**REPORTABLE**

**IN THE HIGH COURT OF SOUTH AFRICA**
**EASTERN CAPE DIVISION – GRAHAMSTOWN**

Case No: CA 42/2013
Date Heard: 5/06/2015
Date Delivered: 26/11/2015

In the matter between:

**RICKSHAW TRADE AND INVEST 49 (PTY) LTD** First Appellant

**BONGILE SAMUEL NKOLA** Second Appellant

and

**MEYERS RENTAL (PTY) LTD** Respondent

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**JUDGMENT**

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**MALUSI, AJ**

[1] This is an appeal against the judgment granted by the regional court, sitting in East London in terms of which the appellants were ordered to pay the respondent a sum of R223 865.21 resulting from a breach of contract. The appeal was filed late, an issue I will return to later in this judgment.

[2] It is necessary to provide a background to the appeal. On 25 May 2011 the parties concluded a written lease agreement. The second

appellant had concluded a suretyship agreement with the respondent on 18 May 2011 wherein he bound himself as surety and co-principal debtor for the due and proper fulfilment of the first appellant's obligations.

[3] The first appellant defaulted on its monthly rental and fell into arrears. The respondent instituted an action for recovery of the arrear rental under Case No 1686/2012 in the court *a quo* (the first action). On 7 June 2012 the claim was settled and judgment per agreement was granted in favour of the respondent. The appellants were ordered to pay the arrear rental due at the time of issuing of the summons. The lease agreement was also cancelled by the order of the court *a quo.* The first respondent was subsequently ejected from the leased premises as ordered.

[4] On 12 July 2012 the respondent launched an action for arrear rental under Case No 765/2000 (the second action). The claim was for recovery of the accumulated arrear rental for the period between the issue of summons in the first action and the ejectment of the first appellant. On 1 August 2012 the appellants filed an appearance to defend. The respondent applied for summary judgment.

[5] The appellants opposed the application for summary judgment. The accompanying affidavit by the second appellant raised the defence that the

second action had been instituted without the first appellant being placed *in mora* by way of a notice of breach. A further defence was that "the extent of the company's indebtedness is disputed". This was coupled with the averment that regardless of the indebtedness, payment was not due as the first appellant had not been placed *in mora*. The affidavit was interspersed with inflammatory averments that the respondent was motivated by ulterior motives, acting in bad faith, its approach unfair and unlawful. Not only were the latter averments irrelevant and distasteful but there was no basis whatsoever to support them in the affidavit.

[6] On 1 November 2012 the regional Magistrate gave an *ex tempore judgment* granting summary judgment against the appellants. He reasoned that the rent remained payable for the period of occupation after cancellation and the appellants were aware of the obligation to pay for this period. He held that summons constitutes demand in the form of *interpellatio iudicalis* so in any event the appellants were placed *in mora.*

[7] On 10 December 2012 the appellants noted an appeal against the summary judgment. On 8 February 2013 a notice of prosecution of appeal was filed by the appellants. On 19 April 2013 the appellants filed a transcript of the *ex tempore judgment*. On 8 October 2014 the appellants filed an application for condonation of the late noting of the appeal and the

late filling of the record. The application was opposed by the respondents. The latter also filed an application to strike out certain paragraphs in the notice of appeal. The appellants in turn filed an application to strike out certain averments in the respondents answering affidavit.

Striking Out Application

[8] The appellants applied for various passages in the respondent's answering affidavit to be struck out as they were privileged communication. The appellants contended that the passages related to settlement negotiations that were later abandoned without a binding agreement being reached. The respondent's Counsel, Mr Schoeman, submitted that the negotiations were not covered by legal privilege. He contended that the amount due by the appellants was never in dispute during the negotiations, the only issue being discussed by the parties was the continued occupation of the premises and the time for payment.

[9] It is trite in our law that negotiations entered into by parties to a dispute are protected from disclosure. This is the doctrine of legal privilege.

[10] The evidence before me indicates that an acknowledgement of debt was sent to the respondents attorneys for signature. This was to be the document encapsulating the agreement between the parties. The

acknowledgement of debt was never signed by respondent. There is also no evidence that there was agreement between the parties on all the issues. Even if the issue of the amount owed was settled during the negotiations it is not admissible on its own if it did form a separate, divisible agreement. In the circumstances, the evidence relating to the negotiations is inadmissible. The application to strike out the evidence must succeed. The evidence in the answering affidavit, page 15 paragraph 2.3.4 annexures AEK 3.1 – 3.12; page 20 – 21 paragraphs 6.4 to 6.6, annexures 18.1 – 22.3 is to be struck out.

[11] The respondent's application to strike out certain paragraphs of the notice of appeal was not pursued during the hearing.

Condonation Application

[12] The dies for noting an appeal against the judgment of the regional Magistrate lapsed on 29 November 2012 as that was the 20th day after the *ex tempore* judgment was handed down by the court *a quo.* As noted above the notice of appeal was only filed on 10 December 2012.

[13] Mr Renaud, Counsel for the appellants, submitted that the notice of appeal was not late. He contended that the registrar of the court *a quo* had delivered "the written judgment" to the appellant's attorneys on 10 April

2013. Consequently the appellants had until 8 May 2013 to note an appeal as the transcript fulfilled the function of requesting reasons in terms of rule 51(1) of the Magistrate's Court rules.

[14] There is no merit in the submission as the court *a quo* never delivered any "written judgment". The regional Magistrate read in court an *ex tempore* judgment on 1 November 2012. This judgment was later transcribed and provided to the appellants' attorneys. Clearly judgment was delivered on 1 November 2012 as it appears from the record that it was read in open court in the presence of the parties' legal representatives.[1] Clearly the appellants were late in filing their notice of appeal.

[15] A court has an inherent right to grant condonation where the interests of justice demand it and where the reason for non-compliance with the time limits have been explained to the satisfaction of the court. The extensive discretion bestowed on the court is to be exercised judicially with regard to all the facts and circumstances of each case.[2] Whether an application was brought within a reasonable time is primarily a factual issue but also

[11] *Snyman v Crouse* 1980 (4) SA 42 (O) at 49 B – C.
[2] *Van Wyk v Unitas Hospital* (Open Democratic Centre as Amicus Curiae) 2008 (2) SA 472 (CC) at 477A-B.

involves a consideration of broader issues, principally the prospects of success.[3]

[16] The appellant's attorney of record deposed to an affidavit in support of the condonation application. She disclosed that instructions to note the appeal were only received from the appellants' on the penultimate day before the expiry of the *dies*. No reason whatsoever for the belated instructions were disclosed.

[17] The appellant's attorney immediately briefed the Counsel who had appeared for the appellants in the summary judgment application. Counsel was engaged in other matters and could only provide the notice of appeal on 10 December 2012. It has not been disclosed why Counsel had to draft the notice of appeal. When Counsel was not available no attempt was made to immediately engage other Counsel nor the attorney to perform the task at hand herself. It was only weeks later that another Counsel was briefed.

[18] The appellants' attorneys only realized the need for the transcription of the *ex tempore judgment* on 5 February 2013. A follow-up enquiry was only made with the contracted transcribers on 20 March 2013. The transcript was finally available on 10 April 2013. I am of the view that the appellants have failed to show that they were not at fault. No reason has

[3] *United Plant Hire (Pty) Ltd v Hills and Others* 1976 (1) SA 717 (A).

been disclosed why the transcription was not requested on 28 November 2012 when Counsel was briefed to prepare the notice of appeal as the parties knew an *ex tempore* judgment had been delivered. Even after the transcript was requested weeks passed by without an enquiry to the transcribers being made by the appellant's attorneys. The appellants' attorneys have provided a woefully inadequate explanation of the delay in light of the stringent requirements for an explanation due to unavailability of transcripts.[4]

[19] The respondent's attorney in the opposing affidavit vehemently protested the delay in launching the application for condonation. The appellants' attorneys waited a period of eighteen months after indicating they will launch the application for condonation before filling it on 8 October 2014. The appellants' attorney contented herself in reply by asserting that no prejudice was suffered by the respondent as the appeal was only heard on 5 June 2015. It is trite that an applicant for condonation should bring the application as soon as possible after the circumstances causing the delay are known to him or her. An unexplained period of eighteen months is grossly unreasonable in my view.

[4] *Unitrans Fuel and Chemical (Pty) Ltd v Dove-Co Carriers CC* 2010 (5) SA 340 (GSJ) at 343 J – 344 A.

[20] The dominant consideration during the hearing was the prospects of success on appeal. Mr Renaud submitted that the respondent had pleaded the wrong cause of action in its particulars of claim. It was argued the claim was framed as arrear rental instead of damages for holding over.

[21] Another point made by Mr Renaud was that there is a dispute regarding the amount owed. The argument was that the amount was not clear since there was no breakdown of how the amount claimed was calculated. Finally it was argued there should have been a notice of breach given to the appellant. It was submitted the requirement for notice arises from the breach clause of the lease agreement.

[22] A proper analysis of the facts discloses that the claim was a hybrid between arrear rental and a holding over. The part of the claim dealing with the period from issue of summons in the first action up to 7 June 2012 was arrear rental. The period from the 8 June 2012 until the date of ejectment of the first appellant is a holding over. This claim arises from the failure of the first appellant to give the respondent vacant occupation on termination of the lease. The particulars of claim did not give a breakdown nor provide particularity. All that is claimed is a globular figure for “rental and other payments”. The other payments have not been specified. The averments necessary for a holding over claim are missing in the particulars of claim.

[23] Be that as it may, a claim has been formulated in the particulars of claim. It has long been held that a plaintiff only needs to show that the facts pleaded establish a cause of action either in delict or contract whichever he or she chooses to pursue.[5] In *casu*, the facts pleaded clearly establish a cause of action on contract. The appellants were required to disclose a *bona fide* defence to the claim.

[24] In my view, the appellants have failed to disclose a *bona fide* defence. They embarked upon a high risk strategy of raising technical points without complying with the requirement that they must disclose the nature and grounds of their defence in full. The averment that "the extent of the company's indebtedness is disputed" is in itself an admission of liability to some unspecified degree. No facts were disclosed so that the nature and grounds of the extent of indebtedness may be ascertained.

[25] It has long been held that it is not sufficient for a defendant opposing a summary judgment application to "simply say that he disputes the correctness of the amount being claimed by the plaintiff". It is necessary for the defendant to state in the affidavit the grounds on which he or she

[5] *Lillicrap, Wassennar and Partners v Pilkington Brothers* 1985 (1) SA 475 (A) at 496 G-H.

disputes the correctness of the plaintiff's claims.[6] There must be sufficient detail of the nature and grounds of the defence to enable the court to decide the issue whether the defence is a good one and honestly made. In the event the defence is not sufficient for this purpose, the defendant has not disclosed fully and must fail.[7] In *casu*, the appellants woefully failed to satisfy this requirement. In the circumstances, the regional Magistrate was correct to grant summary judgment as the defence was not *bona fide.*

[26] The summons in the second action was issued after the lease agreement was terminated by the court *a quo* in the first action. Furthermore, from 8 June 2012 the first appellant was *in mora* for failing to vacate the leased premises on termination of the lease. There was no need for the respondent to issue a notice in those circumstances. The continued occupation was a continuous wrong towards the respondent whom he deprived of possession of the property.[8]

[27] The condonation must be refused as there are no prospects of success on the appeal. It will serve no purpose to grant the condonation only for the appeal to be dismissed on the merits.

[28] In the result the application for condonation is dismissed with costs.

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[6] *Bank of Lisbon v Botes* 1978 (4) SA 724 (W) at 726 F – H.
[7] *Petler Properties v Boland Construction* 1973 (4) SA 554 (C) at 559 B – H.
[8] *Hyprop Investments Ltd and Another v NCS Carriers and Forwarding CC and Another* 2013 (4) SA 607 para 57.

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**T MALUSI**
**Acting Judge of the High Court**

Roberson J: I agree.

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**J ROBERSON**
**Judge of the High Court**

Appearances:

Counsel for the appellant, Adv CA Renaud instructed by Neville Borman & Botha.

Counsel for the respondent, Adv AD Schoeman SC, instructed by GM Nettelton

Date Heard: 5 June 2015

Date Delivered: 26 November 2015