IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

***REPORTABLE***

**CASE NO.: A219/02**

In the matter between:

**DANIEL JOZEF JULES MAES** Appellant

and

**MATTHEW HENRY HANCOX** Respondent

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**JUDGMENT DELIVERED : 3 SEPTEMBER 2003**

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**BOZALEK J**

1. The appellant appeals against an order made by the magistrate, Knysna, dismissing an application brought by the appellant in which he sought, principally, that an agreement of settlement entered into between himself and the respondent be made an order of that court. The application was dismissed with costs on the attorney and client scale. In addition, the appellant also appealed against the magistrate's finding that he had the power to strike out offending material from the appellant's replying affidavit and, in the alternative, appeals against the magistrate's finding on the merits of the striking out application and the costs order made pursuant thereto. The appellant also appeals against the decision by the magistrate allowing the respondent a postponement but abandoned this during argument.

## ***Background***

2. A brief summary of the litigation which led up to the appeal is necessary. At all material times the appellant was either the plaintiff or the applicant in the court *a quo* and the respondent was the defendant or the respondent. I shall refer to the parties throughout as the appellant and the respondent.

3. In April 1998 the appellant sued the respondent for damages of approximately R17 000 arising from the sale during the previous year of an immovable property. The trial proceeded initially on the merits of the claim and in April 2001 the appellant obtained judgment in his favour. It would appear that even at that early stage the litigation was not straight-forward but had been characterised by a series of applications and counter applications.

4. In July 2001 the quantum of the damages suffered by the appellant was settled in an exchange of letters between the parties' respective attorneys. The terms of the settlement were that the appellant would receive payment of a sum comprising the cost of certain planking plus the amount of a bill of costs taxed in his favour less the amounts of two smaller bills of costs taxed in favour of the respondent. The costs of the planking had still not been determined but the terms of the settlement provided that if the parties could not reach an agreement "*regarding the costs of the planking and the labour thereto an independent expert approved by both parties must determine the costs"*.

5. The appellant's attorney proceeded to draw a bill and have his client's costs taxed. He grew impatient however when, approximately a month and a half after conclusion of the settlement, the respondent's legal representative had not, as he had been requested, taxed his client's two smaller bills of costs. Nor had he furnished "*suggestions concerning the finalisation of the capital claim"* as had been requested by the appellant's attorney.

6. In late September 2002 the appellant launched an application in which he sought the following relief:

   (1) that the settlement agreement be made an order of court alternatively that the appellant be permitted to place the matter on the roll for hearing in order to determine the quantum of his claim;

   (2) that the respondent be ordered within a stipulated time to furnish quotations by "*three suitably recognised and independent companies or contractors to give effect to the determination of the quantum (i.e the planking and the labour)"*;

   (3) that the respondent be ordered to serve his bill of costs within a stipulated time failing which "*it shall be considered that the (respondent) has no such bill of costs"*;

(4) costs on an attorney and client scale; [4]

(5) that the appellant be permitted to proceed against the respondent for his taxed costs immediately after expiry of the period referred to in prayer (3) above;

(6) alternative relief.

7. As an initial observation one notes that the appellant's relief confusingly veers between seeking to enforce the settlement agreement and repudiating same.

8. Thus commenced a further round of time-consuming and costly litigation. Both parties briefed counsel and the initial application heard by the court was for a postponement at the instance of the respondent. Although opposed, the application was duly granted. Each party's attorney testified in the proceedings.

9. The next step was that the respondent gave written notice of an application to strike out large portions of the appellant's replying affidavit. Argument first ensued as to whether the court had jurisdiction to entertain such an application and this question too was decided in favour of the respondent. Eventually argument was heard in respect of the striking out application and then in respect of the merits of the matter and the judgment, now appealed against, was delivered.

10. Acrimony has been evident throughout the litigation, if not between the parties then certainly between their legal representatives . This was reflected particularly in the opposing affidavit filed by the respondent's legal representative to which I shall return in due course. It is noteworthy that in the entire proceedings now under appeal not a word has been said by the appellant and the respondent themselves. Instead, the affidavits which were exchanged and what little *viva voce* evidence was given came from the mouths of the parties' legal representatives.

## ***The striking out application***

11. On appeal the appellant maintained his contention that the magistrates court, being a creature of statute does not have the power to, and is precluded from, entertaining the striking out application.

12. It was contended on the basis of case law (See *Hydromar (Pty) Ltd v Pearl Oyster Shell Industries (Pty) Ltd* 1976 (2) SA 384 (C) at 386H-387A) that as the magistrates court is a creature of statute its jurisdiction must be deduced from the four corners of the Magistrates' Court Act, Act 32 of 1944 (as amended) and that in the absence of any reference to such a power in that act and the rules promulgated thereunder, a magistrate does not have jurisdiction to entertain an application for the striking out of, *inter alia*, argumentative and new matter from affidavits in motion proceedings.

13. The appellant's counsel pointed out that, unlike in [6]the case of a summons in respect of which rule 17(6)(a) provides for an application to strike out any argumentative, irrelevant, superfluous or contradictory matter contained therein, a similar provision in respect of motion proceedings is conspicuously absent.

14. That contention however, fails to have regard to the fact that, in the absence of an inconsistent express provision, authority may be implied, as well as that it is recognized that when the Magistrates' Court Act confers jurisdiction its purpose is not to be defeated because of a failure to have specifically mentioned the ancillary powers that may be necessary to give effect thereto (See: *Hatfield Town Management Board v Mynfred Poultry Farm (Pty) Ltd* 1963 (1) SA 737 (SR) at 739F-H; *S v K* 1997 (1) SACR 114 (C) at 114c-e; *Makwanazi v Bivane Bosbou (Pty) Ltd and three similar cases* 1999 (1) SA 765 (LCC) at 768D-E).

15. Section 12(1) of the Magistrates' Court Act imbues magistrates with the power to hold a court and to exercise the powers and perform the duties conferred or imposed upon them by any law for the time being in force within the province in which their district is situate.

16. It is axiomatic that when holding a court magistrates must do so in accordance with the accepted procedures applicable to the particular proceedings serving before them and in compliance with the rules of evidence recognized by common law, provided for in statute law or enunciated by the courts.

17. Section 2 of the Civil Proceedings Evidence Act 25 of 1965 – the provenance whereof, in this province, can be traced to section 34 of Ordinance 72 of 1830 – provides as follows:

> '*No evidence as to any fact matter or thing which is irrelevant or immaterial and cannot conduce to prove or disprove any point or fact in issue shall be admissible.*'

Section 24(1)(d) of the Supreme Court Act, 59 of 1959, furthermore provides that the proceedings of an inferior court may be assailed on review on the basis of, *inter alia*, the admission of inadmissible or incompetent evidence.

18. It is generally accepted that argumentative matter falls under irrelevant matter.

19. What is the situation as regards new matter in replying affidavits?
The affidavits in motion proceedings fulfil a dual purpose namely, to place the essential evidence in support of or in opposition to the granting of the relief claimed before the court and to define the issues between the parties (See: *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (W) at 323G). It is trite that founding affidavits must contain the essential averments on which an applicant's cause of action is based, as in the absence thereof, a respondent would not know what the case is that has to be met (See: *Derby-Lewis and Another v Chairman Amnesty Committee of the TRC* 2001 (3)

SA 1033 (C) at 1052C-E). A respondent's [8]responses to the averments in a founding affidavit delineates the issues between the parties. On the other hand the purpose of a replying affidavit is to deal with the averments made by the respondent in an answering affidavit (See: *Bayat & Others v Hansa & Another* 1955 (3) SA 547 (N) at 553C-E). Except where the averments in an answering affidavit provide additional grounds for the relief claimed (See: *Shakot Investments (Pty) Ltd v Town Council of the Borough of Stanger* 1976 (2) SA 701 (D) at 705A-C) an applicant is not permitted to make out a new cause of action in a replying affidavit or to supplement averments that should have been included in the founding affidavit. In my view, new matter not

covered by the exception alluded to above or not germane to the issues delineated by the founding and answering affidavits, falls squarely within the ambit of section 2 of the Civil Proceedings Evidence Act and would be inadmissible.

20. In a civil trial a magistrate makes rulings as regards the admissibility of evidence as and when the need arises. In the case of an application entailing the filing of founding, answering and replying affidavits (but not necessarily limited to such proceedings), the only practical expedient is an application to strike out the offending material.

21. The recognized authors on civil procedure in the magistrates' courts accept that magistrates have the power to entertain applications to strike out offending material from affidavits (*The Civil Practice of the Magistrates' Court of South Africa: Jones & Buckle* (9ed), Vol 2, pages 12-13 and *Burgerlike Prosesreg in die Landdroshowe,* at

pages 828-829).

22. In view of the aforegoing I incline to the view that the submission that magistrates do not have jurisdiction to entertain applications for the striking out of, *inter alia*, argumentative and new matter in motion proceedings, does not have any merit.

23. As far as the merits of the application are concerned the respondent objected to no less than nine portions of the appellant's replying affidavit on the grounds that the material contained therein was new, irrelevant or argumentative. It is unnecessary to recount the details of the material objected to or the precise grounds upon which the objections were sustained. Whilst I do not necessarily agree in full with the magistrate's analysis of what justified striking out, in my view there is no doubt that certain portions of the affidavit fell to be excluded on the grounds that they sought to introduce new matter or amounted to no more than argument.

24. The appellant's counsel contended that the respondent had failed to show that he would suffer prejudice should the offending material not be struck out. Whilst it is correct that a court will not grant an application for striking out unless it is satisfied that the applicant will be prejudiced in his case, such prejudice does not have to be so substantial that, if the offending allegations remain, the objecting party's chance of success will be reduced. As was stated in *Vaatz v Law Society of Namibia* 1991 (3) SA 563:

> '*It is substantially less than that. How much less depends on all the sircumstances; for instance, in motion proceedings it is necessary to answer the other parties*

*allegation and a party does not do so at its own risk. If a party is required to deal with scandalous or irrelevant matter the main issue could be side-tracked. But if such matter is left unanswered the innocent party may well be defamed. The retention of such matter would therefore be prejudicial to the innocent party.*' *(At 566J-567B).

25. In my view the very fact that in certain instances the appellant sought to introduce new material into his replying affidavit which could not be dealt with by the respondent in the normal course constituted prejudice and for that reason alone deserved to be struck out.

26. It was also contended on behalf of the appellant that argumentative material introduced into the replying affidavit was elicited by the content and abusive tone of the respondent's answering affidavit. Whilst much of the answering affidavit was objectionable, the appellant's proper course of action was not to reply in kind but rather to have applied to strike out what he considered to be the offending portions of the respondent's affidavit. Indeed given the tone and content of the opposing affidavit by the respondent's legal representative I am at a loss to understand why such a step was not taken.

27. In the result I can see no reason why this court should interfere with the magistrate's rulings in regard to the striking out application.

***THE MERITS OF THE MAIN APPLICATION*** 11

28. In the founding affidavit the appellant's attorney set out the terms of the settlement and his fruitless efforts to have the respondent's legal representative tax the bills of costs owing to his client and make an offer in respect of the costs of the planking and related labour costs. It was however only in the appellant's replying affidavit that his attorney spelt out what had been implied in the founding affidavit viz that, in his view at least, an impasse had been reached in the enforcement of the settlement agreement leaving the appellant with no choice but to approach the court for the relief sought.

29. Leaving aside the questions of whether the application was premature and whether there was a sound legal basis for the relief sought, the tone and content of the affidavits filed on behalf of the appellant was unexceptionable. Unfortunately the same cannot be said of the opposing affidavit deposed to by the respondent's attorney. Amongst the allegations he made against the appellant's attorney were the following: the attorney was "*onbewus van die terminologie 'redelik'";* the attorney "*reeds karnuffel is met sy kwelsugtige aansoek rakende die beslaglegging";* the attorney and/ or the appellant considered themselves as "*hoogwaardig"* and were "*compulsive litigants"*. These examples are by no means exhaustive and merely give an indication of the vituperative tone and content of the affidavit.

30. These accusations and adjectives were used in support of allegations that the application was vexatious, premature and unnecessary. Few, if any, relevant facts

were introduced in the affidavit. No explanation [12]at all was given by the respondent's attorney as to why he had not drawn his client's bills of costs or taken any steps towards determining the planking and labour costs for which his client was liable. In my view the overall tone of the affidavit was gratuitously insulting and argumentative. My criticism of the affidavit should not be understood as suggesting that the respondent's opposition to the application was not justified or that all of the points made in support of the respondent's opposition were without merit. As was stated however in a different context in *Vaatz's* case, to the extent that the allegations made by the respondent's legal representative were well-founded, these could and should have been advanced in measured and respectful terms and certainly did not have to be clothed in offensive language. (Ibid p. 569 I - J).

31. In dismissing the application the magistrate found that the appellant's prayer for the deed of settlement to be made an order of court was misconceived since the settlement agreement itself did not provide that it could be made an order of court. He held also that the appellant was not entitled to any relief despite the fact that at a late stage in the proceedings the appellant moved for the addition of a further alternative prayer to prayer 1 which read:

> '*Alternatively that the settlement agreement be noted and/or settlement agreement be made a judgment of court, and/or the settlement agreement be set aside on such directions for the further prosecution of the action as the court may deem fit.*'
>
> (my underlining)

32. Furthermore the magistrate awarded the [13]respondent costs on the attorney client scale but proffered no reasons for this decision.

33. The provisions of the Magistrates' Court Rule 27 which deal with withdrawal, dismissal and settlement read, so far as they are relevant, as follows:

'....

*(6) Application may be made to the court by any party any time after entry of appearance and before judgment to record the terms of any settlement of an action without entry of judgment agreed to by the parties. If the terms of settlement so provide, the court may make such settlement an order of court.*

*(7) Such application shall be on notice, except when the application is made in court during the hearing of any proceeding in the action at which the other party is represented or when a written waiver (which may be included in the statement of the terms of settlement) by such other party of notice of the application is produced to the court.*

*(8) At the hearing of the application the applicant shall lodge with the court a statement of the terms of settlement signed by all parties to the action and, if no objection thereto is made by any other party, the court shall note that the action has been settled on the terms set out in the statement and thereupon all further proceedings in the action shall, save as hereinafter provided, be stayed.*

*(9) When the terms of settlement provide for the* [14]*future fulfilment by any party of stated conditions and such conditions have not been complied with by the party concerned, the other party may at any time within 12 months after the first mentioned party has so failed to comply, apply for the entry of judgment in terms of the settlement. Such application shall be on notice to the party alleged to be in default, setting forth particulars of the breach by the respondent of the terms of settlement.*

*(10) After hearing the parties the court may:*

*(a) dismiss the application;*

*(b) give judgment for the applicant as specified in the terms of the settlement;*

*(c) set aside the settlement and give such directions for the further prosecution of the action as it may deem fit;*

*(d) make such order as may be just as to the costs of the application.*'

*of the application.*"

34. Clearly, in my view, the subrules provide a graduated system for the recordal and if necessary, the enforcement of settlements with a view to minimizing disputes that may arise therefrom.

35. The magistrate found that the exchange of correspondence between the parties which contained the terms of their agreement did not constitute a deed of settlement. In this he was clearly wrong. Neither party ever contended that a settlement had not been arrived at and the letters constituting the settlement agreement were signed by the parties' duly authorised legal representatives. Rule 2 defines a "*party"* as including the attorney or counsel appearing for any such party and therefore the requirements of Rule 26(8) were satisfied.

36. It is settled law that a compromise may be effected by the parties to a dispute

themselves, or by their agents or attorneys. See [15]the authorities referred in *Wille's Principles of South African Law* 8th edition p. 489 footnote 876. The settlement in question must obviously be a settlement which intends to bring an end to the suit as a whole and that requirement has clearly been met in the present instance. See *Siebert and Honey v Van Tonder* 1981(2) SA 146 (O) at 148D.

37. However, the terms of the settlement in question clearly did not provide for it to be made an order of court. For that reason alone the main relief sought by the appellant namely, that the settlement agreement be made an order of court, was misconceived and was correctly refused by the magistrate. In my view, having regard to the provisions of Rule 27 quoted above, the balance of the alternative relief initially sought by the appellant, *viz* the setting of the matter down for the determination of quantum, was similarly misconceived. The parties had entered into a binding agreement of settlement which provided, in the absence of agreement, for an independent expert to determine the quantum. The effect thereof, in the absence of an express or implied reservation of the right of the appellant to proceed upon the original course of action, was to bar proceedings on the original cause of action and had the effect of *res judicata*.

*Mothle v Mathole* 1951(1) SA 785 (T) at 789 A - C.

Apart therefrom, the parties had agreed in effect that quantum would, failing agreement thereon, be determined by an independent expert.

38. Notwithstanding the general principle referred to [16]above, a compromise or *transactio* is subject to the ordinary laws of contract and can be set aside on the usual grounds available to an aggrieved party which would include fraud, *iustus error* and impossibility of performance.

*Blou Bul Boorkontrakteurs v McLachlan* 1991(4) SA 283.

39. However no such allegations were made by the appellant whose case went no further than that the respondent was dragging its heels in complying with the settlement agreement and that an impasse had been reached.

40. Accordingly the relief sought that the appellant be permitted to place the matter on the roll for the determination of the quantum of his claim, as well as the relief that the respondent be ordered to furnish quotations in respect of the cost of the planking and labour within a stipulated time, was correctly refused by the magistrate. For the same reasons the prayer that the respondent's bill of costs be disregarded unless served within a stipulated time was similarly destined to fail.

41. Apart from any other consideration the appellant's seeking of the specific performance envisaged in prayer 2 was premature. The settlement agreement imposed on both parties an obligation to attempt to reach agreement regarding the costs of the planking and the labour and only thereafter, if the parties were unsuccessful in such attempts, were the services of an independent expert "*approved by both parties*" to be obtained

in order to determine such costs. A reading of the [17]papers indicates no attempt by the appellant to reach agreement on the said costs, not even so much as a suggestion on his behalf as to what amount would be appropriate.

42. It would seem, however, that in the course of arguing the application in the court *a quo,* the appellant's counsel recognised the risk that the relief sought was misconceived and moved for an amendment to prayer 1 as set out in paragraph 31 above in terms of prayer 5 of the application (which sought *"Alternative relief"*).

43. This amendment was sought at a late stage, during the appellant's counsel's reply. Nonetheless, the respondent's counsel did not object to the proposed amendment as he would have been fully entitled to do. In his earlier address to the court furthermore, the respondent's counsel explicitly conceded, on two occasions, that at best the appellant could ask the court to record or note the terms of the agreement.

44. In my view it was competent for the appellant to have sought the relief that "*the settlement agreement be noted"* in terms of the prayer for alternative relief despite the fact that it was not initially spelt out in the application. The founding affidavit clearly establishes that the appellant was relying on a settlement agreement and was seeking in the first place to enforce it. The respondent did not dispute the settlement or that its terms had not been fulfilled. Furthermore, the respondent's counsel's concessions that the appellant was at most entitled to record or note the judgment may well have elicited the expanded prayer for the alternative relief sought by the appellant in the

form of the amendment which in itself was not [18]opposed by respondent's counsel. cf *Combustion Technology (Pty) Ltd v Technoburn (Pty) Ltd* 2003 (1) SA 265.

45. Unfortunately the court *a quo* not only failed to rule on the amendment sought but failed to mention or consider whether the appellant was entitled to that particular substantive relief. In my view this omission on the part of the magistrate constituted an error. Further, in my view, although the granting of such relief to the appellant would not have immediately broken the impasse, actual or perceived, it would at least then have signalled to the respondent that the appellant had embarked upon a course of action which could ultimately lead to the entry of judgment against respondent of the terms of the settlement agreement.

46. Such a course of action is provided for by rule 27(9) which holds that where the terms of settlement provide for the future fulfilment by any party of stated conditions and which have not been complied with by the party concerned, the other party may apply for the entry of judgment in terms of the order. In the present case, had the court recorded or noted the terms of the settlement, it would have been open to the appellant at a later stage to take steps in terms of subrule 27(9) as soon as he was able to clearly demonstrate that he had fulfilled his obligations in terms of the settlement agreement and that respondent was in clear breach of his obligations. For the reasons I have set out above, this stage had not been reached at the time that the appellant launched the application which is the subject of this appeal.

47. In my view then the magistrate erred in dismissing the application. Instead, he should have granted the appellant relief in terms of the amended relief sought late in the application namely that the settlement agreement be noted.

**COSTS**

48. As I have mentioned the only relief to which the appellant was entitled was sought late in the day and was relatively insubstantial in relation to the sweeping (and in part contradictory) relief initially sought by the appellant in the application. In the ordinary course of events I would for these reasons have been inclined to deprive the appellant of the costs of the application. However, the circumstances of this matter are far from ordinary, marked as it is by ill-considered and ill-tempered litigation.

49. Both parties and their legal representatives must carry blame for this state of affairs. Nonetheless the most distressing feature of this matter is the insulting and scandalous nature of the opposing affidavit filed by the respondent's attorney. Accordingly, in part as a mark of this court's disapproval of such conduct, I would award the costs of the application to the appellant. Certainly there is no justification at all for the magistrate's decision to award the costs of the application to the respondent on the scale of attorney and client. The magistrate furnished no reasons for this award. I do not accept the argument that he must be taken to have exercised a discretion in this regard simply by reason of the fact of his decision taken together with the further fact

that he declined to include the costs of counsel in such award thereby indicating, so it was agreed, that he applied his mind to the matter.

50. For the reasons which I have already given I see no grounds to interfere with the orders made by the magistrate in respect of the subsidiary applications. As regards the costs of the appeal itself, since the appellant has achieved substantial success I can see no reason why he should not be awarded the costs thereof.

51. Finally, and at the risk of repetition, I must record my dismay that a dispute of such minor proportions has led to such a proliferation of litigation with a concomitant mushrooming of costs.

52. In the result I would uphold the appeal with costs and would substitute the following order:

***(1) The terms of the settlement agreement entered into between the appellant and the respondent as set out in annexures "A" and "B" to the founding affidavit of H J Pama in the application in Knysna Magistrate's Court case no. 1614/01 are recorded in terms of rule of court 27(6) and (8).***

***(2) The appellant (applicant in the application) is awarded the costs of the application.***

53. For the sake of clarity the costs award in [21]paragraph (2) above does not include the costs of counsel.

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**BOZALEK J**

**VAN REENEN J:** I agree, and it is so ordered.

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**VAN REENEN J**