FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: A99/2009

In the appeal of:

DIE PADONGELUKFONDS Appellant

and

NADINE MARGARET TEMPLETON Respondent

CORAM: RAMPAI, J *et* VAN DER MERWE, J *et* MTHEMBU, AJ

JUDGEMENT: RAMPAI, J

HEARD ON: 19 MAY 2010

DELIVERED ON: 1 JULY 2010

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[1] This is an appeal against the judgment and the resultant order by a single judge. The judgment in the court *a quo* was given in favour of the plaintiff, the respondent in these proceedings on 18 Febuary 2009. The scope of the appeal is limited to the merits only. The appeal is opposed.

[2] The appeal is accompanied by a condonation application. The appeal was not filed in good time. The defendant, now the appellant, seeks to have such delay condoned so that the substantive merits may be considered an appeal. The condonation application is likewise opposed.

[3] I shall refer to the parties as they were referred to in the court *a quo*, namely: the defendant and the plaintiff. The plaintiff had sued the defendant for the payment of the sum of R754 402,68 and certain ancillary relief. The amount claimed represented the sum of damages which the plaintiff alleged she suffered as result of certain bodily injuries she alleged she sustained in a road accident.

[4] In the supplementary condonation application the plaintiff alleged that the incident took place in Bloemfontein on 19 March 2005. The scene of the accident was at Westdene where First Avenue intersects Nelson Mandela Drive.

[5] The summons was issued on 3 August 2007. The plaintiff

alleged that the accident was caused by the sole negligence of the defendant's insured driver in the driving of, a VW Passat with registration number BGD411FS, then and there driven by a certain MS Pheko.

[6] In the plea, the defendant admitted the particulars of the accident, the identities of the drivers concerned and the descriptions of the motor vehicles involved. The defendant's plea was filed on 18 October 2007.

[7] The defendant denied that the accident was caused by the sole negligence of the insured driver of the sedan as alleged or in any other manner whatsoever. On the contrary the defendant specifically pleaded that the collision was caused by the sole negligence of the plaintiff herself, N M Templeton, in the driving of a motor cycle with registration number CPH168FS.

[8] The court *a quo* directed that the issues in dispute in respect of the quantum and merits be separately adjudicated and that the costs relating to such a separation application be reserved for

later adjudication. The order was made on 11 December 2008 approximately nine weeks before the hearing.

[9] The hearing started on 17 February 2009 and ended the next day. The court *a quo* came to the conclusion that the sedan driver was 75% negligent and that the scooter driver was 25%. Accordingly judgment was given in favour of the plaintiff with costs including the costs of the separation application.

[10] The defendant was aggrieved. On the 23rd February 2009 the defendant asked for reasons for the findings and the order which resulted from them. On the 4th March 2009 the written judgment of Jordaan J was delivered. Subsequently the defendant brought an application on 25 May 2009 for leave to appeal against the finding of the court *a quo* that the defendant was 75% liable for such damages as the plaintiff might prove and 100% of the plaintiff's cost until the last day of the trial. The defendant was granted leave to appeal on 29 September 2009.

[11] On 29 October 2009 the defendant filed the appeal record. Simultaneously the defendant applied to the registrar to have a date allocation for the hearing of the appeal. These two procedural steps were 71 days belated – see uniform court rules 49(6)(a) and 49(7)(a).

[12] The defendant filed its condonation application on 30 October 2009. The plaintiff filed her notice of intention to oppose the condonation application on 5 November 2009. Two weeks later, on 19 November 2009, she filed her opposing affidavit. On 7 December 2009 the defendant filed her replying affidavit. The appeal was filed on 12 January 2010 for hearing together with the condonation application on Monday 17 May 2010. Having heard argument for and against both we reserved judgment.

[13] I deal with the condonation application first. Subrule section 6(a) of rule 49 provides:

> "6*(a)* Within sixty days after delivery of a notice of appeal, an appellant shall make written application to the registrar of the division where the appeal is to be heard for a date for the hearing of such appeal and shall at the same time furnish him with his full residential address and the name and address of every other party to the appeal and if the appellant fails to do so a respondent may within ten days after the expiry of the said period of sixty days, as in the case of the appellant, apply for the set down of the appeal or cross-appeal which he may have noted. If no such application is made by either party the appeal and cross-appeal shall be deemed to have lapsed: Provided that a respondent shall have the right to apply for an order for his wasted costs."

[14] Subrule section 7(a) of rule 49 provides:

> " (7) *(a)* At the same time as the application for a date for the hearing of an appeal in terms of subrule (6) *(a)* of this rule the appellant shall file with the registrar three copies of the record on appeal and shall furnish two copies to the respondent. The registrar shall further be provided with a complete index and copies of all papers, documents and exhibits in the case, except formal and immaterial documents: Provided that such omissions shall be

referred to in the said index. If the necessary copies of the record are not ready at that stage, the registrar may accept an application for a date of hearing without the necessary copies if-

(i) the application is accompanied by a written agreement between the parties that the copies of the record may be handed in late; or

(ii) failing such agreement, the appellant delivers an application together with an affidavit in which the reasons for his omission to hand in the copies of the record in time are set out and in which is indicated that an application for condonation of the omission will be made at the hearing of the appeal."

[15] The condonation of a parties non-compliance with the court rules is not simply there for the asking. It is not automatically granted. The court has to consider all the relevant factors in order to exercise the discretion entrusted to it properly.[1]

[16] In exercising its discretion the court will take into account the following factors: the degree of non-compliance; the explanation given for it; the prospects of success on appeal; the importance to the case; the respondent's interest in the

[1] United Plant Hire (Pty) Ltd v Hills & Others 1976 (1) SA 717 (AD) at 720 e – h and 722 c – d.

finality of the judgment; the convenience of the court; and the avoidance of unnecessary delay in the administration of justice.

[17] The purpose of civil litigation is to bring about orderly settlement civil disputes. A successful litigant is entitled to final judgment. Delays by an unsuccessful litigant in challenging an unfavourable judgment has an adverse effect on the interest of the successful party in the finality of the judgment.[2]

[18] The defendant applies for the condonation of its lateness, firstly, in applying for the allocation of a date for the hearing of the appeal and secondly, in lodging the appeal record in accordance with the rules. The two procedural steps were both carried on 29 October 2009. They were thus 71 days outside the formal deadlines as laid down in the rules. The appeal has therefore lapsed in terms of rule 49 (6)(a). The purpose of the defendant's condonation application is to have the appeal received and reinstated. The defendant tenders the costs.

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2 **United Plant Hire v Hills,** *supra,* op cit.

[19] Mr Cilliers acknowledges that there has been a clear violation of the court rules on the part of the defendant. Notwithstanding such a concession, he contended that the violation of the court rules was due to some special circumstances which were prevailing in the life of the defendant's attorney who candidly accepted full responsibility for the non-compliance. He therefore submitted that the defendant had made out a proper case for the condonation of its non-compliance.

[20] On behalf of the plaintiff Ms Murray contended that the defendant's violation of the court rules coupled with the negligent actions of its attorney had been such a serious degree of non-compliance that it could not be condoned on the basis of the candid and honest explanation given for it.

[21] In its founding affidavit the defendant stated that leave to appeal was granted on 18 May 2009; that it filed notice of appeal on 25 May 2009; that it requested for a transcript of the

court record from Krino Transcribers; that Ms Ross, its attorney and deponent, received the court record on 25 June 2009; that her work schedule was incredibly hectic at the time since she was on verge on making a new career move; that she put the court record aside with the aim of speedily perusing and working on it later but never got to it in good time; that she was working under tremendous pressure at the time updating all her files; that on 22 September 2009 its responsible claim handler enquired about the pending appeal from its attorney; that only then did the attorney realise that she had not given the file the necessary attention; that she then immediately perused the court record and discovered with dismay, that the court record was incomplete; that she received a complete transcript on 6 October 2009; that she was a novice with limited experience in the legal profession; that she consulted an advocate on the same day; that she briefed an advocate on 8 October 2009; that she resigned from the service of Mpobole & Ismael on 15 October 2009 and that she took up new employment with CRC Church Group two weeks later.

[22] It is also the defendant's explanation that there was a loss of contact between its attorney and its advocate for almost three weeks after 8 October 2009. The advocate's e-mails to the attorney were not answered. The two re-connected on 28 October 2009. The next day the court record was filed together with an application for the appeal date. Both steps should have been taken no later than 18 August when the 60 day period expired since was filed notice of appeal.

[23] In the opposing affidavit Mr Hart, the plaintiff's attorney and deponent, answered that the defendant's attorney Ms Ross, took no further steps to prosecute the appeal between 25 June 2009 and 22 September 2009. The plaintiff countered that the defendant had given an inadequate explanation; that the appeal had no reasonable prospects of success and that the unreasonable delay has severely prejudiced the plaintiff. She prayed through her attorney that the condonation application be refused.

[24] In its replying affidavit the defendant responded through its attorney that she devoted a whole lot more time to her plans in respect of her pending new career move than to the defendant's appeal. She was working on 400 files in order to hand them over to a colleague. She used a diary system but did not diarise the particular file. She kept on thinking that she had time and that she would quickly get to it and start working on it but she never got there. Between 25 June 2009 and 22 September 2009 the file was on top of a cabinet in her office. From 8 October 2009 to 28 October 2009 she was seldom in her office at Mpobole & Ismail. She did not do regular check of her e-mails at the time. She expected to be contacted on her cellphone if she was urgently needed. She was of the opinion that she gave an adequate explanation for the delay; that the defendant had a reasonable prospect of success and that the plaintiff was not prejudiced by the delay.

[25] As regards prejudice, it must be borne in mind that the issues of quantum were separated from those of the merits. The merits were determined in favour of the plaintiff on 18 February 2009.

The quantum issues still had to be determined. It seemed unlikely that the matter would have been enrolled within 71 days for that purpose even if the defendant did not appeal. Moreover, there is no averment by or on behalf of the plaintiff that between 25 June 2009 and 22 September 2009, she ever complained to the defendant about the delay. The defendant was never called upon to expedite the prosecution of its appeal because the delay was prejudicing the plaintiff. In my view the interim payment which the defendant made, in a way mitigated the prejudice caused by the delay. However, I acknowledge that any non-compliance with the court rules entails some prejudice even if the affected party does not complain.

[26] As regards the prospects of the appeal, it would seem that the appeal does have some good prospects of success. This is a very important factor in determining whether to refuse or grant a condonation application. In this case, this factor strongly favours the grant of the application. However its significance may be eroded by some other factors such as the gravity of

non-compliance or the inadequacy of the explanation.

[27] As regards the importance of the case, it will be readily appreciated that a case of over three quarters of a million rand is a huge and important case to both parties. Perhaps it is the first and probably the last case of this sort the plaintiff in which she will ever be involved. However, for the defendant the situation is completely different. The defendant is involved, has been involved and will still be involved in many similar cases. Herein is the importance of the case. It is therefore important, not only for the defendant alone but the general public also, to have such cases correctly decided in accordance with sound principles. Unless the defendant takes doubtful judgments on appeal, it will be failing in its duty to dispense public funds responsibly and appropriately.

[28] Certainly the plaintiff has a vested interest in the finality of the judgment. A successful party is entitled to expect and to demand speedy delivery of the fruit of a judgment. Where an unsuccessful party takes a judgment on appeal, such an

appeal must be prosecuted without undue delays. The respondent, in other words the beneficiary of the judgment, also has an interest in the fairness and justness of the judgment and not only its finality.

[29] The rule required the defendant to have taken the necessary steps within 60 days of its notice of appeal. The defendant exceeded the prescribed time deadline by 71 days. Any non-compliance with the court rules causes inconvenience to the court itself. We are now dealing with this sideline application instead of itself. This exercise in itself is a great inconvenience, precisely caused by the failure to obey the court rules.

[30] The defendant's notice of appeal was filed on 12 May 2009. Nothing seriously constructive was done, other than to seek and obtain a court record, during the sixty-day period. Such a period expired on 18 August 2009. By operation of the law the appeal automatically lapsed. The filing of the record and the request for an appeal date were done on 29 October 2009.

Both steps were taken 71 days out of time. The delay was rather very long. The bad situation becomes even worse when the initial 60 day period is also taken into account. Such a degree of neglect is telling against the defendant.

[31] It is very clear that the long delay was occasioned by the defendant's attorney. She was a novice with no apparent experience in civil litigation in general and appeal procedure in particular. It seemed that she was overwhelmed by lack of personal know-how and in-house support system. Her pending career move made matters worse. She almost exclusively devoted her energy, within the little time she still had, in pursuit of her own interest or those of her new master, at the expense of the interests of her clients, in particular the defendant.

[32] It is indeed so that a party cannot always avoid the adverse consequences of the actions of his legal representatives. Ms Murray argued that the actions of the defendant's attorney boiled down to acts of gross negligence and that the

defendants itself was also to blame for its passiveness during the period of the attorney's inactivity. I am not certain if there was much the defendant could have done to ensure that the appeal was properly prosecuted in accordance with the rules. There is no indication that the responsible claim handler was familiar with the appeal prosecution of civil appeals to have guided the defendant's attorney or that he was aware of the attorney's inadequacies or that he was aware of the fact that her personal affairs were hindering her from prosecuting the appeal.

[33] We do know that on 8 October 2009 she consulted Ms Diane Birch and a certain advocate. The advocate, and probably Ms Birch as well, advised her on the procedures. Notwithstanding such advice(s) she failed to lodge the court record at once. The advocate had to remind her about it almost three weeks later. The point is: if any advice by an advocate could not make her to immediately take constructive steps to prosecute the appeal, what could telephone enquiries from a client have achieved?

[34] In these circumstances, dictates of justice seem to suggest that it will be unfair and unjust to penalise the defendant on account of the neglect or remissness of its attorney. In my view the defendant has given a reasonably adequate and satisfactory explanation for the non-compliance.

[35] Having considered all the relevant factors, the submissions made by the counsel and the peculiar circumstances of the case, I would grant the condonation application. The opposition was justified. The defendant has tendered to pay the plaintiff's costs thereof.

[36] Accordingly I make the following order:

36.1 The appellant's late filing of the appeal record is condoned;

36.2 The appellant's late application for an appeal date is also condoned;

36.3 The appellant's appeal which automatically lapsed in terms of rule 49(6)(a) is hereby reinstated;

36.4 The appellant is hereby directed to pay the costs of this condonation application.

[37] Now the merits of the appeal. The undisputed facts are that early in the morning, on Saturday 19 March 2005 the plaintiff was on her way home at Willows from Cape Town Fish Market at Preller Square. She worked at that restaurant as a waitress; she was riding a scooter in a southerly direction on the inner lane in First Avenue shortly before the accident; at ±02:35 she was on the verge of crossing Nelson Mandela Drive. The insured driver was driving a sedan in a westerly direction on the middel lane in Nelson Mandela Drive, at the same time he was on the verge of crossing First Avenue, the scooter and the sedan collided inside the intersection.

[38] The real issue in the case was in whose favour was the green traffic light at the critical moment of the collision. Put differently, the question was who had the right of way to proceed and who was obliged to stop before entering the intersection?

[39] The plaintiff's version was narrated by the plaintiff herself. She did not call any witness. Her version was that the traffic lights were green in her favour when she ventured into the intersection. She alleged that the sedan driver disobeyed the traffic lights by entering the intersection when the traffic lights were red against him.

[40] The defendant's version was narrated by three witnesses, namely: Mr N E Leseo, Mr J du Plessis and Ins D G Raath. The sedan driver, Mr Pheko, did not testify. He died before the trial. Mr Leseo testified that he was a passenger in the sedan at the time of the collision. His version was that the traffic lights were green in Nelson Mandela Drive when the sedan entered the intersection to cross First Avenue.

[41] Mr du Plessis testimony was that he was driving westwards in Nelson Mandela Drive. He was following a certain vehicle in which friends of his female companion were travelling. The insured sedan was also ahead of him. The traffic lights in

Nelson Mandela Drive were initially red as they were approaching First Avenue but turned suddenly green. Then the insured driver vehicle began moving forward, in other words, to cross First Avenue. He then heard a hard bang.

[42] Inspector Raath's testimony was that he arrived on the scene after the collision. He saw the sedan as well as the scooter involved. His version was that the final rest position of the sedan was 30m from the area of impact inside the intersection.

[43] The version of the plaintiff can be criticised in many respects. Her version that before the collision she saw a speeding motor vehicle in Nelson Mandela Drive going over a red traffic light and her testimony that she concentrated on it for sometime after it had crossed her path of travel, was rather surprising. She knew that Nelson Mandela Drive was a one-way street. There was not traffic from her right-hand-side to worry about. Any possible danger for her by a similarly reckless driver, if any there was, would have emerged from her left-hand-side in Nelson Mandela Drive. However, she hardly looked in that

direction. What is even more amazing, is that she hardly reduced her speed just to make doubly sure there was no other speeding motor vehicle in Nelson Mandela Drive to endanger her safety.

[44] The alleged reckless behaviour of the unidentified motorist would have served as a warning to a reasonable person in those circumstances to be careful before venturing to cross Nelson Mandela Drive. In such circumstances a reasonable careful driver of a scooter would have immediately reduced speed and would have made doubly sure it was safe to cross. The plaintiff knew too well that the particular intersection was notoriously prone to accident but she did not approach it with any caution as one would have expected from someone who knew as much as she did. Moreover she knew that intoxicated drivers, from a pub up the street, often go over the red traffic light at the particular point.

[45] Initially she was adamant that the sedan crashed into her scooter and that it was not the other way round. During

intense cross-examination she was eventually made to concede that it was in fact her scooter which had crashed into the sedan. She testified she did not see the sedan which collided with her scooter. She also testified that she made a mistake by entering an intersection, at night for that matter, without carefully ascertaining that it was safe for her to do so.

[46] When she was asked whether she had slammed the brakes her answer was: "I must have, I don't know." Since she did not see the sedan at all, one would have expected a straight forward negative answer to that question. It seems illogical to say she must have applied the brakes when she saw nothing to make her to take any evasive action. It can be deduced from all these that the plaintiff was not keeping a proper look-out at the crucial moment when she attempt to cross Nelson Mandela Drive. If we accept this, and I think we should, then her evidence that the traffic lights were green in favour of First Avenue and red against Nelson Mandela Drive loses its weight. In my view that aspect of her evidence was very unreliable.

[47] Mr Leseo's version cannot be convincingly criticised. He was an impressive witness with virtually no motive to unfairly build or destroy the case of any of the parties. His version that the traffic lights were green in Nelson Mandela Drive when the sedan enter the intersection was substantively credible and reliable. Implicit in his version was the legitimate inference that the traffic lights must have been red in First Avenue when the scooter entered the intersection. This in turn means that the sedan driver was entitled to proceed across First Avenue and that the scooter driver was supposed to have stop before endeavouring to cross Nelson Mandela Drive.

[48] The gentleman was an objective witness. According to him the sedan entered the intersection at a high speed. He added that had the sedan driver driven at a slower speed he could have noticed the lady on the scooter. The point he was trying to make was that in spite of the scooter driver's going carelessly over the red light, the collision could still have been avoided had the sedan been travelling at a safe and permissible speed

in the circumstances.

[49] The evidence of Ms Raath that he observed brake marks made by the sedan suggested that the sedan driver probably saw the scooter, albeit too late, and that he took some evasive action. The length of such brake marks are objectively give credence to Mr Leseo's evidence that the sedan was speeding. Moreover it tends to indicate that the sedan driver was more alert than the scooter driver. It is probable that a slower speed might have delayed the motion of the sedan by a fraction of a second which could have enabled the sedan to narrowly miss the scooter.

[50] From the aforegoing analysis, it is obvious that both drivers were to blame for the accident. However, the court *a quo* erred in finding that the negligent sedan driver was the primary cause of the accident. Such a finding was not borne out by the evidence of a credible and reliable witness and the evidence as a whole. The issue had to be decided mainly on Mr Leseo's version. No sound reason existed to disbelieve him.

As I see it, the accident was chiefly occasioned by the negligence of the plaintiff. She disobeyed a red traffic light and carelessly tried to cross a major street in the city without keeping a proper lookout. In the process her scooter crashed into the sedan which was entitled to proceed because the traffic light was green in its favour.

[51] In the circumstances the apportion of 75% - 25% in favour of the plaintiff is a finding which I, on appeal, cannot uphold. In view of the misdirection we are entitled to interfere with the apportion of negligence or fault. In my view an apportionment of 80-20 in favour of the sedan driver appears to be fair, just and equitable.

[52] Accordingly, I make the following order:

52.1 That appeal succeeds;

52.2 That the order of the court *a quo* is set aside and substituted with the order as set out below;

52.3 That the plaintiff was 80% negligent in causing the collision and thus 80% liable for the damages she has

suffered;

52.4 That the contributory negligence of the insured driver in causing the collision was 20% and thus 20% liable for the damages suffered by the plaintiff;

52.5 That the defendant is therefore liable for 20% of any damages the plaintiff may prove to have suffered;

52.6 That the defendant pays the costs the action including the costs of the application for separation of issues;

52.7 That the plaintiff pays the costs of the appeal.

M. H. RAMPAI, J

I concur.

C. H. G. VAN DER MERWE, J

I concur.

J. B. MTHEMBU, AJ

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