

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A3061/2016

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED
17.2.17	
Date:	WHG VAN DER LINDE

In the matter between

Lotz, Herman

Applicant

and

Aerts, Paul

First Respondent

Total Concrete Solutions (Pty) Ltd

Second Respondent

JUDGMENT

Van der Linde J:
Introduction and background

- [1] The appellant in this matter appears, and has all along appeared, in person. The record of appeal is regrettably materially confusing. At the hearing the appellant informed us from the

Bar that three orders, all of which were costs orders only, were being appealed against: first, an order by Magistrate van Niekerk dated 13 August 2015, when he postponed the trial of the currently pending action between the parties to 1 October 2015, and directed that costs be in the cause ("the first order"); second, an order by Magistrate van Niekerk dated 12 April 2016, when he refused an application for summary judgment by the appellant against the second respondent, and directed that the appellant pay the costs on a party and party scale ("the second order"); and third, an order by Magistrate Swart also on 12 April 2016, when she postponed the trial between the parties to 21 August 2016, directing the appellant to pay the wasted costs on the scale as between attorney and client, and directed that these be payable and executable immediately ("the third order").

- [2] The appellant made it plain that his appeal was not against the substantive orders given in each instance, but only the costs orders that were given.
- [3] Before discussing the further fortunes that the appeal against these three orders followed during the course of the argument, it is necessary to understand something about the litigation. The appellant initially sued only the first respondent for damages, interest and costs. He then applied to join the second defendant, Total Concrete Solutions (Pty) Ltd and in his first claim sued them both for contractual payment of R61 976.10, and in a second claim the first defendant only for damages in the amount of R17 297.50.
- [4] At the stage when the second defendant was joined, the action against the first defendant had already commenced. On 12 April 2016 the part-heard trial had been set down for continued hearing. However, the appellant set down an application for summary judgment against the second defendant on the same day. That application came before Magistrate van Niekerk, who dismissed the application with costs on the party and party scale, and granted the second defendant leave to defend. This is the second order referred to above.
- [5] Thereafter, on the same day, the second defendant applied for a postponement of the trial, on the basis that it had just been given leave to defend, and wished to file a plea. That

application came before Magistrate Swart, who granted the application, postponing the trial to 21 June 2016, and directing the appellant to pay the wasted costs of the postponement on the scale as between attorney and client, payable and executable immediately. This is the third order referred to above.

[6] Two days later, on 14 April 2016, the appellant filed a request for default judgment. This fact was again mentioned on 21 June 2016.

[7] On 21 June 2016 the trial was called before Magistrate Swart. The fees and disbursements wasted as a result of the postponement of 12 April 2016 had not yet been taxed, and Magistrate Swart was not prepared to allow the trial to proceed, because she interpreted her 12 April 2016 order as including a stay of proceedings until the costs had been taxed and paid. The matter was removed from the roll.

The appeal

[8] The appellant's notice appeal conveyed that three costs orders were being appealed against, being that of 12 April 2016, that of 13 August 2015 and a costs order of 25 November 2015. As pointed out, during the hearing before us, this was corrected, and the appeal was said to be only against the three costs orders identified at the outset. Indeed, as the hearing progressed, the appellant abandoned the appeal against the first and the second orders, being the costs appeals against the orders of Magistrate van Niekerk. This was because the appeal against the first order was way out of time, and the appeal against the second order (as with the first order) had not been preceded by a call on the learned magistrate to provide reasons in terms of rule 51.

[9] That left the appeal against the third order. The appellant refined the appeal yet further. He explained that his appeal was not against the costs order in principle, but against the scale, being as between attorney and client. He submitted that he had accepted liability for costs

as between party and party, but the respondents were not prepared to accept his offer of payment in that regard.

[10]Magistrate Swart had been asked to provide reasons in terms of rule 51, but these have not been forthcoming. As to what transpired before the learned magistrate on 12 April 2016, there was a dispute between the appellant and Ms van der Berg, representing the respondents, as to what comprised the record of the proceedings. Our record comprised two volumes that were in many respects not paginated and contained many duplications. But in addition, there was a typed transcript of proceedings, some seven pages long. The appellant relied on this transcript as being the record of what had occurred on 12 April 2016 before Magistrate Swart, but Ms van der Berg submitted that in truth it was a record of what had transpired on 21 June 2016, at the postponed hearing date.

[11]The confusion is not assuaged by the fact that the transcriber suggests that the proceedings there reflected occurred on 10 January 2013, although one issue on which the parties appear to be agreed, is that the transcriber is wrong.

[12]A reading of the record does not bear out what the appellant submits. He relies on a single sentence that reads as follows: "According to my understanding on 12 April I made a costs order for today for payable and executable immediately and then thereafter we can proceed with the trial." He argues that this conveys that the proceedings of 12 April 2016 were being recorded, and that the learned magistrate was making a costs order there and then.

[13] But it seems plain to us that in the context she was reflecting on events that had occurred in the past, hence the past tense of the verb, "made". When she said that on 12 April 2016 she "made a costs order for today", she was referring to the fact that the costs order she made then, back on 12 April 2016, was because the matter had to be postponed for (until) 21 June 2016.

[14]There are four other features in the transcript that corroborate the conclusion that the transcript is in fact that of the proceedings of 21 June 2016. First, there is the express

reference in lines 5 – 10 on page 1 to the fact that on 14 April 2016 the appellant had filed a request for default judgment; again a reference to an event that had occurred in the past. Second, the representative of the respondents is recorded in lines 17 – 21 at page 1 as conveying that in the meanwhile a plea and special plea had been filed. This could only have occurred after 12 April 2016, the date on which leave to do this had been granted.

[15]Third, the further exchanges from the foot of the first page onwards concerns whether the costs order made on 12 April 2016 meant, without more, that the proceedings were stayed until those costs had been taxed and paid. The learned magistrate was steadfast in her conviction that that was the consequence of her order, and in the result the matter did not then, on 21 June 2016, proceed.

[16]And fourth, on page seven the learned magistrate explained to Mr Waller, a witness, that on the previous occasion she had made a costs order the effect of which was that the matter could not proceed until the costs were taxed and paid. This had not occurred, and so the matter could not proceed, the learned magistrate said.

Conclusion

[17]In the result we have no record of what transpired before the learned magistrate that gave rise to the third costs order, the remaining one being appealed against. This is all the more relevant when regard is had to the fact that the appellant limited his appeal against the scale only of the third order. There is no suggestion that he has made an appropriate tender.

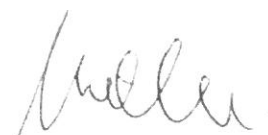
[18]We cannot properly adjudicate the appeal without a record, if not mechanically transcribed then at least reconstructed, of what had transpired on 12 April 2016. Punitive costs orders are in the discretion of the court making those orders, and generally such a discretion is of the narrow kind, permitting of interference only if some misdirection is shown to have occurred or if the discretion was exercised improperly or unreasonably.¹ That assessment

¹ Logistics Technologies (Pty) Ltd v Coetzee and Others, 1998 (3) SA 1071 (W).

cannot be made without a record. The appellant is responsible for procuring the record, and must inevitably bear the consequences for the inability of this court to hear the appeal on the merits.

[19] In the result I propose the following order:

- (a) The appeal is struck from the roll.
- (b) The appellant is directed to pay the costs of 13 February 2017.



WHG van der Linde
Judge, High Court
Johannesburg

I agree, and it is so ordered.




B Vally
Judge, High Court
Johannesburg

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