IN THE HIGH COURT OF SOUTH AFRICA

[WESTERN CAPE HIGH COURT, CAPE TOWN]

Case No: A678/10

In the matter between:

CITY OF CAPE TOWN METROPOLITAN LOCAL COUNCIL

Appellant

and

FARIEDA HALLIEM Respondent

JUDGMENT DELIVERED: 27 MAY 2011

FOURIE, J:

[1] On 30 April 2003, respondent, as plaintiff, issued a summons out of the Magistrates' Court, Cape Town, against appellant, as defendant. In the particulars of claim to the summons, respondent alleged that on 3 May 2001, she was injured while walking along Hyde Road, Woodstock, when she fell into an open drain on the pavement. She contended that her fall

had been caused by appellant's negligence in failing to take the necessary steps to prevent pedestrians being injured by falling into the open drain. She further alleged that, as a consequence of the incident, she sustained injuries to both her knees and ribs. She accordingly claimed an amount of R100 000-00 as damages from appellant.

[2] Appellant defended the action and delivered its plea to respondent's claim, on 23 May 2003. No replication was received in response to the plea, with the result that the pleadings closed ten court days after 23 May 2003.

[3] During June 2005, the attorneys representing respondent formally withdrew as her attorneys of record. No further steps were thereafter taken by any of the parties for a period of almost five years, when respondent's present attorneys of record, on 22 February 2010, delivered a notice requesting discovery of documents by appellant. This prompted appellant, on 10 March 2010, to bring an application in terms of rule 27 (5), for an order that respondent's claim be dismissed with costs. On 16 March 2010, after receipt of appellant's rule 27 (5) application,

respondent's attorneys served a notice of set down for trial for 14 July 2010.

[4] Respondent opposed the rule 27 (5) application and an opposing affidavit deposed to by respondent's attorney, Mr. J S Frank, was filed in response to appellant's founding papers. After hearing argument, the magistrate, on 7 May 2010, dismissed appellant's rule 27 (5) application and ordered that the costs thereof are to be costs in the cause in the main action.

[5] Appellant requested reasons for the magistrate's judgment in terms of rule 51 (1), to which the magistrate responded in writing. In her response the magistrate recorded that she had found, *inter alia*, that respondent had suffered severe injuries and that her attorneys had withdrawn as attorneys of record in June 2005 "due to lack of financial instruction". She noted the following as the reasons for her judgment:

1. Appellant elected to do nothing after close of pleadings for approximately 7 years.

2. No good cause was shown by appellant as to why it only brought the rule 27 (5) application after such a lengthy period.

3. Respondent had no financial means to proceed with the case hence her initial attorneys withdrew as attorneys of record.

4. It was just for the court to arrive at its conclusion taking into account, as well, the seriousness of the injuries sustained by respondent.

[6] Appellant now appeals against the whole of the judgment, including the costs order, of the court *a quo*.

[7] At the hearing of the appeal, Mr. Kawalsky, for respondent, raised an argument *in limine*. He submitted that the decision of the court *a quo* does not have the effect of a final judgment, and, therefore, it is not appealable in terms of section 83 (b) of the Magistrates' Courts Act No. 32 of 1944. In this regard Mr. Kawalsky relied on well-known decisions of our courts, which state that an order or judgment of a court is only final in effect if it disposes of any issue or any portion of an issue in the main action or suit or if it irreparably anticipates or precludes some of the relief

which would or might be given at the hearing. See **Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd** 1948 (1) SA 839 (A) and **South Cape Corporation (Pty) Limited v Engineering Management Services (Pty) Ltd** 1977 (3) SA 534 (A).

[8] Mr. Gerber, for appellant, submitted that the magistrate's order is final and, therefore, appealable, as it irreparably anticipates or precludes the relief envisaged by rule 27 (5). In this regard he relied on the decision in **Jacobs v Baumann NO** 2009 (5) SA 432 (SCA) at 436E-G.

[9] In view of the conclusion that I have reached in regard to the merits of the appeal, I do not deem it necessary to determine the interesting question whether or not the order of the court *a quo* is appealable. I accept, without deciding, that the order of the court *a quo* is appealable.

[10] Rule 27 (5) (as it read at the applicable time) provided that:

"A defendant may, if the plaintiff has not within 15 days after the pleadings have closed given notice of trial either for a day not more than 20 days distant or for the first day obtainable from the clerk of the court, apply to the court to dismiss the action and the court may on such

application either dismiss the action with costs or make such other order in regard thereto and as to the costs of the application as may be just."

[11] It is significant to note that the rules of the Magistrates' Courts were repealed in their entirety and replaced with a new set of rules which came into effect on 15 October 2010. The present rules do not contain a provision similar to the former rule 27 (5). However, where legal proceedings had been instituted under the former rules, those rules remain applicable until finalisation of such proceedings, by virtue of the provisions of section 2 (c) and (e) of the Interpretation Act No. 33 of 1957.

[12] At the outset, I believe it should be borne in mind that, in considering a rule 27 (5) application, the magistrate is required to exercise a discretion. It will be noted that the sub-rule empowers the court to either dismiss the main action or to *"make such other order in regard thereto and as to the costs of the application as may be just"*. In **Vonck v Fraserburg Munisipaliteit** 1974 (1) SA777 (C) at 784, it was stressed that the discretion to be exercised by the magistrate in terms of rule 27 (5), is very extensive and should not readily be abridged. It was held that the plaintiff-litigant who asks the court to grant it an indulgence by not

dismissing the action in terms of rule 27 (5), *"must show something that entitles him to ask for the indulgence of the court; what that something is must be decided upon the circumstances of each particular application"*. As mentioned earlier, the court *a quo* in this instance exercised its discretion in favour of respondent.

[13] Sitting as a court of appeal, it is necessary to bear in mind the manner in which an appeal against the exercising of a discretion by a lower court, should be approached. It is a well-settled principle that the power to interfere on appeal in matters of discretion is strictly circumscribed. In **Ex-Parte Neethling and Others** 1951 (4) SA 331 (A) at 335E, it was held that the question in such a case is whether it can be said that the court *a quo* has exercised is discretion capriciously or upon a wrong principle, that it has not brought its unbiased judgment to bear on the question or has not acted for substantial reasons. See too, **Western Cape Housing Development Board v Parker** 2005 (1) SA 462 (C) at 466F-G.

[14] As explained in **Media Workers Association of South Africa & Others v Press Corporation of South Africa Limited** 1992 (4) SA 791

(A) at 800C-F, the discretion referred to in **Ex-Parte Neethling** is a truly discretionary power characterised by the fact that a number of courses are available to the repository of the power. The essence of a discretion in this narrower sense is that, if the repository of the power follows any one of the available courses, he/she would be acting within his/her powers and his/her exercise of power could not be set aside merely because another court would have preferred him/her to have followed a different course among those available to him/her.

[15] In my view the very wide discretion afforded to the magistrate in terms of rule 27 (5), is a truly discretionary power and the power of this court to interfere on appeal with the exercise thereof, is strictly circumscribed, as explained above. Bearing this in mind, I now turn to consider the basis upon which the magistrate exercised her discretion in favour of respondent.

[16] As alluded to earlier, the magistrate, broadly speaking, dismissed the application on the following grounds:

1. Appellant had elected to do nothing after the close of pleadings for approximately 7 years and has not shown good cause why the rule

27 (5) application was only brought after the expiry of such a lengthy period of time.

2. The respondent had no financial means to proceed with the case, hence her former attorneys withdrew as attorneys of record.

3. The decision was just, taking into account the serious injuries sustained by respondent.

[17] Mr. Gerber, for appellant, emphasised that in terms of rule 27 (5), appellant was *prima facie* entitled to the dismissal of the action upon the failure of respondent to enrol same for trial. See **Vonck v Fraserburg Municipality**, *supra* and **Theron v Van Der Merwe** 1980 (3) SA 462 (C). In terms of these authorities it is clear that respondent bore the onus to show good or sufficient cause as to why the court should exercise its discretion in her favour and not grant the application.

[18] Mr. Gerber argued that the court *a quo* proceeded from the wrong premise by placing the onus on appellant to show why respondent's claim should be dismissed. He further argued that the court *a quo* erred by finding as a fact that respondent had suffered severe injuries and that

respondent's former attorneys withdrew as attorneys of record *"due to lack of financial instruction"*. He submitted that there was no admissible evidence upon which these findings could have been made. Mr. Gerber therefore contended that, upon a proper evaluation of the relevant legal principles and facts, the court *a quo's* findings and its order to dismiss the application, were arrived at unreasonably, unjustly, arbitrarily and capriciously.

[19] I do not believe that the record of the proceedings in the court *a quo*, justifies the conclusion that the magistrate placed an onus on appellant to show why respondent's claim should be dismissed. An express finding of this nature is not found in the magistrate's *ex tempore* judgment, nor is it mentioned in her reasons for judgment. What the magistrate did take into account, according to her reasons, is the fact that appellant had elected to do nothing, after close of pleadings, for a period of approximately 7 years, and that there is no good cause shown by appelant as to why it only brought the rule 27 (5) application after such a substantial delay. It appears to me that the magistrate, at best for appellant, took these factors into account as being relevant to the exercise of her discretion. It cannot, in my view, be said that she thereby saddled

appellant with a full-blown onus to show that respondent's claim should be dismissed.

[20] I am further of the view that, in taking into account the fact that plaintiff had suffered injuries and that her attorneys of record had withdrawn due to financial problems, the magistrate did not misdirect herself to the extent that interference by this court is justified. It should be borne in mind that these are motion proceedings and, insofar as appellant may contend that some of the content of the opposing affidavit constituted hearsay, no attempt was made by appellant to have the alleged hearsay evidence struck out. The court *a quo* was accordingly entitled to have regard to the allegations in the papers, which show that respondent had sustained injuries to her knees and rib, which would, on the calculation of the quantum of her damages, require future medical treatment in an amount of R20 000-00. In the answering affidavit, respondent's present attorney furthermore states that:

"Until the present time, we have, effectively, been financing the action on plaintiff's behalf in that we understood from her that she had no means, and was not able to pay us any funds on account. Monies are also owing to her former attorneys in respect of the services which they rendered on her behalf".

[21] In my view, the magistrate was entitled to take the extra-ordinary long delay by appellant in bringing the rule 27 (5) application, into account for purposes of exercising her discretion. Rule 22 expressly provides that, if a plaintiff does not within 15 days after the pleadings have been closed, deliver notice of trial, the defendant may do so. There is no explanation by appellant as to why no steps were taken by it to have the matter enrolled. Apart from that, there is, as stated by the magistrate, no explanation at all why appellant thought it fit to wait for a period of seven years before utilising the provisions of rule 27 (5).

[22] It is true that a plaintiff (respondent in this instance) is *dominis litis* and should normally be the party who takes the necessary steps to enrol a matter for trial. However, a defendant (appellant) similarly has a right to enrol the matter for trial in terms of rule 22 (1), and its failure to do so, especially in circumstances where seven years have passed, is a relevant factor in the exercise of the court's discretion in terms of a rule 27 (5) application.

[23] It is also true that the magistrate may have overstated the seriousness of the injuries sustained by respondent, but the fact of the

matter is that, on the papers before the court, she did sustain injuries. It is also clear on the papers that she had financial problems which probably caused her former attorneys to withdraw from the proceedings. This would certainly have caused her additional delay in pursuing the matter.

[24] I am of the view that, when the relevant facts are considered as a whole, it cannot be said that the court *a quo* has exercised its discretion capriciously or upon a wrong principle or that it has not brought its unbiased judgment to bear on the question or that it has not acted for substantial reasons. It may be that on these facts another court would have come to a different conclusion, but that is not the test in an appeal against the exercising of a discretion by a lower court. I am of the view that, on the papers before us, the magistrate exercised a judicial discretion by having regard to the relevant facts and considering what would be just in the circumstances. In the latter regard, it should be borne in mind, as alluded to earlier, that rule 27 (5) no longer forms part of the rules of the magistrates' courts. I am not surprised that the legislature has decided to repeal this rule. It seems to me that the constitutionality thereof could probably have been called into question, as it seems to infringe upon the enshrined right of access to courts in section 34 of the Constitution, 1996. Be that as it may, it appears to me that, in the light of all the

circumstances, it would have been a harsh decision to have precluded respondent entirely from pursuing her claim against appellant for the injuries which she had sustained.

[25] In its founding papers in the court *a quo*, the deponent to appellant's founding affidavit did allege that, due to the lapse of time, appellant's file cannot be located as it had in all probability been destroyed. This is a rather tentative statement and no meat has been added to the bare bones thereof. The deponent adds that he has been advised that the file of appellant's attorneys has also been destroyed. He does not, however, provide the source of this information and one is left with a bare allegation without any substance. Be that as it may, I am not convinced that appellant has placed sufficient facts before the court to show that it will be irreparably prejudiced if the main action were allowed to go ahead.

[26] I accordingly remain unconvinced that, in making the order which she did, the magistrate misdirected herself in the respects alleged by appellant. I therefore conclude that there is no basis for this court to interfere with the order made by the magistrate. In regard to her order as

to costs, I believe that it was eminently reasonable for the court *a quo* to order that same be costs in the cause in the main action.

[27] As far as the costs of the appeal are concerned, respondent as the successful party should be entitled to her costs.

[28] In the result, the appeal is dismissed with costs.

P B Fourie, J

I agree.

Mantame, AJ