

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, MTHATHA)**

Case No:5435/17

REPORTABLE

In the matter between:

MXOLISI JOJWANA

Applicant

and

THE REGIONAL COURT MAGISTRATE

MR MENE

First Respondent

RNE HOLDINGS (PTY) LTD

Second Respondent

JUDGMENT

TOKOTA J:

INTRODUCTORY BACKGROUND

[1] The applicant in this matter instituted an action for recovery of damages against the second respondent before the regional magistrate, Mthatha. The details of that suit are not germane to the issue before this court.

[2] After the pleadings were closed, and on 20 June 2017, the applicant applied to the registrar of the regional court for a trial date. The registrar allocated 1 November 2017 as the date of trial. On 10 August 2017 the applicant's attorneys duly served a notice on the second respondent's attorneys setting down the matter for hearing on 1 November 2017. On 27 October 2017, three days before the hearing date, the applicant addressed a letter to the second respondent's attorneys in the following terms:

"We refer to this matter and to the summary of your expert in terms of Rule 24(9)(a) & (b).

In the light of the fact that the expert can only be refuted by another expert evidence, we have taken receipt of report from our expert. Consequently the matter will not proceed on 01 November 2017. We shall furnish you with our expert summary very soon.

With regard to the photographs intended to be used during trial, we request colour copies thereof as some things are illegible in the photos.

We trust that you will find the above in order.

Yours faithfully

A S ZONO & ASSOCIATES”

[3] The above quoted letter was delivered together with a notice purporting to remove the matter from the roll of cases set down for 1 November 2017. On the same day (27 October 2017), the second respondent's attorneys addressed a letter to the applicant's attorneys in which they stated, *inter alia*, that the expert notice referred to in their letter had been delivered timeously, and insisted that the matter proceed on the hearing date. They stated that if the applicant was still persisting with the removal of the matter he would have to make a substantive application for postponement.

[4] On 31 October 2017 once again the second respondent's attorneys addressed another email to the applicant's attorneys wherein it was pointed out that the notice of removal was irregular and that the

respondent would not agree to a postponement of the matter. It was pointed out further in that email that the notice did not address the question of costs to be occasioned by the purported removal. It was persisted that a substantive application be filed, failing which the second respondent would attend court on the hearing date and apply for the dismissal of the claim. The relevant portion of the letter reads thus:

“Your notice is therefore irregular and the matter remains on the roll until the Court has agreed that the matter either be removed or postponed as provided in Rule 31(1). We therefore reiterate that you should comply with the Rules by delivering a formal application for postponement and advance reasons for the request and more importantly tender our wasted costs herein, such costs to include preparation, the travel and accommodation of our expert witness, Counsel’s fees at the bar council tariff on an attorney and client scale and to be taxable and payable immediately.” These letters were ignored.

[5] On 1 November 2017 neither the applicant nor his attorney attended court. The second respondent’s Counsel attended court and submitted that the claim be dismissed, alternatively, that the matter be struck from the roll with costs but the magistrate struck the matter from

the roll and ordered the applicant to pay costs including costs of employment of Counsel which costs were to be taxed immediately.

THE PRESENT PROCEEDINGS.

[6] On 17 November 2017 the applicant launched these proceedings seeking an order reviewing and setting aside the order of the magistrate. The magistrate has, quite properly in my view, elected to abide the decision of this court. The applicant contended that the magistrate committed an irregularity in striking the matter from the roll primarily on two grounds. First, it was submitted that there is no provision in the magistrates' Rules for the striking of the matter from the roll. For this reason, so it was argued, the magistrate exceeded his powers. Second, the magistrate breached the *audi alteram partem* rule by making an order of costs against the applicant in his absence. The applicant contended that a substantive application for a cost order should have been made so as to afford him an opportunity to oppose it.

[7] Ms du Toit, who appeared for the second respondent, on the other hand, submitted that, first, the matter is not reviewable as the proceedings in the magistrate's court have not yet been finalised and

there are no exceptional circumstances justifying interference at this stage. Second, the applicant was not entitled to unilaterally remove the matter from the roll. Consequently the removal was irregular and liable to be ignored. Therefore the magistrate committed no irregularity in striking the matter from the roll.

IS THE MATTER REVIEWABLE?

[8] It is by now well established that, generally, a High Court will not, by way of entertaining an application for review, interfere with uncompleted proceedings in a lower court.¹ It has been stated that a Superior Court should be slow to intervene in unterminated proceedings in the court below, and should, generally speaking, confine the exercise of its powers to *'rare cases where grave injustice might otherwise result or where justice might not by other means be attained.'*²

¹ *Ismail and Others v Additional Magistrate, Wynberg and Another* 1963 (1) SA 1 (A): at 5H - 6A; *Wahlhaus and Others v Additional Magistrate, Johannesburg and Another* 1959 (3) SA 113 (A) at 119G;; *Sita and Another v Olivier NO and Another* 1967 (2) SA 442 (A) at 447E - F; *Lombard en 'n Ander v Esterhuizen en 'n Ander* 1993 (2) SACR 566 (W) at 569e - f; *S v Western Areas Ltd and Others* 2005 (5) SA 214 (SCA) (2005 (1) SACR 441) in para 20.

² *Wahlhaus* at 120 footnote 1

[9] Ms du Toit submitted that the civil action is still pending in the magistrate's court and there are no exceptional circumstances to justify interference at this stage. Accordingly, she submitted that this court should dismiss the review on this ground alone. Mr Zono, for the applicant, on the other hand, submitted that the proceedings in the magistrate's court have been terminated. He submitted that the striking of the matter from the roll has had the effect of terminating the proceedings. In this regard he relied on the cases of **Zuma v Democratic Alliance and Others 2018 (1) SA 200 (SCA)** and **Thint Holdings (Southern Africa) (Pty) Ltd v National Director of Public Prosecutions; Zuma v NDPP 2009 (1) SA 141 (CC)**. In the latter case it was stated:

"[41] There are two obstacles in the way of this argument. First, once a case is struck from the roll, the case terminates and is no longer pending. There is no guarantee that the criminal proceedings will be reinstated. Removal of a matter from the roll is therefore abortive of the currency of the trial proceedings. Should the trial ever be re-enrolled, it would start anew.

[42] As soon as the criminal matter had been struck from the roll by Msimang J, therefore, the criminal proceedings were terminated and the proceedings were no longer pending. At the time, Mr Zuma had not yet

pleaded to the charge. Even if there might have been an intention on the part of the NDPP at that stage to reinstitute proceedings, there was no guarantee that he would actually do so. But it would not matter even if the probabilities were that he would do so.”

[10] In my view the above cases do not lay down a general rule that if a matter is struck from the roll it is thereby terminated and may not be re-enrolled. The striking of the matter from the roll has nothing to do with the merits of the case. In civil matters it often happens that if a party has either failed to comply with practice directives such as pagination, filing of heads of argument etc, or that the applicant or plaintiff failed to appear when the matter was called, the matter is struck from the roll. In practice where the matter has been struck from the roll under those circumstances it may be re-enrolled upon the delivery of an affidavit explaining the reasons for the failure to comply with the practice directive and/or failure to appear when the matter was called. In this context therefore striking of the matter from the roll is not aimed at terminating the proceedings but merely suspends the hearing thereof pending an application for re-instatement.³ Furthermore the cases relied on by Mr Zono were decided in the context of criminal proceedings. In any event,

³ *Skhosana v Roos t/a Roos se Oord* 2000 (4) SA 561 (LCC) ([1999] 2 All SA 652) para.19; *Goldman v Stern* 1931 TPD 261 at 264;

even in those cases the criminal proceedings were not terminated against Mr Zuma hence he is presently standing trial for the same charges. The word “terminate” was not used in the context of its general meaning, namely, to ‘bring to an end’; to ‘close’; to ‘conclude’; or to ‘discontinue’. In my view when the courts said the proceedings were ‘terminated’ they meant suspension thereof pending any decision to reinstate them.

[11] Furthermore my interpretation of the word “terminate” in the context of civil matters is fortified by the fact that even appeals which have been struck from the roll for failure to prosecute the same can still be reinstated. The appellant can simply apply for condonation for failure to prosecute it.⁴ The failure to prosecute such appeal can be condoned and the appeal reinstated notwithstanding the fact that the striking thereof from the roll has the effect of discontinuing it.

[12] Consequently I find that when the magistrate struck the matter from the roll he did not thereby bring to an end the litigation between the parties. Accordingly the case is still pending before the magistrate and it is up to the applicant to re-instate it.

⁴ *Herf v Germani* 1978 (1) SA 440 (T)

[13] The striking of the matter from the roll does not have the effect of *res judicata*. The proper procedure which should have been followed by the applicant was to apply for the re-enrolment of the matter in the magistrate's court and explain why he was not present in court on the hearing date. On this ground alone the application cannot succeed.

DID THE MAGISTRATE COMMIT AN IRREGULARITY BY TRIKING THE MATTER FROM THE ROLL?

[14] Section 173 of the Constitution of the Republic of South Africa, Act 1996 provides that the Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice. The magistrate's court does not have such powers. Its powers are therefore derived from Statute.

[15] The Rules of procedure are devised for the purpose of administering justice and not for hampering it; where the Rules are

deficient the Judge would go as far as he/she can in granting orders which would help to further the administration of justice. If there is a construction of the Rules which would assist in this respect the Judge would be disposed to adopt it. The variety of its inherent power has to do purely with the conduct of litigation, with procedure - "*where the rules are deficient*" - not with substantive law.

[16] Mr Zono submitted that the magistrate exceeded his powers in striking the matter from the roll in that there is no provision either in Statute or in the Rules of the magistrate's court permitting such course. He contended that this conduct constituted an illegality. We were referred to Rules 31 and 32 of the magistrate's court Rules (the Rules): I quote these Rules in full hereunder:

Rule 31 "***Adjournment and postponement***"

- "(1) *The trial of an action or the hearing of an application or matter may be adjourned or postponed by consent of the parties or by the court, either on application or request or of its own motion.*
- (2) *Where an adjournment or postponement is made sine die, any party may by delivery of notice of reinstatement set down the action, application or matter for further trial or hearing on a day*

generally or specially fixed by the registrar or clerk of the court, not earlier than 10 days after delivery of such notice.

- (3) *Any adjournment or postponement shall be on such terms as to costs and otherwise as the parties may agree to or as the court may order.*

32 *Non-appearance of a party - withdrawal and dismissal*

- (1) *If a plaintiff or applicant does not appear at the time appointed for the trial of an action or the hearing of an application, the action or application may be dismissed with costs.*
- (2) *If a defendant or respondent does not so appear, a judgment (not exceeding the relief claimed) may be given against him or her with costs, after consideration of such evidence, either oral or by affidavit, as the court deems necessary.”*

[17] It is true that there is no express provision in the Rules for the striking of the matter from the roll. By the same analogy there is also no provision for removal of matters already set down for trial in the Rules. This much was conceded by Mr Zono. In my view notwithstanding the absence thereof, Rule 31 must be interpreted to have impliedly included removals and striking off. The effect thereof would be tantamount to an

adjournment or postponement. When a matter has been postponed *sine die* Rule 31(2) provides that “*any party may by delivery of notice of reinstatement set down the action, application or matter for further trial or hearing on a day generally or specially fixed by the registrar or clerk of the court, not earlier than 10 days after delivery of such notice.*”

It follows that the same procedure would be applied if the matter is removed or struck from the roll.

[18] Consequently, in my opinion, the removal and striking from the roll is implied in Rule 31. Rule 31(1) provides that the matter may be postponed by consent of the parties or on application in court. This implies that no party may unilaterally postpone the matter. I hold therefore that whenever a party seeks a removal of the matter from the roll such party cannot unilaterally do so without the consent of the other party or leave of the court.

[19] In this matter the applicant neither got the consent of the second respondent nor the leave of the court to remove the matter from the roll. He was repeatedly informed by way of letters that the matter would be placed before the magistrate and the second respondent would proceed

with it. It was therefore incumbent upon the applicant to attend court and make the necessary application for postponement or removal. I therefore find that since the applicant did not get consent from the second respondent to remove the matter from the roll such unilateral removal did not affect the trial date and the second respondent was entitled to ignore it especially that the applicant did not even tender wasted costs.

[20] In the absence of agreement for the removal the applicant ought to have made an application in court for either the removal or postponement of the matter. Application means application on motion⁵ in terms of Rule 55. However, where a party realises its inability to proceed with the matter at short notice such party may attend court and may make oral application at the trial court without notice to the other party. There is also nothing preventing the party to bring a formal application at short notice to the other party and seek a condonation from court for non-compliance with the Rules.⁶

[21] If the applicant/plaintiff fails to appear on the trial date properly set down and the court orders the application or action to be struck from the roll such an order is not equivalent to one of either dismissal or

⁵ Rule 2(1)

⁶ Momentum Life Assurers Ltd v. Thirion [2002] 2 ALL SA 62 (C) 69h

absolution from the instance but merely suspends the original notice of set down until the case is placed on the roll again.⁷ Notwithstanding the provisions of Rule 32 the court is not obliged to dismiss the action or the application if the plaintiff/applicant fails to appear on the date of set down. The court has a discretion either to postpone the matter or even strike it from the roll and make an appropriate order as to costs.

[22] On the date of hearing (1 November 2017) Counsel for the second respondent applied for dismissal of the matter, alternatively, submitted that the matter be struck from the roll with costs. The magistrate struck the matter from the roll with costs. The nub of the argument of Mr Zono was that since there is no provision in the Rules the magistrate exceeded his powers and therefore acted illegally.

Ms du Toit, on the other hand, submitted in her heads of argument that the magistrate was entitled to strike the matter from the roll.⁸ She referred to **Jones and Buckle: The Civil Practice of The Magistrates' Courts in South Africa**. The authors in the tenth edition state that “*(i)f the plaintiff fails to appear on the day of set down of an application and the court orders the application to be struck from the roll, such order is not equivalent to one either of dismissal or absolution, but merely*

⁷ Goldman v Stern 1931 TPD 261

⁸ Skhosana v Roos t/a Roos se Oord 2000 (4) SA 561 (LCC) ([1999] 2 All SA 652) para 19;

suspends the original notice of set-down until the case is placed on the roll again. The court is not obliged to dismiss the action or application if the plaintiff or applicant does not appear on the day of set-down: It is entitled to postpone the case and to make an appropriate order as to costs.” The learned authors go further and state that the Rules are not exhaustive and the magistrate can “*fairly*” act upon the analogy of the Superior Court where the Rules are silent. The magistrate is entitled to exercise implied powers in order to attain the object of the Act and the Rules.

[23] Mr Zono submitted that in the cases relied on by Ms du Toit this point was not pertinently raised. It is true that upon a reading of those cases it does not appear that the point was raised. In my view it was correctly not raised and I do not think the courts overlooked it.

I have already found that the striking of cases from the roll is implied in the Rules. Therefore the magistrate is entitled to exercise not only powers expressly conferred on him by legislation but also those powers that are implied in the Rules in order to give effect thereto. I therefore hold that the magistrate was entitled to strike the matter from the roll.

[24] In any event even if there has been an irregularity on the part of the magistrate (and I find that there has not been such an irregularity) this court has a discretion to review such conduct. If the irregularity was calculated to prejudice the applicant the court must set aside the impugned decision unless it is satisfied that the applicant has not been prejudiced thereby. It was never argued by any of parties that the conduct of the magistrate was prejudicial to the applicant.⁹

WAS THE MAGISTRATE ENTITLED TO MAKE AN ORDER OF COSTS WITHOUT FIRST HEARING THE APPLICANT?

[25] In terms of Rule 31(3) the magistrate may make an order of costs in the event of a postponement. In terms of Rule 33 when the court gives judgment or makes any order, including any adjournment, it may make an award of costs. If a party wishes to oppose such an order such party must attend the proceedings. In *casu* the applicant was, by way of correspondence, afforded ample opportunity not only to avail himself in court and make an application for postponement but also to tender costs. The letters were ignored. The second respondent's attorneys

⁹ *Jockey Club of South Africa and Others v Feldman* 1942 AD 340 at 359; *Le Roux and Another v Grigg-Spall* 1946 AD 244 at 254 and *Caxton Ltd and Others v Reeve Forman (Pty) Ltd and Another* 1990 (3) SA 547 (A) at 566. ; *Tao Ying Metal Industry (Pty) Ltd v Poole NO and Others* 2007 (5) SA 146 (SCA) para.90

forewarned him what they would do if he failed to attend court. He still did not attend court to oppose the application for dismissal with costs.

[26] When the matter was argued before us there was no explanation by Mr Zono as to why he did not attend court on the day in question to make an application for the postponement of the matter or to oppose the second respondent's application for dismissal of the matter. The above quoted letter from the second respondent's attorneys is clear regarding what the second respondent intended to do in court on 1 November 2017. Mr Zono was adamant that the matter had been removed from the roll and even referred to the registrar's diary in which it was indicated that it had been scratched. He also did not proffer any explanation about the correspondence which he received from the second respondent's attorneys.

[27] Mr Zono argued that the magistrate committed an irregularity by awarding costs in his absence and without hearing the applicant. In **Estate Garlick v Commissioner for Inland Revenue**¹⁰ the learned Judge of Appeal stated that when a court has made an order as to costs, without having heard any argument on costs, the court is not *functus*

¹⁰ 1934 AD 499

officio. The mulcted party is entitled thereafter to contend that the order should be altered by the same court. The court may alter it if it later takes a different view. This principle applies to all courts and is not peculiar to the Supreme Court of Appeal only. This principle applies even where the parties were present in court and had in fact addressed no argument on costs, even though it may not be strictly correct to say that they had no opportunity to do so.

[28] In this case the respondent on the day in question applied for the dismissal of the claim on the basis of Rule 32. The magistrate did not grant that order but struck the matter from the roll. In so doing in my view the applicant was not prejudiced because it could still reinstate the matter at any time rather than making a lengthy process of applying for rescission of judgment if the claim was dismissed. That was an indulgence granted to the applicant even though he was not present. The award of costs is a discretion of the court which must be exercised judiciously. The exercise of that discretion is, after all, essentially a matter of fairness to both sides.¹¹

¹¹ Ward v Sulzer 1973 (3) SA 701 (A) at 706; Gelb v Hawkins 1960 (3) SA 687 (A) at 694

[29] The applicant had two options. He could have either applied to the same court to revisit its decision to award costs or abide the decision. It was not necessary to take the magistrate on review having not exhausted his remedy first. He was afforded an opportunity to appear in court when there was a clear indication that the purported removal was not acceptable to the second respondent. He elected not to avail himself of that opportunity. He has made his bed with his eyes open; it is not unfair that he should lie on it. In any event I am not persuaded that the magistrate breached any *audi* rule. There is therefore no merit in the argument.

[30] In all the circumstances I am of the view that the applicant has failed to make out a case for the review.

COSTS.

[31] The court has a discretion regarding the award of costs. The general rule is that costs should follow the event. The second respondent has asked for a punitive cost order on the basis of the conduct of the applicant. The applicant has made unsubstantiated

allegations of dishonesty on the part of the second respondent. He accused the second respondent of having concealed “*obvious shortcomings in the case.*”

[32] It is true that unwarranted accusations of this nature deserve censure from the court and should generally be visited with a punitive cost order. But in the present matter I do not believe that the applicant would have made these accusations himself. I am inclined to think that this conduct is attributable to the legal practitioner who drew the papers. These are in the form of argument and legal opinion not supported by any facts. In motion proceedings founding affidavits constitute evidence in support of the relief sought. That evidence should be confined to the facts relating to the matter concerned. Legal practitioners should refrain from using metaphoric language imputing unwarranted accusations not supported by any evidence. If they do so courts will not hesitate to mulct them with costs *de bonis propriis*. In this case since I am of the opinion that this conduct is not attributable to the applicant it will be unfair to punish him.

ORDER

[33] In the result the following order is made.

1. The application is dismissed
2. The applicant is ordered to pay costs on a party and party scale.

B R TOKOTA

JUDGE OF THE HIGH COURT.

I agree

N MLOMZALE

ACTING JUDGE OF THE HIGH COURT

Appearances:

For the applicant: Mr A S Zono of Zono and Associates

For the second respondent: Adv. A du Toit

Date of hearing: 23 August 2018

Date Delivered: 11 September 2018