


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: A203/2023

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
14/06/2024	
DATE	SIGNATURE

In the matter between:

EXCELLENT NKOWANA

APPELLANT

and

H J BOSCH AND SONS (PTY) LTD

RESPONDENT

JUDGMENT

Mkhabela, AJ:

Introduction

[1] This appeal arises from a decision of the Magistrates' Court sitting in Pretoria which held that the appellant was liable to pay 100% of the respondent's agreed

and proven damages. It is common cause that there was a collision of two motor vehicles. The drivers of these two motor vehicles were Mr Andries Francis Victor (“Victor”) for the respondent, and the appellant was the driver of the other motor vehicle.

[2] At the commencement of the trial proceedings, the parties requested that the merits be separated from quantum in terms of rule 29 of the Magistrates’ Courts Rules. The Magistrate duly granted the application for separation.

[3] After hearing oral evidence by Victor and the appellant, the Magistrate found in favour of the respondent in respect of the separated issue of liability and made the order that the appellant was 100% liable for damages that the respondent could prove. Aggrieved by the merits judgment and before the issue of quantum was determined, the appellant lodged the current appeal.

[4] The Magistrate’s judgment was granted on 29 November 2022. The appellant’s notice of appeal is dated 10 July 2023 and is therefore egregiously late. Alive to the lateness, the appellant has applied for condonation. Although the grounds for condonation are flimsy, the respondent had elected not to oppose the lateness of the appeal. For this reason, I am inclined to grant the condonation so that there could be finality on the matter.

[5] The grounds of appeal are as follows:

- a. The Learned Magistrate erred in finding that the appellant was 100% liable for the damages as a result of the motor vehicle collision with the respondent.
- b. The Learned Magistrate erred in finding that the respondent’s motor vehicle was roadworthy prior to the collision.

- c. The Learned Magistrate erred in accepting that the respondent immediately after the collision, removed the taillights as he testified that he was taken by the ambulance.
- d. The Learned Magistrate erred in not ordering the apportionment of damages between the parties.

[6] The respondent opposes the appeal on various grounds. The first one is that the record is woefully incomplete as the appellant has failed to provide the transcripts of the proceedings in the trial court. The second is that the appellant is attempting to appeal a finding of liability without a determination of quantum, which finding is unmistakably not final. The third and last ground is that the appeal on the issue of liability is without merit since it is common cause that the appellant collided with the rear of the respondent's vehicle.

The incomplete record

[7] Before I consider the issues that arise for determination, I deem it necessary to dispose of the preliminary issue pertaining to the failure to obtain the transcripts. In my view, the appeal is capable of being adjudicated without the record of the trial proceedings. This does not mean that the record was not essential for adjudicating the appeal.

[8] The reasoning of the Magistrate contains sufficient material for this Court to be able to adjudicate on the matter. This is because the question of the appealability of the liability judgment is not dependant on the availability of the trial record since it is largely a legal question.

Issues

[9] There is no doubt in my mind that there are mainly two issues that arise crisply for determination in this appeal.

- a. The first is whether the decision of the Magistrates' Court in respect of liability is appealable.
- b. If so, whether the Magistrate committed a misdirection when he found on the facts and evidence before him that the appellant was responsible for causing the collision and was therefore 100% liable to pay the agreed or proven damages suffered by the respondent.

Applicable law

[10] It is imperative to emphasise that the appellant does not endeavour to comprehend the possibility that the Magistrate's decision regarding liability may not be appealable. The appellant's heads of argument do not even hint at the fact that the appealability of the Magistrates' Court is a matter that should have been addressed. The issue of appealability was exclusively addressed during the oral argument.

[11] I now turn to the applicable law. It is trite that until fairly recently, the accepted approach to appealability was governed by *Zweni v Minister of Law and Order*.¹

[12] The Constitutional Court polished the *Zweni* principle to a high gloss in the case of *International Trade Administration Commission v SCAW South Africa (Pty) Ltd*² which summarised the *Zweni* principle as follows:

“[T]he decision must be final in effect and not open to alteration by the court of first instance, it must be definitive of the rights of the parties; and lastly, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.”

[13] A further gleam to the *Zweni* principle was added by the Constitutional Court and the Supreme Court of Appeal to the effect that under common law as laid down

¹ *Zweni v Minister of Law and Order* [1992] ZASCA 197; 1993 (1) SA 523 (A) at 532J-533A.

² *International Trade and Administration Commission v SCAW South Africa* [2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 at para 49 (“SCAW”).

in *Zweni*, if none of the requirements set out therein were met, it was the end of the matter. But now the test of appealability is the interest of justice, and no longer the common law test as set out in *Zweni*.³

Analysis

[14] Having outlined the applicable legal principle, I turn now to the evaluation of the appeal before this Court. Commencing with the three requirements in *Zweni*, it is not in dispute that the Magistrates' Court is *functus officio* in respect of the judgment pertaining to the issue of liability. Accordingly, the judgment on liability is final in effect and is not susceptible to consideration by the court *a quo*.

[15] This leaves the second requirement. Does it dispose of a substantial portion of the relief claimed. In my view it does. The issue of liability is crucial to the dispute between the parties. It triggers the next stage of determining the issue of quantum.

[16] However, the third requirement is missing. The judgment is not definitive of the rights of the parties in the trial proceedings. The issue of quantum still remains to be adjudicated. It follows therefore that one of the three requirements is absent. The order granted by the court *a quo* was not final in effect nor was a case made that the interest of justice warrants an appeal. It is trite that the interest of justice will depend on a careful evaluation of all relevant factors in a particular case.⁴ In this regard there is no prejudice to the appellant if there would be an appeal after the judgement on quantum has been granted. In *TWK Agriculture Holdings Pty (Ltd) v Hoogveld Boerdery Beleggings (Pty) Ltd and Others*,⁵ the Supreme Court of Appeal re-affirmed the importance of finality as a prominent feature in the jurisprudence of our courts on appealability. It held as follows:

³ See *Philani Ma-Africa v Mailula* [2009] ZASCA 115; 2010 (2) SA 573 (SCA) at par 20; see also *S v Western Areas* [2005] ZASCA 31; 2005 (5) SA 214 (SCA) at paras 25-8 and *SCAW id* at para 52.

⁴ *SCAW id*.

⁵ [2023] ZASCA 63; 2023 (5) SA 163 (SCA).

"[21] As a general principle, the high court should bring finality to the matter before it, in the sense laid down in *Zweni*. Only then should the matter be capable of being appealed to this Court. It allows for the orderly use of the capacity of this Court to hear appeals that warrant its attention. It prevents piecemeal appeals that are often costly and delay the resolution of matters before the high court. It reinforces the duty of the high court to bring matters to an expeditious, and final, conclusion. And it provides criteria so that litigants can determine, with tolerable certainty, whether a matter is appealable. These are the hallmarks of what the rule of law requires."

[17] There is thus another formidable hurdle for the appellant to overcome. It is the salutary rule that courts should avoid piecemeal litigation. If the appellant's appeal was to be entertained, it would trigger a further appeal to the Supreme Court of Appeal or even to the Constitutional Court before the issue of quantum could be adjudicated.

[18] As I have already alluded, the other requirement is the interests of justice. The question is whether the interests of justice require the Magistrate's decision on liability to be dealt with as an appealable decision, notwithstanding the fact all the three requirements in *Zweni* have not been met.

[19] It is also trite that what is in the interests of justice will depend on a careful evaluation of all relevant factors in a particular case.⁶ In this regard and as already mentioned there is no prejudice to the appellant if they were to appeal after the judgment on quantum has been granted.

[20] In my view, the appellant's attempt to appeal the decision on liability before the issue of quantum is finalised would be tantamount to engaging in piecemeal litigation. The situation is analogous to an accused who has been convicted and appeals the judgment on conviction before sentencing proceedings have been completed.

⁶ SCAW *id.*

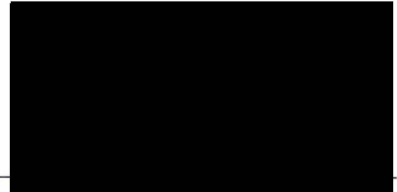
- [21] In addition, it is customary in matters where there was a separation of liability from quantum to await the judgment on quantum. If aggrieved, a litigant can then elect to appeal on both the issues of quantum or one of them.
- [22] The appellant's attempt to appeal the judgment on liability seeks to undermine the very agreement that the appellant had agreed to in separating liability from quantum.
- [23] To my mind the appellant cannot be allowed to both approbate and reprobate. The consequences of a separation of liability from quantum is that a litigant must wait for the adjudication of the quantum case before appealing.
- [24] On the contrary, if there is no separation of issues, both the merits and quantum are determined by the same court. Thereafter, if dissatisfied with the outcome, an appeal can be prosecuted.
- [25] For all these reasons, I am of the view that the Magistrates' Court's judgment on the issue of liability does not meet all the requirements enunciated in *Zweni*. Nor are there any grounds that militate in favour of regarding the matter as an appealable decision on the grounds of the interests of justice. Accordingly, there is no need to deal with the second issue which pertains to the question as to whether the Magistrate was correct in his factual findings that it is the appellant that is 100% liable for having caused the collision.
- [26] What is left is the issue of costs. The respondent has urged the Court to grant it costs against the appellant on a punitive scale for the manner in which the appeal was prosecuted. This includes the failure to deal with the applicable legal issues pertaining to the appealability of the Magistrate's judgment and the fact that the appeal is egregiously late, concomitant with the fact that the appellant had withdrawn the appeal and subsequently enrolled it.
- [27] I am of the view that costs should follow the result and I agree that a punitive costs order is warranted. The appellant should have been aware that there were no prospects of success. The appellant did not need leave to appeal the decision

of a civil Magistrates' Court. Without an automatic right of appeal, the appellant would not have been granted leave to appeal given the poor prospect of success on the appeal.

Order

[28] In the result I make, I make the following order:

1. The appeal is struck from the roll with costs, so payable on attorney and client scale.



RB MKHABELA
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree,



L WINDEL
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES

Date of Hearing	:	30 January 2024
Date of Judgment	:	June 2024
Counsel for the Appellant	:	Adv. L. Moela
Instructed by	:	L Nkowane Attorneys
Counsel for the Respondent:	:	Adv. J. Scallan
Instructed by	:	Van Breda Herbst Inc