REPUBLIC OF SOUTH AFRICA

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable
Case number: 113/2000

In the matter between:

C J STEENKAMP Appellant

and

SOUTH AFRICAN BROADCASTING CORPORATION Respondent

CORAM: **HOWIE, MPATI JJA and FRONEMAN AJA**

HEARD: **20 SEPTEMBER 2001**

DELIVERED: **28 SEPTEMBER 2001**

Subject: Magistrate's finding on liability in damages claim not appealable.

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JUDGMENT

MPATI JA:

[1] The issue in this appeal is whether or not a finding by a magistrate in favour

of a plaintiff on the issue of liability where that issue and the issue of *quantum* have been separated in terms of rule 29(4) of the Magistrates' Courts Rules is appealable.

[2] During the morning of 3 June 1994 the appellant, an insurance broker of Johannesburg, travelled from home to work in his motor vehicle. His route, which he had followed for the past 20 years, took him along Artillery Road, a public road in which the respondent's premises are situated. At some point adjacent to the respondent's premises he stopped when he saw, ahead of him, two security men employed by the respondent assisting another motorist who appeared to have been in some difficulty. When he tried to continue on his journey his vehicle did not move forward. He engaged reverse gear and when he accelerated the vehicle slid sideways and came to a standstill across the lane in which he had been travelling, with its rear wheels against the left curb as one travels from west to east in Artillery Road. The appellant alighted and walked towards the back of the vehicle but in the process he slipped on a layer of ice on the tarmac and fell on his back. The two security men rushed to his rescue. As one of them attempted to lift him up he, too, slipped and fell, landing on the appellant's chest. They succeeded in assisting each other onto their feet. The two security men then pushed the appellant's vehicle onto the inner lane where there was no ice.

[3] The appellant allegedly sustained bodily injuries as a result of the incident and subsequently instituted action for damages in the magistrates' court, Johannesburg, against the respondent. He alleged in his particulars of claim that the water which had frozen on the road had come from a sprinkler system on the respondent's premises. The respondent denied the appellant's allegations of negligence and denied that the water had come from its sprinklers. The *quantum* of the appellant's claim was also put in issue.

[4] At the commencement of the trial the magistrate ordered, at the request of the parties, that the merits and *quantum* be separated in terms of rule 29 and that the matter proceed on the issue of liability only, the question of *quantum* to stand over for determination at a later date.

[5] Only the appellant testified at the trial. After the case for the respondent was closed without any evidence having been tendered on its behalf, the magistrate found in favour of the appellant on the merits. The respondent was, however, successful on appeal to the Witwatersrand Local Division. That court set aside the magistrate's finding and substituted for it an order of absolution from the instance. It also ordered the appellant to pay the respondent's costs. The appellant's

application for leave to appeal was dismissed and he now comes before us with leave of this Court.

[6] Before it dealt with the merits of the appeal the court below *mero motu* raised the issue of the appealability of the magistrate's finding, since it was a finding on the merits of the case only. It appears, though, that counsel for the parties were *ad idem* that the magistrate's finding was appealable. The court *a quo* (per Kruger AJ, Snyders J concurring) came to the conclusion that the magistrate's finding was indeed appealable and that the matter was thus properly before it.

[7] Counsel who argued the appeal in this Court were requested beforehand to prepare argument on the question of appealability. Additional heads of argument were then delivered and on the day of the appeal counsel were afforded an opportunity also to argue the merits of the appeal.

[8] Appeals from magistrates' courts are governed by the provisions of s 83 of the Magistrates' Courts Act, 32 of 1944. Section 83(b) provides that a party to any civil suit or proceeding in the magistrate's court may appeal to a provincial or local division of the High Court having jurisdiction against "any rule or order made in such suit or proceeding and having the effect of a final judgment …". To be appealable then, a magistrate's ruling or order must have the effect of a final judgment.

[9] In considering this issue the court *a quo* was faced with two conflicting decisions, *Santam Bpk v Van Niekerk* 1998 (2) SA 342 (C), where Conradie J (Ngcobo J concurring) held that the magistrate's finding on liability alone is not appealable, and *Raubex Construction h/a Raumix v Armist Wholesalers (Pty) Ltd* 1998 (3) SA 116 (O), where Van Coppenhagen J (with whom Cillié J concurred) held that such a finding is appealable. The court *a quo* aligned itself with the decision in the *Raubex Construction* case.

[10] Two more judgments on the issue have since appeared. In *Keet v De Klerk* 2000 (1) SA 927 (T), Southwood J (Kruger J concurring) came to the same conclusion as Conradie J in the *Santam* case, while in *Hendrikus Erasmus Cloete v Mbale Cladwin Botha*, an as yet unreported judgment of the Orange Free State Division (appeal no 137/2000 delivered on 29 March 2001), the Full Court effectively overruled the decision in *Raubex Construction*.

[11] Both Southwood J in *Keet v De Klerk* and Malherbe JP in *Cloete v Botha* referred in their respective judgments to *Durban Water Wonderland (Pty) Ltd v Botha and Another* 1999 (1) SA 982 (A), a decision of this Court of which the court *a quo* and counsel who appeared before it were obviously unaware. In that case the following was said (at 992G-I):

> "In terms of s 83(b) of the Magistrates' Courts Act 32 of 1944 any

> ‘rule’ or ‘order’, to be appealable, has to have ‘the effect of a final judgment’. The difficulty that arises in relation to the kind of order considered in the *Santam* and *Raubex Construction* cases is that it does not finally dispose of any portion of the relief claimed (cf *Van Streepen & Germs (Pty) Ltd v Transvaal Provincial Administration* 1987 (4) SA 569 (A) at 585 F-G); nor can an order of this kind be regarded as a declaratory order since a magistrate has no jurisdiction to make such an order. (Compare *S A Eagle Versekeringsmaatskappy Bpk v Harford* 1992 (2) SA 786 (A) at 792H).”

[12] Counsel for the respondent contended that what was said in the *Durban Water Wonderland* case about the appealability of the magistrate’s finding was *obiter* and that *Raubex Construction* was correctly decided. Counsel conceded that the magistrate’s finding in favour of the plaintiff on the issue of liability only cannot be a declaratory order since a magistrate has no competence to issue a declaratory order. He argued accordingly that the emphasis should be on the effect of such an order and because the order is final in its effect, in the sense that it cannot be altered by the magistrate, it is appealable. It is true that what was said in *Durban Water Wonderland* concerning the appealability of a magistrate’s order on the issue of liability only is *obiter dictum*, but this Court will not lightly depart from a view previously expressed by it, particularly by five of its members sitting together, even if expressed *obiter*. As will appear below I am not persuaded that

this Court should depart from that view.

[13] In the course of his judgment in the *Raubex Construction* case Van Coppenhagen J refers to a number of decisions of this Court which deal with the appealability of orders or rulings of the High Court in terms of s 20(1) of the Supreme Court Act 59 of 1959. A comprehensive re-examination of those decisions will serve no purpose. But one of them is *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A), where the following was said (at 532J-533A):

> "8. A 'judgment or order' is a decision which, as a general principle, has three attributes, first, the decision must be final in effect and not susceptible of alteration by the Court of first instance; second, it must be definitive of the rights of the parties; and , third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings (*Van Streepen & Germs (Pty) Ltd* case *supra* at 586I-587B; *Marsay v Dilley* 1992 (3) SA 944 (A) at 962C-F)."

Van Coppenhagen J then says (in *Raubex Construction*, at 123G-124B):

> "Dit kom vir my as logies voor dat die woorde 'order' en 'judgment' soos dit in art 83(*b*) van die Wet op Landdroshowe 32 van 1944 voorkom, dieselfde betekenis het as dié deur Harms AR in die *Zweni* saak *supra* aan die woorde in art 20(1) van die Hooggeregshofwet 59 van 1959 toegeskryf. Daar is moontlik 'n enkele verskil en wel in dermate dat art 1 van die Wet op Landdroshowe 'n 'bevel' of 'order' gelyk stel aan 'n vonnis.
>
> Die bevinding wat deur die landdros geboekstaaf is ten opsigte van die geskilpunt wat vir beregting gedien het is in effek finaal en nie

> onderhewig aan verandering deur die landdros nie. Die bevinding het ook die effek dat finale uitsluitsel gegee is ten aansien van die applikant se aanspreeklikheid om skadevoergoeding, sonder om die bedrag daarvan te kwantifiseer, te betaal. Dat die bevinding ook ‘n substansiële deel van die aansprake van die eiser – in die sin dat die eiser aanspreeklikheid van verweerder as deel van sy skuldgrond moes bewys het – in die aksie afgehandel het, spreek feitlik vanself. Die bevinding van die landdros, alhoewel nie elegant geformuleer nie, behoort myns insiens as ‘n bevel wat die effek van ‘n finale vonnis het, soos bedoel in art 83(*b*) van die Wet op Landdroshowe 32 van 1944 aangemerk te word. As sulks kan teen die bevel van die landdros geappelleer word.”

This reasoning was followed by the court *a quo* in the present matter.

[14] The fundamental flaw in the reasoning of Van Coppenhagen J in the *Raubex Construction* case is this. This Court did not hold in *Zweni* that a finding by a Superior Court in favour of a plaintiff on the question of liability, where the merits and *quantum* were separated, is a “judgment or order” as envisaged by s 20(1) of the Supreme Court Act. Quite to the contrary, this Court held in *SA Eagle Versekeringsmaatskappy Bpk vHarford* 1992 (2) SA 986 (A) at 792H, that such a finding “in wese ‘n verklarende bevel is en dat dit ‘n appelleerbare uitspraak of bevel daarstel omdat die bevinding ‘n finale en beslissende effek op die geding tussen die partye gehad het”. What makes the finding appealable is not merely the

fact that it is final and definitive of the issue of liability, but also because it is in essence a declaratory order. At 791 D-E of the *Harford* judgment the following was said:

> "Die Verhoorhof het bevind dat die appellant aanspreeklik was, en, hoewel die skade nog nie bepaal was nie, 'gave judgment for plaintiff with costs'. Wat vermoedelik gebeur het, is dat 'n bevel met die effek van 'n verklarende bevel dat die appellant aanspreeklik was, gemaak is. Immers, 'n bevel wat vir eksekusie vatbaar was, kon dit, in die afwesigheid van 'n bepaling van die skade, nie wees nie."

And (at 792C-D):

> "Die stelling dat die eiser se eis op die meriete toegestaan is, maak nie sin nie aangesien daar nie 'n eis ten aansien van die meriete was nie, maar 'n eis ter betaling van skadevergoeding. … Die bevel is die operatiewe deel van die uitspraak; dit is waarteen geappelleer kan word en dit is waarop eksekusie gehef word."

[15] The third attribute of a decision, for it to be a "judgment or order" as envisaged in s 20(1) of the Supreme Court Act, is that "it must have the effect of disposing of at least a substantial portion <u>of the relief claimed</u> in the main proceedings" (*Zweni supra* at 532J-533A). (My underlining.) The relief claimed in the main action *in casu* is for payment of damages in the sum of R56 751.15 and interest thereon, with costs (compare the *Harford* case *supra* at 792 C-D). No

substantial portion of that relief has been disposed of. The appellant cannot execute on the magistrate's finding. Consequently, such finding cannot be said to be "'n bevel wat die effek van 'n finale vonnis het". And, as was said in the *Santam* and *Durban Water Wonderland* cases, a magistrate's order in favour of a plaintiff in respect of the issue of liability cannot be viewed as a declaratory order since the magistrate has no jurisdiction to issue a declaratory order.

[16] It follows that the *Raubex Construction* case (and consequently the present matter in the court *a quo*) was wrongly decided. A magistrate's order in favour of a plaintiff on the issue of liability where that issue and the issue of *quantum* have been separated in terms of rule 29(4) of the Magistrates' Courts Rules is not appealable.

[17] Strictly speaking that should be the end of the matter since the effect of this finding is that the court *a quo* had no jurisdiction to entertain the appeal and that the magistrate's order is thus still in force. But since counsel were afforded an opportunity to argue the merits of the appeal, it may be appropriate merely to say this. Counsel for the respondent contended that it was not proved that the water from which the ice had formed and on which the appellant slipped came from the respondent's sprinkler system. That argument has no substance. It is common cause between the parties that no rain fell in Johannesburg during the night preceding the incident, nor during the morning of the incident. It is also common cause that cold weather conditions caused the water on the road to freeze. Photographs which were placed before the magistrate by the appellant show sprinklers on the respondent's premises, close to the boundary of the said premises adjacent to Artillery Road. Ice on the metal bars in the boundary wall of the respondent's premises can also be seen on the photographs. The most plausible inference to be drawn from these facts is that the water indeed came from the respondent's sprinklers, which were either faulty or had operated at a wrong time, with the result that they deposited water where, and at a time when they should not have done so.

[18] There was no evidence on behalf of the respondent to show that the respondent did not know or could not reasonably have known that its sprinklers deposited water on Artillery Road. That such water could freeze due to weather conditions in Johannesburg and cause harm to a road user was, in my view,

reasonably foreseeable. The respondent, through its employees negligently failed to guard against such an eventuality, with the result that it incurred liability for such bodily injury and consequent damages as the appellant sustained. Brief mention may also be made of the fact that two employees of the respondent, who appear to have been on duty, were on the scene and had seen at least one motorist whose vehicle skidded on the ice. They therefore had knowledge of the hazardous condition of the road but failed to warn the appellant of it. They were in my view negligent, thereby making the respondent vicariously liable in a second respect. The magistrate's ruling on liability therefore seems fully justified.

[19] The question of costs remains. The appellant, who had a finding in his favour, and could not abandon it, was obliged to oppose the purported appeal in the court *a quo*. Upon the purported appeal succeeding, he now had an order against him and was then obliged to seek relief in this Court. There seems to me to be no reason why he should not be entitled to the costs that he incurred in both the court *a quo* and in this Court.

[20] I make the following order:

1. The appeal is upheld with costs.
2. The order of the court *a quo* is set aside and for it is substituted the following:

> "Geen bevel word ten opsigte van hierdie verrigtinge gemaak nie behalwe dat die appellant die koste daarvan moet betaal."

L MPATI

JUDGE OF APPEAL

CONCUR:

HOWIE JA)
FRONEMAN AJA)