agency agreement' between CAT and ICT; that, 'on a proper construction' of the founding papers, CAT had 'conceded' that its rights as owner had been 'relinquished to ICT'; and that the relinquished rights were CAT's 'right to sell its property and lease its property out'. The allegations in question show no such thing. The documents embodying the agreement or agreements between CAT and ICT did not form part of the eviction papers. CAT simply stated that any agreements on which ICT might have relied to occupy and let out premises had been terminated. CAT did not allege that there were in fact any agreements which gave ICT the right to let out premises.

[15] In any event, the very allegations on which counsel relied included the allegation that such rights as ICT might have had to occupy and let out the premises

had been terminated. JWP did not place the validity of the terminations in issue. On ordinary principles, a sub-lessee cannot raise, against the owner, a lease which it has with the owner's lessee.[3] The position would be different if, in the present case, ICT had concluded a lease with JWP as an agent for CAT, but the allegations I have summarised from the founding papers do not show such to have been the case nor did JWP's opposing papers allege agency. The lease on which JWP relied, including the very detailed standard terms and conditions, made no reference whatsoever to CAT. CAT was not called upon to reply to a defence based on agency.

[16] Given its very bleak prospects on the merits had the proposed appeal not become moot, JWP should be ordered to pay the costs of the application in this court for leave to appeal. (JWP has already been ordered to pay the costs of the application for leave to appeal in the court a quo.) Counsel for CAT submitted that these costs should be on a punitive scale. This is something to which I have given careful consideration. There is much to criticise about JWP's conduct. JWP appears to have bought itself time by pursuing an unmeritorious application for leave to appeal, all the while failing to pay rent. Furthermore, it did not vacate the premises at the end of September 2017 and did not curtail further costs by raising the question of mootness with CAT. However, the facts regarding its continued occupation and non-payment of rent were communicated to us informally from the bar and have thus not been canvassed in affidavits. It may also be mentioned that CAT could have, but did not, take the initiative in raising the question of mootness. CAT also did not give notice that it would be seeking a punitive costs order. While this last consideration is not decisive, I am narrowly persuaded that we should not mark our displeasure by way of a special costs order.

[17] The following order is made:

The application for leave to appeal is dismissed with costs.

OL Rogers

Acting Judge of Appeal

[3] *Ntai & others v Vereeniging Town Council & another* 1953 (4) SA 579 (A) at 589A-D; *Ellerine Brothers (Pty) Ltd v McCarthy Ltd* [2014] ZASCA 46; 2014 (4) SA 22 (SCA) para 5.

APPEARANCES

For Applicant:	J P Broster Instructed by Leon Pillay & Company Attorneys, Durban c/o Bezuidenhouts Inc, Bloemfontein
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