

**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE LOCAL DIVISION: MTHATHA]**

CASE NO. 1829/2019

In the matter between:

DIAMOND HILL TRADING 97 CC

t/a THE FISH AND CHIPS CO.

1st Applicant

OLUGBENGA JONH AKINBOHUN

2nd Applicant

And

REGIONAL MAGISTRATE SIHLAHLA: MTHATHA

1st Respondent

ARNOLD PROPERTIES (PTY) LTD

2nd Respondent

JUDGMENT

JOLWANA J

[1] The applicants seek the review and setting aside of the decision or order of the magistrate for the regional court, Mthatha made on 10 April 2019 in case no. EC/MTHA/RC/97/2014. The presiding magistrate issued a punitive costs order against the applicants consequent upon the postponement of the trial which had been set down to commence on that day between the applicants who are the defendants in those proceedings and the second respondent which is the plaintiff. It is that costs order that is sought to be reviewed and set aside on the basis that the court a quo committed gross irregularity when it made the order. Only the second respondent opposes this application and has filed opposing papers, the first respondent having not participated at all.

[2] The applicant approached this Court in terms of rule 53(1)(a) and (b) of the Uniform Rules of Court¹ read with section 22(1)(c) of the Superior Courts Act 10 of 2013.² The alleged grounds for the review application are that the first respondent exercised his judicial discretion in granting the costs order against the applicants improperly and capriciously, and that the costs order itself constitutes a fundamental error of law. The applicants further allege that the order was made without the presiding officer having applied his mind to the relevant issues and the material before him. In exercising his discretion in those circumstances and in the manner he did, so contend the applicants, the first respondent allowed himself to be influenced by gratuitous accusations against the applicants made by the second respondent's legal representative from the bar. The upshot of all of this is that that exercise of judicial discretion by the first respondent, was, in all those circumstances, grossly irregular and so unreasonable and improper that no reasonable judicial officer could have exercised it in that manner.

[3] The issues raised by the applicants arose in the context of a pending case between the applicants and the second respondent in the regional court Mthatha in respect of case no. EC/MTHA/RC/97/2014. That matter was set down by the respondent for trial for 10th April 2019. The relevant notice of set down was served on applicants' attorneys on 27 February 2019 and filed of record with the registrar on 28 February 2019. The applicants promptly started their preparations for trial. They also, on 26 March 2019, filed a request to the registrar for a pre-trial conference to

¹ Rule 53(1) reads: Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairman of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected-

(a) calling upon such persons to show cause why such decision or proceedings should not be reviewed and corrected or set aside, and

(b) calling upon the magistrate, presiding officer, chairman or officer, as the case may be, to dispatch, within fifteen days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as he is by law required or desires to give or make, and to notify the applicant that he has done so.

² Section 22 reads: The grounds upon which the proceedings of any Magistrates' Court may be brought under review before a court of a Division are-

(a) absence of jurisdiction on the part of the court;

(b) interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;

(c) gross irregularity in the proceedings; and

(d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.

(2) This section does not affect the provisions of any other law relating to the review of proceedings in Magistrates' Court.

take place before the commencement of the trial in terms of rule 25(1) and (2) of the magistrates' court rules read with section 54(1) of the Magistrates Court Act 32 of 1944

[4] Rule 25 reads:

(1) The request in writing referred to in section 54(1) of the Act shall be made in duplicate to the registrar or clerk of the court requesting the court to call a pre-trial conference and shall indicate generally the matters, which it is desired should be considered at such conference.

(2) The registrar or clerk of the court shall place a request referred to in subrule (1) before a judicial officer who shall, if he or she decides to call a conference, direct the registrar or clerk of the court to issue the necessary process.

(3) The process for requiring the attendance of parties' legal representatives at a pre-trial conference shall be by letter signed by the registrar or clerk of the court together with a copy of the request, if any, referred to in subrule (1), which letter shall be delivered by hand or registered post at least 10 days prior to the date fixed for the said conference."

[5] The applicants' attorneys followed up their rule 25(1) request for a pre-trial conference telephonically with a registry staff member Ms Lukas bringing to her attention the provisions of rule 25(2). They were advised by Ms Lukas to ask their local correspondents JA Le Roux Attorneys to attend to the registry with the pre-trial conference request for the apparent purposes of taking the court file to the presiding judicial officer in compliance with rule 25(2).

[6] Furthermore, the relevant practice note applicable in the regional court provides that all civil case files must reach a judicial officer at least 6 days before the date of the hearing. It was therefore, so contend the applicants, important that they take the steps that they did to ensure that the trial would proceed on 10 April 2019 as scheduled. Their intention was that before the trial commenced, there would be a pre-trial conference hence their cautious steps of ensuring not only that they complied with rule 25 but also that the said rule was complied with by the office of the registrar. They also set down special pleas that would also need to be dealt with on 10 April 2019.

[7] On or about 5 April 2019 the applicants' attorneys made enquiries to the registrar and were told that the matter was not enrolled for the 10 April 2019. The reason they were given was that there was no notice of set down of the trial for that day. On

8 April 2019 the applicants' attorneys received correspondence from their local correspondent attorneys to the effect that they would not be able to attend court on 10 April 2019 because of other commitments and requested the applicants' attorneys to make other arrangements for court attendance. This development prompted them to request their correspondent attorneys to formally withdraw as their local correspondents so that they could appoint alternative correspondents to attend court on 10 April 2019.

[8] Their understanding was that in any event the matter would not proceed on 10 April 2019 because the matter was not on the roll according to what they were told at the registrar's office on 5 April 2019. To then travel to Mthatha from their offices in Welkom to attend a trial they had been informed was not on the roll did not make sense to them. On a previous occasion on 16 May 2018 the matter could not proceed because of the failure of the second respondent or its attorneys to properly index and paginate the court file. On that occasion the applicants and their legal representatives including counsel had attended court and were ready for the hearing of the matter which did not proceed.

[9] On 09 April 2019 JA Le Roux Attorneys withdrew as the applicants' attorneys' local correspondents and on 10 April 2019 Luzipho Attorneys came on record as their correspondent attorneys. Even before they came on record formally Luzipho Attorneys were requested on 9 April 2019 and indeed they attended court to confirm if the matter was on the roll for the 10th April 2019 or not. It was confirmed to Mr Luzipho that the matter was not on the roll. On 10 April 2019 Mr Luzipho attended court and found the second respondent's legal representatives in court. The second respondent's attorneys had, on discovering that the matter was not on the roll, gone to see the first respondent and showed him a notice of set down bearing the registrar's date stamp in confirmation of filing. The file was for the first time, brought to the first respondent on the date of the hearing. The first respondent first dealt with matters that appeared on the roll and ultimately the matter between the applicants and the second respondent was called. Mr Luzipho was present obviously in his capacity as the local correspondent of the applicants' attorneys.

[10] The applicants point out that the first respondent, due to no fault of his own, had not read the file in preparation for the hearing of the matter. It was the fault of the registrar's office that the notice of set down which had clearly been filed, was not placed in the court file. The applicants also allege that the second respondent's

attorneys should have ensured that the notice of set down found its way into the court file. Furthermore, the registrar ought to have complied with the peremptory provisions of rule 25(2) as she had been requested to do so by the applicants' attorneys some twelve days earlier.

[11] Essentially, the applicants make three central contentions on which they impugn as being grossly irregular the conduct of the first respondent when he made the costs order that is sought to be reviewed and set aside. First, they contend that the matter was not properly or at all before the first respondent. This was illustrated by the fact that he had not read the court file as it had not been brought to him timeously. In this regard they argue that a matter cannot be said to be on the roll or properly before court only on the basis of a notice of set down that bears both proof of service with the opponents and proof of filing with the registrar. The delivery of a notice of trial provided for in rule 22 is the placing of the notice of set down in the court file and as this did not happen the notice of set down for the 10 April 2019 was not delivered, so went the submission.

[12] Second, the applicants submit that the first respondent, instead of exercising his judicial discretion referred to in rule 33(1)³ properly, he merely rubber stamped the argument made by second respondent's counsel. In essence the second respondent's counsel had argued that costs should be paid by the applicants on an attorney and client scale as provided for in the contract between the parties. The said contract was and still is the subject matter of the lis between the parties still to be ventilated during trial.

[13] Third, the first respondent acted contrary to rule 33(3)⁴, in ordering the second respondent's bill of costs to be taxed and paid immediately, only because the second respondent's legal representatives had asked for that relief. The applicants' contention in this regard is that the first respondent should have found that it was the registrar and the second respondent who were to blame for the matter not being on the roll of the 10th April 2019. Had he made this finding he would not have made an adverse costs order against them.

³ Rule 33(1) reads: The court in giving judgment or in making any order, including any adjournment or amendment, may award such costs as it deems fit.

⁴ Rule 33(3) provides: Unless the court shall for good cause otherwise order, costs of interim orders shall not be taxed until the conclusion of the action and a party may present only one bill for taxation up to and including the judgment or other conclusion of the action.

[14] They further submitted that it would be a travesty of justice or even judicial misconduct for any judicial officer to continue with a trial of such magnitude which needed thorough preparation without reading the pleadings in the court file. In those circumstances court attendance by the applicants would have aided and abated the said injustice. They would have applied for and insisted on the recusal of the first respondent were he to insist on presiding and continuing with the trial when he had had no time to read the file contents. They, as the applicants, were not to blame in a manner that justified any costs order against them. This therefore, so went the submission, flouted the fundamental principle that costs should be ordered against a party either seeking indulgence or the one bearing the blame for the postponement as provided for in rule 33(1).

[15] A record in terms of rule 53 of the Uniform Rules of Court was filed consisting of basically the entire contents of the court file of the regional court with most or all of the pleadings, notices as well as other documents and the transcribed record of the proceedings of 10 April 2019. On receipt of the transcribed record the applicants filed a supplementary affidavit in terms of rule 53(4)⁵ in augmentation of the averments contained in the founding affidavit.

[16] In their supplementary affidavit, the applicants point out with reference to the record that the presiding magistrate said that he was not ready to deal with the matter because he had not read the file in preparation for the hearing on that day. On this basis, even if they were present and in attendance in court, that would not have changed the fact that the court was not ready to deal with the matter. Secondly because of the ineptitude of the registry staff in that court which the first respondent referred to on record the first respondent had not read the pleadings. This was because the notice of set down was not placed in the court file. For this reason, even if the applicants were in court, nothing would have changed and the presence in court of the second respondent did not alter the position in which the court found itself. By the same token court attendance by the applicants and their legal representative would not have changed this situation.

[17] The applicants contend that on the face of the situation for which they were not to blame and based on the second respondent's counsel's gratuitous accusations

⁵ Rule 53(4) of the Uniform Rules of Court reads: The applicant may within ten days after the registrar has made the record available to him, by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of his notice of motion and supplement that supporting affidavit.

made from the bar, the first respondent, not only made an unjustified order that costs must be borne by the applicants but mulcted them with costs on an attorney and own client scale with no factual or legal basis. Their presence on that day would not have made a difference and it is unclear why it was said that they should have been there. They ask, they should have been there to do what when the matter would have been postponed for the reasons already mentioned in any event. The applicants further make the point that they deserved all the praise for acting responsibly in ascertaining whether or not the matter was on the roll for that day and once advised that it was not, for asking a local attorney to verify if indeed the matter was not on the roll.

[18] In its answering affidavit deposed to by the second respondent's attorney of record the second respondent contends that the first respondent exercised his discretion judiciously in light of the background of how the matter was set down for trial. First, the second respondent, as plaintiff had set the matter down for trial by serving and filing a notice of set down in compliance with rule 22 of the magistrates' court rules.⁶ The notice of set down was served on the applicants' local correspondents on 27 February 2019 and filed at court on 28 February 2019.

[19] The applicants as defendants served two significant notices, one setting the matter down for a pre-trial conference which the applicants wanted held on the day of the trial before the commencement of the trial. The second notice was a notice in terms of which the applicants themselves set down separated issues for determination at the trial. The above facts are common cause and are also adumbrated in the applicants' founding affidavit in these proceedings.

[20] On the day of the trial neither the applicants nor their attorneys attended court. However, Mr Luzipho, their new correspondent attorney after the withdrawal of JA Le Roux attorneys attended court and in addressing court, indicated that he was the applicants' attorneys' correspondent attorney. It was apparent that he had limited instructions armed with nothing more than his letter of appointment and a notice of acting. His instructions were merely to argue that the matter was not properly before court and he had not yet, for obvious reasons, been placed in a position to run the trial nor could he deal with the issues set down by his instructing attorneys themselves, namely the pre-trial conference and the special pleas.

⁶ Rule 22(1) reads: The trial of an action shall be subject to the delivery by the plaintiff, after the pleadings have been closed, of notice of trial for a day or days approved by the registrar or clerk of the court: Provided that, if the plaintiff does not within 15 days after the pleadings have been closed deliver notice of trial, the defendant may do so.

[21] In this regard the second respondent makes reference to the transcribed record in which Mr Luzipho's submissions in court are reflected. In those submissions Mr Luzipho argued that the matter was not properly before court and this is obviously the issue that he required the court to rule on. He had obviously been instructed to persuade the court that for various reasons the matter ought not be heard as it was not properly before court. In his submissions he was careful to point out that he was not asking for the adjournment of the matter as in his views there was nothing to adjourn. It follows by operation of logic that the court could rule in one of two ways. First, that indeed the matter was not properly before court and on that basis, refuse to hear it. Second, the court could rule against those submissions and decide to hear the matter despite the fact that its own rules may not have been complied with in every detail. It is unclear what the applicants' intentions or plans were in the event that the court ruled against Mr Luzipho's submissions and therefore against the applicants as it was entitled to do.

[22] Quite surprisingly the applicants, in their replying affidavit have submitted that it is false to say that Mr Luzipho was instructed to apply for an adjournment on the basis that if the matter is not on the roll there was no reason to apply for an adjournment. This begs the question why was Mr Luzipho there making the submissions that he made. It might very well be that Mr Luzipho was not there to apply for an adjournment because in their view there was no reason for that. However, the court thought differently. Mr Luzipho took some time arguing, trying to convince the court that because of various reasons which he articulated the matter was not on the roll. The court debated the matter with Mr Luzipho at length about all the aspects pertaining to the main issue of whether or not the matter was properly before court. The court ruled that the matter was properly before it. The basis on which the decision of the court on a matter that both parties debated before it extensively could be said to be a gross irregularity escapes me.

[23] It was common cause that the second respondent had served and filed the notice of set down. What had not happened was that the clerk of the court had not placed the said notice of set down in the court file. The applicants' attorneys knew about the date for the hearing of the matter and confirmed in writing that they had received the notice of set down served on them by the second respondent's attorneys. They themselves had also set down a pre-trial conference for that day to take place before the trial commenced together with special pleas which also needed

to be dealt with by the court. None of that could take place because the applicants were not there.

[24] In their heads of argument the applicants have quoted the first respondent's remarks that were made on record in dealing with the matter in which the court said: "I am very much worried because I wish the court was ready with this matter the court would make a different ruling to what the court is going to make. The court believes that it has to be ready with the case so that if there are some issues that are dealt with or are ventilated, the court would be very much *au fait* with that"

[25] It appears that on the basis of this remark the applicants contend that whether or not the applicants and the second respondent were in attendance on the 10 April 2019 was immaterial. This is because their presence would not have changed the fact that because the notice of set down had not been placed in the court file by the registrar the magistrate had not read the bulky file, nor prepared for trial. Therefore, so submit the applicants, it was grossly unfair for the court and an inappropriate exercise of its judicial discretion to make an adverse costs order against the applicants in circumstances in which the magistrate himself had not read the file.

[26] In framing their case as they have done the applicants have unfortunately been selective with regard to the first respondent's remarks. For instance the first respondent also said that because the second respondent and its attorneys were not aware about the fact that there was a problem of the registrar who had not taken the file to the magistrate they were before court and there was a witness that had come to give evidence. The court further made it clear that the issue of the notice of set down not being in the court file resulting in the court not having read the file was caused by the clerk of the court. He then concluded that in his view the matter was properly before him despite the fact that he had not read the file. The magistrate went on to say that despite all of that he was prepared to proceed with the matter even if just to hear the evidence of the witness who was available. He could not do so not because he had not read the pleadings but because the applicants had elected not to come to court, after discovering and getting confirmation that the matter was not on the roll.

[27] They first made this discovery that the office of the registrar had not placed the notice if set down in the court file which had evidently been filed after which they sought and received confirmation from the clerk of the court that the matter was not on the roll. Having sought and received confirmation that there was this problem

they did not bring this discovery to their opponents' attention. This is important because that date had been reluctantly accepted by the applicants' attorney as it did not suit them. Second the notice of set down had been served with the requisite acknowledgement of receipt by them and therefore service of the notice of set down as between the parties was not in issue. Third, it was common cause that the notice of set down had been filed with the clerk of the court and had been date stamped. Fourth, the applicants themselves had served and filed a notice pertaining to a pre-trial conference that they required to be dealt with first before the commencement of the trial as well as special pleas.

[28] In my view there was nothing more in terms of the rules that the second respondent's attorneys needed to do in order to ensure that the matter was brought to the attention of the presiding officer. In fact the whole issue of the notice of set down, having been served and filed, but not having been placed in the court file was clearly a failure on the part of the office of the registrar and not anything done or not done by the second respondent.

[29] I feel that it is necessary to say that there are some troubling aspects in how the applicants' attorneys dealt with this matter a few days before the date of the hearing. First, they are the ones who discovered that the matter did not appear on the roll and sought and obtained confirmation that the matter was not on the roll. They failed to communicate this information to their opponents for no apparent or discernible reason. Second, it cannot be ignored that a few days before trial, they were told by their erstwhile correspondent attorneys that they would not be able to assist them with the matter on the date of the trial. The applicants' attorneys asked their erstwhile correspondent attorneys to serve and file a notice of withdrawal so that they could appoint new correspondent attorneys and this was done.

[30] Mr Luzipho's inability to be ready for trial on that day, though clearly available was, it appears, because he had not yet been furnished with the file by the applicants' erstwhile correspondent attorneys or had an opportunity to familiarise himself with the matter. The applicants' attorneys who elected not to inform the second respondent's attorneys that the matter was not on the roll clearly had some difficulties after being dropped on the eleventh hour by their correspondent attorneys. If, regardless of whether or not their correspondent attorneys were available, they had intended to come themselves, it is difficult to understand why they did not come. They, at the very least, could and should have ascertained what

posture their counterparts were taking in light of the fact that the matter did not appear to be on the roll. It is even more difficult to understand why they did not communicate their intention not to come to their opponents. The second respondent's attorneys had earlier, in writing, warned them that their client would attend court on the 10th April 2019 and that if the applicants did not attend, they would apply for a default judgment.

[31] The trial readiness of the presiding judicial officer is always ideal and its value should never been underestimated especially in a complex matter. However, the suggestion that where a court file has just been placed before the presiding judicial officer who has not had time to go through the pleadings, that on its own must result in the matter not proceeding, is a foreign concept in our procedural law. It is not only foreign but also inimical to the speedy finalisation of court cases for matters that are otherwise properly set down. The reality is that the fact that the court file is timeously placed before a magistrate does not necessarily mean that he has in fact prepared for trial and has had time to read the pleadings. It is precisely for this reason that it happens sometimes that the matter starts later than expected because the presiding officer needs time to read the pleadings. Whether or not the trial will actually proceed does not always depend on whether the procedural rules have been fully complied with. Sometimes they are merely substantially complied with. It is the presiding officer who determines what must happen after hearing the parties.

[32] The real issue in this application is whether it was grossly irregular for the magistrate to make an adverse costs order against the applicants. The award of costs as well as the scale thereof is all purely and primarily a matter for the discretion of the court which must determine the appropriate costs to be awarded and whether or not in fact any costs should be awarded against any of the parties. The legal position in this regard has been stated and restated with consistency by our courts over time. In *Beinash*⁷ the court stated the legal position as follows:

"The issue as to what orders of costs would be appropriate in the circumstances of any particular case falls primarily within the discretion of the Court of first instance. It is trite law that this Court on appeal will not interfere with a costs order made by such a Court unless it has failed to exercise a proper judicial discretion."

⁷ *Beinash v Wixley* 1997(3) SA 721 (SCA) at page 739 G-H.

[33] The question of how this discretion is to be exercised has received even the attention of the Constitutional Court. In *Ferreira*⁸ Ackerman J had this to say:

“The Supreme Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer, and the second that the successful party should, as a general rule, have his or her costs. Even this second principle is subject to the first. The second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs. Without either attempting comprehensiveness or complete analytical accuracy, depriving successful parties of their costs can depend on circumstances such as, for example, the conduct of parties, the conduct of their legal representatives, whether a party achieves technical success only, the nature of the litigants and the nature of the proceedings.” (Footnotes have been omitted).

[34] These principles are in my view all generally applicable and have been applied across the whole spectrum of litigation. The overriding principle is that the award of costs is a matter for determination by the court of first instance. The review court has very limited powers to interfere with the judicial exercise of the discretion by the court of first instance especially on costs. In this case the applicants and indeed their attorneys have been unnecessarily pedantic and sought to point fingers at the door of the presiding officer accusing him of not exercising his discretion or improperly exercising it. In the process they failed to take responsibility for their own conduct and for their wrong decision to not come to court ready for trial when in fact they should have done so.

[35] Once a notice of set down is served technical procedural non-compliances are dealt with in court and not unilaterally by a party deciding to ignore the notice of set down because of some or other procedural shortcomings. Furthermore, and even if the matter would not have proceeded regardless of their presence as they contend, it was still up to the presiding judicial officer to determine how costs should be dealt with. The reason for the matter not proceeding plays a hugely significant role in determining how costs should be awarded. In this regard the court *a quo* made it clear that it would have proceeded to hear the matter as it was entitled to do so. It was precisely because it was, according to the magistrate, the ineptitude in the

⁸ *Ferreira v Levin and Others, Vryenhoek and Others v Powell NO and Others* 1996(2) SA 621 (CC) at 624 B-E.

registrar's office that he decided that he was going to hear the matter. This would have ensured the litigants were not inconvenienced because of an administrative failure in the office of the registrar.

[36] In this case, there is no basis for this Court to interfere with the exercise of the discretion by the presiding officer. The fact of the matter is that despite the predicament in which the magistrate found himself in not being familiar with the pleadings, he was nonetheless prepared, in the interests of justice to hear the matter. The only reason he could not hear the matter was not because he had not read the pleadings and familiarised himself with them. It was only because the applicants did not come to court despite having been served with a notice of set down. In deciding not to come to court they failed to establish what their opponents' attitude was in light of their discovery that the matter was not on the roll. This conduct on the part of the applicants' attorneys was discourteous in the extreme and was done regardless of the inconvenience it caused to the court. The magistrate must be commended for not seeking to refuse to hear the matter because of a fault that was not attributable to any of the parties but of the clerk of the court. He took a pragmatic decision that in his discretion the matter could proceed but for the absence of the applicants and their legal representatives. This informed, quite correctly, his decision on how costs should be awarded.

[37] In the result the following order shall issue:

1. The application is dismissed with costs.

M.S. JOLWANA

JUDGE OF THE HIGH COURT

I agree:

G.N.Z. MJALI

JUDGE OF THE HIGH COURT

Appearance

Counsel for the applicant: L. VAN VUUREN

Instructed by: KEMI AKINBOHUN ATTORNEYS

c/o TL LUZIPHO ATTORNEYS

MTHATHA

Counsel for the Respondent: A. DA SILVA

Instructed by: KRITZINGER ELLISH ATTORNEYS

c/o ZILWA ATTORNEYS

MTHATHA

Date heard: 15 OCTOBER 2020

Delivered on : 04 MARCH 2021