HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

(1) REPORTABLE: Electronic reporting only.
(2) OF INTEREST TO OTHER JUDGES: No.
(3) REVISED.

16-04-2020 P. A. Meyer
Date Judge P.A. Meyer

Case no: 45456/17

In the matter between:

ROBERT DAVID LEVIN Applicant/Plaintiff

and

MARK CORRIGAN Respondent/Defendant

***Case Summary*: Practice – Uniform Rules of Court, r 39(22) – Transfer of action proceedings from high court to magistrates' court – Whether high court should decide liability for costs incurred up to stage when matter is transferred.**

JUDGMENT

MEYER J

[1] The applicant, a senior counsel at the Johannesburg Bar, seeks an order that an action, which he instituted in this court against the respondent for payment of an amount of R46 056 plus interest, be transferred to the Randburg Magistrates' Court and that all costs incurred to date be reserved for determination by the trial court. The respondent, a businessman in Sandton, in a counter-application also seeks an order that the action be transferred to the Randburg Magistrates' Court, but that the applicant be ordered to pay all his legal costs incurred in the action 'from inception until the date of this order' on the attorney and client scale, alternatively on the party and party scale.

[2] The applicant instituted the action on 22 November 2017. Therein he claims damages, due to breach of contract, in the amount of R46 056.00, representing the fair and reasonable cost to him of employing a contractor to plaster and paint a boundary wall on the side facing his property, constructed by the respondent following building work which he undertook on his neighbouring property.

[3] In his particulars of claim the applicant relies on an oral agreement that was concluded between him and the respondent in terms of which: (a) the applicant consented to the respondent demolishing the common boundary wall between their two neighbouring properties in Inanda, Sandton; (b) the respondent would, on or before the completion of the development, at his sole cost take all necessary steps to replace the demolished common boundary wall, construct a replacement new brick common boundary wall, cause the side of the new wall facing the applicant's property to be plastered and painted a dark green colour and at a standard of finish to match the remaining boundary walls on the applicant's property; and (c) the respondent would ensure that the erected wall was built in accordance with approved building plans. It is the applicant's case that the respondent failed to cause the side of the newly built boundary wall facing his property to be plastered and painted, as agreed, and hence the claim for damages.

[4] The respondent, in his plea, dated 22 February 2018, denies the terms of the agreement as pleaded by the applicant. According to him they only agreed that he 'would build a new boundary wall in accordance with building plans'. But, pursuant to the completion of the building of the boundary wall during May 2017, they orally agreed that he would pay to the applicant an amount of R20 000 for plastering and painting the boundary wall on the side of the applicant's property. He tendered payment of that amount, but the applicant refused to accept payment of that amount, and repeats the tender in his plea. The respondent further denies that the amount claimed by the applicant constitutes the fair and reasonable cost to employ a contractor to plaster and paint the boundary wall on the side facing the applicant's property, and pleads that the amount of R20 000 constitutes the fair and reasonable amount.

[5] The applicant denies the conclusion of the May 2017 oral agreement upon which the respondent relies. At an early stage, according to him, he sent an electronic message to the respondent in which he said this:

'Hi Mark, it is now weeks later than you said you would be coming back to me about plastering and painting our side of the wall. I can have the work done for R20 000.00. If you like I will do but need to pay the contractor virtually all up front. Please let me know what you would like to do failing which I shall have to hand the matter over for legal redress.'

The applicant states that his proposal was rejected by the respondent when he repeatedly promised to have the work done by his own contractor. As it happens, he states, the quotation he 'had from a workman proved entirely inadequate. This emerged once [he] obtained professional advice and a full quote on the cost and requirements for the work'.

[6] On 13 December 2017, following the receipt of the summons commencing the action in this court, the respondent's attorneys wrote a letter to the applicant's attorneys urging the applicant to withdraw the action and to tender the respondent's costs, because, according to them, the matter belonged in the magistrates' court and not in the high court. By letter of even date, the applicant's attorneys advised the respondent's attorneys that summons 'was advisedly issued out of the High Court' and that the applicant 'will not withdraw the instant action or tender [their] client's costs'.

[7] In correspondence between the attorneys that followed in the subsequent months, the respondent's attorneys repeatedly protested or suggested that the summons should have been instituted in the magistrates' court. The respondent required the applicant to withdraw the action or to launch an application to have the matter transferred to the magistrates' court with jurisdiction and he also intimated that he was going to launch such an application, but he required the applicant to pay the costs which he had incurred in the high court or to 'make an appropriate tender of [his] costs thus far'. That was unacceptable to the applicant who believed he had good and sufficient reasons for having instituted the matter in the high court.

[8] The applicant explains that he initiated the action in the high court, because of the 'circumstances which prevailed at that time, *inter alia,* the unfounded and scurrilous allegations made against [him] personally by the defendant, which could potentially have impacted on [his] reputation and credibility – a serious issue for a senior counsel of this Court.' He states 'that the respondent did not only dispute the quantum of the claim, but at that time, disputed the existence of any agreement, including casting aspersions on [his] integrity in alleging such an agreement.' The dispute, according to him, at that stage 'included allegations of mala fides and

impropriety made by the defendant against [him]'. He states that 'until such time as the respondent belatedly contended that we agreed on the payment of R20, 000.00, which I dispute, he strenuously denied that there was any agreement with me as contended by me, or at all, relating to plastering the wall.' Other than for bare denials, the respondent does not engage with these factual averments made by the applicant.

[9] The registrar allocated 15 February 2019 as the trial date for the action in this court. The applicant's attorneys served the notice of set down for trial on the respondent's attorneys on 24 May 2018. On 28 June 2018, pursuant to admissions sought by the applicant at a pre-trial conference that was held on 13 June 2018, the respondent admitted that he agreed to plaster and paint the new boundary wall on the side facing the applicant's property and he admitted his liability for 'the reasonable amount claimed by the Plaintiff initially, in the sum of R20,000-00 (twenty thousand rand), as tendered in his plea'. According to the applicant, although there had been good reason for him to initiate the action in the high court, once the respondent conceded the existence of the agreement as well as a portion of the quantum of his claim, 'the only outstanding matters for trial are the issues of quantum and costs. The difference in quantum is not an issue that should occupy the High Court.'

[10] On 15 November 2018 the applicant's attorneys wrote to the applicant's attorneys, stating that-

'. . . on a conspectus of the evidence filed in this matter, the remaining issues in the matter are the quantum of the claim and costs. On any basis, the gap between the amount of the claim and your client's settlement figure leaves the dispute as to quantum relatively small. In those circumstances, it is incumbent on the parties to attempt to resolve the issue as to quantum and forum without incurring further costs of suit, and you and your client are invited to engage in 'without prejudice' discussions to that end.'

The respondent's attorneys answered the same day, saying that their-

'. . . client remains adamant that given, *inter alia*, the quantum of your client's claim the action should never have been brought in the High Court. All our client's rights regarding same remain strictly reserved. In the interim, our client once again invites your client to withdraw the action in the High Court and tender our client's costs in order to avoid further costs in this matter.'

The applicant's attorneys replied the next day, saying their-

'. . . client will not withdraw the action and tender costs, as suggested by you. Your requirement that he does so is without merit, unhelpful and futile.'

[11] The issue regarding the quantum of the applicant's claim was not resolved. On 30 November 2018, the applicant's attorneys again wrote to the respondent's attorneys, saying-

'. . . in the circumstances, our client hereby agrees to the transfer of the matter to the Magistrate's Court, having competent jurisdiction, with the costs thereof to be costs in the cause, alternatively that the costs thereof be reserved for determination by the eventual Trial Court, including the removal of the matter from the High Court Trial Roll, by consent. Our client would, in those circumstances, attend to the necessary steps to achieve the aforegoing.'

[12] The respondent's attorneys replied on 4 December 2018, reminding them that it was the applicant who 'was reluctant and refused to transfer the matter to the Magistrates Court . . . despite repeated requests and later demands to have the matter so transferred', and stating:

'5. Our client consents to the transfer of the matter to the Magistrates Court but reserves his rights to argue that the matter never belonged in the High Court, thereby our client will be seeking all costs occasioned by your client in the High Court.
6. Your client should attend to the removal of the matter from the High Court roll and all steps should be taken by your client to have the matter transferred. Our client will provide whatever notices necessary with the reservation of our client's aforesaid rights.'

[13] On 5 December 2018, the applicant's attorneys wrote back, saying that-

'[i]n light of your aforementioned correspondence, we shall now take appropriate steps to cause the action to be transferred to the Magistrate's Court with jurisdiction to hear the matter, costs reserved, by consent. The High Court will be advised accordingly.'

And in a follow-up letter the next day:

'2. Pursuant to the aforegoing, and in accordance therewith, kindly find attached hereto, a Notice of Removal from the Trial Roll, for you to kindly sign at the appropriate space provided.
3. Once you have signed the attached Notice of Removal from Trial Roll, kindly transmit a copy thereof to us via e-mail, upon receipt of which, we shall counter-sign same, and thereafter attend to formally serve same on yourselves, and file same at Court with the Civil Trial Registrar.'

[14] The respondent's attorneys wrote back the same day, saying:

'3. Our client consents to the matter being transferred to the Magistrate's Court with jurisdiction to hear the matter. Our client does however, so consent with the proviso that all costs (reserved or otherwise) in the High Court matter be dealt with before the matter

is transferred. Our client is of the view that your client should tender to pay the costs associated with the High Court matter and its subsequent transfer. Should your client not tender costs, we have instructions to address the issue of costs in the High Court before the transfer. One of the reasons for this is because the Magistrate's Court cannot deal with historic High Court costs.

4. Our client further consents to the removal of the matter from the trial roll with costs reserved. We attach a copy of the signed removal as requested.'

[15] The applicant's attorneys attended to the filing and service of the notice of removal of the matter from the trial roll. The applicant maintains that the respondent did an about turn on 6 December 2018, in consenting to the transfer of the matter to the magistrates' court only on the pre-condition that all costs in the high court be dealt with before the matter is transferred or that the applicant tenders all costs associated with the high court matter to that point and the costs of the transfer. This, according to the applicant, was contrary to the express agreement reached between the parties in terms of their respective attorneys' letters dated 30 November 2018 and 4 December 2018 for the matter to be transferred to the magistrates' court, which agreement did not assert those pre-conditions for the transfer. The respondent, on the other hand, maintains that paragraphs 5 and 6 of his attorneys' letter upon which the applicant relies do not state that the costs incurred in the high court would be reserved. On the contrary, according to him, it was specifically stated that he will be seeking all costs occasioned by the applicant in the high court.

[16] The action has not run its full course in this court. The pleadings and pre-trial procedures have been concluded, but there was not a trial. The parties, however, consented to the transfer of the action to the Randburg magistrates' court, and the only issue between them is the question of the costs incurred in the high court before the transfer and of the present application.

[17] The respondent's repeated demands in the correspondence from his attorneys for the applicant to withdraw the action or for the matter to be transferred to the magistrates' court and for the applicant to pay his legal costs incurred in the high court, and his present claim for such costs, are premised, *inter alia*, on the contention that '[t]he main action will effectively start afresh in the Magistrate's Court once the matter was transferred', as stated by him in his affidavits. That premise is clearly wrong. A case simply proceeds further in the magistrates' court from the stage when it is

transferred from the high court to the magistrates' court, and does not start afresh. The relevant costs at issue to date can thus only be the difference between those in the magistrates' court and those in the high court, since, as the applicant correctly points out, the relevant preparation of pleadings, discovery and any other process would have been necessary anyway. The matter is ripe for hearing and simply requires a hearing and a finding on the limited issues that remain.

[18] Rule 39(22) of the Uniform Rules of Court provides as follows:

'By consent the parties to a trial shall be entitled, at any time, before trial, on written application to a judge through the registrar, to have the cause transferred to the magistrate's court: Provided that the matter is one within the jurisdiction of the latter court whether by way of consent or otherwise'.

[19] And r 50(9) of the Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa provides thus:

'The summons or other initial document issued in a case transferred to a court in terms of rule 39(22) of the Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa shall stand as summons commencing an action in the court to which such case has been so transferred and shall, subject to any right the defendant may have to except thereto, be deemed to be a valid summons, issued in terms of the rules and any matter done or order given in the court from which such case has been transferred and the case shall thereupon proceed from the appropriate stage following the stage at which it was terminated before such transfer.'

[20] Furthermore, the respondent does not substantiate with evidence that the costs he had thus far incurred have been any different to or greater than those he would have incurred to date had the action been initiated in the magistrates' court. The remaining issues at trial will be ventilated on the existing pleadings and pre-trial procedures which have been completed.

[21] The respondent's contention to the effect that, because the amount of the applicant's claim falls within the jurisdiction of the magistrates' court, he was not entitled to initiate the action in the high court, is also not entirely correct. It is trite, as a general rule, that 'a litigant instituting proceedings in the High Court when he or she ought to have proceeded in a lower court will be mulcted in costs in so far as such litigant will, if successful in his or her claim, be awarded costs only on the scale applicable in the forum he or she ought to have chosen'. (*LAWSA* Vol 3 Part 2 Second

Edition para 299.) However, a plaintiff may justify his recourse to the high court, and the question whether high court costs or magistrates' court costs are to be awarded is a matter within the discretion of the trial judge, to be exercised judicially upon a consideration of all the facts. (*Ramsuran and another v Yorkshire Insurance Co Ltd* 1965 (2) SA 263 (D) at 264G-265A.)

[22] The main considerations which may lead to a deviation from the general rule under consideration, said De Wet J in *Barnard v SA Mutual Fire & General Insurance Co Ltd* 1979 (2) SA 1012 (SE) at 1015H-1016A,

'. . . appear to be (a) where the case presents considerable difficulties in fact or in law; (b) cases of public interest; (c) cases where the decision is of great importance to the plaintiff, and (d) cases involving fraud and misrepresentation. It would, therefore, be wrong to suggest that, whenever an award falls within the jurisdiction of the magistrate's court, the costs should automatically be allowed on the magistrate's court scale and not on the Supreme Court scale. This decision can be taken only after the Court has considered all the facts before it.'

[23] The considerations mentioned by De Wet J are not exhaustive. Other factors which may be relevant in permitting a deviation from the general rule, include that the plaintiff was justified in coming to the high court to vindicate his reputation or professional reputation or where he is an officer of the court. In awarding costs on the high court scale in *Udwin v May* 1978 (4) SA 967 (C) at 976C, Van Winsen J said that '[a]lthough the award of damages [for defamation] is within the jurisdiction of a magistrate's court this case has involved important matters of principle and the parties both occupy important professional positions in the community'. And in *Gelb v Hawkins* 1960 (3) 687 (A) at 694B, Holmes AJA took into account *inter alia* that the 'accusation was an extremely serious one' and that the 'appellant's professional good name was involved'. In *Raliphaswa v Mugivhi and others* 2008 (4) SA 154 (SCA), para 22, Snyders AJA held that, '[b]earing in mind that the appellant is an officer of the court, he was entitled to approach the High Court', even though his claim for damages based on defamation and indecent assault fell well within the jurisdiction of the magistrates' court.

[24] I realise that this is not an action brought to vindicate the applicant's character or reputation, but whether the considerations referred to by him justified his initiation of the action in the high court, should, together with all other relevant factors, best be considered by the trial court in exercising its discretion in respect of costs at the

conclusion of the trial. To require this court to do so at this stage in these proceedings is premature. This decision can be taken only after the trial court has considered all the facts before it.

[25] Rule 39(2) of the Uniform Rules of Court is silent on the question of costs incurred in the high court up to the stage when an action is transferred to the magistrates' court, but r 50(10) of the Magistrates' Courts Rules provides that such costs 'shall, unless the court otherwise directs, be costs in the cause.' The costs incurred in the high court before the transfer, therefore, are generally costs in the cause. The general rule, it is trite, is that costs follow the event, in other words the successful party should be awarded costs, and it should be departed from only where good grounds for doing so exist. (*LAWSA* Vol 3 Part 2 Second Edition para 299.) This general rule seems to me to be the ratio underlying r 50(10) of the Magistrates' Court Rules that the costs incurred before the transfer of a case to the magistrates' court shall ordinarily be costs in the cause. Here, the action has not yet been finalised and it remains to be seen who the successful party would be. Furthermore, allowing a party to seek the costs of an action incurred in the high court before the transfer of the matter to the magistrates' court would lead to piecemeal adjudication, the wasteful use of judicial resources, increased legal costs and prolong the litigation.

[26] The magistrates' court may award such costs as it deems fit and as may be just. It may, for example, in its discretion order that the whole of the costs of the action be paid by the parties in such proportions as it may direct. It may also in certain circumstances award costs as between attorney and client. (Section 48(d) of the Magistrates' Courts Act and rules 33(1) and (11) of the Magistrates' Courts Rules.) Should the respondent ultimately be the unsuccessful litigant and the general rule that costs follow the event is applied, then he would be in precisely the same position of having to pay the costs of suit on the magistrates' court scale than he would have been had the action ran its full course in the high court and the general rule was applied that a litigant instituting proceedings in the high court when he ought to have proceeded in a lower court will be awarded costs only on the scale applicable in the forum he ought to have chosen.

[27] The result is that in my view the sensible and appropriate order is to reserve all costs incurred to date for determination by the trial court at the appropriate time. This

conclusion is dispositive of the application and counter-application and renders it unnecessary to consider the question whether paragraphs 5 and 6 of the respondent's attorneys' letter dated 4 December 2018 amounted to a consent for the matter to be transferred to the magistrates' court with costs reserved, as contended for by the applicant, and the alternative awards of costs that ought to be made should an award of costs as claimed in the counter-application not be made, as contended for by the respondent.

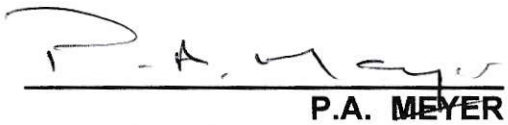
[28] There remain, however, to be considered the costs of the present application and counter-application. No good grounds exist for a departure from the general rule that costs follow the event. The applicant as the overall successful party is clearly entitled to his costs of the application and of opposing the counter-application. He requests costs on a punitive scale. But, in my view, this is not one of those 'rare' occasions where a deviation from the ordinary rule that the successful party be awarded costs as between party and party is warranted, not as far as the application or the counter-application is concerned. (See *LAWSA* Vol 3 Part 2 Second Edition para 320.)

[29] In the result the following order is made:

(a) The application succeeds with costs.

(b) This action is transferred to the Randburg Magistrates' Court, all costs incurred to date being reserved for determination by the trial court.

(c) The counter-application is dismissed with costs.



P.A. MEYER
JUDGE OF THE HIGH COURT

Judgment:	16 April 2020
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Instructed by:	Nowitz Attorneys, Hyde Park
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