

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

2023/06/14

DATE

A handwritten signature in black ink, appearing to be "D. Marais".

SIGNATURE

CASE NO: 2022-017144

In the matter between:

VICKY DOCKRAY

APPLICANT

and

KEEP IT SIMPLY TRADING (PTY) LTD

RESPONDENT

JUDGMENT

D MARAIS AJ:

[1] This is an application for summary judgment in terms of rule 32.

[2] The background of the applicant's claim is an application which the respondent herein brought in the magistrates' court in Kempton Park, seeking an order for the eviction of the applicant herein from an immovable property. I will refer to the parties as they are named in this matter, and not as they were in the magistrates' court. After papers have been exchanged in the matter, but before the respondent delivered its replying affidavit, the applicant apparently vacated the premises. This resulted in the respondent indicating in its replying affidavit that it intended withdrawing the application and that it will seek an order for cost only. The applicant enrolled the matter for hearing. During this hearing, the following evidently transpired:

[2.1] The magistrate adopted the view that the matter was not properly enrolled;

[2.2] The respondent's counsel orally indicated from the bar that it was withdrawing the application;

[2.3] The respondent did not make a tender for costs when withdrawing the application;

[2.4] The magistrate noted the withdrawal, but at the same time also recorded that the matter was not properly on the roll;

[2.5] The magistrate made an election from a number of potential cost orders appearing on a standard form he was using to make "no order".

It is to be noted that his form also made provision for “costs in the cause”, “each party to pay its own costs”, and “costs reserved” which options he did not elect. Having deselected the other options, the magistrate intended to remain silent on the question of costs, which had the effect that each party was to pay their own costs for the day. I do not view the order he made as dispositive of the costs of the matter as a whole.

[3] The applicant adopted the view that the respondent, having withdrawn the application, was liable for the costs of the application. Before this court, the applicant argued that the withdrawal automatically entitled her to the costs of the application. I disagree with this generalised statement. Whilst a party who withdraws an action of application is usually liable for the costs, that is certainly not always the case. Costs remains in the discretion of the court, and the court must grant an appropriate order, exercising a discretion that must be judicially exercised.¹

[4] In terms of rule 27(3) of the Rules of the Magistrates’ Court, if a plaintiff or applicant has withdrawn an action or application by notice, the other parties to the action or application can apply to court for a cost order. The background of this rule of court was that before 1917, when the first Magistrates’ Court Act came into being the law was, somewhat formalistically, to the effect that the withdrawal of an action in the Magistrates’ Court brought an end to the proceedings, which made in

¹ See *Harding v Maclear* 7 CC 2016 JDR 2188 (WCC); *Erasmus v Grunow en 'n Ander* 1980 (2) SA 793 (O)

impossible to apply for a cost order. Thus, a new action had to be instituted to obtain a cost order.² The purpose of rule 27(3) is said to ameliorate this situation, by enabling the defendant or respondent to apply for a cost order.

[5] The applicant adopted the view that it was a prerequisite for the application of rule 27(3) that the withdrawal must have been by notice, and that in the face of an oral withdrawal from the bar, rule 27(3) found no application. Thus, the plaintiff was of the view that a new action must be instituted. The applicant, therefore, proceeded to institute action in this court for a cost order on a punitive scale, citing certain alleged jurisdictional difficulties in instituting an action in the magistrates' court.

[6] I am *prima facie* of the view that the application of a purposive interpretation³ of rule 27(3) calls for an interpretation of rule 27(3) on the basis that the rule find application even when a matter was orally withdrawn from the bar. A literal interpretation to the contrary would result in an absurdity which was clearly not intended by the makers of the Rules and would result in formalism that does allow the Rules of Court to promote the fair and just administration of justice. However, due to the conclusion I have reached, I need not make a final decision on this issue.

² See the discussion under rule 27 in *Jones and Buckle The Civil Practice in the Magistrates' Court in South Africa*.

³ See *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA)

[7] Even on the basis of the aforesaid *prima facie* view, it appears that it would still be open for the applicant to institute an action for the costs. In *Ecclestone & Co v Levenberg & Co*⁴, Watermeyer J held:

“There are a number of cases which have been decided in this Court which lay down that a defendant can sue for his costs if the case against him has been withdrawn and no order has been made by the Court with regard to costs. See for example Terblanche v Oudtshoorn Municipality (13 SC 275); Stoffberg v Augustyn (1916 CPD 477). These cases are binding on me and the principle which they lay down seems to me to have been approved in other cases such as: Matoko v Wellbeloved (1911 CPD 84); Eisenstadt v Barone (1931 AD 486). It is true that when these cases were decided Act 32 of 1917 was not in force and there was no provision in the magistrate's court procedure at that time corresponding to Order 19, rule 2(2) which would enable a defendant to get an order for his costs by making an application to the magistrate's court, but I do not think that the introduction of such a provision took away a defendant's right to sue for his costs. It may be that if the procedure by motion is less expensive than the procedure by action, the Court which hears the action will not allow the full costs of an action; but it does not follow that procedure by motion is the only remedy open to a party who wishes for a judgment for his costs. I think, therefore, that the plaintiff was entitled to sue for his costs.”

⁴ 1933 CPD 57 at 60

[8] In *Behm v Ord*⁵ the court held that all *Ecclestone & Co* was authority for, was that a person can, despite the existence of a provision like the current rule 27(3), still issue a separate action for costs in the same *forum* as the previous proceedings, but that they did not authorise an action for damages for costs (which in essence is the same as applying for a cost order) in a different *forum*.

[9] The court held that the course taken by plaintiff (in instituting action in the magistrates' court for costs in connection with a Supreme Court application) was inherently open to objection because the very question whether plaintiff is, as against defendant, entitled to any costs at all in respect of the proposed motion proceedings in the Supreme Court is a matter which should be determined by the Supreme Court, and not by the magistrate's court. The court followed *Rothschild v van Wyk*⁶, wherein De Villiers, J.P., held that our law was in accord with the following passage in Mayne on Damages (6th ed at p. 88) viz.:

“As a general principle the right to costs must always be considered as finally settled in the Court where the question is adjudicated to which that right is accessory; so that, if any costs are awarded, nothing beyond the sum taxed, according to the Rules of Court, can be recovered as damages; or, if costs were expressly withheld by an adjudication in the particular case, none would be recovered by suit in any other Court.”

⁵ 1953 (4) SA 96 (C) at 101F

⁶ 1916 T.P.D. 270

[10] The High Court has inherent jurisdiction to hear matters in respect of which the magistrates' court has jurisdiction.⁷ It could be argued that where the applicant in this matter is entitled to institute an action for a cost order in the magistrates' court, this court has inherent jurisdiction to hear such case as well.

[11] However, the issue of costs is in a particular category of cases, where the authority is to the effect that the issue of costs must be decided by the court in which the dispute is to be adjudicated. It would appear to me that this would be an exception to the rule that the High Court must exercise concurred jurisdiction. However, this issue was not argued before me and in view of the recent case law on the issue of the inherent jurisdiction of the High Court⁸ it is obviously undesirable to attempt any judgment on the matter.

[12] The cases referred to above, must also be considered subject to the principle that once a matter has reached *litis contestatio*, a party cannot simply withdraw a matter and thereby remove the matter from the control of the court, nor deprive the other side of the opportunity to have the merits heard. The magistrates' court has the discretion to order a hearing on the merits and give judgment, despite the withdrawal.⁹ As such the court has a discretion whether to terminate the proceedings, and the

⁷ See *Standard Bank of South Africa Ltd and Others v Mpongo and Others* - 2021 (6) SA 403 (SCA); *South African Human Rights Commission v Standard Bank of South Africa Ltd and Others* 2023 (3) SA 36 (CC)

⁸ See note 7 above.

⁹ See *Cassimjee v Vather Bros* 1958 (2) SA 310 (N); *Karoo Meat Exchange Ltd v Mtwazi* - 1967 (3) SA 356 (C) and *Jacobson v Havinga t/a Havingas* 2001 (2) SA 177 (T).

proceedings do not come to an automatic end. Under the circumstances, the proceedings in the present case may still be pending in the magistrates' court.

[13] A further allegation is made in the summons that, apart from the absence of a written notice of withdrawal as required by rule 27(3), the magistrates' court does not have jurisdiction because the order sought is a claim for specific performance.¹⁰ Therefore, the applicant claims that she was constrained to approach the High Court. It is highly doubtful that this assertion by the applicant is correct. A cost order in relation to legal proceedings cannot be regarded as an order for specific performance. In terms of the Magistrates' Courts Act, a magistrates' court has the power to grant appropriate cost orders in general.¹¹ It is also settled law that a magistrates' court has jurisdiction in this kind of matter.

[14] In my view this matter should be disposed of on a rather simple basis. The applicant seeks to argue that her claim for a cost order is for a liquidated amount of money and that it was competent for her to apply for summary judgment in terms of rule 32.

[15] As I have already held, although a party withdrawing proceedings will usually be liable for the costs of the withdrawn proceedings, this is by no means a certainty. A court must consider all the circumstances, including the merits of the matter that was withdrawn, and make an appropriate

¹⁰ Presumably having section 46(2)(c) of the Magistrates' Court Act in mind.

¹¹ See section 48 and rule 33

cost order. There is a possibility, and I have not considered this nor do I make any finding in this regard, that the respondent was entitled to bring the eviction application and the applicant vacated because of the application, seeing that the writing is against the wall. In such a case the withdrawal would simply signify that the main relief sought has become superfluous. The respondent may in such circumstances be entitled to a cost order, despite the withdrawal. If a cost order is for some reason not granted in the respondent's favour, the applicant may be deprived of her costs, if appropriate.¹² Conversely, it is a possibility that the respondent would not have succeeded with the eviction application, and the applicant vacated the premises for reasons unrelated to the merits of the case. In such event the applicant may be entitled to a cost order. The applicant, furthermore, seeks a punitive cost order which requires the court to consider whether there are circumstances justifying such order.

[16] I am not required in these proceedings to make any finding on the merits of the proceedings in the magistrates' court, and the matter is entirely up in the air. For this reason, counsel for the applicant was constrained to advance the unsustainable proposition that the withdrawal automatically entitled the applicant to a cost order. This was also not the basis upon which the applicant founded her claim for a cost order; the basis of her claim is a general allegation that she is entitled to a cost order in respect

¹² See the authorities mentioned in note 1.

of the proceedings in the magistrates' court, not that she is entitled to the order without further ado.

[17] The applicant's claim is patently not a claim for a liquidated amount of money. In fact, the discretionary order sought is evidently quite the opposite.

[18] The applicant attempted to create the impression that her claim is for a liquidated amount of money by attaching a draft bill of costs to her verifying affidavit in these proceedings. Apart from the fact that such untaxed bill of costs is not necessarily indicative of a liquidated amount of money, reliance on the bill of costs begs the question. The bill of costs will only become relevant once the applicant has obtained a cost order in her favour. It does not turn her claim for a cost order into a claim for a liquidated amount of money. Furthermore, attaching the bill of costs to the verifying affidavit was also impermissible in terms of rule 32.

[19] As it was not competent for the applicant to bring an application for summary judgment, this is not a case where leave to defend should be granted; the application ought to be dismissed with costs.

ORDER

[20] Consequently, the following order is made:

“The applicant’s application for summary judgment is dismissed with costs”.



DAWID MARAIS
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG
14 June 2023

This judgment was handed down electronically by circulation to the parties’ legal representatives by email and by being uploaded to CaseLines. The date of this judgment is deemed to be 14 June 2023.

Appearances:

Appearance for Applicants:	ADV C D ROUX
Instructed by:	C R CHRISTIE INC
Appearance for first respondent:	ADV S FREESE
Instructed by:	RHK ATTORNEYS
Date of hearing:	11 May 2023
Date of Judgment:	14 June 2023