IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

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

(3) REVISED.

16/4/2014
DATE

SIGNATURE

Case Number: A135/2013

16/4/2014

In the matter between:

SEYENZA CONSULTANTS CC Appellant

and

MOKANATLE MASHILEGO TRADING CC Respondent

JUDGMENT

POTTERILL J

1 The appellant is appealing against the judgment and two orders granted by the magistrates' court on respectively the 21st of October 2010 and the 29th of

October 2010. The appeal against the judgment and order dated the 21st of October 2010 has in argument fallen by the wayside.

2 The question the court needs to address is whether the court *a quo* could without notice to the appellant or the Bushbuckridge Local Municipality issue a further order pertaining to quantifying the damages.

3 It is necessary to set out the background pertaining to this matter. The appellant was appointed by the Bushbuckridge Local Municipality to supply water services fleet management. Pursuant to this appointment the appellant and respondent concluded a memorandum of understanding agreement in terms of which the respondent supplied a water tanker to be utilised for the supply of water to fulfil appellant's obligations in terms of its appointment with the Bushbuckridge Local Municipality.

4 The appellant informed the respondent that its truck did not meet the required standard and it instructed it to replace the truck. The respondent did not replace the truck and the appellant sent a letter of termination of the contract. The respondent brought a motion application to reinstate the respondent to provide the service i.e. to continue to transport the water in their water tanker. Prayer B of their notice of motion read *"that the first respondent be ordered to pay monies that the applicant would have earned from the date that the applicant was stopped from operating to the date on which the applicant shall resume as the court might order."*: those the prayers relevant to this appeal.

5 The court *a quo* then made the following order:

> *"1. That the first respondent is ordered to allow the applicant to continue to work to transport water around Thulamahashe. Bushbuckridge as per the agreement between the parties.*

2. *That the first respondent is ordered to pay monies that the applicant would have earned from the date the applicant was stopped from operating to the date on which the contract is resumed."*

6 On 29 October 2010 the following draft court order was made an order of court:

"1. That the application is hereby granted.

2. *That the second respondent is hereby ordered to pay to the applicant or its attorneys the amount of R434 000.00 which money represent damages suffered by the applicant from date of the cancellation of the agreement to date of judgment day.*

3. *That first respondent is hereby further ordered to reinstate the applicant's truck. failing which the first respondent shall be liable for the loss of income that the applicant suffered as a result of the unilateral cancellation of the agreement between the parties."*

7 It is common cause that when this order was made there was no adherence to the *audi alteram partem* rule as neither the appellant nor the Bushbuckridge Local Municipality were ever notified of this application or were present when this order was made. The respondent however raises two points *in limine*. The first point *in limine* being that the appeal is lodged out of time. The reason for this is that the orders were granted on respectively 21 and 29 October 2010. The notice of appeal in accordance with Rule 51(4) was filed on the 29th of November 2012, just short of two years after the orders appealed against were granted. The appellant furthermore elected not to file a request for reasons from the court *a quo* in respect of the order dealing with the quantum. On the appeal record there is accordingly no reasons and or grounds for the granting of the quantum order. In terms of the rules the appellant should have requested reasons within 10 (ten) days after granting of the quantum order. Upon receiving same an appeal may be noted within 20 days after the date of the

judgment appealed against or within 20 days after the court *a quo*'s judgment is delivered. It was thus submitted that the appeal had lapsed due to the appellant's failure to properly note and prosecute the quantum order alternatively that a substantial application for condonation within which to note an appeal should have accompanied this appeal.

8 On behalf of the appellant it was argued that there was a delay in this process but it was not due to the fault of the appellant. It is common cause that it was a presiding officer acting on a temporary basis and that on the 24th of May 2011 the clerk of the court of Mhala informed the appellant's attorneys as follows:

> *"Be informed that the Presiding Officer of this case was on temporary basis. Therefore the office will arrange with him to come and perform his duty as requested."*

In reply thereto on page 124 this magistrate in his handwriting with the heading "Reasons for judgment" then sets out that the reasons for judgment appear on the record. It is thus quite clear that the attorneys for the appellant attempted to obtain reasons for the judgment prior to 24 May 2011, but to no avail. The notice of appeal is then in terms of Rule 51(4) served on the Clerk of the Court on the 29th of November 2012. Mr. Van As, on behalf of the respondent, conceded that it would not be in the interests of his client or of justice to dismiss the appeal due to the late prosecution of the appeal as in all likelihood a further appeal with a condonation application will be filed and served only to be heard two years along the line. A court is also loathe to uphold technical points when weight is given to the prospects of success of the appeal.

9 The further point *in limine* raised was that the incorrect procedure is followed by the appellant in appealing as a review or a rescission of the order would be the

correct procedure to follow. This is so because it is conceded that an irregularity took place in the granting of the order of the 29th of October 2010. A litigant has a choice to either go the review or appeal procedure, and can elect and stand and fall by which procedure it chooses. In these circumstances where there is an affidavit by an article clerk in an application for a writ setting out the amount of damages there certainly is no certainty pertaining to the proof of the damages. This is compounded by the fact that the appellant was not afforded an opportunity to attend and oppose the amount of damages as quantified. I am satisfied that although the appellant had other remedies his election of prosecuting an appeal is not fatal and ill-conceived.

10 In view of the fact that respondent negated the trite *audi alteram partem* rule this appeal must be successful. Mr. Botes, on behalf of the appellant, argued that the costs must then follow the success in the appeal and that the respondent's actions in approaching a court without giving proper notice and then raising technical points on the appeal further substantiates a costs order in favour of the appellant.

11 Mr. Van As, on the other hand, argued that since the appeal against the second order is slipped in by the backdoor in that they never requested the reasons from the magistrate, no documents that was put before the court *a quo* is in the appeal bundle and that the prosecution of this appeal took two years renders the appellant not entitled to its costs.

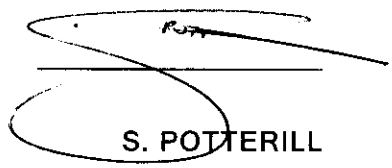
12 This is very much a case wherein the appellant did take two years to prosecute this appeal thereby frustrating the respondent in the execution of an order. On the other hand the respondent took this order in an irregular fashion. Under these circumstances I exercise my discretion in that each party is to pay their own costs.

13 I accordingly make the following order:

13.1 The appeal is upheld with each party to pay their own costs.

13.2 The order of 29 October 2010 is set aside.

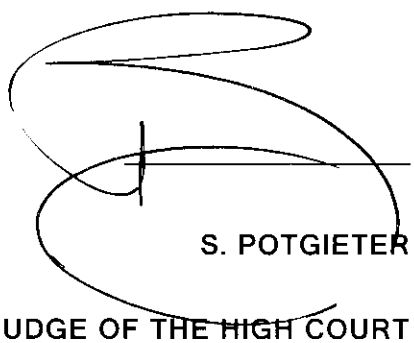
13.3 The costs, if any, pertaining to the order of 29 October 2010 is to be carried by the respondent.



S. POTTERILL

JUDGE OF THE HIGH COURT

I agree



S. POTGIETER

ACTING JUDGE OF THE HIGH COURT

CASE NO: A135/2013

HEARD ON: 15 April 2014

FOR THE APPELLANT: ADV. F.W. BOTES

INSTRUCTED BY: Du Toit – Smuts & Mathews Phosa Inc

FOR THE RESPONDENT: ADV. E. VAN AS

INSTRUCTED BY: Mpho Mashiloane Attorneys

DATE OF JUDGMENT: 16 April 2014