IN HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: AR732/14

In the matter between

POOBALAN PILLAY **Appellant**

And

FEISAL DAWOOD **Respondent**

JUDGMENT

Delivered on: 09 September 2016

MBATHA J:

[1] On 5 September 2016 we made an order to the effect that the appeal is dismissed with costs.

[2] The appellant brought an appeal against the magistrate's refusal to order the respondent to discover properly and the order that the appellant should pay the costs occasioned by the adjournment on 4 September 2014.

[3] The appellant asks that those orders be set aside and be replaced by the following order:

> ‘(i) that plaintiff is ordered to make further and better discovery of documents in regard to which it claims privilege to;
> (ii) that the plaintiff is ordered to pay the costs occasioned by the adjournment to include the reasonable costs of counsel on brief. Such costs to be taxed and to include the travelling costs from Durban to Stanger and return.’

[3] The appeal is opposed by the respondent only on the basis that the ruling granted by the learned magistrate is not appealable. The respondent submits that it was an interlocutory application for an adjournment and therefore not appealable. Counsel for the appellant has conceded that it is indeed so, as the order granted by the learned magistrate did not have the effect of a final judgment. The appeal then proceeded on the basis of whether the learned magistrate misdirected himself as to the order for costs which he granted in favour of the respondent and if such an order is appealable.

[4] The appellant submits that an order for costs should have been made in his favour. In consideration of that, the appeal court has to decide whether the appellant ought to have been the successful party in the court *a quo,* hence the merits of the dispute have to be investigated.[1] [2]

[5] According to the appellant, the respondent had relevant correspondence in his possession which he did not adequately disclose or reveal until 19 June 2014. The appellant had no reason to suspect that the respondent was withholding a discoverable document. The appellant had to compel the respondent to discover that document. Therefore the proximate cause of the adjournment was due to the withholding of that document until 2 September 2014. As a result the appellant could not proceed with the trial on 4 September 2014.

[1] *Du Plessis v Nienaber* 1948 (4) SA 293 (T)
[2] *Pretoria Garrison Institutes v Danish Variety Products (Pty), Ltd* 1948 (1) SA 839 (A)

[6] It is common cause that the respondent had withheld the discovery of the document on the basis that it was a privileged document between attorney and client. On 1 September 2014, the court ruled that although it was correspondence between attorney and client it must be made available to the appellant as it was relevant to the action.

[7] On 2 September 2014 the respondent delivered the document, which is an email between the respondent and Mr Weissinger, his attorney. On 3 September 2014 the appellant sent a letter to the respondent stating that due to their defective discovery and lack of understanding of relevance and privilege, they were not willing to proceed with the trial tomorrow. As a result thereof they are preparing an affidavit in support of an application on these grounds for an order adjourning the matter the following day, with the respondent paying the costs occasioned by the adjournment. It was proposed to the respondent that if they consent to the adjournment, they will agree to costs to be costs in the cause, but should they be forced to argue the matter they will seek an order for costs occasioned by the adjournment.

[8] The respondent's response was to that effect that they were to proceed with the trial and that should the appellant require a postponement, wasted costs, including counsel's actual fees, must be tendered with a written request for such a postponement, which request must not be made later than 10h30 on 2 September 2016.

[9] On 3 September 2016 the appellant responded by stating that they were preparing an affidavit in support of an application for an adjournment along the grounds stated in their letter, with the respondent to pay the wasted costs occasioned by the adjournment.

[10] On 4 September 2014, *Mr Southwood* SC, representing the appellant, handed over an affidavit deposed on 4 September 2014 to the learned magistrate, which he intended to use for the purposes of the application for an adjournment. The magistrate stated that he would not entertain any issue relating to discovery of documents save for the application for an adjournment that is before him. Counsel

for the appellant embarked on the history of the discovered documents, namely, that a document was discovered on 19 January 2014 when the respondent gave evidence in the trial, which led to an application which was heard on 1 September 2014. The basis for the application for an adjournment is that the discovery was defective and should be fixed, and that they still needed to do a proper investigation for purposes of trial, as the discovery was late.

[11] In closing his argument he submitted that there should be on order directing the respondent to file a supplementary discovery affidavit and wasted costs occasioned by the adjournment.

[12] The respondent opposed this application on the basis that there is a procedure in terms of the rules for further and better discovery , which the appellant had not followed and that as the appellant sought an indulgence it should pay the costs occasioned by the adjournment.

[13] The learned magistrate ruled that there are mechanisms available to a litigant to compel discovery, likewise to the applicant, when the litigant believes that the discovery is defective. The appellant had ample time to do so, and it did not use the mechanism available to it as provided in terms of Rule 23 of the Magistrates' Court Act.[3]

[14] In light thereof the learned magistrate refused to entertain any issue about whether the discovery of the document was defective or not, when considering the application for an adjournment. His view was also that a party that was seeking an indulgence should tender costs occasioned by the adjournment. Accordingly, he granted the adjournment and ordered the appellant to pay the costs occasioned by the adjournment, including the reasonable costs of counsel on brief, such costs to be taxed to include the travelling costs from Durban to Stanger and return.

[3] Act 32 of 1944

[15] On appeal the appellant still persisted with the prayer that the respondent be ordered to make further and better discovery of documents in regard to which it claims privilege and that it should be awarded costs.

[16] Magistrates' Court Rules, Rule 55(1)(a) states as follows:

> 'Every application shall be brought on notice of motion, supported by an affidavit …'

Rule 55(4)(a) provides further that interlocutory applications are to be supported by affidavits if facts need to be placed before the court. Rule 55(5)(b) provides that an urgent application must be supported by an affidavit explaining the urgency. Nowhere is it stated that if the application is urgent it must not be on notice.

[17] The application in the form of an affidavit as presented by the appellant on 4 September 2014 was not properly before the court. It should have been served upon the respondent. The respondent should have been afforded an opportunity to oppose the application before it was set down for hearing. The procedure for a party who seeks an order for further and better discovery is provided in terms of Rule 23 (3). In order to 'compel' a party who has made discovery, a notice in terms of Rule 23(11)(a) is necessary, requiring the other party to produce at the hearing the original of such document or recording provided it is not privileged. The notice must be given not less than five working days. Having stated the position in law it is our view that the learned magistrate correctly refused to entertain the application for further and better discovery as that application was not properly before the court.

[18] The appellant, with respect, failed to appreciate this, as his notice of appeal persisted with an order directing the respondent to make further and better discovery. The appellant had received the contentious document after the court *a quo* had ruled that it was not a privileged document. If he still was not satisfied, he could have used the mechanisms provided in Rules. It was only the appellant who sought an indulgence to investigate further, which one could view as a fishing expedition, as he could not even give a time frame to the learned magistrate for such an investigation. On the other hand, the respondent was ready to proceed with the part heard trial.

[19] It is our view that the learned magistrate rightfully granted the adjournment to the appellant, giving him an opportunity to bring the proper application for further and better discovery. As the respondent was ready to proceed with the trial, it is our view that he was entitled to an order for wasted costs occasioned by the adjournment.

[20] In conclusion, the appeal should not have been brought by the appellant against an interlocutory order which did not have a final effect on the parties. Section 83 of the Magistrates' Court Act[4] is clear on this issue. This has led to great inconvenience and expense to all the parties. The courts are also loath in dealing with appeals in a piecemeal fashion.[5]

[21] In *Hip Hop Clothing Manufacturing CC v Wagener NO and Another,*[6] the court held that where a truly interlocutory order carries costs the aggrieved party's remedy appears to be to apply in terms of section 36 (d) of the Magistrates' Courts Act to rescind the substantive order and to appeal against the costs order. Accordingly, the only part of the order that was appealable before this court was against an order for costs.

Accordingly, for these reasons we gave the order dated 5 September 2016.

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MBATHA J

I agree,

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TOPPING AJ

[4] Act 32 of 1944
[5] *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A)
[6] 1996 (4) SA 222 (C) at 229B

Date of Hearing:	02 September 2016
Date of Reasons Filed:	09 September 2016

Appearances

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