

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

CASE NO: HCA 24/2019

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED.
Signature <i>[Handwritten Signature]</i>	
Date <i>29/09/2020</i>	

In the matter between:

ADV M.S SCHNEHAGE**APPELLANT**

and

ESPAG MAGWAI ATTORNEYS**RESPONDENT**

JUDGMENT

MAKGOBA JP

- [1] The Appellant appeals against the whole of the Judgment and order , including the order as to costs, made by the Magistrate's Court, Polokwane on 18 June 2019 in terms whereof the Magistrate upheld a *point in limine* to the effect that a Magistrate Court has no jurisdiction to grant an order in the form or nature of an "Anton Piller Order".
- [2] The Respondent opposes this appeal on two grounds, namely:
- 2.1. Certain procedural shortcomings in the Appellant's noting and prosecuting of the appeal which resulted in the appeal having lapsed; and
 - 2.2. The lack of jurisdiction of a Magistrate's Court to grant an Anton Piller Order.

Background

- [3] The Appellant, an advocate, issued summons in the Polokwane Magistrate's Court against the Respondent, his instructing attorneys, on 28 May 2018 for an amount of R 48 500.00 being for professional services rendered to the Respondent. The matter was defended and upon application for summary judgment the Respondent was granted leave to defend the action.

- [4] On 30 July 2018 the Appellant approached the Magistrate's Court; on ex parte, for an order, inter alia:

"6. *The Respondent or its representatives or any other third party where the*

Respondent might have sent or stored, or are keeping any photo's, objects, registers, files and documents, to point out and to disclose to the sheriff specified files, objects, registers and documents, together with the Applicant, to wit the following files:

.....

7. *The Respondent to disclose at which third party and address these photos, objects, registers, files and documents will be found, in the event of these photos, objects, registers, files and documents not being in the possession of the Respondent.*
8. *The Sheriff be authorised to seize, attach and remove the specified photos, objects, registers, files and documents.*
9. *The photos, objects, registers, files and documents be kept in the possession of Mr Morris Pogrand, an attorney practicing under the name and style of Kampherbeek & Pogrand Attorneys, 25 Biccard street, Polokwane, pending the directions of the Court.*
10. *Costs of the application*

11. *That prayers 1 to 10 supra will be in the form of a rule nisi with immediate effect and with return date onat On which date the Respondent must show cause why the rule nisi should not be confirmed.*
12. *The order is to be served on the Respondent, and it is entitled to anticipate the postponement date referred to below upon 48 hours' notice to the Applicant.*
13. *The application is postponed to 20 August 2018."*

[5] At the hearing of the present appeal the Appellant explained the essence of the above order as an application for relief for purposes of preservation of evidence in what has commonly become known as an "Anton Pillar Order" which order was actually granted as per draft order made an order of Court on 30 July 2018.

[6] At the opposed hearing of the application in the Magistrate's Court the Respondent raised two points *in limine*, that (1) the Magistrate's Court lacked jurisdiction to grant such an order and that (2) the order granted by the Magistrate's Court on 30 July 2018 is a nullity and stands to be set aside.

- [7] The Magistrate pronounced judgment on the point *in limine* on 18 June 2019 upholding the point *in limine* with costs.

It is against that judgement and order including the costs order, that this appeal lies.

The Process of Appeal

- [8] Section 84 of the Magistrates' Court Act 32 of 1944 provides *inter alia* that every party noting an appeal shall do so within the period and in the manner prescribed by the rules.

The periods for noting an appeal are laid down by Rule 51(3) of the Magistrate's Court rules and the periods for prosecuting appeals in the High Court are governed by Uniform Rule of Court 50, that is, the prosecution of an appeal from the Magistrate's Court is a proceeding which is conducted in the High Court.

In other words, although the noting of an appeal is an act done in the Magistrate's Court, it lays the foundation of the proceedings in the High Court.

- [9] An appeal must therefore be noted within the period and in the manner prescribed by Magistrate's Court rule 51 and prosecuted within the period and in the manner prescribed by Uniform Rule of Court 50.

In the present appeal before us, the Magistrate, Mr Maharaj gave an oral judgment on 18 June 2019. There is no indication in the papers before us that the Appellant made a written request for a judgment in writing as provided for in rule 51(1) of the Magistrates' Court Rules.

Rule 51(3) provides, *inter alia*, that an appeal may be noted within 20 days after the date of the judgment appealed against.

This will be the case where an appellant has not made a written request for judgment in writing as provided for in rule 51(1) of the Magistrates' Court Rules.

- [10] In the absence of proper service of a notice of appeal on the respondent or his attorney, no appeal has been noted – Rule 51(4)

Bringing the appeal to the notice of the other party in a manner which is not in accordance with that prescribed by the rules, is not sufficient.

See Nunlal v Pillay 1948 (4) SA 720(N)

[11] Rule 51(8) of the Magistrate's Court Rules provides, inter alia, as follows:

"(8)(a) Upon delivery of a notice of appeal the relevant judicial officer shall within 15 days thereafter hand to the registrar or clerk of the court a statement in writing showing (so far as may be necessary having regard to any judgment in writing already handed in by him or her) –

(i) the facts he or she found to be proved;

(ii) the grounds upon which he or she arrived at any finding of fact specified in the notice of appeal as appealed against;

and

(iii) his or her reasons for any ruling of the law or for the admission or rejection of any evidence so specified as appealed against.

(b) A statement referred to in paragraph (a) shall become part of the record".

[12] The provision in subrule (8)(a) is imperative.

The Magistrate's written explanation forms an integral part of the appeal record and serves to assist the Court of appeal in dealing with the appeal in a speedy and cost-effective manner.

(Regent Insurance Co Ltd v Maseko 2000 (3) SA 983 (W) at 990A-E)

If a notice of appeal has been filed without a prior request in terms of rule 51(1) for the Magistrate's written judgment, the Magistrate must thereafter give his findings of fact and rulings of law in terms of subrule (8)(a).

A Magistrate is entitled, despite having given reasons, to give further reasons dealing specifically with any ground of appeal set out in the Notice of Appeal.

[13] Rule 51(9) reads in relevant part as follows:

"(9) A party noting an appealshall prosecute same within such time as may be prescribed by rule of the Court of appeal and, in default of prosecution, the appealshall be deemed to have lapsed, unless the Court of Appeal shall see fit to make an order to the contrary"

By prosecution of an appeal is meant applying in writing to the registrar of the High Court on notice to all other parties, for a date of hearing. See in this regard Rule 50(4) of the Uniform Rules of Court, that is the High Court rules.

See also **Hall v Van Tonder 1980 (1) SA 908 (C) at 910**

[14] As stated above the prosecution of appeals from Magistrates' Courts is dealt with in Uniform Rule of Court 50. The relevant time limits prescribed by Uniform Rule of Court 50(1) to (4) are as follows:

14.1. the appeal must be prosecuted within 60 days after the noting of the appeal;

14.2. if the appellant has not within 40 days after noting the appeal applied to the registrar for a date of hearing, the respondent may do so within the remaining 2 weeks;

14.3. if no application for a date of hearing is made by either the appellant or the respondent within 60 days, the appeal lapses.

[15] In terms of Uniform Rule of Court 50(5) the registrar shall upon receipt of the appellant's written application for the assignment of a date (Rule 50(4)) forthwith assign a date of hearing of the appeal, which date shall be at least 40 days after receipt of the said application. The registrar shall give the parties and the clerk of Court from which the appeal emanated, at least 20 days, written notice of the date of set down.

Whether the Appellant has followed the Appeal Procedure

[16] Having set out herein above the prescribed procedure in civil appeals, it remains to be seen whether the Appellant in the present appeal has complied with the rules regulating the appeals from Magistrate Court to the High Court. I hasten to state herein that the Appellant has not followed the procedure provided for in Magistrate's Court rule 51 and Uniform Rule of Court 50.

There is no indication on the papers before us that the Appellant had timeously noted the appeal as provided for in the Magistrate's Court rules, and/or prosecuted same as provided for in the Uniform Rules of Court and, in so doing preventing the appeal from lapsing.

[17] The Appellant filed a Notice of Appeal, dated 25 October 2019, which was served on the Respondent's attorneys of record on the same day on 25 October 2019 in this Court, being the Court of Appeal.

The Appellant somehow procured the enrolment of the appeal by the registrar of this Court for hearing on 11 September 2020 without following the procedure prescribed in Magistrate's Court rule 51(9) and Uniform Rule of Court 50(1), (4) and (5) for prosecuting the appeal.

Clearly, there is no indication in the indexed and paginated bundles that the Appellant had applied for a date for the hearing of the appeal within the period provided for in the Uniform Rule of Court 50 (4)(a).

[18] Furthermore the following irregular steps are apparent from the papers before us:

- 18.1. the Appellant chose not to request a written judgment from the Magistrate in terms of rule 51(1);
- 18.2. the Appellant did not note the appeal as provided for in rule 51(4) read with rule 51(3).
- 18.3. as a result the Magistrate was not called upon to hand a written statement as required by rule 51(8) to the clerk of the Magistrate's court;
- 18.4. there was no prosecution of the appeal as required by rule 51(9), as a result of which the appeal is deemed to have lapsed;
- 18.5. the registrar somehow assigned the date of hearing of the appeal without having received a written application from the Appellant as provided for in Uniform Rule of Court 50(4) read with Uniform Rule of Court 50 (5).

[19] In the light of the Appellant's non-compliance with the rules regarding the appeal, he brought an application for condonation, which application is dealt with hereunder.

Condonation

[20] In the application for condonation the Appellant sought the following relief:

20.1. That Appellant's non-compliance with the rules of this Court, if any, as regards the appeal be condoned;

20.2. That the appeal, which has lapsed, be reinstated.

The Respondent opposed the application.

[21] The Appellant stated in his founding affidavit that a notice of appeal, containing the grounds of appeal, was served on the Respondent on 17 July 2019 after judgment was pronounced by the magistrate on 18 June 2019.

A request for a transcription of the Court record was made on 15 July 2019 and the transcribed record was received by his attorney on 14 October 2019, that is after almost three months.

The Appellant made a concession that as a result of the transcribed record of proceedings being provided to his attorneys at such a late stage, the prosecution of the appeal was out of time.

[22] The Appellant stated further that one Mr Arno Maree a clerk at the firm of Appellants attorneys of record attended the registrar's office and filed with the registrar bundle of documents required for the appeal on 25 October 2019.

A copy of the same bundle was served on the Respondent on the same date. On this occasion the said clerk enquired from the registrar as to a date for the hearing of the appeal, whereupon he was told by the registrar that a date of hearing would be allocated and communicated to his attorneys. The Clerk thought that the requirements for the appeal had been complied with and he was not informed that a notice requesting the assignment of the date of hearing (also to be served on the Respondent) was necessary.

[23] On the basis of this assertion the Appellant has clearly failed to validly prosecute the appeal in accordance with the provisions of rule 51(9) of the Magistrate's Court Rules and rule 50 of the Uniform Rules of Court with the result that the appeal has lapsed.

The Appellant alleges that he only became aware of the fact that a notice of application for a trial date of the appeal was not served on the Respondent in terms of the rules, when he had sight of the Respondent's heads of argument wherein they take this point, that is on 31 August 2020.

[24] The Appellant's predicament is of his own, and/or his attorney's making. Their flagrant disregard of the relevant rules of Court has resulted in the appeal not being properly noted as required by rule 51(3) of the Magistrate's Court Rules and, accordingly not being capable of being prosecuted as required by rule 51(9) of the Magistrates' Court Rules and rule 50 of the Uniform Rules of Court.

It is the duty of the Appellant and his attorneys of record to ensure that the relevant court rules pertaining to the noting and the prosecution of an appeal from the Magistrate's Court to the High Court are complied with.

[25] In paragraph 6 of the founding affidavit, the Appellant alleges as follows:

"A notice of appeal, containing the grounds of appeal, was then served on the Respondent on 17 July 2019. I am aware that an appeal has to be lodged within 20 days from date of judgment, and as judgment was given on 18 June 2019, I submit that notice of appeal was given timeously"

The Appellant has not attached a copy of the notice of appeal that he alleges was served on the Respondents on 17 July 2019. No such document appears from any of the bundles of documents placed before this Court for purposes of the hearing of this appeal.

The only notice of appeal before us is the one served on the Respondent, dated 25 October 2019 and served on the same day. This then means that this appeal was apparently noted on 25 October 2019, well out of time.

[26] In the premises there is no proof before this Court that the Appellant had noted an appeal as provided for in section 84 of the Magistrates' Courts Act 32 of 1944 read with rule 51(3) and (4) of the Magistrates' Court Rules. There is, furthermore, no application before us by the Appellant for condonation of his non-compliance with the provisions of rule 51 (3) insofar as the noting of the appeal is concerned.

[27] Counsel for the Respondent submitted that the Appellant has failed to make out a case for the relief sought by him in the condonation application. There is no explanation whatsoever in the founding affidavit for the Appellant's failure to ensure that the relevant court rules pertaining to the noting of the appeal as well as the prosecution thereof had been duly followed. I agree.

[28] In this connection I would refer to the case of **Immelman v Loubser en 'n Ander 1974(3) SA 816 (A)** where the headnote reads in part as follows:

"In an application for condonation of failure to note an appeal timeously, etc, the fact that the applicant himself was in no way to blame is an important consideration, but it does not necessarily always serve as a sufficient excuse. A reasonable prospect of success on appeal is naturally also an important consideration.

In such an application there was, on the part of one or other of the Applicants' attorneys, failure in a number of respects to comply with the Rules of both Courts, which had caused a long delay.

In addition there was also the circumstance that no sufficient explanation had been offered, either for the mistakes which had been made with the noting of the appeal or the failure to file a complete record timeously after the typed record had been obtained

"

See also **Hall v Van Tonder and Another 1980 (1) SA 908 (CPD)** at 916 D-F

[29] In **Melane v Santam Insurance Co Ltd 1962(4) SA 531 (A)** at 532 C-E

it was said:

“In deciding whether sufficient cause has been shown, the basic principle is that the court has a discretion to be exercised judicially upon consideration of all the facts and in essence it is a matter of fairness to both sides.

Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success and the importance of the case.

Ordinarily these facts are interrelated; they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation.”

Prospects of Success

[30] The prospect of success in the present case will be determined in the light of the issue whether the Magistrate’s Court has jurisdiction to grant an order in the nature of an Anton Piller Order and furthermore whether in any event the Appellant had made out a case for such an order.

[31] Jurisdiction means the power and competence of a court to hear and determine an issue between the parties. The Magistrates' Courts are creatures of statute and have no jurisdiction beyond that granted by the statute creating them, being the Magistrates' Courts Act 32 of 1944. They have no inherent jurisdiction such as is possessed by the Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa, and can claim no authority which cannot be found in the four corners of their constituent Act. Furthermore, Magistrates' Courts do not have the power to protect and regulate their own process and to develop the common law, taking into account the interests of justice, that the Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa have by virtue of the provisions of section 173 of the Constitution of the Republic of South Africa, 1996.

See **Graaf-Reinet Municipality v Van Ryneveldt's Pass Irrigation Board** 1950(2) SA 420(A) at 424;
Ndamase v Functions 4 All 2004 (5) SA 602 (SCA) at 605 F-H;
B v B 2008 (4) SA 535 (W) at 543 C-E

The essence of Anton Piller Order

[32] An Anton Piller order is described as :

“a civil search, seizure and preservation of evidence procedure. In this process generally the court orders the sheriff to search for, then seize and preserve evidence which is material to a matter. It will be employed where the applicant justifiably believes the respondent may destroy the evidence if no order is granted”

See **Beecham Group Ltd v BM Group (Pty) Ltd [1977] 1 All SA 267 (T); 1977(1) SA 50 (T)**

Harms: Civil Procedure in the Superior Courts, Lexis Nexis 2016 at page B-255 says: *“It is an order directed at the preservation of evidence.”*

To obtain an Anton Piller order the following requirements must be established:

- (1) the applicant has a cause of action against the respondent which he intends to pursue;
- (2) the respondent has in his possession specific documents or things which constitute vital evidence in substantiation of the applicant's cause of action (but in respect of which the applicant cannot claim a real right) and

- (3) there is a real and well-founded apprehension that this evidence may be hidden or destroyed or in some manner be spirited away before discovery or by the time the case comes to trial.

[33] An Anton Piller order has been described as “a draconian form of a relief which should be granted only under exceptional circumstance”. The use of the remedy has been described as an example of the outer extreme of judicial power -

Roth v Rees 2007(1) SA 99 (C) at 107-108

In **Mathias International Ltd and Another v Baillache and Others 2015 (2) 357 SA (WCC) at 363D** it was held that in exercising a discretion to grant the order, the court will have regard to the importance and value of the interest that the applicant seeks to protect and this will be weighed against the potential harm that will be suffered by the respondent if the remedy is granted as compared with the potential harm to the applicant if the remedy is withheld.

[34] I am of the view that due to the delicate balancing exercise of the parties' rights and interests that are required when granting an Anton Piller order, it is appropriate that such relief should be granted by a High Court (which has inherent powers) and not by a Magistrate's Court.

[35] Section 30 of the Magistrates' Courts Act, 1944 under the heading **Arrests and Interdicts** provides that:

“(1) Subject to the limits of jurisdiction prescribed by this Act, the Court may grant against persons and things orders for attachments, interdicts and manament van spolie.

(2) Confirmation by the Court of any such attachment or interdict in the judgment in the action shall operate as an extension of the attachment or interdict until execution or further order of the Court.”

The Appellant argued that by virtue of the provisions of section 30 of Magistrate's Court Act, the Magistrate Court has the necessary jurisdiction to grant an Anton Piller order because, according to him, an Anton Piller order is another form of interdict.

For the reasons that will appear hereunder, I disagree.

[36] Section 30 of the Act does not empower a Magistrate's Court to grant an Anton Piller order. Section 30(1) of the Act creates jurisdiction and it authorises a Magistrate's Court to grant certain extraordinary remedies of a temporary nature.

There is a distinction between the two orders. An Anton Piller order is, by its very nature, of temporary effect. On the other hand an interdict is a judicial process whereby a person is ordered to refrain from doing a particular act or is ordered to perform a particular act.

[37] It was authoritatively decided in **Shoba v Officer Commanding Temporary Police Camp, Wagendrift Dam 1995(4) SA 1 (A)** that an Anton Piller order is not a rule nisi operating as an interim interdict. It is an order which grants immediate relief of a procedural nature, namely the preservation of evidence, subject to the possibility of a later variation or discharge of the order.

The sole purpose of an Anton Piller procedure is the preservation of evidence. It is not a substitute for possessory or proprietary claims. On the other hand an order for attachment of things is held to secure the claim of the creditor. Therefore an Anton Piller order is neither an order for attachment nor an interdict.

[38] In the premises, the Magistrate's Court has no jurisdiction to grant an Anton Piller order. The Court a quo was correct in upholding the *point in limine* raised by the Respondent.

Accordingly, there are no prospects of success in the appeal in the event we were to hear this appeal on the merits.

It will be inappropriate to grant the application for condonation in the face of the lack of prospects of success in the appeal.

Costs

[39] The Respondent has prayed for a punitive cost order on attorney and client scale for reasons I need not canvass further in this matter.

It is trite that the granting of a cost order is in the discretion of the Court which must be considered judiciously.

Attorney and client costs of appeal are awarded only in very exceptional or special circumstances – **Ward v Sulzer 1973 (3) SA 701 (A) at 707**; and **Herold v Sinclair 1954 (2) SA 531 (A) at 537**.

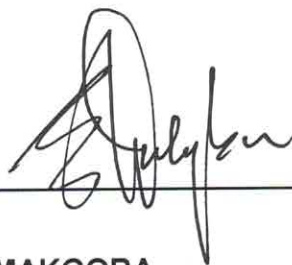
Although the Appellant conducted this appeal with flagrant disregard of the rules of Court, one may not impute an element of *mala fides* on his side. The conduct of the Appellant may be reprehensible in pursuing a meritless appeal such as this, but that cannot, without more, justify a punitive cost order.

We are of the view that a cost order on party and party scale is appropriate in the present matter.

Order

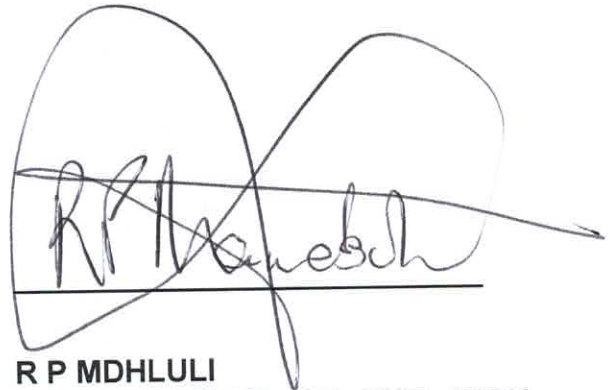
[40] In the result the following order is made :

1. The appeal is struck from the roll.
2. Appellant shall pay the costs of the appeal.

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**E M MAKGOBA
JUDGE PRESIDENT OF THE HIGH
COURT, LIMPOPO DIVISION,
POLOKWANE**

I agree

A handwritten signature in black ink, appearing to read 'R P Mdhluli', is written over a horizontal line. The signature is stylized with large, sweeping loops.

R P MDHLULI
ACTING JUDGE OF THE HIGH
COURT, LIMPOPO DIVISION,
POLOKWANE

APPEARANCES

Heard on	: 11 September 2020
Judgment delivered on	: 29 September 2020
For the Applicant	: Adv. M.S Schnehage
Instructed by	: Maree VD Berg Attorneys
For the Respondents	: Adv. J Malan
Instructed by	: Espag Magwai Attorneys