THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 177/2008

JOHN WILLIAM CARTER **Appellant**

and

KATHLEEN SHIRLEY HAWORTH **Respondent**

Neutral citation: *Carter v Haworth* (177/2008) [2009] ZASCA 19 (20 March 2008)

Coram: Mthiyane, Maya, Snyders JJA, Leach and Bosielo AJJA

Heard: 16 February 2009
Delivered: 20 March 2009

Summary: **Whether a 'judgment' of a trial court 'allowing damages' and other relief, and determining certain factual findings to be referred to an actuary to facilitate the calculation of an item of damage, which was to be thereafter referred back to the judge, is appealable.**

ORDER

On appeal from: Cape of Good Hope Provincial Division (Erasmus J sitting as court of first instance).

1 'The appeal is struck from the roll.'

JUDGMENT

MTHIYANE JA (MAYA, SNYDERS JJA, LEACH and BOSIELO AJJA concurring):

[1] This appeal is concerned with the question whether the 'judgment' of the trial court in which damages and other relief were 'allowed' and certain findings of fact were referred to an actuary to facilitate the calculation of an item of damage, which was to be thereafter referred back to the judge if the matter is not settled, is appealable.

[2] The appeal, with leave of this Court, is from the decision of the Cape High Court (NC Erasmus J) in which the court 'allowed' damages and other relief and made certain factual findings in favour of the respondent, as plaintiff. The respondent claimed damages against the appellant arising out of bodily injuries she sustained in a motor collision on 30 April 2001, while she was on a visit to South Africa. The claim was advanced under different heads which included general damages, future medical expenses and future loss of earnings. The appellant conceded liability in respect of the merits of the claim, leaving only the quantum of the respondent's damages to be determined by the trial court. By agreement between the parties the learned judge was asked to determine

only questions relating to the quantum of the respondent's damages. In addition the court was asked to make certain 'factual assumptions' which would then be furnished to an actuary for the purpose of the calculation of the claims for past and future loss of earnings.

[3] In respect of the claim for future medical expenses the court found that the amount of R100 500 was 'reasonable and should be allowed'. As to general damages it found that the amount of R100 000 'would constitute a fair and reasonable' compensation. No order was however made directing the appellant to compensate the respondent in either of these amounts.

[4] As regards the claim for past loss of earnings the court indicated that the parties had accepted a contingency deduction of five per cent as reasonable. The judge then went on to deal with the 'factual assumptions' he made for submission to an actuary to facilitate the calculation of the respondent's claim for future loss of earnings.

[5] Ultimately the respondent was 'awarded costs on a party and party scale, either as taxed or agreed. . .'. But the costs of the postponement of the matter on 13 April 2005, were allowed 'to stand over for later determination'.

[6] Because the question of appealability was raised from the bench at the commencement of the appeal and counsel were caught somewhat unawares, we afforded them the opportunity to file supplementary heads of argument on this question in due course.

[7] It is convenient to deal first with the question of appealability,

because if it should prevail a decision on the merits of the appeal would be premature. During argument both counsel contended that the judgment is appealable. Counsel for the respondent in particular submitted that, in the Cape of Good Hope Provincial Division, matters are routinely disposed of as the trial court had done. I have not been able to find any authority to support this contention. I have found at least two cases which suggest the contrary. These cases indicate that where a judge is required to determine certain issues, be they legal or factual, he or she will in conclusion at the very least make an order. See *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd*; *D'Ambrosi v Bane*.[1] Where, for example, a litigant claims compensation on the basis of negligence which is admitted by the wrongdoer ─ as the respondent has done in the present matter ─ it is difficult to see how an assertion to the effect that a particular amount should be 'allowed' or is 'fair, equitable or reasonable' ─ without such finding culminating in an order ─ would be of any assistance to a successful party. This is not to say that a court may not be required by the litigants to determine certain factual or legal issues to enable them to thereafter either settle or move onto the next stage of their dispute based on the finding of the court. The three *Consol* cases referred to above illustrate the point. In each one of them the issues referred to the judge for decision were dealt with, answered and an order subsequently made.

[8] This is unfortunately not what happened in the present matter. I have already indicated how the respective claims for future medical expenses and general damages were dealt with. As to the 'factual assumptions' made by the judge in respect of the past and future loss of earnings which were to be referred to the actuary for the calculation of

[1] 2002 (6) SA 256 (C) paras 58 and 59; 2005 (6) SA 1 (SCA) para 62; 2005 (6) SA 23 (C) para 63; 2006 (5) SA 121 (C) para 46.

the loss of earnings, there is no indication in the judgment as to what was to happen after the actuary had completed the calculation. Would the calculations be referred back to the judge for finalisation? Or was the judge still engaged in what Howie JA referred to as 'merely steps along the way towards the final conclusion and consequent order'. (See *Guardian National Insurance Co Ltd v Searle NO*.[2]) During argument, counsel expressed the hope that the matter would settle once the actuaries of the respective sides had made their calculations, but conceded that if settlement was not reached it would be necessary to revert to the trial court for it to determine the amount to be allowed in respect of loss of earnings. Until that stage, the trial court would neither to able to assess the total amount of the respondent's damages nor issue an order holding the appellant liable to the respondent in that sum. The proceedings in the trial court in respect of the issue of damages have therefore clearly not finally concluded, and an appeal to this court is premature.

[9] There is yet a further conundrum in the judgment. The wasted costs of the postponement on 13 April 2005 were reserved by the judge for later determination. Again, was the matter to be referred back to the judge for finalisation? These factors militate against the judgment of the court below having finally disposed of the issues and against the judgment being final and therefore appealable.

[10] An appealable 'judgment or order' as intended by s 20(1) of the Supreme Court Act 59 of 1959 has three attributes. First, it must be final in effect and not susceptible to alteration by the court of first instance. Second, it must be definitive of the rights of the parties in the sense that the person seeking relief has, for example, been granted definite and

[2] 1999 (3) SA 296 (SCA) at 301G.

distinct relief. Third, the 'judgment or order' must have the effect of disposing of at least a substantial portion of the relief claimed. (See *Zweni v Minister of Law and Order*; *Ndlovu v Santam Ltd*.[3])

[11] But this litmus test only finds application when the court concerned has pronounced conclusively on the issues submitted to it for determination. The difficulty with the judgment of the court below is that we do not even get to the application of test in *Zweni* because upon a proper reading of the judgment the issues in the case do not appear to have been brought to final conclusion. I have already alluded to the absence of any indication as to what was to happen after the calculation of loss of future earnings by the actuary.

[12] In my view the weakest link in the judgment lies in the absence of an order. I do not think there is a part of a judgment that provides a stronger indication of finality than an order at the end. If the order is removed or omitted the judgment is rendered ineffective and so, too, its element of finality. It is incapable of execution by the Sheriff or Messenger of the court in the case of proceedings in the magistrate's court. I cannot emphasize the importance of the order more than was done by this court in *SA Eagle Versekeringsmaatskappy Bpk v Harford*[4] where it was said an order is the operative part of the judgment. It is what a losing party appeals against. The court also stressed that a duty rests on a court to formulate a clear order and for the registrars to ensure that the order so issued is clear and corresponds with the judgment. On the same theme this court in *Administrator, Cape, and Another v Ntshwaqela and Others*[5] declared that there can be an appeal only against a substantive

[3] 1993 (1) SA 523 (A) at 532I-533B; 2006 (2) SA 239 (SCA) para 9.
[4] 1992 (2) SA 786 (A) at 792C-D.
[5] 1990 (1) SA 705 (A) at 715D.

order made by a court, not against the reasons for judgment.

[13] Given the uncertainty regarding the fate of the actuarial calculations and the absence of an order, the conclusion is unavoidable that the judgment of the court below is not appealable. Having come to this conclusion it would be inappropriate to express any views on the merits of the appeal. For the above reasons the matter falls to be struck from the roll.

[14] I turn to the question of costs. To the extent that both parties failed to appreciate the appealability point ─ and indeed persisted in arguing that the 'matter' was appealable ─ it seems fair that each should shoulder responsibility for its own costs.

[15] In the result the following order is made:
'The appeal is struck from the roll.'

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KK MTHIYANE
JUDGE OF APPEAL

Appearances:

For Appellant: D Stephens

Instructed by:
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For Respondent: PA Corbett

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