IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

Case No: 715/2015

Date heard: 29 May 2019

Date delivered: 2 July 2019

NOT REPORTABLE

In the matter between:

JOHN PETER MOLYNEUX KILLIK **Plaintiff**

AND

EUGENE VAN VUUREN **Defendant**

JUDGMENT

Goosen J:

[1] The plaintiff is suing the defendant for damages arising from an alleged assault. The assault is alleged to have occurred on 11 December 2015. It is alleged that the plaintiff was pushed and that he fell backwards onto a hard surface causing an injury to his right shoulder.

[2] The conduct of this litigation has been bedevilled by delays and, consequently, several postponements. Relations between the parties are not conducive to communication. Regrettably this has not always been confined to the parties but has at times infected the legal representatives.

[3] The matter first came to court by way of an application for default judgment. This was in April 2016. It was, no doubt, because the matter came to be defended, postponed *sine die* to enable the matter to proceed on the trial roll. It was enrolled for 24 November 2017. On that occasion both parties were represented. For reasons not apparent from the case file the matter was again postponed *sine die* and the defendant was ordered to pay the wasted costs. On that occasion Revelas J made an order that the matter be enrolled on an expedited date to be arranged with the Registrar.

[4] The matter was then enrolled, presumably by agreement as foreshadowed by Revelas J, for trial on 12 March 2018. On this occasion it appears that certain pre-trial proceedings, as required by Rule 37, had not been completed. Eksteen J accordingly postponed the matter *sine die* and again directed, no doubt to enable the plaintiff to bring the matter to finality, that the Registrar grant a preferential trial date. Eksteen J further directed that a pre-trial conference be held before him in chambers and that both parties attend in person.

[5] The matter was on the trial roll on 10 May 2018 before Schoeman J. On that occasion there was no appearance for the defendant. Schoeman J made the following order:

"1. That the matter is postponed to the 1st August 2018.

2. That the Defendant is to pay all costs occasioned by the postponement of the matter such costs to include the costs of the medical experts, if any, counsel's fees and the attorney's fees on an attorney and client basis, such costs to be taxable and payable immediately.

3. That in the event that the taxed costs aforesaid are not paid before Wednesday, the 1st of August 2018 the Defendant's defence shall be struck out and the Plaintiff shall be entitled to proceed on an unopposed basis."

[6] It is this order which formed the centrepiece of proceedings before this court on 29 May 2019. Before we get there it is necessary to complete the saga.

[7] On 1 August 2018 the matter was on the trial roll. Yet another postponement was sought. Huisamen AJ postponed the matter *sine die* and reserved the costs for determination by the trial court.

[8] When the matter came before me on 29 May 2019 the plaintiff, relying upon the order of Schoeman J, sought to proceed on an unopposed basis. The defendant who again sought a postponement contended that funds were available in trust to pay the taxed costs and that the matter ought not to proceed on an unopposed basis. It was further argued that the sheriff by writ of attachment had attached a motor vehicle as security for payment of the taxed costs. There was accordingly sufficient security to ensure payment of the taxed costs.

[9] It is common cause between the parties, that the bill of costs setting out the costs covered by paragraph 2 of Schoeman J's order had not been taxed by 1

August 2018, and had for that reason not been paid. Said bill of costs was only taxed and the allocatur issued on 29 November 2018.

[10] Mr *Dyke* SC, for the plaintiff, argued that Schoeman J's order was clear in its effect namely that it envisaged that upon non-payment of the taxed costs the defendant's defence is *ipso facto* struck out. Since such costs had still not been paid the defence was struck out and the plaintiff was entitled to proceed on an unopposed basis. Ms *Veldsman*, for the defendant, took the stance that the costs have now/or can now be paid and that the defence is not struck out.

[11] A court order is to be interpreted in the same manner as a statute or contract or other written instrument. In ***Firestone South Africa (Pty) Ltd v Genticuro AG***[1] Trollip JA set out the approach as follows:

> "First, some general observations about the relevant rules of interpreting a court's judgment or order. The basic principles applicable to construing documents also apply to the construction of a court's judgment or order: the court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual, well-known rules. See Garlick v Smartt and Another, 1928 AD 82 at p. 87; West Rand Estates Ltd. v New Zealand Insurance Co. Ltd., 1926 AD 173 at p. 188. Thus, as in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. If, on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it. Indeed, it was common cause that in such a case not even the court that gave the judgment or order can be asked to state what is subjective intention was in giving it (cf. Postmasburg Motors (Edms.) Bpk. v Peens en Andere, 1970 (2) SA 35 (NC) at p. 39F - H). Of course, different considerations apply when, not the construction, but the correction of a judgment or order is sought by way of an appeal against it or otherwise - see infra. But if any uncertainty in meaning does emerge, the extrinsic circumstances surrounding or leading up to the court's granting the judgment or order may be investigated and regarded in order to clarify it; for example, if the meaning of a judgment or order granted on an appeal is uncertain, the judgment or order of the court a quo and its reasons therefor, can be used to elucidate it. If, despite that, the uncertainty still persists, other relevant extrinsic facts or evidence are admissible to resolve it. See Garlick's case, supra, 1928 AD at p. 87, read with Delmas Milling Co. Ltd. v Du

[1] 1977 (4) SA 298 (A) at 304D-H

> Plessis, 1955 (3) SA 447 (AD) at pp. 454F - 455A; Thomson v Belco (Pvt.) Ltd. and Another, 1960 (3) SA 809 (D)."[2]

[12] The order of Schoeman J is, in my view, clear and unambiguous. The learned judge granted a postponement of the matter to a specified date. In doing so she ordered the defendant to pay certain costs which, she directed, should be taxable and payable immediately. Then, in an effort to bring what by then was a sorry saga to finality, the learned judge provided that the defence shall be struck out in the event that the taxed costs are not paid by the specified date.

[13] It is clear that Schoeman J intended that the defendant's defence would, upon the occurrence of the event, be automatically struck out. Such automatic striking out of a defence or claim in the event that previous costs are unpaid is a drastic order which has the effect of shutting the doors of the court to a litigant.

[14] In ***Ikamva Architects CC v MEC for Department of Public Works and Others***[3], in which a defence had been struck out upon failure to respond to a Rule 35(3) notice within 10 days of service of the court order compelling such response, Plasket J (as he then was) expressed some doubt as to the competence of such an order in the light of the provisions in the Rules by which discovery may be compelled[4]. Different considerations apply in this instance.

[15] Orders to stay proceedings or to otherwise regulate the conduct of proceedings in circumstances where previous costs orders remain unpaid are not unusual.

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[2] See also KPMG Chartered Accountants (SA) v Securefin Ltd and Another 2009 (4) SA 399 (SCA) at par 39.
[3] (CA337/2013) [2014] ZAECGHC 70 (22 August 2014)
[4] At par 30

They are made in the exercise of the court's inherent jurisdiction to regulate its own procedures and to prevent an abuse of the court's process.[5]

[16] It is clear that Schoeman J, mindful of the sorry history of the litigation, issued the order so that the plaintiff would not be held to ransom by further dilatory conduct on the part of the defendant and so that the matter might be brought to finality.

[17] The question is whether there is scope to go beyond the clear terms of the order and thereby give effect to its purpose. Mr *Dyke* contended that this was competent. The fact that the costs were not payable by 1 August 2018 by reason of the fact that the bill had not been taxed was, he submitted, of no moment. Once it was taxed it became payable and since the costs remain unpaid effect must now be given to Schoeman J's order.

[18] I am unable to agree with the submission. It can surely not be ignored that, as at 1 August 2018, Schoeman J's order could not be carried into effect. As of that date the defendant's defence was not struck out. When was it struck out? Is it to be assumed that the defence was struck out 14 days after the date of the allocatur? Or perhaps when the bill was presented for payment? Or is it to be assumed that the defence was only struck out if the costs were unpaid by the date of the next trial date? These questions highlight the difficulty in approaching the issue on the basis contended for by the plaintiff.

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[5] See *Hurter v Hough en 'n ander* 1989 (3) SA 545 (C) at 554D; *Western Cape Housing Development Board and Another v Parker and Another* 2005 (1) SA 462 (C) at par [3] ff. But see *Clipsal Australia (Pty) Ltd and Others v Gap Distributors and Others* 2010 (2) SA 289 (SCA) where the court left open the question as to the ambit of the discretion to stay proceedings based on grounds of equity.

[19] In my view, since the order could not in law be carried into effect on 1 August 2018 it thereupon ceased to be an effective order. This is, of course, not to suggest that the plaintiff would not have been able, after the costs became due and payable and remained unpaid, to have sought an order which would have given effect to the intention of Schoeman J's order. This the plaintiff could have done by applying for the striking out of the defence.

[20] When the matter was argued I indicated that I would require time to consider the matter. It was therefore inevitable that the trial could not proceed. Since this was also what was sought by the defendant the only question would relate to costs. The plaintiff, as already indicated, was ready to proceed but sought a determination that it be on an unopposed basis.

[21] In the circumstances of this matter the proper order is to postpone the trial *sine die*. It is also appropriate to order that the taxed costs, as per the allocatur of the Taxing Mistress, be paid within a specific period and further to give effect to the intention underlying Schoeman J's order. In respect of the further costs incurred on 1 August 2018 these were reserved for determination at trial, as per the order of Huisamen J and no order need be made in relation thereto.

[22] In respect of the costs of 29 May 2019 it would be appropriate to direct that each party pay their own costs. The plaintiff wished to have this court determine that the defendant's defence had been struck out. In this the plaintiff did not succeed. The defendant was, however, not ready to proceed in any event.

[23] In the result I make the following order:

1. The trial is postponed *sine die*.

2. The parties shall pay their own costs occasioned by the postponement.

3. In the event that the defendant fails to pay the taxed costs encompassed by paragraph 2 of Schoeman J's order of 10 May 2018 within 5 days of the date of this order, the defendant's defence shall be struck out and the plaintiff shall be entitled to proceed on an unopposed basis.

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G.G GOOSEN

JUDGE OF THE HIGH COURT

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