**IN THE HIGH COURT OF SOUTH AFRICA**
**WESTERN CAPE DIVISION, CAPE TOWN**

**REPORTABLE**

**CASE NO: A 272/2016**

In the matter between:

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| **MARK HARDING** | First Appellant |
| **MELTRADE 7CC T/A** | |
| **REMAX PROPERTY ASSOCIATES** | Second Appellant |
| And | |
| **KAREN ELIZABETH MACLEAR** | Respondent |

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## JUDGMENT DELIVERED ON 24 NOVEMBER 2016

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**GAMBLE, J:**

INTRODUCTION

[1] This is an appeal against a costs order made in favour of the respondent by the Magistrate for Cape Town in an interlocutory application. It demonstrates to my mind how, when the stakes are low, a litigant's money can be wasted on peripheral issues rather than focusing on the core of the case. I have little doubt that the money

already spent in this matter by far exceeds the capital claimed by the appellants in the main action.

[2] There is nothing complicated in the story. In March 2014 the respondent sold a residential property in Parklands for R850 000. The deed of sale records that the first appellant was entitled to brokerage at the rate of 6% plus VAT in respect of the sale. The first appellant, representing the second appellant, accepted the benefits of the agreement in writing. The property was transferred to the purchaser in July 2014 with the respondent's current attorney of record acting as the conveyancing attorney in the transaction.

[3] The amount due to the appellants as commission totalled R 51 000.00. As is customary the agent's commission was to be paid on transfer out of the proceeds of the sale then being held in the attorney's trust account. The conveyancing attorney however only made payment of the sum of R32 210.13 to the appellants leaving an outstanding balance of R25 929.87. The appellants issued summons against the respondent on 14 August 2014 for that amount together with interest and costs. More than two years later the trial for payment of a relatively paltry amount has not yet commenced. Rather, the parties have busied themselves with interlocutory challenges somewhat akin to a game of legal snakes and ladders.

[4] When the respondent entered an appearance to defend the matter the second appellant filed an application for summary judgement on 9 October 2014. The supporting affidavit was signed by a certain Ms Caron Leslie in her capacity as a member of the second appellant. The respondent filed a 15 page opposing affidavit

taking a plethora of procedural points. The affidavit is unnecessarily verbose, purporting to provide a full background history to the matter.

[5] The substance of the defence to the claim for commission appears to lie in fact that problems arose with compliance with the original deed of sale due to the fact that the purchaser was unable to come up with the requisite guarantee for payment. The respondent says that this necessitated the intervention of her attorney , who she says (in an affidavit obviously prepared by him) was required to

> *"… advise me on the envisaged further conduct of the transaction and how to resolve the crisis. I was adamant that I would not and should not be liable for any costs of any nature to rectify [the agreement of sale] and he should ensure that the sale of the property was effected and finalised."*

[6] It appears that when the time came to transfer the property, the respondent's attorney drew up an account relating to his attendances in regard to the "rectification" of the deed of sale. This was said to total R24 228.42. The respondent goes on to say that

> *"My Attorney duly accounted for their (sic) interventive (sic) attendances… and transferred the balance of R32 210.13 …to Remax*…"

[7] The papers before this court do not indicate what became of the application for summary judgement but, since the respondent subsequently filed a plea, it is safe to assume that the respondent was able to avoid the chop at that stage. The defence articulated in the plea is that the respondent's attorney concluded an oral agreement with the aforesaid Ms Leslie in terms whereof the appellants' commission would be reduced by an amount equivalent to his account to the respondent for rectifying the sale agreement. It would seem then that the respondent's attorney is likely to be a material witness if this matter ever gets to trial.

THE RULE 54 NOTICE

[8] On 16 September 2014 the respondent's attorneys issued a "*Notice in Terms of Uniform Court Rule 54(2),(4),(5) and (6)"*, despite the fact that the matter was before the Magistrate's Court and not the High Court where the Uniform Rules apply. No doubt the respondent's attorneys purported to act in terms of Magistrates Court Rule 54 which provides for a defendant to demand of her opponent the issuing of a notice disclosing who the partners in the plaintiff business are when sued by a firm or partnership.

[9] The notice is oddly worded and commences with the following verbage:

> *"Be pleased to take notice that without being construed as an admission and without prejudice to defendant's rights, the alleged First and Second Plaintiff are required…. to deliver to the Defendant's Attorneys in writing, a statement of the name(s) and place(s) of residence(s) of any person(s) who are/were at the time of the accruing of the cause of action*

*partners/members/associates/trustees/persons carrying on business/trading as Meltrade 7 CC T/A Remax Property Associates…"*

I say odd because it is beyond comprehension how one can issue a notice in a terms of the Rules of Court (other than perhaps an offer to settle) on a without prejudice basis.

THE RULE FIRST 60A NOTICE

[10] It appears as if the appellants ignored the Rule 54 notice. On 20 January 2015 their attorneys issued a *"Demand for Plea*" which was served on the respondent's attorney the same day. The latter wasted little time in generating yet another interlocutory application, this time a notice in terms of Rule 60A(1), which was served on 23 January 2015 and which sought to set aside as an irregular proceeding what was referred to as the "*Plaintiff's Notice of Bar*" (it was, as set out above, in fact entiled "Demand for Plea") of 20 January 2015, on the basis that the appellants had failed to furnish an answer to the aforesaid Rule 54 notice of 16 September 2014.

[11] When there was yet again no response, the respondent's attorney delivered a notice of motion on 27 February 2015 setting down an omnibus application for hearing on Monday, 16 March 2015, for relief

*"… in terms of Rule 60(A)(1) declaring that:*

1. *Respondent's "demand for plea" dated 20 January 2015 and received at Applicant's attorneys of record on 20 January 2015 is declared to be an irregular step and set aside; and*

2. *Respondents are to comply with Applicant's Notice in terms of Magistrates Court Rule(s) 54 (2),(4),(5) and (6) ("the Notice") dated 16 September 2014 and served on Respondents (sic) Attorneys of record and filed at this Court on 16 September 2015, within five (five) days of this Court Order.*

3. *Respondents jointly and/or severally to pay the costs of this application on an (sic) Attorney-Client scale immediately taxable to include preparation, waiting and travelling time.*

4. *Failing timeous compliance with this Court Order by Respondents, the following relief:*

    *4.1.1 Respondents' claims against applicant be struck out with costs on the Attorney-Client scale to be paid jointly and/or severally to include preparation, waiting and travelling time, immediately taxable; and*

    *4.1.2 Respondents not be permitted to reinstitute the action until all costs have been paid."*

[12] That interlocutory application was opposed by the appellants whose attorney deposed to an answering affidavit on 12 March 2015 while a 19 page replying affidavit was deposed to by the respondent's attorney on 15 April 2015. On 15 May 2015 the Magistrate dismissed the application in terms of Rule 60 A with

costs, finding (quite correctly in my view) that Rule 54 could not be resorted to in circumstances where the plaintiff was a Close Corporation.

DISCOVERY AND THE FURTHER RULE 60A(2) NOTICES

[13] The next procedural step was discovery. The appellants called for discovery first, initially in a notice in terms of Rule 23 dated 12 June 2015. This notice, however, did not comply with requisite time period for reply contemplated in the rule (10 days instead of the mandatory 20). The respondent was quick out of the blocks and on 30 June 2015 she filed a fresh notice in terms of Rule 60A(2) asking for the discovery notice to be set aside as an irregular proceeding in light of the short time given for her reply. The appellants wisely did not proceed with their first discovery notice and on 14 July 2015 gave a second discovery notice, this time giving the correct time for a reply.

[14] On 15 June 2015, possibly spurred on by receipt of the appellants' notice, the respondent served her discovery notice. The first and second appellants complied with the respondent's notice without more and filed their discovery affidavits on 22 July 2015. The respondent's attorney however was not satisfied with the wording of the appellants' discovery notice and fired off a third notice in terms of Rule 60 A (2). This time he took a point not raised in the first Rule 60A notice: objecting to the fact that the appellants used the pronoun "you" in the preamble to their notice in terms of Rule 23(1) –

*"**BE PLEASED TO TAKE NOTICE** that Plaintiffs require <u>you</u> within 20 (TWENTY) days after receipt of this Notice to make discovery on oath…."* (Emphasis added)

Use of the same pronoun is made in the accompanying notices in terms of Rules 23(6),(7),(9) and (11).

[15] In the third notice in terms of Rule 60A (2) dated 11th of August 2015, the defendant's attorney complains firstly that the first and second appellants were not referred to in the discovery notice "*separately alternatively jointly*", whatever that may mean. Then, the respondent goes on to raise the following objections:

> "*5.4 The discovery notice(s) refer to a further natural or legal third person referred to as "you". "You" is repeatedly instructed to comply with directives from Plaintiffs. It is also not clear as to who Plaintiffs are, as alluded to in sub-paragraphs 5.1 and 5.2 above.*
>
> *5.5 We have no knowledge of or mandate from "you" and unable(sic) to determine the status of "you" in the litigation or how "you" is able or capable to comply.*
>
> *6. It is ambiguous, confusing and uncertain as to who <u>"you"</u> refers to (sic) and who is to comply with the Discovery Notice ("the cause of complaint").*"

[16] The professed ambiguity and confusion raised in the mind of the respondent and her attorney is farcical, to say the least. The notice appears in a

document with the correct court heading, is signed by the appellants' attorneys of record and is marked for the attention of the Clerk of the Court and the respondent's attorneys. Surely any sensible attorney would have realized that a party doesn't call on him/herself to discover? And given that there was only one defendant in the case, from whom, other than the respondent could the appellants have sought discovery?

[17] Finally on this aspect, what purpose is served in a notice under Rule 60A, by placing one's client's case before the court as was purportedly done in para 5.5 of the Notice: by pleading that the respondent had "*no knowledge of or mandate"*? Had this not been an attorney who, according to counsel for the respondent on appeal, has practiced in this Division for a good number of years one may have ascribed the objection to rank inexperience. Absent that, the only reasonable conclusion is that the attorney was deliberately, and without reason, wasting the court's and his opponent's time and resources by unnecessarily protracting the matter, while no doubt requiring his client to settle his fee notes. It seems also that, having failed in the earlier application under Rule 54, para 5.4 of the third Rule 60A notice was intended as a subterfuge to attempt to establish, yet again, who the members of the 2nd appellant were. In the event, it appears from the record that the respondent did not persist with the third application under Rule 60A.

THE APPLICATION TO COMPEL

[18] When the respondent failed to reply to the appellants' notice to discover, the attorneys for the appellants made application on 7 October 2015 in terms of Rule 60(2) to compel discovery within five days. The respondent duly complied with this notice by filing her discovery affidavit dated 8 October 2015 the following day. In the

result, on 12 October 2015 the appellant's attorneys filed a notice of withdrawal of the application to compel discovery by the respondent. However, the respondent's attorney was not done yet.

[19] On 16 October 2015 the respondent launched an application in terms of Magistrates Court Rule 27 (3) for an order directing the appellants to pay the costs of the withdrawn Rule 60(2) application, on the attorney and client scale, including "*preparation, waiting and travelling time immediately taxable."* That application was opposed by the appellants whose attorney pointed out in the answering affidavit that the respondent had only filed her discovery affidavit after receipt of the application to compel in terms of Rule 60 (2). He went on to point out that although his clients

> "*would be entitled to pursue a costs order against the defendant in respect of the application to compel",*

he had been instructed that:

> "*12.2 The Plaintiffs expressly withdrew the compel (sic) application without prejudice to their rights and explicitly without prejudice to the right to pursue a costs award against the Defendant. The Defendant was advised however that the Plaintiff's did not desire to pursue a costs award in the interests of pursuing the matter to trial as swiftly as possible."*

[20] The respondent's attorney filed yet another lengthy affidavit setting out the chequered history of the litigation and asserting that the appellants' attorney (who is repeatedly, and disparagingly, referred to by the respondent's attorney as "Peter Rogers", as if to suggest that this is perhaps the attorney's *nom de plume)* did not afford him the collegial courtesy of a prior request to comply with the discovery notice before launching the application to compel. While our courts always encourage collegial courtesy in circumstances where this can save a client unnecessary expense, I consider that in light of the combative manner in which the respondent's attorney had chosen to conduct his client's case, such a complaint does strike one as a little rich: a case of the proverbial pot calling the kettle black.

[22] The magistrate heard the application to compel the payment of costs and granted an order in favour of the respondent on 20 January 2016. The award included the costs incurred by a postponement on 8 December 2015 and were directed to be taxed on the party and party scale. It is against that order that the appellants now appeal. The basis for the magistrate's finding was that the appellants had not tendered the costs of the respondent in the application to compel, and that the respondent was therefore entitled to invoke Rule 27(3) and procure payment thereof.

[23] Counsel for the respondent argued that there was a further basis, not argued in the lower court, upon which the respondent might have succeeded. With reference to *van der Schyff*[1], she suggested that Rule 60(2) was not available to the

[1] Van der Schyff v Taylor 1984 (2) SA 688 (C)

appellants since there is an in-built remedy in Rule 23 (8) which they ought to have used to compel discovery.

[24] The point is interesting but one which does not fall to be decided given that it was not taken in the court below. It seems, in any event, that ***van der Schyff*** dealt with a materially different factual scenario. That case concerned the automatic lapsing of a Magistrates Court summons under Rule 10. In such circumstances it was held that an application under Rule 60(2) an order declaring the summons to have lapsed was not competent given that there was nothing further that a plaintiff could do, or be required to do, in the circumstances which prevailed. Rule 60, it was said, was there to ensure the fulfilment by the defaulting party of non-compliance with a procedural step required by the other party under the Rules.

COSTS AWARDS GENERALLY

[25] It is trite that an award for costs involves the exercise of a discretion on the part of a judicial officer . Nearly a century ago the Appellant Division summarised the position thus:

"*The rule of our law is that all costs - unless expressly otherwise enacted – are in the discretion of the Judge. His discretion must be judicially exercised….*"[2]

[26] In the lower courts, pursuant to the provisions of section 48 (d) of the Magistrates Court Act, 32 of 1944, the court's discretion is statutorily confirmed – the

[2] Kruger Bros & Wasserman v Ruskin 1918 AD 63 at 69.

court being permitted to grant such costs order "*as may be just"* in the circumstances. What is to be understood by "*just"?* In Intercontinental Exports[3] the Supreme Court of Appeal offered the following guidance –

> *"…The court's discretion is a wide, unfettered and equitable one. It is a facet of the court's control over the proceedings before it. It is to be exercised judicially with regard to all relevant considerations. These would include the nature of the litigation being conducted before it and the conduct of the parties (or their representatives)."*

[27] In *Huey* [4] the Full Bench of this Division observed that

> *" 'Judicially' means 'not arbitrarily'. It has been held…. that where the magistrate or judge 'brings his unbiased judgement to bear upon the matter and does not act capriciously or upon any wrong principle' a court of appeal may not interfere with the honest exercise of a discretion. A court's discretion is wide, though not unfettered."*

[28] In *Blom* [5] Corbett JA restated the principle as follows when considering the approach of an appellate court in reviewing a costs order of a lower court:

"*In awarding costs, the Court of first instance exercises a judicial discretion and a Court of appeal will not readily interfere with the exercise of that*

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[3] Intercontinental Exports (Pty) Ltd v Fowles 1999 (2) SA 1045 (SCA) at [25]

[4] McDonald t/a Sport Helicopter v Huey Extreme Club 2008 (4) SA 20 (C) at 22 B-C

[5] Attorney-General, Eastern Cape v Blom and Others 1988 (4) SA 645 (A) at 670 D-E

*discretion. The power of interference on appeal is limited to cases of vitiation by misdirection or irregularity, or the absence of grounds on which a court, acting reasonably, could have made the order in question. The Court of appeal cannot interfere merely on the grounds that it would itself have made a different order."*

[29] It is generally the case that a party which withdraws an action (or application) is to be regarded as being in the same position as an unsuccessful litigant. In such circumstances the opposing party is ordinarily entitled to be compensated by an award for costs incurred in resisting what was essentially a futile case[6]. However, in ***Germishuys***[7] the Court held that an order for costs can be made against the party against whom the withdrawal has been effected provided sound reasons exist therefor. I am of the view that this is just such a case.

[30] In the lower court the appellants' application was withdrawn because the substantive relief sought therein - to compel discovery by the respondent - had become a "*dead issue"* due to the respondent filing her discovery affidavit after the application to compel had been served on her attorneys. In my view the appellants then did the eminently sensible thing: rather than waste more time and money arguing over the costs of an interlocutory application that had been effectively settled by the respondent's conduct, they elected not to insist on an order for costs (which they were manifestly entitled to do in the circumstances) but rather to press on in order to bring the matter to finality. This their attorneys told the respondent in no uncertain terms.

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[6] Cilliers et al, Law of Costs, 3rd ed Para 8.17.

[7] Germishuys v Douglas Besproeiingsraad 1973(3) SA 299 (NC)

[31] I consider that the attitude taken up by the respondent in the circumstances was both dilatory and cynical. It is clear that the respondent was not in a hurry to file her discovery affidavit as her attorney was still busy cavilling about who "*you"* was in the discovery notice; a tactic which I have already observed was both obtuse and dilatory. The cynical nature of that tacic is adequately demonstrated by what happened when the application to compel was launched – then the respondent and her attorney seemingly had no difficulty in establishing who "you" was and who was obliged to discover. One has to ask why the respondent's attorney did not do what happens in similar circumstances in our motion court every day when there is a reply filed after an application to compel has been launched: agree that the costs should stand over for determination at the trial? Why yet another interlocutory application with the concomitant escalation of costs?

[32] In this matter the magistrate slavishly followed the provisions of Magistrates Court Rule 27(3)[8] believing that the failure on the part of the appellants, upon withdrawal of the application to compel, to tender the costs thereof was fatal. The magistrate manifestly not apply his mind to the background facts and circumstances giving rise to this application, nor the pedantic and obstructive fashion in which the respondent and her attorney had conducted the matter thus far. Importantly, he failed to consider the fact that he had an overriding discretion in relation to the award of costs and was not bound by the strictures of the rule in

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[8] "*27(3) Any party served with notice of withdrawal may with in 20 days thereafter apply to the court for an order that the party so withdrawing shall pay the applicant's costs of the action or application withdrawn, together with the costs in so applying: Provided that where the plaintiff or applicant in the notice of withdrawal embodies a consent to pay the costs, such consent shall have the force of an order of court and the registrar or clerk of the court shall tax the costs on the request of the defendant."*

question. Simply put, the magistrate did not properly apply his mind to the matter at hand.

[33] I consider that had the magistrate considered *Germishuys* he would have realized that there was no merit in the Rule 27(3) application.Furthermore, had the magistrate properly considered the matter he would have realised that the appellants had been put to the expense of applying for an order to compel the respondent to discover, that she had responded thereto immediately notwithstanding the earlier dilatory tactic employed in attacking the Rule 23 notice, and that her reply ultimately had the effect of settling the substantive issue in the interlocutory application. Far from being considered the losers, the applicants had succeded in removing a significant procedural obstacle which enabled them to move closer to trial. In my view, therefore, the respondent's application in terms of Rule 27(3) should have been refused with a punitive costs order in favour of the appellants. Indeed, it would have not been out of place in this matter to have ordered the attorney to bear those costs *de bonis propriis.*

[34] Counsel for the appellants asked the court to consider upholding the appeal with costs on the scale as between attorney and client. In my view, there is nothing in the manner in which the respondent conducted herself in this court which merits a punitive costs order. After all, she was the fortunate beneficiary of a discretionary order granted in the lower court and she was entitled to come before this court to defend that judgement. Her attorney's conduct in the lower court is properly addressed by the scale of costs incurred in that forum.

[34] In conclusion I wish to issue a note of caution to practitioners generally. One sees all too often dilatory tactics and "*smart"* points of law taken on behalf of parties which do not advance the litigation one jot but only serve to frustrate the opponent from bringing the case to finality. Ultimately, in such circumstances it is only the legal practitioners who are the winners. This sort of practice is to be deprecated and in appropriate circumstances in the future, this court will not hesitate to order the practitioner to bear those costs personally.

**ORDER OF COURT**

A. The appeal is upheld with costs.

B. The order of the Magistrate, Cape Town of 20 January 2016 is set aside and replaced with the following order :

"**The application in terms of Rule 27(3) is dismissed with costs on the scale as between attorney and client"**

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**GAMBLE J**

I AGREE : _____

**SAMELA J**