Reportable: Yes / No

Circulate to Judges: Yes / No

Circulate to Magistrates: Yes / No

IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape Division)

Case No: CA&R 91/05
Heard: 16/04/07
Delivered: 25/05/07

WERNER HOFFMAN **APPELLANT**

versus

D.J.P. FARMER **RESPONDENT**

Coram: KGOMO JP *et* MOKGOHLOA AJ

JUDGMENT ON APPEAL

MOKGOHLOA AJ:

1. There are two matters before us relating to the same parties. In the first matter Case No: 2303/03 the appeal is against the Magistrate's refusal to rescind default judgments granted against the appellant by the Clerk of the Court Namakwaland on 31 October 2003 and by the Magistrate Namakwaland, on 10 March 2004. The second matter Case

No: 651/04 is an appeal against the default judgment granted on 2 June 2004. The plaintiff/respondent ("plaintiff") issued Summons against the defendant/appellant ("defendant") on 22 September 2003 for payment of arrear rentals in the amount of R15 000.00 with costs. The defendant's attorney, Mr van Sittert, states in his affidavit that the defendant entered appearance to defend by signing the back page of the Summons. This he did through the assistance of an Office Manager at Port Nolloth Magistrate's Court. The notice of intention to defend was faxed by the defendant to the plaintiff's attorneys and allegedly also to the Magistrate's Court Springbok. The plaintiff's attorneys did receive the notice and placed the defendant under bar for delivery of his plea. On 24 October 2003 the defendant apparently faxed his plea to the Magistrate's Court Springbok. On 31 October 2003 default judgment was granted against the defendant and a Warrant of Execution was authorised.

2. The Warrant of Execution was served on the defendant on 18 November 2003. He then engaged the services of an attorney to assist him. There were attempts to settle this matter which failed. The plaintiff therefore enrolled the matter for trial on 10 March 2004. On this day the defendant failed to appear in court and judgment by default was granted against him.

3. The plaintiff issued another Summons under case number 651/04 against the defendant for payment of the amount of R17 500.00 plus costs. It was a different cause of action. Judgment by default was granted against the defendant on 2 June 2004 in this matter.

4. On 30 July 2004 the defendant made an application for rescission of the default judgments granted on 31 October 2003, 10 March 2004 and 2 June 2004, which application was refused on 17 November 2004. The Magistrate furnished his reasons for refusal on 26 November 2004. On 28 December 2004 the defendant served his notice of appeal. He only applied for a date of trial on 27

September 2005. The defendant furnished security for costs as provided for by Rule 51(4) of the Magistrates Court Rules belatedly on 1 April 2005 in the amount of R1000-00.

5. The appellant's grounds of appeal are as follows:

"*a) Dat die Agbare Landdros verkeerdelik bevind het dat die verstekvonnis wat toegestaan was deur die Klerk van die Hof op die 31ste Oktober 2003 nie nietig ab origine was nie.*

b) Dat die Agbare Landdros in bovermelde verband regtens gedwaal het deur:

<u>Eerstens,</u> nie te bevind dat die Klerk van die Hof, op die stadium toe die respondent aansoek gedoen het om bevermelde vonnis by verstek nadat die respondent 'n artikel 12(1)(b) kennisgewing aan die appèllant en die Klerk van die Hof afgelewer het en nadat gemelde kennisgewing reeds op die Hof se leêr geliaseer was, bedag daarop moes gewees het dat die appèllant van voorneme is om die respondent se eis teenstaan, en/of

<u>Tweedens,</u> nie te bevind dat daar met inagneming van die voorbehoudsbepaling in Reël 12(2)(a)(i) en (iv) voldoende rede was vir die Klerk van die Hof om by die prokureur van die respondent (eiser) navraag te doen oor die waarskynlikheid van 'n voorneme van die appèllant (verweerder) om die respondent se eis te verdedig, en/of

<u>Derdens,</u> nie te bevind dat artikel 12(2)(a) gebiedend is, dat in bovermelde verband 'n positiewe plig op die Klerk van die Hof plaas en dat die nakoming van die prosedure daarin voorgeskryf, in omstandighede van hierdie saak, 'n voorwaarde was vir die toestaan van 'n vonnis by verstek deur die Klerk van die Hof, en dus

<u>Vierdens,</u> nie te bevind dat die Klerk nie gemagtig was om die respondent se versoek om 'n vonnis by verstek teen die appèllant toe te staan alvorens die respondent die appèllant versoek het om 'n behoorlike betekende kennisgewing van voorneme om te verdedig binne 5 dae na ontvangs van sodanige kennisgewing af te lewer en die appèllant daarmee in verstek was.

c) Dat die Agbare Landdros verkeerdelik bevind het dat die Klerk van die Hof gemagtig en bevoeg was om vonnis by verstek toe te staan op die 31ste Oktober 2003 omdat die respondent nie 'n verweerskrif afgelewer het nie.

d) Dat die Agbare Landdros in bovermelde verband regtens gedwaal het deur:

<u>Eerstens,</u> nie te bevind dat die kennisgewing in gevolge artikel 12(1)(b) wat die respondent op die appèllant bestel het voortydig was en dus nietig is, en/of

<u>Tweedens,</u> nie te bevind dat die aansoek om vonnis by verstek wat die respondent op die 28 Oktober 2003 opgestel, getik en geteken het en wat op die 31ste Oktober 2003 deur die Klerk van die Hof toegestaan is voortydig was en dus nietig is.

e) Dat die Agbare Landdros verkeerdelik bevind het dat die aflos landdros die vonnis by verstek wat die Klerk van die Hof op die 31ste Oktober 2003 toegestaan het bekragtig het.

f) Dat die Agbare Landdros verkeerdelik bevind het dat al die eise soos uiteengesig in die respondent se dagvaarding eise vir gelikwideerde bedrae is.

g) Dat die Agbare Landdros korrek bevind het dat hy op die 10de Maart 2004 foutiewelik 'n tweede vonnis in die bovermelde saak toegestaan het en dat die vonnis wat hy al dus toegestaan het ongeldig en sonder regskrag is. Die Agbare Landdros moes dus ook hierdie vonnis tersyde gestel het met 'n bevel vir koste soos gevra deur die appellant."

6. Rule 51 (4) of the Magistrates Court Rules provides as follows:

" ***An appeal shall be noted by the delivery of notice, and, unless***

the court of appeal shall otherwise order, by giving security for the respondent's costs of appeal to the amount of R 1000: Provided that no security shall be required from the State or, unless the court of appeal orders, from a person to whom legal aid is rendered by a statutory established legal aid board."

7. Mr Pieterse, for the Appellant, made an application from the bar and at the eleventh hour that both applications for appeal be heard as one and that the security already furnished in respect of the one application, though late, be regarded as sufficient for both appeals. He also requested hat condonation be granted for the late payment of the said security. He contended in the alternative that it was not necessary for the appellant to furnish security for costs as the appellant's properties that were attached have already been sold.

8. Rule 11 of the Uniform Rules of Court provide as follows:

"*Where separate actions have been instituted and it appears to the court convenient to do so, it may upon the application of any party thereto and <u>after notice</u> to all interested parties, make an order consolidating such actions, whereupon* **-**

(a) the said actions shall proceed as one action" (My underlining)

9. This rule makes it clear that the actions may be consolidated upon the application of any party thereto and after notice to other parties. The appellant did not give notice to any interested party. It is also clear that the appellant's belated

application in court to consolidate the two appeals is made with the intention to induce the court to accept that the security for costs furnished in one appeal should be regarded as sufficient for the consolidated appeal. Advocate van Niekerk, SC, for the Respondent has objected to this ad hoc application by the appellant and contends that respondent would suffer serious prejudice. See **Deosook & Another v South African Railways And Harbours 1961 (1) SA 402 (NPD)**.

10. Having regard to the aforesaid I do not think that it is convenient and appropriate to order consolidation at this late stage. The respondent has taken a *point in limine* that the appellant failed to furnish security for costs timeously as provided for by Rule 51(4) of the Magistrate's Court Rules. The rule only exempts the State or an indigent appellant who is assisted by the Legal Aid Board.

11. The appellant argued that he could not furnish security timeously as he had no funds. He refers to his bank statement as at 10 December 2004 which reflects a debit balance of R17 638.08. What his financial position was on 28 December 2004 when he filed his notice of appeal is not known. The appellant did not state whether he is employed or not. Instead he argued in the alternative that it was not necessary for him to furnish security as the attached properties were already sold in execution. According to the record the judgment debt amounted to R15 160.00. The respondent recovered R10 716.00 from the sale in execution of the appellant's goods. The respondent did not over recover from the sale in execution.

12. The appellant further made an application for condonation for the late prosecution of the appeal or appeals. Rule 51(9) of the Magistrate Court Rules provides as follows:

"*The party noting an appeal or a cross appeal shall prosecute*

the same within such time as may be prescribed by rule of the court of appeal and, in default of such prosecution, the appeal or cross - appeal shall be deemed to have lapsed, unless the court of appeal shall see fit to make an order to the contrary."

13. Rule 50 of the Uniform Rules of Court provides as follows:

"*(1) An appeal to the court against the decision of a magistrate in a civil matter shall be prosecuted within 60 days after the notice of such appeal, and unless so prosecuted it shall be deemed to have lapsed.*

(4) (a) The appellant shall, within 40 days of noting the appeal, apply to the registrar in writing and with notice to all other parties for the assignment of a date for the hearing of the appeal and shall at the same time make available to the registrar in writing his full residential and postal addresses and the address of his attorney if he is represented..

(4)(c) Upon receipt of such an application from appellant or respondent, the appeal shall be deemed to have been duly prosecuted."

14. The application for the date of hearing of the appeal was made by the appellant on 27 September 2005, almost 6 months late. It has been held in **SA Shipping Co Ltd v Liquidators Promotors Ltd 1918 CPD 606** that the High Court has an inherent right to grant condonation where principles of justice and fairness demand it and where the reasons for non-compliance with the time limits have been explained to the satisfaction of the court.

15. In **Darries v Sheriff, Magistrate Court, Wynberg, and Another 1998 (3) SA 34 (SCA) at 40 I - 41D**, **Plewman JA** remarked as follows:

"Condonation of the non- observance of the Rules of this Court is not a mere formality (see Meintjies v H D Conbrick (Edms) Bpk 1961 (1) SA 262 (A) at 263H - 264B; Saloojee and Another NNO v Minister of Community Development 1965 (2) SA 135 (A) at 138E - F). In all cases some acceptable explanation, not only of, for example, the delay in noting an appeal, but also, where this is the case, any delay in seeking condonation, must be given. An appellant should whenever he realises that he has not complied with a Rule of Court apply for condonation as soon as possible. See ***Commissioner for Inland Revenue v Burger 1956 (4) SA 446 (A) at 449F - H****;* ***Meintjies's case supra at 264B; Saloojee's case supra at 138H****. Nor should it simply be assumed that, where non-compliance was due entirely to the neglect of the appellant's attorney, condonation will be granted. See* ***Saloojee's case supra at 141B-G****. In applications of this sort the appellant's prospects of success are in general an important though not decisive consideration. When application is made for condonation it is advisable that the petition should set forth briefly and succinctly such essential information as may enable the court to assess the appellant's prospects of success. See* ***Meintjies's case supra at 265C-E; Rennie v Kamby Farms (Pty) Ltd 1989 (2) SA 124 (A) at 131E-F; Moraliswani v Mamili 1989 (4) SA 1 (A) at 10E****. But appellant's prospect of success is but one of the factors relevant to the exercise of the Court's discretion, unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation obviously unworthy of consideration. Where non- observance of the Rules has been flagrant and gross an application for condonation should not be granted, whatever the prospects of*

success might be." See also **United Plant Hire (Pty) Ltd 1976 (1) SA 717 AD at 720 E-G.**

16. **Heher JA** in **Uitenhage Transitional Local Council v SA Revenue Services 2004(1) SA 292 (SCA) at 297 H** laid down what should be averred in an affidavit in support of condonation:

"*(6) one would have hoped that the many admonitions concerning what is required of an applicant in a condonation application would be trite knowledge among practitioners who are entrusted with the preparation of appeals to this Court: condonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the non-compliance is time-related then the date, duration and extent of any obstacle on which reliance is place must be spelled out.*"

17. In *casu* the affidavit of the appellant's attorney which was filed made no mention of what transpired from 4 July 2005 until 27 September 2005 when the application for a date of hearing of the appeal was made. He also stated that the appeal could not be prosecuted timeously probably because the appellant lacked funds. The appellant himself did not mention this.

18. We, however, directed Counsel for the appellant to argue the merits of the appeal so as to enable the Court to weigh or assess the appellant's probable prospects of success with all the other relevant circumstances in the case.

19. Counsel for the appellant argued that the default judgment granted on 31 October 2003 was void *ab origine* in that it was granted prematurely. It appears from the Magistrate's reasons for judgment that when this judgment was granted the appellant’s notice of intention to defend and his plea were not filed at Court. The appellant merely states that the notice and plea were faxed to the clerk of the court. It is the duty of the appellant to serve and file his notices and pleadings in a manner provided by the rules of Court.(See **Rule 1 of Uniform Rules of Court)**

20. It was further argued that the respondent had actually abandoned the default judgment that he obtained on 31 October 2003. It, however, appeared from the record that this is not true. What happened is that there were negotiations between the two sets of attorneys. The respondent’s attorney requested the appellant’s then attorney to furnish him with a letter containing settlement proposals whereafter he would consider consenting to the rescission of the judgment if the settlement proposals were acceptable. The appellant’s attorney failed to deliver the said letter to the respondent but instead informed the respondents that he did not have further instructions from the appellant and may take the necessary steps to protect the respondent’s interests. The respondent then enrolled the matter for hearing on 10 March 2004. On this day the appellant failed to attend court and default judgment was granted against him.

21. The appellant has not incorporated in his papers before us the notice of intention to defend and/or the plea which he avers should have been in the court file when default

judgment was granted against him on 31 October 2003. The only document to be found was a letter dated 18 November 2003 signed by the appellant and addressed to the Clerk of the Court Springbok. In this letter, the appellant refers to yet another letter which was probably a covering letter to his alleged plea to the applicant's summons. On 18 November 2003 the Magistrate of Springbok wrote "*Letter not attached W/E must be executed*". The "W/E" stands for Warrant of Execution. When we asked why the letter which was referred as a pleading was missing from this application, Mr Pieterse, for the appellant, submitted most surprisingly that it was not necessary for the "pleading" to be on the file. This attitude sums up appellant's case. There was therefore nothing to draw the Magistrate's attention to the fact that respondent's action was being opposed. I am of the view that the appellant failed to satisfy this court that judgment was erroneously granted against him on 31 October 2003.

22. Rule 49 of the Magistrates Court Rules provides as follows:

"*(1) A party to proceedings in which a default judgment has been given, or any person affected by such judgment, may within 20 days after obtaining knowledge of the judgment serve and file an application to court, on notice to all parties to the proceedings, for a rescission or variation of the judgment and the court may, upon good cause shown or if it is satisfied that there is good reason to do so, rescind or vary the default judgment on such terms as it may deem fit.*

(3) Where an application for rescission of a default judgment is made by a defendant against whom the judgment was

granted, who wishes to defend the proceedings, the application must be supported by an affidavit setting out the reasons for the defendant's absence or default and the grounds of the defendant's defence to the claim."

In **De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd 1994(4) SA 705 (E) at 708 G Jones J** said:

"(*T)he wilful or negligent or blameless nature of the defendant's default now becomes one of the various considerations which the courts will take into account in the exercise of their discretion to determine whether or not good cause is shown.*"

23. The appellant's attorney stated in his Founding affidavit in the application to rescind the judgment that the appellant could not attend court on 10 March 2004 because his car got stuck somewhere between Kakamas and Pofadder. He, howeve, did not state whether the appellant was on his way to court or to another destination when this happened. He does not state what time it was. What is surprising is that the appellant did not make this averment in his affidavit to show that he was not in wilful default. He took no trouble to notify the respondent's attorney of his predicament and to negotiate a postponement. It would have taken a mere phone call to achieve this. The respondent's attorneys stated that the appellant only contacted him on 3 June 2004 after a Warrant of Execution was served on him. The delay from 10 March 2004 to 3 June 2004 remains unexplained.

24. One of the appellant's grounds of defence to the respondent's claim is that he withheld his rental payment because the respondent interfered in his tenancy by disapproving of his choice of music and guests. This can never be construed as a valid or bona fide defence to the respondent's claim. This implies that appellant would have paid his rental if his landlord did not so interfere.

25. **Jones J** in **De Witts' case (**supra) went on to say at 771 E-I:

"*An application for rescission is never simply an enquiry whether or not to penalise a party for failure to follow the rules*

and procedures laid down for civil proceeding in our courts. The question is, rather, whether or not the explanation for the default and any accompanying conduct by the defaulter, be it wilful or negligent or otherwise, gives rise to the probable inference that there is no bona fide defence and hence that the application for rescission is not bona fide. The magistrate's discretion to rescind the judgments of his court is therefore primarily designed to enable him to do justice between the parties. He should exercise that discretion by balancing the interests of the parties... He should also do his best to advance the good administration of justice. In the present context this involves weighing the need, on the one hand, to uphold the judgments of the courts which are properly taken in accordance with accepted procedures and, on the other hand, the need to prevent the possible injustice of a judgment being executed where it should never have been taken in the first place, particularly where it is taken in a party's absence without evidence and without his defence having been raised and heard." See also **Harris v Absa Bank Ltd t/a Volkskas 2006 (4) SA 527 (T) at 530**

27. I cannot find any reason for the appellant's failure to attend court on 10 March 2004. I can also not find any valid ground of defence to the respondent's claim. The appellant's application for the condonation of the late payment of security and late prosecution of the appeal cannot be condoned. The prospects of success on the merits of this appeal fail to save this as they are insubstantial and for this reason the appeal must fail.

28. In the second matter, Case No: 651/04, as already discussed I find that the appeal is not properly before us and stands to be struck from the roll with costs.

I therefore make the following order

1. Case No:2303/03

(a) Condonation for late prosecution of the appeal is refused;

(b) The appeal (on the merits) is dismissed with costs.

2 Case No: 651/04 the appeal is struck from the roll with costs.

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FE MOKGOHLOA
ACTING JUDGE
NORTHERN CAPE DIVISION

I concur

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FD KGOMO
JUDGE PRESIDENT
NORTHERN CAPE DIVISION

For the Appellant	: *Adv. R.J. Pieterse*	Instructed by Elliott, Maris, Wilmans & Hay
For the Respondent	: *Adv. J.G. van Niekerk*	Instructed by Haarhoffs Inc.