SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

CASE NO: 20053/2014

In the matter between:

NICHOLUS THEMBOKWAKHE BLOSE **APPELLANT**

and

ETHEKWINI MUNICIPALITY **RESPONDENT**

Neutral citation: *Blose v Ethekwini Municipality* (20053/14) [2015] ZASCA 87 (29 May 2015).

Coram: Mpati P, Maya, Pillay, Zondi JJA and Van der Merwe AJA

Heard: **06 May 2015**

Delivered: **29 May 2015**

Summary: Magistrate"s court – civil proceedings – application by plaintiff to reopen case in terms of rule 28(11) of Magistrates" courts rules - discretion of presiding officer – such discretion to be exercised judicially.

ORDER

On appeal from: KwaZulu-Natal High Court, Pietermaritzburg (D Pillay J and Chili AJ sitting as court of appeal)

1 The appeal is upheld with costs.
2 The order of the court below is set aside and substituted with the following:
„(a) The appeal is upheld, with costs.
(b) The order of the magistrate is set aside.
(c) The matter is remitted to the magistrate in order to hear further evidence from the plaintiff relating to proof of compliance with the provisions of s 3(1)*(a)* of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 and thereafter to come to a judgment afresh."

JUDGMENT

Pillay JA (Mpati P, Maya, Zondi JJA and Van der Merwe AJA concurring)

[1] This appeal, with the leave of this court, is against the judgment of the KwaZulu-Natal High Court, Pietermaritzburg (D Pillay J and Chili AJ). The appellant instituted action against the respondent for damages in respect of alleged unlawful arrest, search and detention in the magistrate"s court for the district of Durban. I will, for the sake of convenience, hereinafter refer to the appellant as „the plaintiff" and the respondent as „the defendant" – as they were in the trial court.

[2] On 17 July 2009 at Botanic Gardens Road, Durban, a minor collision between a motor vehicle and a motor cycle occurred causing a traffic jam. While Mr Sandy McCutcheon (McCutcheon), the driver of the motor vehicle, was assisting the injured motor cyclist, the passenger in a BMW motor vehicle which was part of the traffic being held up, approached him, allegedly threatened him and then assaulted

him. The passenger thereafter hastily left the scene and got into the BMW motor vehicle which immediately sped off. Moments later members of the Durban Metropolitan Police Service (the police) employed by the defendant arrived on the scene. McCutcheon made a report to them. He was also able to point out the BMW motor vehicle to them as it was still within sight. The plaintiff was the driver of the BMW motor vehicle at the material time.

[3] The police then gave chase and caught up with the BMW motor vehicle at the intersection of Moore and Cleaver Roads. The occupants, Mr Ndokweni and the plaintiff, were requested to step out of the vehicle and were both asked to put their hands on the roof of their motor vehicle. When this occurred, the police found a firearm sticking out of the waistband of Ndokweni. Another firearm was also found in the compartment of the driver"s door. Neither the plaintiff nor the passenger was able to produce a license for either of the firearms. There seems to be a dispute about that but it does not require determination and in view of the order made in this appeal, it would in any event be unwise to comment thereon. The firearms were confiscated and the plaintiff and his passenger were arrested, handcuffed and detained in the police vehicle. They were subsequently dealt with at the Berea Police Station, Durban. The plaintiff was released from there after a few hours.

[4] The plaintiff's action, which was commenced by summons issued on 25 January 2010, was defended. The defendant initially pleaded to the claim on or about 31 May 2010. On 6 July 2011, the defendant amended its plea. Whilst there is no indication in the record as to what process was followed in amending the plea, counsel for the plaintiff confirmed that proper notice of intention to amend the plea in terms of Rule 55A of the Magistrates" Courts Rules[1] was served on the plaintiff, who did not object to the proposed amendment. In fact, the amendment included inter alia, what amounted to a withdrawal of an admission that s 3(1)*(a)* of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 (the

[1]The relevant parts of Rule 55A read as follows:
„(1)(a) any party desiring to amend a pleading or document (other than an affidavit) filed in connection with any proceedings, must notify all other parties of his intention to amend and shall furnish the particulars of the amendment;
(b) . . .
(2) The notice referred to in sub-rule (1) shall state that unless written objection to the proposed amendment is delivered within 10 days of delivery of the notice of amendment, the amendment will be effected."

Act) had been complied with. It is also not clear from the record which procedures were employed to give effect to the said withdrawal.

[5] As regards the withdrawal of the admission that s 3(1)*(a)* of the Act had been complied with, Mr Quinlan, who appeared for the defendant at the trial and in this court was unable to shed light as to whether the magistrate had granted leave to withdraw the admission or not. In relation to whether a party can simply withdraw an admission, especially, as in this case, a material one, he submitted that it was never raised in the trial court, in the court below nor in the plaintiff's heads. He had thus not done any research on the point.

[6] It is true that there was no objection to the proposed amendment. However where a withdrawal of a prior admission is sought, the party seeking the withdrawal should make a substantive application in regard thereto, explaining under oath, that the admission was an error, the circumstances under which the error was made and satisfying the court that the withdrawal of the admission will not prejudice the other party (normally the plaintiff).[2] It seems no such procedure was followed. It is however unnecessary to delve into this issue in light of the conclusion I have arrived at in this judgment.

[7] The trial proceeded on the basis that the amendment had been effected. After both parties had tendered evidence and closed their respective cases, Mr Quinlan argued that the plaintiff had not proved compliance with the provisions of s 3(1)*(a)* of the Act. He submitted that the defendant should thus be absolved from the instance with costs. S 3(1)*(a)* of the Act reads as follows:

„3 **Notice of intended legal proceedings to be given to organ of state**.

(1) No legal proceeding for the recovery of debt may be instituted against an organ of state unless –

(a) the creditor has given the organ of state in question notice in writing of his or her intention to institute the legal proceedings in question;"

Mr Ndlovu, for the plaintiff, then applied to reopen the plaintiff"s case in order to merely submit a copy of a letter which constituted proof of compliance with s 3(1)*(a)* of the Act.

[2] L T C Harms *Civil Procedure in Magistrates' Courts* Service Issue 34 (1997) at B–540; *Bellairs v Hodnett & another* 1978(1) SA 1109 (A) at 1150 - 1151.

[8] Mr Quinlan strongly objected and opposed the application to reopen the plaintiff's case. The magistrate, in dealing with the application stated:

„The considerations that usually fall to be weighed when the Court has to consider an application of this nature are generally five fold. Firstly the reason why the evidence was not led timeously, secondly the degree of materiality of the evidence, thirdly the balance of prejudice, fourthly the general need for finality in judicial proceedings and fifthly the stage that the particular litigation has reached.'

[9] The magistrate briefly dealt with each of the factors she had tabulated. It is not necessary to deal with each of them in this judgment. I will deal with two only. It is trite that in considering an application to reopen a party‟s case, the court has a discretion in making such a decision. This is what Mr Quinlan emphasised. He argued that in the circumstances, this court was not entitled to interfere with that decision.

[10] In magistrates‟ courts, leave to adduce further evidence – leave to reopen a case – is governed by Rule 28(11) of the Magistrates‟ Courts Rules which reads as follows:

„Either party may, with the leave of the court, adduce further evidence at any time before judgment; but such leave shall not be granted if it appears to the court that such evidence was intentionally withheld out of its proper order.‟

As was stated in *Mkwanazi v Van der Merwe & another*,[3]

„The discretion under Rule 28(11) must be exercised judicially, upon a consideration of all relevant factors, and in essence it is a matter of fairness to both sides.‟

[11] The magistrate‟s whole approach to the question of reopening the plaintiff‟s case was flawed. Most significantly, in the two paragraphs where she dealt with the issue of prejudice, she clearly misconstrued the notion thereof.

[12] I think it is necessary to quote portions of her judgment to illustrate this. In one instance she said the following:

„As far as prejudice is concerned, it is prejudice to the applicant if the application is refused and prejudice to the respondent if the application is in fact granted.

In *Coetzee v Jansen* 1954 (3) SA 173 it was stated that:

“Generally a party will not be allowed to adduce further evidence if, having the evidence at

[3] *Mkwanazi v Van der Merwe & another* 1970 (1) SA 609 (A) at 616B.

his disposal, he deliberately elects not to put it before the Court because he is of the opinion that it is unnecessary."

As far as the first point is concerned, that is the issue as to why the evidence was not before the Court timeously, in the case before me the reason itself is not really clear. As I"ve indicated *supra* the plaintiff had argued that the defendant should have raised it as a point *in limine*. But as will be recalled, this is neither here nor there. After the notice was placed in dispute, the plaintiff bore the onus of proof of that particular notice."

In another instance she went further and stated:

„As far as prejudice is concerned, clearly there is prejudice. If the application to reopen the plaintiff"s case is allowed and thereby the [s 3(1)*(a)*] notice to be handed in to the record, clearly there is prejudice to the defendant in the matter and, likewise, if the Court refuses the application, there is prejudice to be borne by the plaintiff in this matter."

[13] As is apparent, she merely mentioned that both parties were at risk of prejudice depending whether the application to lead further evidence was granted or not. She seemed to measure this aspect as against the final outcome of the case rather than what was ultimately procedurally fair to the parties. She therefore failed to balance the issue of prejudice. Had she done so properly and judicially - as she was required to do - she would have found that the defendant was at no risk of prejudice at all. The failure to balance possible prejudice to either of the parties ignored any notion of fairness required to make the decision. In this case, to have refused the introduction of further evidence was extremely prejudicial to the plaintiff. On the other hand, there is not one iota of evidence or suggestion that the defendant would have been prejudiced by allowing the plaintiff"s case to be reopened as was conceded by Mr Quinlan. In my view this was a misdirection by the magistrate resulting in an improper exercise of her discretion.

[14] Secondly, she paid lip service to the need to bring the case to a final conclusion. In this regard she said the following:

„As far as the need for finality in judicial proceedings is concerned, in principle there is no bar to align the reopening of a case even after judgment is reserved. In the particular case before me, but for the defendant bringing the issue of a [s 3(1)*(a)*] notice to the plaintiff, it is certainly arguable that the plaintiff would not have addressed such deficiency at all and the Court in all probability would have granted judgment on the evidence as it stood before the Court in the absence of evidence relating to the [s 3(1)*(a)*] notice."

As was the case with all the rest of the factors, she gave no explanation as to why she thought this factor would militate against granting the plaintiff the opportunity to adduce further evidence. Nobody could doubt that granting the application would not extend the life of the trial by any significant period or at all. It would merely be a matter of handing in the document which proved delivery of the notice as intimated by Mr Ndlovu. This would not entail any amendment of pleadings and the notice itself would be self explanatory. The failure to deal with this aspect properly was also a misdirection and resulted in an improper exercise of the magistrate"s discretion.

[15] It ought to be noted that the purpose of the requirement envisaged in s 3(1)*(a)* of the Act is clearly not to non-suit a litigant but rather to place the organ of state concerned in a position to assess the claim as described by Didcott J in *Mohlomi v Minister of Defence.*[4] The magistrate ought then to have allowed the further evidence to be adduced instead of committing the aforementioned misdirections. Mr Quinlan was constrained to concede that the magistrate had misdirected herself in this regard and therefore did not exercise her discretion properly. The court of appeal was thus at large to revisit the issue and come to its own decision.[5]

[16] The court below found that the refusal of the plaintiff"s request to reopen the proceedings was not appealable. It reasoned that in applying to reopen the plaintiff"s case, Mr Ndlovu sought an indulgence and that the magistrate had applied her mind in exercising her discretion judiciously when refusing the plaintiff"s request to do so.

[17] As was illustrated in the aforegoing, the magistrate did not exercise her discretion properly and judiciously. This seemed to have escaped the court below. It failed to properly analyse the approach of the magistrate in considering the application to reopen the plaintiff"s case. If it had, it would have come to a different conclusion since it would have found that the magistrate had clearly not exercised her discretion judicially. This, in my view, is a misdirection on the part of the court below and this court is therefore at large to interfere with its decision.

[4] *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) para 9.
[5] *Director of Public Prosecutions (KwaZulu Natal) v Henry & others* (305/07) [2008] ZASCA 63 (29 May 2008); *Minister of Safety & Security v Sibiya* [2005] JOL 15401 (T).

[18] Generally the achievement of justice should not be hampered by excessive adherence to printed form of legislation without regard to its significance and what it seeks to accomplish. The aforegoing, in my view, represents compelling and pragmatic reasons why the appeal should succeed and the plaintiff ought to be afforded an opportunity to lead further evidence.

[19] In the result, I would make the following order:

1 The appeal is upheld with costs.

2 The order of the court below is set aside and substituted with the following:

„(a) The appeal is upheld, with costs.

(b) The order of the magistrate is set aside.

(c) The matter is remitted to the magistrate in order to hear further evidence from the plaintiff relating to proof of compliance with the provisions of s 3(1)*(a)* of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 and thereafter to come to a judgment afresh."

R PILLAY

JUDGE OF APPEAL

APPEARANCES:

FOR APPELLANT:	Mr S Tsangarakis Instructed by: Thami Ndlovu & Company, Durban Matsepes, Bloemfontein
FOR RESPONDENT:	Mr P D Quinlan Instructed by: Linda Mazibuko & Associates, Durban Symington & De Kok, Bloemfontein