NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: AR81/2016

Magistrates' Court, Durban Case No.: 42466/2014

In the matter between:

WAYNE RONALD STAINFORTH N.O.	**FIRST APPELLANT**
LYNN ELIZABETH PROUDE N.O.	**SECOND APPELLANT**
MERRIL HEATHER NICHOLSON N.O.	**THIRD APELLANT**

(First to Third Defendants in the Court a quo)

and

BRAVOSPAN 230 CC	**FIRST RESPONDENT**
SHINE THE WAY 138 CC	**SECOND RESPONDENT**

(First and Second Plaintiffs in the Court a quo)

JUDGMENT

Delivered on : FRIDAY, 16 SEPTEMBER 2016

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[1] This appeal comes to us from the Magistrates Court at Durban where an enrichment action was instituted by the two respondents (close corporations, which I will refer to as the first and second plaintiffs) against the three appellants who were sued in their capacities as trustees of a Trust which I will call the defendant.

[2] It is necessary to furnish a brief account of the pleadings in order to explain our conclusion that we cannot entertain this appeal. In doing so I shall

avoid unnecessary detail, and forsake precision where it makes no contribution to an understanding of the problem which arises in this appeal.

[3] The case for the plaintiffs was pleaded as follows.

(a) The defendant let certain premises to the first plaintiff in terms of the written agreement of lease annexed to the particulars of claim.

(b) During 2012 both plaintiffs were under the impression that in terms of the lease agreement the first plaintiff was obliged to pay to the defendant a contribution to levies, rates and taxes payable by the defendant in respect of the property in question. (I will call these outgoings "rates".)

(c) Being under that impression the first plaintiff paid some R26 000 to the defendant in respect of rates during 2012, and the second plaintiff paid some R3000 to the defendant (presumably on behalf of the first plaintiff) for the same reason.

(d) In fact no such contribution to rates was due in terms of the lease agreement.

(e) In the result the defendant was unjustly enriched, the plaintiffs co-extensively impoverished, and the defendant had to refund the monies paid in error.

[4] The defendant's plea proceeded along the following lines.

(a) The first plaintiff was not the tenant contemplated by the lease annexed to the particulars of claim. The defendant explained that, without limiting the generality of its denial of the allegation that the first plaintiff was that tenant, the document reveals that the lease was concluded on behalf of a tenant which would be a close corporation still to be formed.

The first plaintiff had not ratified the lease according to law and accordingly was not the tenant.

(b) The defendant denied the allegation that a contribution to rates was not payable by the tenant in terms of the lease agreement.

(c) The defendant admitted that it had received some payments in respect of a contribution to such rates but did not admit the particular amounts pleaded on behalf of each of the plaintiffs.

(d) The defendant denied that it had been unjustly enriched.

(e) Concerning the second plaintiff it was pleaded that if it regarded itself as impoverished by the payment it claimed to have made, it should look to the first plaintiff for recompense.

(f) Finally the defendant pleaded that in any event the issue as to whether a contribution to rates was payable to the defendant in terms of the lease agreement was settled after the commencement of the lease in terms of an oral agreement.

[5] At the commencement of the trial the parties requested the learned magistrate to make an order in terms of s29 (4) of the Magistrates' Court Act, that the issue as to whether the lease required the tenant to make a contribution to rates should be decided separately and first, leaving all other matters over for later determination should that prove necessary. A reading of the record shows that this was somewhat imperfectly conveyed to the magistrate. However it is clear that he understood that the issue upon which he had to rule was the proper construction of the lease agreement insofar as it dealt with the question of rates.

[6] Some evidence was led and the matter was argued. The magistrate thereafter delivered judgment and made the following order.

"(i) The 1st plaintiff was not obliged as per the lease agreement to pay a pro-rata share of the levies, rates and taxes payable by the [defendant] to the local authority in respect of the leased premises.

(ii) The monies paid by the 1st plaintiff to the [defendant] in payment of pro-rata share of rates, levies and taxes were not owing to the same.

(iii) The [defendant] to pay the costs of the 1st plaintiff up to the appearance in court on 25 May 2015 and such costs to include the reasonable cost of counsel on brief."

[7] The defendant then delivered a notice of appeal against the whole of the judgment of the magistrate. The grounds of appeal (which run to some 12 pages) canvassed principally the errors the magistrate was said to have perpetrated in interpreting the lease; but also the defendant's contention that the magistrate had erred by making findings beyond the one he was asked to make. No ground of appeal set out in the document canvassed the question as to whether it was proper for the magistrate to have made an order as to costs at that stage, notwithstanding his decision favourable to the plaintiffs on the question of the proper construction of the lease.

[8] A little over a week before the day set for the hearing of the appeal we addressed a query to the parties, referring them to the judgment in *Steenkamp v South African Broadcasting Corporation* 2002 (1) SA 625 (SCA), and requesting them to prepare to address the court on the question as to whether the orders made by the magistrate were appealable. Thus forewarned, the defendant's attorney addressed us supporting the proposition that the magistrate's judgment is appealable, and the plaintiffs' counsel argued the contrary proposition.

[9] Section 48 of the Magistrates Court Act, 32 of 1944 provides for what judgments and orders the court may make "as a result of the trial of an action". It speaks to what is to be done at the end of the case. Section 83 of the Magistrates Court Act deals with appeals against decisions made in the magistrates court, and s83 (a) provides for an appeal against any judgment of

the kind described in s48. Such a judgment was not given by the magistrate in this case.

[10] For present purposes, s83 (b) then goes on to allow an appeal against "any rule or order made in such suit or proceeding and having the effect of a final judgment, ... and any order as to costs."

[11] The case of *Steenkamp* concerned the appealability of a ruling made by a magistrate on liability in a delictual claim, that issue having been separated from the issue of quantum which was to be dealt with later. In *Steenkamp* the court endorsed as correct what had already been held (*obiter*) in *Durban's Water Wonderland (Pty) Limited v Botha and Another* 1999 (1) SA 982 (SCA) that, in terms of s83 (b), any order made in a suit had to have the effect of a final judgment before it would be appealable; and that an order or ruling on a component of a plaintiff's case (such as liability, when quantum still remains to be determined) does not have that quality; and that it could not gain that quality by being regarded as a declaratory order (final in the sense that the magistrate cannot revisit it) because a magistrate has no jurisdiction to make declaratory orders.

[12] As pointed out in *Steemkamp* (paragraph 15) a magistrate's finding on liability which has been separated from quantum does not dispose of a portion of the relief claimed by the plaintiff and does not constitute an order upon which the appellant can execute; as a result of which such a finding cannot be regarded as an order having the effect of a final judgment. It is accordingly not appealable.

[13] In this case the situation is if anything even more clear. It will be apparent from the summary of the pleadings given earlier that there are a number of hurdles which the plaintiffs have to clear in order to succeed in their action. The magistrate was asked to deal with only one of them. It was presumably selected because, if the defendant won the argument over the question as to whether the tenant under the written lease had to make a contribution to rates, that would bring the litigation to a swift conclusion. The

claim would be dismissed with costs. But if the plaintiffs won that argument the trial would have to resume in order to resolve all the remaining issues, not the least of which was the question as to whether the first plaintiff was in fact the tenant contemplated by the written lease. The order the magistrate would make if he found for the plaintiffs on the single point he was asked to decide would dispose of no part of the relief claimed by the plaintiffs.

[14] As I understood the argument advanced by Ms Nel on behalf of the defendant, she does not question the propositions and principles stated above. Instead she argued that the magistrate's judgment is appealable because certain features of the magistrate's order had the effect of putting this case outside the scope of what was held in *Steenkamp*. I will deal with these arguments in turn.

[15] Before doing so I should state that much of the argument advanced on behalf of the defendant is based on a most uncharitable reading of the magistrate's judgment and of the orders he made. I think it is safe to say that a reading of the judgment (and the orders) illustrates that the magistrate was in some respects confused about how to approach the issue he had been asked to decide. The principle reason for that is quite easy to discern from the record. Both parties gave opening addresses in the course of which the request for an order separating one issue from the rest was made. The precise form of order which the parties sought was not given to the magistrate. Neither was he told what order he should make if he decided the point one way, and what order ought to be made if he decided the point the other way. No clear account of the remaining issues in the case was given to the magistrate so as to generate a sufficient awareness of context, and of where he should take care not accidently to stray when considering and delivering his judgment and making his order. This case is yet another example of an overly casual attitude and approach to orders for the separation of issues.

[16] The first of the defendant's arguments focuses on the fact that in paragraphs (i) and (ii) of the order made by the magistrate (reproduced earlier

in this judgment) the magistrate found that the first plaintiff was not obliged under the lease to pay rates and that the monies paid by the first plaintiff to the defendant for rates were not owing. The plaintiffs have conceded that the magistrate ought to have made no reference to the first plaintiff but should instead have found that the lessee or tenant under the lease was not obliged to pay a contribution to rates. The plaintiffs argue, correctly in my view, that the error in the orders can be corrected by the magistrate. Section 36 (1) (c) of the Magistrates Court Act would permit that to be done. However that concession does not satisfy the defendant.

[17] Before us the defendant has argued that the magistrate has now determined that the first plaintiff is the tenant under the lease, an issue he was not supposed to decide. It is argued that the magistrate has thereby made a final ruling on what is said to be one of the defendant's defences. The principle sought to be applied is the one in *Ndlovu v Santam Limited* 2006 (2) SA 239 (SCA) at paras 8 – 10. As I understand it the principle is that if a defence is raised which stands entirely outside the claim made by the plaintiff, and it is decided by the court, that decision has the effect of a final judgment. As pointed out in *Ndlovu* the case of *Durban's Water Wonderland* is a prominent example of the application of the principle the defendant seeks to rely on. In *Durban's Water Wonderland* a contract excluding liability was raised by the defendant in answer to a delictual claim made by the plaintiff, and a ruling on that special defence was held to be appealable because it finally disposed of a discrete defence raised altogether outside the elements of the plaintiff's case. In *Ndlovu's* case the court was concerned with a special plea as to jurisdiction raised before the magistrate by the defendant. That was held to be a defence standing apart from and "entirely outside" the plaintiffs claim.

[18] What we are asked to hold is that the allegation made by the defendant in the plea that the first plaintiff has not adopted the lease as required by law is such a separate defence standing apart from the plaintiffs claim. And we are asked to conclude that the magistrate, by his reference to the "first plaintiff" in his order, has in effect rejected that defence.

[19] For at least two reasons this submission made by the defendant cannot be sustained. Firstly, the question as to whether or not the first plaintiff is a party to the lease is very much part of the plaintiff's claim. It is denied by the defendant, and the need for a corporate body such as the first plaintiff to adopt or ratify an agreement such as the lease (which described the tenant as a close corporation still to be formed) is pleaded merely in support of the defendant's general denial of a crucial element of the plaintiffs' case, that the first plaintiff is in fact the tenant under the lease. There is no separate defence in that regard raised by the defendant. Secondly, a perusal of the judgment shows that the magistrate did not consider the so-called special defence. He did not in his judgment examine or consider the question as to whether the first plaintiff is the tenant, and did not intend to make a finding that the first plaintiff is in fact the tenant. His reference to the first plaintiff in the order was clearly an error.

[20] The next argument raised by the defendant concerns the second of the orders made by the magistrate. The defendant argues that it has the effect of determining the quantum of the claim. I find difficulty understanding the argument. It is correct that the magistrate was not asked to determine the quantum of the claim. It is said that "he finally determined a substantial portion of the relief insofar as quantum is concerned". I am not at all sure as to what that means. The questions as to how much money was paid to the defendant and as to who paid the monies remains in dispute on the pleadings and was not canvassed before the magistrate. Clearly paragraph (ii) of his order was unnecessary, and if one reads his judgment one sees that he did not seek to determine any dispute as to how much was paid and as to who paid it. The whole of the second paragraph of the order was made in error, I suspect in an attempt to explain or clarify paragraph (i) of the order. That was done erroneously and it can be corrected.

[21] These issues aside, the question which arises immediately is how the defendant's submissions as to the qualities of paragraph (ii) of the magistrate's order can affect the question as to whether the order is

appealable. The answer to that question given by the defendant is that cases such as *Steenkamp* and *Jordaan v Bloemfontein Transitional Local Authority and Another* 2004 (3) SA 371 (SCA) hold that decisions on liability are not appealable because the quantum of the claims remains to be established and incorporated into a judgment. That, argues the defendant, is not the situation here because the magistrate has finally determined the issue of quantum. In my view there is no merit in this argument. The principle applied in those cases is not that judgments are unappealable until the quantum of any claim has been decided. It is that rulings or orders made by a magistrate are not appealable unless they have the effect of a final judgment. Such a judgment must have the effect of disposing of at least a substantial portion of the relief claimed. Even if one wrongly (and uncharitably) reads the order of the magistrate to convey a determination of the quantum of the plaintiffs' claims, that did not have the effect of disposing of any part of the claims made by the plaintiffs. The analysis of the pleadings given earlier illustrates that.

[22] There are one or two embellishments to the arguments advanced on behalf of the defendant concerning the first two orders made by the magistrate, and dealt with above. An example is the fact that the magistrate overlooked the late concession made by the plaintiffs that in terms of the agreement, whereas a contribution to the rates payable in respect of the leased premises at the time of conclusion of the lease was not required of the tenant, if such rates were increased the tenant would be obliged to make a contribution to such increase only. In my view no such embellishment adds anything to the qualities of the two arguments and they need not be canvassed any further.

[23] The defendant's final argument is constructed around the proposition that in terms of s83 (b) of the Magistrates Court Act an appeal lies against "any order as to costs".

[24] Relying on the case of *De Vos vs Cooper & Ferreira* 1999 (4) SA 1290 (SCA), the defendant argues that the order as to costs made by the magistrate is appealable; and that in considering an appeal against such a

costs order, we are obliged not to look at the order which the magistrate actually made on the merits (which we cannot alter because it is itself not appealable), but to the order which the magistrate ought to have made on the merits. The defendant argues that we must therefore consider the merits of the matter and decide whether the magistrate was right or wrong; and if we find that he was wrong, we must set aside his court order as to costs. We must do this despite the fact that his order on the merits will continue to stand; as a result of which the trial will proceed to its end. And if at its end the plaintiffs are successful, one of the grounds of appeal against the ultimate final judgment will be that the order of the magistrate which we now have no jurisdiction to alter was in fact wrong. In arguing this facially remarkable proposition the defendant's attorney did not say anything to address the concern that if there is any merit in her argument, the scenario she maps out involves a totally unacceptable potential for conflicting decisions by two appeal courts of equal standing on the same issue between the same parties in the same litigation.

[25] The principle upon which the defendants rely, and which was employed in the case of *De Vos*, emanates from the judgment of Watermeyer CJ (Tindall JA and Centlivres JA concurring on this point) in *Pretoria Garrison Institutes v Danish Variety Products (Pty) Limited* 1948 (1) SA 839 at 863. The appeal in that case concerned an order which a magistrate had granted directing a plaintiff to furnish certain particulars, accompanied by an order that the plaintiff pay the costs of the application. The majority decided that the order to furnish particulars was not appealable. It would therefore have to stand. However, given the provisions of s83 (b) of the Magistrates Court Act, the order as to costs was appealable, and it was held that in determining such an appeal the court had to ask who ought to have been the successful party in the application for the supply of the particulars. Tindall JA expressed his view as follows at pages 865 – 866.

> "From the fact that no appeal lies against the substantive order it does not seem to me to follow inevitably as a matter of logic that the legislature intended that, in the appeal against the order for costs, the only question which the court can investigate is whether, assuming the

> substantive order to be right, the order as to costs is in itself wrong. As the language, in terms of which the right of appeal against the order as to costs is granted, is unqualified, it may equally well be held that the legislature intended that the enquiry into the validity of the order as to costs should not be limited. The question is one on which opinions may well differ. The latter view strikes me as the better one, though I would not be prepared to go to the stake for it."

[26] What strikes me as important in considering the *Pretoria Garrison* case is the fact that the order directing the furnishing of particulars was one which, not being appealable, would never be altered. It would remain enforceable, right or wrong.

[27] The same phenomenon is to be found in the case of *De Vos*. There it was held that a magistrate's order rescinding a default judgment was not appealable; but that, given the provisions of s83 (b) of the Magistrates Court Act, the order for costs made against the party resisting the rescission of the judgment was appealable. Following *Pretoria Garrison* the court decided (at 1302 A-H) that in considering the appeal against the costs order the merits of the application for rescission of the judgment had to be considered. Again, the decision to rescind the judgment would never be altered and would remain in force.

[28] In this case the position is quite different. As already pointed out, there is a potential for the merits of the ruling now under consideration to be considered in a subsequent appeal once the magistrate has finally delivered judgment in the action. If the plaintiffs are ultimately successful before the magistrate the defendant will undoubtedly attack the ruling now under consideration in any appeal which the defendant may launch. Likewise, if the defendant is ultimately successful, in any appeal launched by the plaintiffs the defendant would undoubtedly argue that the judgment in the defendant's favour was correct because the ruling now under consideration was incorrect.

[29] Neither *Pretoria Garrison Institutes* nor *De Vos* is in my view authority for the proposition that in a case like the present, an appeal against the costs

order can be used as a surrogate and premature appeal on the merits. In those cases there never could be a subsequent appeal on the merits.

[30] There is no need for us to consider the question as to whether the order as to costs made by the magistrate in this case could have been appealed at this time (i.e. mid-trial) upon a ground which is not dependent on the appeal court's opinion as to whether the magistrate's unappealable ruling on the merits was right or wrong. The grounds upon which the defendant appealed in this case do not include such a self-standing attack on the costs order; such as, for instance, that costs ought to have been reserved or made in the cause, given that the plaintiffs' claim to a favourable order of costs as successful parties will only arise if they are ultimately successful in the action. No such issue was argued before us. It is quite plain from the notice of appeal that the order of costs was challenged only as an adjunct to the misconceived appeal against the magistrate's decision on the merits.

[31] I accordingly conclude that we have no jurisdiction to entertain the present appeal.

[32] We were informed from the Bar that the issue as to whether the magistrate's decision was appealable was raised by the defendant's attorney in an email addressed to the plaintiffs' attorney before the appeal was launched, the defendant's attorney saying that the defendant did not want to become embroiled in an appeal if the issue as to whether the magistrate's order was appealable would arise. The plaintiffs' attorney apparently replied, ambiguously it seems to me, with the words "I agree". I stress that this account was given to us orally from the Bar, the defendant's attorney contending that in those circumstances, if the defendant is unsuccessful in this appeal, each party should pay it's own costs.

[33] I do not think that this somewhat imperfectly conveyed exchange between the attorneys justifies a conclusion that costs should not follow the result in this appeal. In *Steenkamp* the court observed that a person in the position of the plaintiffs in this case has no option but to resist the appeal.

(See *Steenkamp*, para 19.) The same proposition can be put slightly differently. The decision as to whether there will be an appeal is that of the appellant. It is the appellant's responsibility, and not that of the proposed respondent, to avoid engaging a court which lacks appellate jurisdiction. It is also not without significance that having been forewarned of the problem a week before the appeal was due to be argued, the defendant chose to press ahead, and to do so with a considerable measure of vigour in the face of opposition from plaintiffs' counsel. Costs must follow the result.

The following order is made.

1. The appeal is struck off the roll with costs.

OLSEN J

SEEGOBIN J

Date of Hearing:	MONDAY, 05 SEPTEMBER 2016
Date of Judgment: :	FRIDAY, 16 SEPTEMBER 2016
For the Appellant :	Ms C A NEL
Instructed by:	MACGREGOR ERASMUS ATTORNEYS Appellants' Attorneys 114 Bulwer Road Glenwood Durban (Ref.: CN/sb/STA4/0001) (Tel No.: 031 – 201 8955)
For the Respondent:	MR C EDY
Instructed by:	TOMLINSON MNGUNI JAMES Respondents' Attorneys 2 Ncondo Drive Nedbank Building Umhlanga Ridge (Ref. R Steyn/Kim/11B688514) (Tel.: 031 – 566 2207) **c/o TOMLINSON MNGUNI JAMES** 165 Pietermaritz Street Pietermaritzburg (Ref.: Mr V Reddy)