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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: A741/2013

Date: 1/6/2015

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHERS JUDGES: YES/~~NO~~
(3) REVISED

1/6/2015 .....
DATE ~~SIGNATURE~~

In the matter between:

THE BODY CORPORATE OF THE BEL AIRE SCHEME NO. SS 1821/2006

APPELLANT

And

SURE GUARD CC

RESPONDENT

JUDGMENT

PRETORIUS J,

[1] This is an appeal against the judgment and order delivered on 27 March 2013 in this court. Leave to appeal was granted on 15 August 2013 and the appellant delivered its notice of appeal on 11 September 2013.

[2] Heads of argument have been filed by both the appellant and respondent. The respondent did not deal with the merits of the appeal, but only with the notice of appeal. According to the respondent the applicant had not complied with the provisions of Rule 49(4) of the Uniform Rules of Court.

[3] Rule 49(4) provides:

> "*Every notice of appeal and cross-appeal shall state-*
>
> *(a) what part of the judgment or order is appealed against; and*
>
> *(b) the particular respect in which the variation of the judgment or order is sought."*

[4] The respondent's argument is that the appellant's notice of appeal fails to specify the findings of fact and/or rulings of law that are appealed against, the notice of appeal does not comply with the peremptory requirements of Uniform Rule 49(4). The result of this alleged non-compliance is that the notice of appeal is invalid *ab initio*.

[5] The respondent requests the court to strike the appeal from the roll, as the notice of appeal is void and cannot be cured by an amendment. The appellant vehemently opposes this argument of the respondent.

[6] The respondent only filed heads of argument dealing with the point *in limine* and did not deal with the merits of the appeal at all. The court decided to hear the argument that the notice of appeal is void and that another court would deal with the merits of the appeal at a later stage if the court finds for the appellant on the point *in limine*.

[7] Legal Background:

Section 17(6) of the Superior Courts Act, 10 of 2013 has been amended and provides:

> *"(6) (a) If leave is granted under subsection (2) (a) or (b) to appeal against a decision of a Division as a court of first instance consisting of a single judge, the judge or judges granting leave must direct that the appeal be heard by a full court of that Division, unless they consider-*
>
> *(i) that the decision to be appealed involves a question of law of importance, whether because of its general application or otherwise, or in respect of which a decision of the Supreme Court of Appeal is required to resolve differences of opinion; or*
>
> *(ii) that the administration of justice, either generally or in the particular case, requires consideration by the Supreme Court of Appeal of the decision, in which case they must direct that the appeal be heard by the Supreme Court of Appeal.*
>
> *(b) Any direction by the court of a Division in terms of paragraph (a), may be set aside by the Supreme Court of Appeal of its own accord, or on application by any interested party filed with the registrar within one month after the direction was given, or such longer period as may on good cause be allowed, and may be replaced by another direction in terms of paragraph (a)."*

[8] The present wording of Uniform Rule 49(4) was introduced by GNR472 of 12 July 2013 and took effect on 16 August 2013.

[9] It differs from Uniform Rule 49(3), which was applicable prior to the

amendment, as Rule 49(3) provided:

> *"The notice of appeal shall state whether the whole or part only of the judgment or order is appealed against and if only part of such judgment or order is appealed against, it shall state which part and shall further specify the finding of fact and/or ruling of law appealed against and the grounds upon which the appeal is founded."*

[10] Uniform Rule 49(3) provides in peremptory terms for these requirements to be set out in the notice of appeal, namely whether the whole or part of the judgment is appealed against and if only part of the judgment is appealed against, which part of the judgment is appealed against as well as the finding of fact and/or ruling of law appealed against. Thirdly it must set out the grounds upon which the appeal is founded.

[11] In the present Uniform Rule 49(4) only two requirements have to be met, where it is stated what part or order is appealed against and the particular aspect in which the variation of the judgment or order is sought.

[12] The requirements as set out in the previous Uniform Rule 49(3) were similar to the requirements of Rule 51(7) of the Magistrates' Court Rule. The requirements are no longer similar to Magistrates' Court Rule 51(7) and therefor the case law applicable to Magistrates' Court Rule 51(7) is no longer of assistance to interpret the provisions of Rule 49(4) presently.

[13] The respondent referred the court to **Kilian v Geregsbode, Uitenhage 1980(1) SA 808 AD**. This *dictum* deals with Magistrate's Court Rule 51(7) and cannot be applied to Rule 49(4) as the three requirements in a notice of appeal has been changed to only two requirements. Similarly, the court

cannot rely on the judgment in **Tzouras v SA Wimpy (Pty) Ltd 1978(3) SA 204 (WLD)** as it dealt with Uniform Rule 49(4) which is no longer applicable. Margo J found at p205 E-F:

> *"The particular requirements of Uniform Rule of Court 49(4) and of the corresponding Rule in the magistrates' court have generally been regarded as peremptory so that failure to comply with them (or at least to comply with them substantially) invalidates the notice of appeal ab initio. Such a notice of appeal is void and therefore cannot be cure by amendment."*

[14] It is thus clear that the Tzouras judgment dealt with Uniform Rule 49(4) at the time, which was similar to Magistrates' Court Rule 51(7) and is no longer applicable to Rule 49(4).

[15] Uniform Rule 49(4):

In the present Uniform Rule 49(4) two requirements are set out: that the applicant has to set out what part of the judgment or order is appealed against and the particular respect in which the variation of the judgment or order is sought.

[16] The notice of appeal in the present case sets out:

> *"BE PLEASED TO TAKE NOTICE that the appellant, having been granted leave to do so on 15 August 2013, hereby notes an appeal against the whole of the judgment and order of His Lordship Mr Justice Pathudi granted on 27 March 2013 in terms of which judgment was granted against the appellant in favour of the respondent, the appellant being ordered to pay the respondent the amount of R324 558.00 together with costs of*

the action.

TAKE NOTICE FURTHER that the appellant seeks an order in the following terms:

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

   "The action is dismissed with costs.""

[17] Uniform Rule 49(4) must be compared to Rule 7(3) of the Supreme Court of Appeal Rules which provides:

> *"7(3) Every notice of appeal and cross-appeal shall –*
>
> *(a) state what part of the judgment or order is appealed against;*
>
> *(b) state the particular respect in which the variation of the judgment or order is sought;*
>
> *(c) ..."*

[18] The respondent takes issue with the provision that: "*it shall state which part and shall further specify the finding of fact and/or ruling of law appealed against and the grounds upon which the appeal is founded*". The respondent argues that the appellant should: "*make it clear whether the appeal is on a point of law, or on facts, or both*" and "*specify the findings of fact or rulings of law appealed against, and in what particular respect variation thereof is sought*".

[19] In **Holland v Deysel 1970(1) SA 90 (AD)** Wessels JA found at p93 A-B:

> *"Na my mening is die uitspraak van hierdie Hof in Heyman v Yorkshire Insurance Co. Ltd., 1964 (1) SA 487 (AA), egter*

afdoende wat die geopperde vraag betref. Dit bied regverdiging vir die beslissing dat die woorde 'uitspraak', 'bevel', 'beslissing' en 'vonnis' almal dui op die uitsluitsel wat 'n hof gee in verband met die bepaalde regshulp wat in gedingvoering deur 'n party aangevra is. Die presiese formulering van die uitsluitsel sou van die woordkeuse van die Hof afhang, of kan verband hou met die formulering van die aangevraagde regshulp of ook moontlik met die aard van die gedingvoering."

And at C-D:

"Om terug te keer na die kennisgewing van appèl wat in die onderhawige geval ingedien is. Waar dit voorgee 'n appèl teen die hele uitspraak te wees, dui dit na my mening ondubbelsinnig daarop dat die appèl op die beslissing van die Hof a quo in sy geheel gerig is. Dit sou geensins die sin van die kennisgewing geaffekteer het nie indien dit woordeliks sou voorgegee het 'n appèl teen die hele bevel van die Hof a quo te wees nie. Die kennisgewing van appèl is gerig op die hele omvang van die regshulp wat volgens die beslissing van die Hof a quo aan eiser toegestaan is, en dit voldoen derhalwe aan die vereistes gestel in Reël 5 (2) van die Reëls van hierdie Hof."

[20] In **Atholl Developments (Pty) Ltd v The Valuation Appeal Board for the City of Johannesburg [2015] ZASCA 55 (30 March 2015)** the court found at para 8:

"There can be an appeal only against the substantive order made by the Court, not against the reasons for judgment".

[21] This court has to agree that the appellant set out in his notice of appeal: *"hereby notes an appeal against the whole of the judgment and order..."*

[22] In **Leeuw v First National Bank Ltd 2010(3) SA 410 SCA** Snyders JA found at para 5:

> *"In this court it is not required that grounds of appeal be stated in the notice of appeal. The nature of the proceedings is such that this court is entitled to make findings in relation to 'any matter flowing fairly from the record'. The parties in their written and oral arguments have dealt with all the issues relevant to the appeal and the appellant has not pointed to anything that has been overlooked. The point, apart from being bad, had long lost its significance."*

It is thus clear that in an appeal to the Supreme Court of Appeal the heads of argument, the record and oral argument are used to state the grounds of appeal.

In the present instance the appellant supplied the court with the order it sought to replace the original order with in the notice of appeal. This was supplemented by heads of argument which dealt solely with the contents of the notice of appeal.

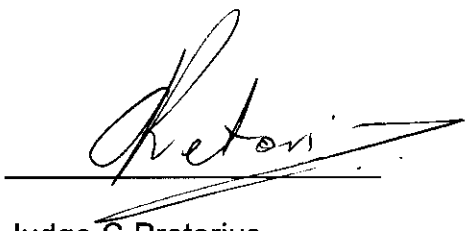
[23] Rule 49(4) is thus the same as Rule 7(3) of the Supreme Court of Appeal Rules and the authorities applicable to the Supreme Court Rule should be applicable to Rule 49(4). It is no longer necessary for an appellant to the full court to state grounds of appeal in the notice of appeal, as the notice of appeal will be augmented and amplified by written and oral arguments of the parties. The court cannot find that the respondent is correct when

arguing that the notice of appeal is void *ab initio*. The notice of appeal has been amplified by full argument, both written and oral, by both parties.

[24] The court finds that the appellant had set out and dealt with the issues relevant to the appeal.

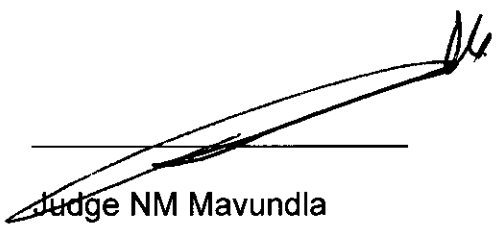
[25] Therefor the following order is made:

1. The point *in limine* is dismissed;
2. The respondent to pay the appellant's costs relating to the point *in limine*;
3. The appeal on the merits is postponed *sine die*.



Judge C Pretorius

I agree:



Judge NM Mavundla

Judge TM Makgoka

Case number	: A741/2013
Appeal heard on	: 29 April 2015
For the Applicant	: Adv. J L MYBURGH
Instructed by	: STUART VAN DER MERWE INC.
For the Respondent	: Adv. E. DREYER
Instructed by	: SIKANDER TAYOB ATTORNEYS
Date of Judgment	: 2015