



**IN THE GAUTENG DIVISION, PRETORIA
(REPUBLIC OF SOUTH AFRICA)**

A285/15
4/5/15

Magistrate: Phalala

Review Case no: SC28/2013

Magistrate's Serial no: SC28/2013

High Court Ref no: 167/14

(1) REPORTABLE: ☒ YES/NO

(2) OF INTEREST TO OTHER JUDGES: ☒ YES/NO

(3) REVISED ☒

28.4.2015

DATE

SIGNATURE

JESIA MOLEKWA & MONENE ZACHARIA

VS

MPHO SELOBA

REVIEW JUDGMENT

MSIMEKI, J

INTRODUCTION

- [1] The matter served before me as a stated review case. The plaintiffs are Mr Molekwa (Molekwa) and Mr (Monene) while the defendant is Mr M G Seloba (Seloba).

BRIEF FACTS

- [2] The matter concerns a building contract which the defendant concluded with the government. It is unfortunately unknown whether the other party is the National, Provincial or Local government. This is not disclosed. The defendant after getting the contract, employed the two plaintiffs who had to assist him in the project. It appears that the plaintiffs were not paid in full and this resulted in the action which the two plaintiffs brought against the defendant. The allegations seem to be that Molekwa is owed R4100.00 and Monene R1200.00. The defendant denied owing the two plaintiffs as alleged.
- [3] Both the plaintiffs testified. It is, however, not clear if they called witnesses. The defendant testified and called a witness.
- [4] The matter appears to have been before the court a number of times the last of which was 21 November 2013 when judgment was granted in favour of the plaintiffs.
- [5] The defendant, on 4 December 2013, applied for the review of the matter. His application was based, *inter alia*, on the following grounds:
1. That he was not given an opportunity to cross examine the plaintiffs.
 2. That the principle of *audi alteram partem* was not followed.
 3. That the conclusion reached "was based on sympathy than justice". This would seem to be conveying that there was bias on the part of the commissioner.
- [6] The commissioner, on 4 February 2014, responded to the defendant's application. The response is as follows:

**"RE: APPLICATION FOR REVIEW OF THE CASE OF MR SELOBA MG
V/S MR MOTSWAI MOLEKWA & OTHER. CASE NUMNER: 28/2013**

The above matter was partly heard on 14 March 2013 and postponed to 20 June 2013 for witnesses Lebiso Zero and Elias Segabetla after evidence heard in the matter.

In order to obtain further information the case was postponed until 20 June 2013 for evidence of the abovementioned witnesses.

After further postponements the matter was finalized on 21 November 2013.

The defendant was given ample opportunity for stating his case and cross examined the plaintiff's during the final hearing after the defendant had also opportunity during the previous occasion on 14 March 2013 to cross examine the plaintiffs.

During the hearing on 21 November 2013 the defendant was not able to prove any case against the plaintiffs and a ruling was given on the matter after considering all the facts available and granted judgment in favour of the plaintiffs.

The defendant at his own peril just continued to repeat what was already on record in the matter and not of any use.

The defendant has to be silenced after judgment due to his disrespect to accept the judgment"

- [7] Upon receipt and perusing the documents presented before me, I realised the need to engage the commissioner by asking him to respond to my request for information in order for me to do justice to the matter. My request was as follows:

"The Commissioner is requested to respond to the following questions within 7 days of receipt of the request.

1. It is not clear as to what transpired in court. There is no evidence or understandable summary. Can this be attended to.

2. It is difficult to follow what transpired following the notes made available. Could the Commissioner furnish understandable summary or evidence which will enable us to deal with the matter.
3. The defendant claims that he was not allowed to cross examine the plaintiff(s). Kindly comment.
4. Kindly let us know:
 1. Who testified on behalf of which plaintiff?
 2. Was the defendant allowed to cross examine those who testified?
 3. Kindly provide us with the sequential list of how the witnesses testifies, what was said and the cross examination.
 4. Did the defendant call witnesses? if so, what was their evidence?"

The commissioner, whom I am indebted to for his responses, responded as follows:

"RE: REQUEST FOR INFORMATION BY THE REVIEWING HONOURABLE JUDGE M W MSIMEKI:

AD PARAGRAPH 1:

Evidence was heard of both plaintiffs and the defendant on 3 October 2013.

The defendant testified that he obtained a building contract with the government and employed *inter alia* the plaintiffs to work in the project.

The plaintiffs agreed to the work at R20 per 4 m².

AD PARAGRAPH 2:

The contract obtained by the defendant was terminated by government after a period on account of not being able to stick to time frames.

The plaintiffs worked at the project of the defendant for 3 months where after the plaintiffs was told to stop work.

The amount still outstanding and due to the plaintiffs amounted to R4106.00 for J Molekwa and R1200.00 for Z Monene.

The defendant indicated that there was no paper work available to assist his version that the plaintiffs in fact received full payment for their work done over a period of 3 months.

The defendant indicated that he wanted to call George Molefe and Elias Lebise as witnesses.

The matter was then postponed to allow the witnesses as requested.

The aforesaid witnesses were of no assistance to take the matter further.

AD PARAGRAPH 3:

The defendant was in fact fully allowed to cross examine the plaintiff which has become of no use to reach any other conclusion for a finding.

AD PARAGRAPH 4.1

The plaintiffs testified personally on behalf of each and were allowed cross examine all witness called;

AD PARAGRAPH 4.2

The defendant was in fact allowed to cross examine all witnesses called;

AD PARAGRAPH 4.3

The sequential list of witnesses was Jesia Molekwa, Zacharia Monene, Mpho Seleba and Lucas Lebese.

AD PARAGRAPH 4.4

The defendant has called witnesses as recorded above.

This matter was heard in March 2013 which makes it more difficult to remember details of the proceedings without proper recording equipment.

I hope that the contents of the information recorded above will be of assistance.”

- [8] It is important to refer to two sections of the Small Claims Courts Act No. 61 of 1984 (The Act) before one deals with the matter. These are sections 3 and 46.

Section 3 provides:

“3 Nature of courts and force of process. __ (1) Subject to the provisions of subsection (2), a court shall not be a court of record.

(2) The presiding officer shall record or cause to be recorded the verdict, judgment or order of the court and shall sign it”.

Section 46 provides:

“46 Grounds of review .__ The grounds upon which the proceedings of a court may be taken on review before a Provincial or Local division of the Supreme Court of South Africa are –

(a)

(b) Interest in the cause, bias, malice or the commission of an offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of chapter 2 of the

Prevention and Combating of Corrupt Activities Act, 2004 on the part of the commissioner; and

(c) Gross irregularity with regard to the proceedings.”

THE ISSUES

[9] The issues to be determined are:

1. whether the matter was properly handled and in accordance with justice.
2. whether the defendant has produced evidence demonstrating the presence of any of the grounds mentioned in section 46 of the Act.

[10] Section 3 specifically states that the court is not a court of record. There appears to be no proper recordal of the proceedings of the court. This no doubt creates a huge problem. The commissioner, *inter alia*, said:

“This matter was heard in March 2013 which makes it more difficult to remember details of the proceedings without proper recording equipment”.

One can understand the commissioner's difficulties. No one, without a proper record, can be expected to remember what transpired in a case in 2013. This, indeed, has created a huge challenge.

[11] Without a proper record it is almost impossible for me to see and understand in the clearest perspective what transpired in this matter. I hardly can say that the defendant has or has no justiciable case. I can also not say that the proceedings were or were not in accordance with justice. One would be in a better position to adjudicate upon the matter if the record of the proceedings existed.

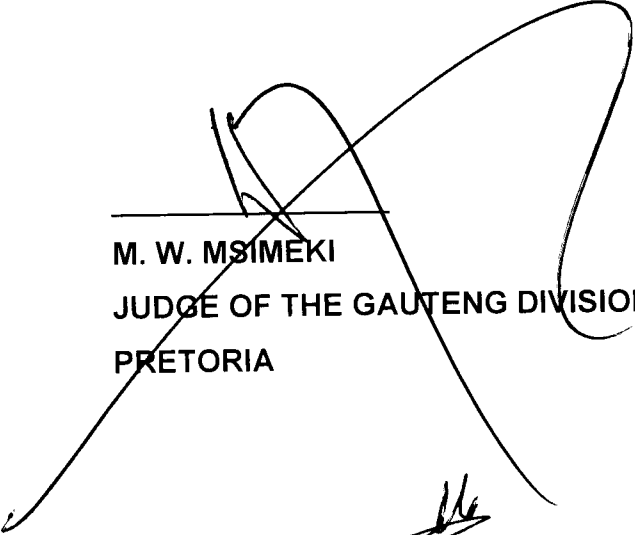
[12] Justice, in my view, and in the circumstances of this matter, demands that the matter be heard *de novo* and before a different commissioner.

I hold the view that the proceedings in the Small Claims Courts also ought to be properly recorded. Without a proper record it becomes unfair to expect the commissioner to remember what transpired in his court in 2013. A proper record of the proceedings, in my view, should also be generated and properly kept in the Small Claims Courts. A proper adjudication of cases such as this is impeded by the absence of the necessary records.

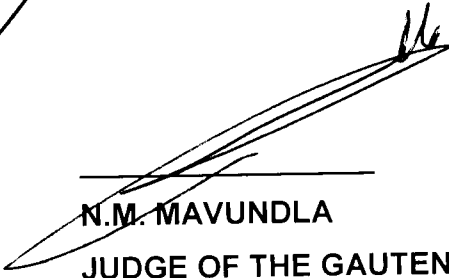
[13] I, in the result, make the following order:

1. The judgment and order of the commissioner of 21 November 2013 is hereby set aside.
2. It is ordered that the matter be heard *de novo* before a different commissioner who must ensure that a proper record is generated and kept.

I agree
And it is so ordered.



M. W. MSIMEKI
JUDGE OF THE GAUTENG DIVISION
PRETORIA



N. M. MAVUNDLA
JUDGE OF THE GAUTENG DIVISION
PRETORIA