

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION
PIETERMARITZBURG

CASE NO: AR 348/16

In the matter between:

Rashid Gani

Appellant

and

A Singh

Respondent

Judgment

Lopes J

[1] The appellant in the matter, as plaintiff, instituted action in the Chatsworth Magistrates court against the respondent, as defendant, for payment of a total sum of R300 000-00 arising out of two claims for defamation. The action was set down to be heard on the 7th, 9th and 10th days of March 2016. I shall refer to the parties in this judgment by their citations in the court *a quo* – i.e. the appellant as the plaintiff and the respondent as the defendant.

[2] The matter was not heard on the 7th March 2016 because of the unavailability of the learned magistrate. When the matter was called on the 9th March 2016 the plaintiff's counsel raised the following:

- (a) The plaintiff had served a notice to discover on the defendant on the 8th June 2015.
- (b) The defendant had delivered a discovery affidavit on the 19th February 2016.

- (c) In terms of the magistrates' court rules, discovery was to have been made at least twenty days before the trial date. The plaintiff's attorney accordingly notified the defendant's attorney on the 25th February 2016 that the defendant should remove the matter from the trial roll and pay the plaintiff's costs, alternatively proceed with the trial and not be able to use the documents discovered by the defendant.
- (d) On the 25th February 2016 the defendant's attorneys notified the plaintiff's attorneys that they will be making an application for condonation of the late filing of the defendant's discovery affidavit. They record in the letter that if the application is refused, the defendant has sufficient witnesses to run the matter without the use of the documents.
- (e) No application for the condonation of the late filing of the defendant's discovery affidavit was made by Monday the 7th March 2016, nor indeed by the 9th March 2016.
- (f) The plaintiff's counsel informed the learned magistrate that if the defendant intended to use the documents referred to in his discovery affidavit, the plaintiff would oppose the introduction of such documents during the trial.

[3] The defendant's counsel criticised the raising of this issue by the plaintiff's counsel because the issue could have been raised on Monday the 7th March 2016, and the defendant would have prepared an application for condonation by Wednesday the 9th March 2016. The defendant's counsel then indicated that it was necessary for the defendant to use the documents which it had discovered in order to establish its case. In those circumstances the defendant's counsel felt constrained to seek an adjournment of the matter, and the defendant's counsel tendered the party and party costs occasioned by the adjournment of the action.

[4] In reply the plaintiff's counsel referred to the correspondence between the parties' attorneys. The plaintiff's counsel argued that the costs payable for the 9th and 10th March 2016 should be paid on the scale as between attorney and client, and should '*include the reasonable costs of the plaintiff's counsel as per his invoice or his fee note...*' The plaintiff's counsel argued that if the plaintiff were only allowed his counsel's fee on the appropriate magistrates' court tariff of fees then the plaintiff would be severely out of pocket in circumstances where the plaintiff was not at fault, and the defendant was seeking an indulgence. The plaintiff's counsel quoted the matter of *Smit v Maqabe 1985(3) SA 974 (T)* to the learned magistrate as authority for the proposition that the plaintiff was entitled to be paid his counsel's fees. In this regard the plaintiff's counsel submitted that there was no distinction between counsel and senior counsel. He also drew to the learned magistrate's attention, the complexity of the matter, and the necessity for the plaintiff briefing senior counsel.

[5] Having heard protracted argument by both counsel, the learned magistrate granted the application for an adjournment and directed the defendant to pay the wasted costs on an attorney and client scale for the adjournment of the matter on the 9th March 2016. The learned magistrate also ordered that there would be no order for costs for the 10th March 2016 and that counsel's fees for the costs awarded would be excluded.

[6] The plaintiff has appealed the decision of the learned magistrate, seeking that the order of the court a quo should be substituted with the following:

'The defendant is ordered to pay the plaintiff's wasted costs occasioned by the adjournment, for the 9th and 10th March 2016, on the attorney and client scale in respect of both the plaintiff's attorney and advocate.'

[7] It is trite that a court of appeal will not likely interfere with the exercise of a magistrate's discretion with regard to costs, which discretion is judicially exercised.

[8] In *Pretorius v Herbert* 1966(3) SA 298 (T) at 301 at H-302B Trollip J stated:

‘The mere fact that that is not the order that I would have made does not mean that this Court is justified in interfering with the exercise of the magistrate’s discretion. *Penny v Walker* 1936 (A) 241 at p260, states specifically that the mere fact that the court of appeal would have made a different order as to costs is no ground for interfering with the lower court’s order. The limits to which this Court on appeal can interfere with an order made by the magistrate as to costs is, I think clear from *Merber v Merber* 1949(1) SA 446 (A) at pp 453. The effect of the passages there is that the discretion as to costs must be judicially exercised by the trial court, that is, there must be some grounds on which a court, acting reasonably, could have come to the particular conclusion; if there are such grounds their sufficiency to warrant that conclusion is a matter entirely for the trial court’s discretion, and the court on appeal cannot interfere, even if it would itself have made a different order.’

[9] With regard to the learned magistrate’s disallowance of the order for costs on the 10th March 2016, she recorded that she was unable to understand or appreciate the full complexity of the matter until the matter had been dealt with fully and the trial ran before her. She stated that by merely looking at the papers before her, she was not in a position to determine the complexity of the matter.

[10] The learned magistrate further stated, with regard to the disallowance of the costs of the 10th March 2016, that whilst the matter had originally been set down for three days, there were only two days left and no one could anticipate what would have happened had the matter proceeded on the Wednesday and the Thursday.

[11] The learned magistrate referred to the *Smit* judgment which records that it is undesirable that principles be defined to indicate in what circumstances a magistrate exercising his or her discretion with regard to costs will be entitled to deprive a

plaintiff of his costs or a part thereof, for example advocate's costs. The court in that case found that the magistrate had unfairly deprived the party of the costs of an advocate. The court recorded that a litigant is entitled to use the services of an advocate in the magistrates court without being penalised in respect of the costs of that advocate, and a court will not likely interfere with that right.

[12] Plaintiff's counsel referred us to *RAF v G P van Rhyn and RAF v F J van Rhyn* [2002] ZAECHC 6 at paragraph 44 where Plasket J stated:

'If a costs order is arbitrary, it follows that it could not be said that the trial court exercised a judicial discretion in making that costs order. In *Road Accident Fund v Forbes*, Jones, J, with reference to a costs order, defined an arbitrary decision as one that is 'capricious, variable, uncertain, an unrestrained exercise of personal whim without reference to any sensible matter or criteria.'

[13] Plaintiff's counsel submitted that:

- (a) *Smit* entitles a litigant to counsel costs where he is successful;
- (b) that a lack of complexity does not justify depriving a party of counsel's fees; and
- (c) that the learned magistrate in this matter simply gave no indication why she denied the plaintiff the costs of counsel.

[14] Although the learned magistrate has not expressly said so, she appears to indicate that counsel's fees were disallowed because she was unable to assess the complexity of the matter until the trial was heard. In my view it is clear from the pleadings that the matter is one of some considerable importance to the plaintiff. It is alleged in the particulars of claim that the plaintiff's character has been publicly attacked by the defendant without proper cause. In those circumstances it would be somewhat unusual for a litigant not to have elected to be represented by counsel, albeit in the magistrates' court.

[15] In the circumstances I am of the view that the learned magistrate misdirected herself in not allowing counsel's fees amongst those to be paid by the defendant on an attorney and client scale for the adjournment which took place on the 9th March 2016. In the circumstances I would make the following order:

(a) The appeal succeeds.

The ruling of the learned magistrate in paragraphs 2 and 3 are amended to read as follows:

'2. The defendant is to pay the plaintiff's wasted costs occasioned by the adjournment of the 9th March 2016, such costs to be calculated on the scale as between attorney and client, and to include the taxed costs of counsel.

3. There is no order for costs for the 10th March 2016.'

(b) The respondent is directed to pay the costs of the appeal.

Lopes J

I agree.

Mnguni J

Counsel for the Appellant:

Instructed by:

Mr M S Khan SC

Shenaaz B Habib

311 Lenny Naidu Drive

Bayview

Chatsworth

Counsel for the respondent:

Instructed by:

Mr N Moosa

Govender, Mchunu & Associates

1st Floor, 24-48 McKenzie Road

Windermere

Durban

Date of hearing:

13 February 2017

Date of Judgment:

3 March 2017