



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case no: A179/2023

In the matter between:

TSIU ADAM MATHIBELI

Appellant

and

DIPPENAAR & CROUS ATTORNEYS

Respondent

BEFORE: CHESIWE, J *et* MANYE, AJ

HEARD ON: 15 APRIL 2024

DELIVERED ON: 19 SEPTEMBER 2024

- [1] The appellant brought an application for leave to appeal the whole judgment and order granted in the Magistrate Court, Bloemfontein on 2 August 2003, wherein the appellant was the defendant and the respondent was the plaintiff.

- [2] The appeal was placed on the roll for 15 April 2024 in order to ventilate the grounds for appeal. The appellant was in person and there was no appearance on behalf of the respondent.
- [3] The respondent had at the Magistrate Court, filed a Rule 27(2) in which the action was withdrawn against the appellant dated 13 September 2023.¹
- [4] The appellant served the appeal application and the notice simultaneously on the respondent on 9 February 2024.
- [5] I need to pause to mention that the appellant appeared in person; his papers are intricate and leaving this Court in a conundrum. The written heads of argument were filed and the appellant presented his case on these written heads. The Court also had difficulty to discern what is relevant or irrelevant in the heads of arguments presented before it.
- [6] The appellant's main grounds of appeal are that, the respondent withheld documents that were relevant to the case in the Court *a quo* and that the Court misdirected itself in finding that the appellant failed to prove the alleged allegations.

Background

- [7] The respondent had acted as a legal representative for the appellant in a matter against BMW Financial Services, under case number: 6178/2017, at the Bloemfontein Magistrate Court. The respondent withdrew as attorneys of record and instructed Kruger Venter to institute action against the appellant for their legal fees. Summons were served on the appellant on 25 October 2021. The appellant defended the matter in person and served a notice of bar on 6 December 2021,

¹ Annexure 'D' Notice of Withdrawal of Action in terms of Rule 27(2), page 76 of the Index - Appellant's Bundle of Documents.

and on 22 April 2022, served the Respondent's attorneys with a notice of intention to apply for a dismissal of the case.

[8] On 12 May 2022, the Court *a quo* granted the following order:²

'1. The Plaintiff's claim is dismissed with costs.

2. Absolution from the instance is granted.'

[9] The respondent approached the Magistrate Court with an application for rescission of judgment. The Court *a quo* granted a rescission on 2 August 2023.³ The appellant, aggrieved by the order, noted an appeal at the Magistrate Court that the application for rescission be dismissed with costs.⁴

Notice of appeal

[10] The submissions as contained in the notice of appeal are not set out succinctly and were therefore challenging to follow.

[11] The appellant states that in the answering affidavit which forms part of the record pertaining to the rescission application granted, a document was withheld from the Court *a quo* by the respondent which bore 'unsolicited advice' for another application. Further that it is noted as part of the filed record, the Respondent's Affidavit in support of the rescission application it never received a notice of set down from the appellant's attorneys.⁵

² Draft Order, page 24 of the Index – Appellant's Bundle of Documents.

³ Court Order, page 41 of the Index – Appellant's Bundle of Documents.

⁴ Erasmus Superior Court Practice/Volume 2: Uniform Rules and Appendices/Part D Rules/D1 Uniform Rules of Court/Rules regulating the conduct of the proceedings of the several provincial and local divisions — GN R48 of 1965/RULES OF COURT/50 Civil appeals from magistrates' courts.

⁵ Affidavit in support of the rescission application, page 86, paragraph 7.1 of the Index – Appellant's Bundle of Documents.

- [12] However, the record shows that on 5 May 2022, the matter in which an order was granted in favor of the appellant, was postponed with the respondent represented,⁶ which is a total contrast to the affidavit as noted above.
- [13] However, the appellant during appeal proceedings before this Court, was made aware of the Rule 27(2) notice though insisted that he wants to proceed with the appeal application for the rescission judgment that set aside the decision of 12 May 2022 as noted above. Further, the appellant affirmed that he stands by the written heads of argument.
- [14] In having sought and received clarity from the appellant as indicated above, an appeal against an order of the magistrate in a civil matter granting an application for rescission of judgment granted in favor of the respondent on 2 August 2023, commenced.

Grounds of appeal

- [15] The grounds of appeal as contained in the notice of appeal states the Court *a quo*'s misinterpretation of the law. Moreover, in having considered the rescission application, the Court *a quo* misdirected itself in its reply to the reasons for the granting of the rescission application about the facts found to be proven.⁷
- [16] Further that, the heads of argument presented by the appellant in the appeal state that there are reasonable prospects of success and that another Court would come to a different conclusion. Again, this poses a conundrum based on fact that, the test of reasonable prospects of success which postulated a dispassionate decision based on the facts and the law that a Court of appeal could come to a reasonable

⁶ Transcribed record, page 19 of the Index – Appellant's Bundle of Documents.

⁷ Rule 51(1): Presiding Officer's Reply, page 49 of the Index – Appellant's Bundle of Documents.

conclusion different to that of the trial court, is applicable in a leave to appeal application and not an appeal.⁸

[17] This is a civil appeal from the magistrate court in terms of Rule 50. Although the noting of an appeal lays the foundation of the proceedings in the High Court, it is an act done in the Magistrate's Court. The prosecution of an appeal under this rule is a proceeding in the High Court.

[18] In *Tavakoli and Another v Bantry Hills (Pty) Ltd*⁹, the Supreme Court of Appeal said the following:

‘An appeal lies against the order, not the reasons, of a court.’¹⁰

[19] The issue, is whether should the Court *a quo* in the exercise of its discretion, have refrained from setting aside the order of 12 May 2022 granted in favor of the Appellant.

[20] The appellant has to, however, pass the hurdle of the notice of withdrawal of the action against him. The respondent was *dominus litis* in the rescission application and the granting thereof. The action has been withdrawn against the appellant with no tender for defendant's costs made.

[21] The respondent, in a letter dated 18 September 2023, noted the following:

‘We enclose herewith a copy of the judgment in the rescission application, which application was granted (sic) with costs in favor of the applicant.

We wish to confirm that we no longer wish to pursue the matter. It is simply not worth the time and effort involved.

Consequently, we are filing a Notice in terms of Rule 27(2).

⁸ *Smith v S* [2011] ZASCA 15; 2012 (1) SACR 567 (SCA) 570 para 7.

⁹ *Tavakoli and Another v Bantry Hills (Pty) Ltd* [2018] ZASCA 159; 2019 (3) SA 163 (SCA).

¹⁰ *Ibid* para 3.

You will notice that no costs are tendered as it is clear that Plaintiff's costs in the rescission application will far exceed your client's costs in the action.'

[22] It is therefore with consideration of the above, that the appellant's appeal is rendered moot in that the action against the appellant has been withdrawn and that the appellant was informed of the withdrawal of action in September 2023. Therefore, appellant ought not to have proceeded with the appeal.

[23] Further that, most of the issues raised in the notice to appeal, as well as the in heads of argument, are irrelevant pursuant to the matter that is before this Court.

[24] In my view, the appeal application ought to be dismissed as the respondent being *dominus litis*, has withdrawn the action.

[25] I accordingly order as follows:

1. The Appeal is dismissed.
2. No order as to costs.




CHESIWE, J

I concur.




MANYE, AJ

On behalf of the Appellant: In Person

On behalf of the Respondent: No appearance