REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, PIETERMARITZBURG

AR 124/2019

VISHAL SANCHO **APPLICANT**

and

MAGISTRATE P MNGOMA N.O. **1ST RESPONDENT**
MINISTER OF CORRECTIONAL SERVICES **2ND RESPONDENT**

ORDER

I make the following order herein:

1 the trial court's order of absolution from the instance, including its order as to costs, is hereby reviewed and set aside.

2 the trial under case number 14944/2015 in the Magistrates' Court for the District of Pinetown is to be placed *de novo* before another magistrate for hearing,

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REVIEW JUDGMENT

Delivered on: 29 November 2019

GOVINDASAMY AJ:

[1] The applicant, Vishal Sancho, and the plaintiff in the court a quo, has brought the review application on the basis that the first respondent, the magistrate Ms P Mngoma, hearing the trial, committed a gross irregularity in granting absolution from the instance before the applicant closed its case and completed his evidence.

[2] Section 22 of the Superior Courts Act 10 of 2013, as amended, stipulates the grounds upon which a review is brought in this court arising from the proceedings in the magistrates court. It provides as follows:

"(1) the grounds upon which the proceedings of any Magistrates' Court may be brought under review before a court of a Division are –

(a) absence of jurisdiction on the part of the court;

(b) interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;

(c) gross irregularity in the proceedings; and

(d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.

(2) The section does not affect the provisions of any other law relating to the review of proceedings in Magistrates' Courts."

[3] Rule 53 of the Uniform Rules of Court sets out the procedure to be employed when a litigant is desirous of bringing review proceedings in respect of a decision of a magistrate.

[4] Before I may consider the review application itself, something needs to be said about the record. Although the record was referred to in the applicant's practice note, regrettably it was not furnished to me timeously. I understand that the record was lying in the Durban Division of the KwaZulu-Natal High Court. The applicant's attorneys should have been alive to this fact and should have taken steps to ensure that the record was lodged with the Registrar of the Pietermaritzburg Division of the KwaZulu-Natal High Court. Judges in this division are very busy. The workload has increased substantially and not having the record, hampers the smooth and efficient

manner in which matters such as appeals and reviews, which are dealt with in this court almost on a weekly basis. A special costs order will not be made but the failure or omission, as has happened, will not be lightly condoned in future. In this regard, it is important to emphasize that compliance with Rule 53 of the Uniform Rules of Court regarding time frames and providing a complete record is not just a procedural process, but is a substantive requirement which serves to ensure that the substance of the decision is properly put to the fore at an early stage.[1] The Constitutional Court in *Turnbull-Jackson v Hibiscus Coast Municipality*[2] held that:

'Undeniably, a rule 53 record is an invaluable tool in the review process. It may help: shed light on what happened and why; give the lie to unfounded ex post facto (after the fact) justification of the decision under review; in the substantiation of as yet not fully substantiated grounds of review; in giving support to the decision-maker's stance; and in the performance of the reviewing court's function.'

[5] What appears to have transpired in the court a quo is that the plaintiff was giving evidence before the first respondent and during cross-examination by the second respondent, the Minister of Correctional Service and defendant in the Magistrate's Court for the district of Pinetown, applied for absolution from the instance, which application was granted.

[6] Section 48*(c)* of the Magistrate's Court Act 32 of 1944, provides that:

'The court may, as a result of the trial of an action, grant —

(a) judgment for the plaintiff in respect of his claim in so far as he has proved the same;

(b) judgment for the defendant in respect of his defence in so far as he has proved the same;

(c) absolution from the instance, if it appears to the court that the evidence does not justify the court in giving judgment for either party …'

[7] According to *Jones and Buckle*[3] in the commentary in respect of this provision, the following is said:

'In South African practise the decree of absolution from the instance fulfils a different function. It is an order, granted either at the end of the plaintiff's case or at the end of the

[1] *General Council of the Bar v Jiba* 2017 (2) SA 122 (GP) paras 111 – 112.
[2] *Turnbull-Jackson v Hibiscus Coast Municipality* 2014 (6) SA 592 (CC) para 37.
[3] DE Van Loggerenberg *Jones and Buckle: Civil Procedure of the Magistrates' Courts in South Africa* 10 ed (Revision Service 15 – 2018) at Act-p325.

whole case, dismissing the plaintiff's claim. Its effect is to leave the parties in the same position as if the case had never been brought, for a judgment of absolution from the instance does not amount to *res judicata* and the plaintiff is entitled to proceed afresh.'

[8] It is clear from the facts in his case, that the applicant was called to the stand as the first witness to give evidence. After he was led in examination in chief, the legal representative for the second respondent began his cross-examination of the applicant. The applicant was asked two questions and thereafter the second respondent brought the application for absolution from the instance. The application was granted with costs by the first respondent.

[9] Harms JA in *Gordon Lloyd Page & Associates v Rivera & another*[4] succinctly set out the correct approach to an application for absolution as follows:

'The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409G - H in these terms:

". . . (W)hen absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (*Gascoyne v Paul and Hunter* 1917 TPD 170 at 173; *Ruto Flour Mills (Pty) Ltd v Adelson (2)* 1958 (4) SA 307 (T)".

[10] This approach by the Supreme Court of Appeal as quoted in *Gordon Lloyd Page* above, in no uncertain terms directs that a court should exercise its discretion whether or not to grant absolution at the end of the plaintiff's case upon a consideration of all the facts and not before the close of a plaintiff's case. Clearly, the plaintiff in this matter did not close his case. The first respondent in her explanatory affidavit conceded that she made an error of law in that the plaintiff's case was not closed when she allowed the application for absolution from the instance.

[11] There is not authority for the view that a mistake in law is an irregularity justifying a review of proceedings.[5]

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[4] *Gordon Lloyd Page & Associates v Rivera & another* 2001 (1) SA 88 (SCA) para 2.

[12] In the case of *Hirschhorn v Reich and another*,[6] Matthews J quote the following from *Ellis v Morgan*,[7] with approval that:

'an irregularity in the proceedings does not mean an incorrect judgment: it refers not to the result but to the methods of the trial, such as, for example, some high-handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined.'

[13] Both the first and second respondent filed notices to abide the decision of this court.

[14] I have no hesitation in granting the relief sought by the applicant on the basis that the judgment dismissing the plaintiff's case with costs is a gross irregularity and it should therefore be reviewed and set aside.

[15] The second respondent submits that the matter should be referred back to first respondent for the trial to continue from the point before the application for absolution was made. This submission is not very sound. I agree with the applicant's contention that it would be inappropriate for the first respondent, who had clearly formed a view in relation to plaintiff's case, having prejudged the issues, to proceed with the hearing of the matter.

[16] The applicant has been substantially successful in his review application, the second respondent was not entitled, under the circumstances of this case, for the order of absolution from the instance on the grounds on which it was applied for and granted.

[17] I therefore make the following order:

1 the trial court's order of absolution from the instance, including its order as to costs, is hereby reviewed and set aside.

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[5] *Doyle v Shenker & Co Ltd* 1915 AD 233 at 236 – 237.
[6] *Hirschhorn v Reich & another* (1929) 50 NPD 314 at 317.
[7] *Ellis v Morgan* (1909) TS 576 at 581.

2 the trial under case number 14944/2015 in the Magistrates' Court for the District of Pinetown is to be placed *de novo* before another magistrate for hearing,.

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GOVINDASAMY AJ

I agree, and it is so ordered.

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NKOSI J

DATE OF HEARING:	29 November 2019
DATE OF JUDGMENT:	29 November 2019
FOR THE APPLICANT:	Mr R B Donachie Instructed by Henwood Britter & Caney, locally represented by Tatham Wilkes Attorneys.
FOR THE RESPONDENT:	Mr A Essa Instructed by The State Attorney, Locally represented by Cajee Setsubi Chetty Incorporated.