

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION PRETORIA)**

CASE NO: A391/2019

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED
<u>12 July 2021</u>	
DATE	SIGNATURE

In the matter between:

Pierre Pienaar N.O.

Appellant

And

Silver Lakes Home Owners Association NPC

Respondent

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the

electronic file of this matter on Caselines by the Judge or his/her secretary. The date of this judgment is deemed to be 12 July 2021.

JUDGMENT

L I VORSTER, AJ (COLLIS J Concurring)

INTRODUCTIONS

1. The Appellant was the Defendant in an action instituted by the Respondent. The Appellant defended the action. The trial was set-down for 16th of July 2019. On the day before the trial, 15th of July 2019, the Respondent served a notice of withdrawal on the Appellant. The notice was not filed at Court.
2. The notice of withdrawal stated that the Respondent withdraws its action and tenders to pay the Appellants costs of the action. The Appellant was not satisfied with the tender for costs, as the Appellant wanted Attorney and Client costs. When the trial commenced, the Appellant informed the Court that the Appellant is dissatisfied with the tender for costs in the notice of withdrawal and wanted to proceed with an application in terms of Rule 27(3) of the Magistrate's Court Rules to argue the question of costs. The Court accepted the withdrawal and agreed with the Appellant that the Appellant was to bring the application in terms of Rule 27(3). On the 5th of November 2019, the Appellant brought its application in terms of Rule 27(3), as envisaged at the date of the trial. The Court found that the application for costs on the scale of Attorney and Client

was not competent after the withdrawal of the matter and where a tender for costs was embodied in the notice of withdrawal.

ISSUE TO BE DETERMINE

3. The first issue for determination is the reinstatement of this appeal which has lapsed due to effluxion of time. The appeal lapsed through no fault of the Appellant or its attorney but through undue lapse of time as a result of constraints caused by Covid- 19 restrictions and access to typing facilities and court facilities. These factors are beyond control and cannot serve as reasons for dismissing an application for late prosecution of the appeal. Consequently, the application for condonation should succeed. The issue in this appeal is whether the finding of the Magistrate that it was not competent to decide the application in respect of costs because the notice of withdrawal embodied a tender for party and party costs, was correct. That question entails an interpretation of Rule 27 and particularly Rule 27(3) of the Magistrate's Court Rules.

4. Rule 27 of the Magistrate's Court Rules provides as follows:

"(1) Where a summons has not been served or the period limited for the delivery of notice of intention to defend has expired and no such notice has been delivered the plaintiff may withdraw the summons by notice to the Registrar or Clerk of the Court.

(2) Save as provided by subrule (1) a plaintiff or applicant desiring to withdraw an action or application against all or any of the parties

thereto, shall deliver a notice of withdrawal similar to Form 6 of Annexure "1".

- (3) *Any party served with a notice of withdrawal may within 20 days thereafter apply to the Court for an order that the party so withdrawing shall pay the applicant's costs of the action or application withdrawn, together with the costs incurred in so applying. Provided that where the plaintiff or application in the notice of withdrawal embodies a consent to pay the costs, such costs consent shall the force of an order of Court and the Registrar or Clerk of the Court shall tax the costs on the request of the defendant."*

5. A literal reading of Rule 27(3) illustrates the problem. On the face of it, any party served with a notice of withdrawal may apply to the Court for an order that the party withdrawing shall pay the costs of the Applicant.
6. The same subrule however provides that where a notice of withdrawal embodies a consent to pay the costs of the other party such costs consent shall have the force of an order of Court. Therefore, on a literal interpretation of Rule 27(3), a Plaintiff who realizes that it is at risk to attract a punitive costs order if the matter proceeds, can serve a notice of withdrawal and can tender the party and party costs, which costs will then in terms of Rule 27(3) have the effect of an order of Court. In that way such a person can avoid the possibility of a punitive costs order against it. On a proper construction of the rule and what it seeks to achieve, this could not have been the intention of the legislature.

7. It follows that, an interpretation of the rule according to the literal meaning of the words used, is not correct.
8. Rule 27 is a statutory enactment and it is trite that it must be interpreted in a purposive way to get to the true meaning taken into account the fundamental values which are referred to in the Constitution. **Vide: Re Hyundai Motor Distributors (Pty) Ltd & others v Smit NO & others 2001(1) SA 545.**
9. One has to have particular regard to the context of the legislation as a means to establish the true meaning of the words used. The context of Rule 27(3) indicates that it is dealing with the situation where either a Plaintiff or a Defendant decides to withdraw its claim or defence, as the case may be, before the matter is heard and decided by a Court of law. It deals with the position where a litigant unilaterally decides to end litigation and to withdraw its claim or defence. Naturally the question of liability for costs of the action incurred by the other party in whose favour the withdrawal operates is then a factor to be adjudicated or settled between the parties. It may differ from case to case. The amount and scale of such costs will not be the same or even comparable in different situations. Therefore, the rule must be interpreted in a way that the party in whose favour the withdrawal operates will be entitled to its costs of suit, as the case may be.
10. As the rule now stands, only a party in whose favour a withdrawal operates and where costs have not been tendered as part of the withdrawal has the right to apply to Court for an order for costs which would include also the scale of costs.

11. In the case where a withdrawal is made and costs is tendered as part of the withdrawal the rule provides that such costs offered will be having the force of an order of Court and must be taxed by the Taxing Master.
12. There can be no reason why a litigant in whose favour a withdrawal is made by the opposing party should be tied down to the amount or scale of costs which the withdrawing party states in the notice of withdrawal, to avoid that result the rule must be interpreted to safeguard in the right of the party in whose favour the withdrawal operates to approach the Court for an appropriate order as to costs. Any other interpretation will be discriminatory without a lawful basis for such discrimination.
13. *In casu* the Magistrate considered himself bound by the provision in Rule 27(3) that, where costs are offered as part of the withdrawal, such offer as to costs has the effect of an order of Court. Literally that would be correct. The point is that it is not however the correct interpretation of Rule 27(3). The Courts have warned against the slavish following of the provisions of Magistrate's Court Rule 27(3). In **Harding v Ma clear 2016 (JDR) 2188 (WCC) at 32** the following is said:

"In this matter Magistrate slavishly followed the provisions of Magistrate's Court Rule 27(3).... The Magistrate manifestly did not apply his mind to the background facts and the circumstances giving rise to the application, nor the pedantic and obstructive fashion in which the respondent and her attorney has conducted the matter thus far. Importantly, he failed to consider the fact that he had an overriding

discretion in relation to the award of costs and was not bound by the stricture of the rule in question. Simply put, the Magistrate did not properly apply his mind to the matter at hand."

14. Clearly, that is also what happened in the instant case. It follows that the slavish following of the literal wording of Rule 27(3) of the Magistrate's Court Rules by the learned Magistrate, was irregular and must be set-aside.

15. When the withdrawal of the action was made known to the Appellant, the day before the trial, the Appellant indicated that it wanted to argue the question of costs in the notice of withdrawal. The Magistrate found the wording of Rule 27 as peremptory and that he was powerless to entertain the argument about costs.

16. That was not regular or correct and is a reason to interfere with the decision of the Magistrate. It follows that the interests of justice require that the overriding discretion of a Court, including a Magistrate's Court in relation to orders of costs cannot be limited to the extent that a party is, precluded from having its case decided by the Court.

ORDER

17. Consequently, I am of the view that the appeal must succeed with costs. In the result, I propose the following order:

17.1. Condonation is granted for the reinstatement of the lapsed appeal in terms of Uniform Rule 50(1) with no order as to costs.

17.2. The appeal succeeds.

17.3. The Respondent is ordered to pay the costs of the appeal.

17.4. The order of the Magistrate or finding of the Magistrate that the Court was - *functus officio* in terms of Rule 27(3) is set-aside and replaced by the following order:

17.4.1 Plaintiff is ordered to pay Defendant's costs in the main action under case number 1296/2014 on the scale of between Attorney and Client.

17.4.2 The Respondent is ordered to pay the Applicant's costs in the Rule 27(3) application for costs on the scale of Attorney and Client, including costs of counsel on the higher scale which shall include the preparation of heads of argument in terms of Rule 33(8)(d).



L.I. VORSTER
ACTING JUDGE OF THE HIGH COURT

I agree



C.J. COLLIS
JUDGE OF THE HIGH COURT

It is so ordered:

Appearances:

For Appellant : Adv. H.P. Wessels 0610 528 6860; 012 4244 017

For Respondent : Adv. L.C.M. Morland 0824977657

Attorneys:

For Appellant : E.W. Serfontein & Associates, Pretoria.

**For Respondent : Warrener De Agrella & Associates c/o Prinsloo vd Linde.
Attorneys, Pretoria**

Date of Hearing : 03/06/2021

Date of Judgment : 12/07/2021

Judgment transmitted electronically