




IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

Case No: A290/2021

(1)	REPORTABLE: YES/NO	NO
(2)	OF INTEREST TO OTHERS JUDGES: YES/NO	NO
(3)	REVISED	
		
SIGNATURE		
		3/2/2023
		DATE

In the matter between:

ERNERT OLVERMAN COLLINS

PETRUS JACOBUS COLLINS

JASPER CHRISTOFFEL VAN DER LINDE

FIRST APPELLANT

SECOND APPELLANT

THIRD APPELANT

and

MINISTER OF POLICE

RESPONDENT

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JUDGMENT

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THOMPSON AJ

[1] This is an appeal by three appellants against "*the whole of the judgment and finding*" of Magistrate B Mtebele of 27 September 2017 and the reasons given on 6 November 2017. All of the problems relating to the hearing of the appeal by us is, in effect, contained in the aforesaid opening sentence.

[2] The three appellants were the plaintiffs in the court *a quo*. Each of the appellants testified in the court *a quo*. The transcript of the record of the proceedings in the court *a quo* contains almost no evidence in respect of the third appellant (the third plaintiff). It is important to note that the third appellant testified first and, if his evidence had been led properly, he would have set the scene for the evidence to be led during the course of the trial. The evidence of the third appellant consists wholly of transcribed shorthand written notes by the Magistrate. By virtue of the notes being shorthand, it does not reflect the questions posed or the answers given in any particularity. The transcribed notes make no differentiation between evidence-in-chief, cross-examination or re-examination. Simply put, for the purposes of a proper adjudication of an appeal, the evidence of the third appellant is for all intents and purposes non-existent.

[3] The appellants, duly represented by legal practitioners, have not sought to approach this Court for an order whereby all legal representatives, including the learned Magistrate, is to convene an open court sitting and properly reconstruct the record. No application to condone the filing of the incomplete record is before us either.<sup>1</sup> An application for condonation for the late delivery of the record exists. In this affidavit it is submitted that a reconstruction of the record will be a fruitless exercise as there is no co-operation from the State Attorney. Why this Court was not approached for an order compelling a reconstruction of the record is unexplained. In light of the failure to seek an order compelling all parties to reconstruct the record, I decline to express a view whether a condonation application would have been successful in the circumstances.

[4] What is disconcerting being that the appellants' attorney cannot provide dates for when the third appellant testified, making an order as to the reconstruction of

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<sup>1</sup> *Kahn v Radyn* 1949 (4) SA 552 (C).

evidence given on specific dates impossible. It will thus have to be left to the parties, in reconstructing the record, to determine what evidence is missing and reconstruct those portions of the record.

[5] The record contains no judgment by the Learned Magistrate. From the Notice of Appeal, the relevant portion which is quoted in paragraph 1 hereof, implies that an *ex tempore* judgment was given by the Learned Magistrate. When counsel appearing for the appellants were asked whether this inference is correct, he was unable to provide an answer. The taking of instructions from his instructing attorney did not clarify the matter either. The appellant's legal representatives were requested to determine whether an *ex tempore* judgment was handed down and furnish this information to us via email. No direct answer has been provided and an answer must be inferred.

[6] According to the appellants' attorney, the following transpired "*I refer the Honourable Judges to my request for reasons dated 27 September 2017 being annexure "A1" which was immediately after I came from court the day which was scheduled for the judgment after I and the State Attorney had submitted extensive written heads of argument.*" It would have been a simple matter for the appellants' attorney to state that no written judgment was handed down and no *ex tempore* judgment was handed down and that is the reason he immediately requested reasons. Instead, he has left us guessing as to whether an *ex tempore* judgment was given which may not have been recorded. The implied approach by the appellants' attorney that an inference must be drawn that no *ex tempore* judgment was handed down due to the fact that he immediately requested reasons is, in the absence of a positive statement that no *ex tempore* judgment was given, ill-considered. Rule 51(1) of the Magistrate's Court Rules makes it peremptory for reasons to be requested, even where an *ex tempore* judgment was handed down. It is then open to the Magistrate to, in response to such a request for reasons, to indicate that he has nothing to add to the *ex tempore* judgment.<sup>2</sup>

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<sup>2</sup> *Strategic Liquor Services v Mvumbi* NO 2010 (2) SA 92 (CC).



[7] The reasons that was supplied by the learned Magistrate equally leaves one guessing whether an *ex tempore* judgment was given. The reasons are terse and does not, by any stretch of the imagination, consist of a reasoned decision. An appellant is entitled to proper reasons for a particular final order being made and written reasons are indispensable to an appeal. The failure to give a properly reasoned judgment to underscore the order being made constitutes a grave lapse of duty by a presiding officer. Of difficulty, however, in the absence of a positive statement by the appellants' attorney that no *ex tempore* judgment was given and that only an order dismissing the action was given, followed up by the terse and wholly inadequate reasons, it would be improper for us to find that the learned Magistrate shirked his duty and lament thereon.

[8] In so far no *ex tempore* judgment exists, the appellants' attorney should have realized the reasons provided is inadequate and, in fact, improper. No explanation has been provided why no application was launched to compel the learned Magistrate, if this was needed, to comply with his duties and provide proper reasons for the order that he has granted. Instead, the appellants and their legal practitioners was quite content to have this court of appeal sit, *de facto*, as a court of first instance in evaluating the evidence without having had the benefit of seeing the witnesses testify and to assess their demeanour.

[9] In my view, in light of the aforesaid aspects, the appeal is not ripe for hearing. As not all reasonable steps were taken to place a proper appeal record, including reasons by the learned Magistrate before us, which is the duty of the appellants and/or their attorney,<sup>3</sup> it would have been open to us to merely strike the matter from the roll. However, I am of the view that to strike the matter from the roll in circumstances where the cooperation of third parties, including a magistrate, is required to ensure that a proper record is placed before a court of appeal, would merely cause the matter to be further delayed and would prejudice the appellants in ensuring that a proper record of appeal is placed before the court of appeal. I am also of the view that the condonation application that was filed in order to condone the late delivery of the record is sufficient in nature for the exercise of a discretion in favour of the appellants to not strike the


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<sup>3</sup> *Venter v Bophuthatswana Transport Holdings (Edms) Bpk* 1997 (3) SA 374 (SCA) at 390G – 391A.


matter from the roll, but to rather make an appropriate order to ensure that a proper record of appeal is created.

[10] In the premises I propose the following order:

1. The appeal is removed from the roll.
2. The legal practitioners/representatives of the parties in the court *a quo* shall, within 30 (THIRTY) days of this order, agree on a date with Magistrate B Mtebele and suitable to all parties, for the convening of an open court sitting where the missing portions of the record is to be reconstructed.
3. The appellants' attorney shall file an affidavit confirming the reconstruction of the record, including that all parties agreed to and is satisfied with the contents of the reconstructed portions of the record. In the event that there is no consensus as to the reconstructed portions of the record, or any party has not co-operated in the reconstruction of the record, or the record could not be reconstructed, the appellants are given leave to file a condonation application demonstrating good cause why the appeal should be heard in such circumstances.
4. The contemplated reconstruction of the record shall include the reconstruction of any *ex tempore* judgement, if any. In the event of no *ex tempore* judgment having been previously given, Magistrate B Mtebele is directed to comply with the spirit and purport of Rule 51(1) of the Magistrate's Court Rules and to indicate, in writing, the facts found to be proved and the reasons for the dismissal of the plaintiffs' claim.
5. There shall be no order as to costs for the setting down of the appeal on 3 November 2022.

  
C E THOMPSON  
ACTING JUDGE OF THE HIGH COURT  
GAUTENG DIVISION, PRETORIA

I agree

  
N MNGQIBISA-THUSI  
JUDGE OF THE HIGH COURT  
GAUTENG DIVISION, PRETORIA

*This judgment by the Judge whose name is reflected herein, is delivered and submitted electronically to the parties/their legal representatives by e-mail. This judgment is further uploaded to the electronic file on this matter on Caselines by the Judge or his / her secretary. The date of the judgment is deemed to be*

#### APPEARANCES

Counsel for the Appellant:  
Instructed by:

ADV. J MOLLER  
LOURENS & SCHWARTZ ATTORNEYS INC

Counsel for the Respondent:  
Instructed by:

UNKNOWN  
THE OFFICE OF THE STATE ATTORNEY

Date heard:  
Date of Judgment:

03 November 2022  
3 february 2023