

Reportable:	YES / <u>NO</u>
Circulate to Judges:	<u>YES</u> / NO
Circulate to Magistrates:	YES / <u>NO</u>
Circulate to Regional Magistrates:	YES / <u>NO</u>



IN THE NORTH WEST HIGH COURT, MAFIKENG

CASE NO: 273/2015

In the matter between:

**NEW VENTURE MINING INVESTMENT
HOLDINGS (PTY) LTD**

Applicant

and

**ANDRE PETRUS DU PREEZ N.O
WANDA DU PREEZ N.O
ANDRE PETRUS DU PREEZ N.O
DAPHINE DU PREEZ N.O**

1st Respondent
2nd Respondent
3rd Respondent
4th Respondent

DATE OF HEARING : 18 MAY 2017

DATE OF JUDGMENT : 19 MAY 2017

COUNSEL FOR THE APPLICANT : MR. MATSIMELA

COUNSEL FOR THE RESPONDENT : ADV. PJS SMIT

JUDGMENT

HENDRICKS J

Introduction

- [1] This is an opposed application for rescission of a default judgment granted on 26th November 2015 by Diaje AJ against the Applicant. The Notice of Motion was filed with the Office of the Registrar on the 06th September 2016, more than nine (9) months later. The Applicant indicated in the Notice of Motion that it intended that the matter be heard on the 22nd September 2016. A notice of intention to oppose was filed on 20th September 2016. An application for allocation of a date of hearing was served and filed on the 07th December 2016. The answering affidavit was initially e-mailed to the Applicant and later filed and served on the 09th January 2017. On the 13 February 2017 the Registrar of this Court allocated the date of 18th May 2017 for the hearing of this opposed application. This application was set down by the Applicants on 01 March 2017.
- [2] The Applicant failed to file its heads of argument as required in terms of Practice Direction 14 of this Court. The Respondents filed and served their heads of argument on the 16th May 2017 in which they raise amongst others as a point *in limine*, the non-compliance by the Applicant with the prescripts of Practice Direction 14 of this Court. On the morning of 18th May 2017 the Applicant applied for a postponement of the matter from the bar raising *inter alia* that it needs time to consider the application for condonation by the Respondents for the late filing of

their answering affidavit. After listening to the arguments presented, I reserved judgment on the postponement application.

[3] Practice Direction No 14 reads thus:

**“FILING AND SERVICE OF HEADS OF ARGUMENT IN
MATTERS OTHER THAN CIVIL OR CRIMINAL APPEALS”**

1. *In all matters except trials and civil or criminal appeals which have been set down for hearing or argument on a specific date by the Registrar, heads of argument as defined in paragraph 6 of Practice Direction No.13 and clearly indicating the names of the parties, the number of the case and the date upon which it is set down on the roll shall be delivered by counsel appearing on behalf of the parties as follows:*

- (a) by the delivery of an appropriate number of copies of the heads of argument of plaintiff, applicant or excipient (as the case may be) to the General Office of the office of the Registrar, not less than fifteen (15) days before the date upon which the matter is to be heard;*
- (b) by like delivery of the heads of argument of defendant or respondent (as the case may be) in like manner not less than ten (10) days before the said date;*
- (c) by the exchange between the parties’ attorneys of a copy of each party’s heads of argument on the dates on which same are filed in the General Office of the office of the Registrar.*

2. *The Judge President may in any particular instance determine earlier or later dates than those prescribed in this notice.*
3. *In all applications where the Respondent has only filed a notice of intention to oppose but no answering affidavit has been filed, it will not be necessary for heads of argument to be filed unless the presiding Judge directs otherwise.”*

[4] Practice Direction No 28 states:

**“NON-COMPLIANCE WITH THE PROVISIONS OF THE RULES
OF COURT OR PRACTICE DIRECTIONS**

1. *Save in exceptional cases or cases of urgency, compliance with the provisions of the Rules or Practice Directions will be insisted upon.*
2. *Non-compliance may result in the Court making such order against the defaulting party as it deems fit, including the case being struck off the roll and/or by a special order as to costs, unless in each such instance condonation of such failure is sought on good cause shown on written application, and is granted.”*

[5] In **AC Buildings Services CC v PB & A Personnel Consultants (Pty) Ltd** 1992 (2) SA 55 (T) the following is stated:

“The appellant noted an appeal against an order of a magistrate that the appellant pay the respondent R3 000.

The appellant has failed to file heads of argument and to appear, and the respondent has asked us to decide the appeal on the merits. Rule 50(9) of the Uniform Rules of Court provides for such heads to be filed by an appellant not less than 15 days before the appeal is heard. Respondent's counsel has not been able to refer us to any case in which the merits of an appeal were considered in the absence of the appellant's heads and of the appellant. Indeed, we have been referred to no case where a request such as that made by the respondent in this matter was considered.

The usual order in the present circumstances appears to be that the appeal is struck off the roll. In my view this is what we ought to do. The appellant's failure to file heads and to appear amounts to its having chosen not to proceed with the appeal. Appellant is thus in effect now not appealing and there is no appeal for us to hear. I would strike the appeal off the roll with costs.”

[6] In **S v Van Der Westhuizen** 2009 (2) SACR 350 (SCA) the following is stated:

“[13] It was necessary for the appellant to explain not only why heads of argument were not filed and why there was no appearance, but also the delay in bringing an application for condonation. There is no attempt by the appellant to explain why it took him until 14 June 2006 to bring an application for

condonation when he was alerted to all the problems surrounding his appeal during March 2006.

[14] The appellant's explanation for the non-compliance with the rules amounts to no explanation at all. In addition, there are no prospects of success on appeal."

[7] In **S v Nel** 2000 (1) SACR 295 (W) the following is stated:

"Mr Ackermann told me, as I understood him, that there is a practice in this Court that if counsel appears for the appellant at the hearing of an appeal where a postponement is sought to apply for condonation, as in the circumstances of this matter, the appeal will be postponed and not struck from the roll.

I know of no such practice. If it exists, the sooner it is desisted from the better. In any event I do not propose to follow it if it exists. Postponements of criminal appeals are not to be held for the asking. The need for the postponement and how the need arose must be properly explained.

I think the Court should demonstrate its disapproval of the attorney's lackadaisical handling of this matter, which shows complete disregard for the law and the State, by ordering that he should not be entitled to recover any costs from any person whatsoever in respect of today's appearance.

I asked Mr Ackermann whether he wished to make any submissions in regard to the costs order which I propose to make and he said he had no submissions to make.

Order

Accordingly I propose the following order:

- 1. The appeal is hereby struck from the roll.*
- 2. The appellant's attorney shall not be entitled to recover any costs from any person in respect of today's hearing."*

[8] In **S v Mohlathe** 2000 (2) SACR 530 (SCA) the following is stated:

"[7] ...

(a) ...

(b) ... The advocate, to whom I shall refer as 'K', accepted the brief and on 13 January 1998 personally visited the appellant in prison to obtain his power of attorney to prosecute the appeal.

[10] ... In all the circumstances the inference is overwhelming that the late filing of the heads of argument was solely the fault of K.

*[11] As was pointed out by **Steyn CJ in Saloojee and Another NNO v Minister of Community Development** 1965 (2) SA 135 (A) at 141C,*

'there is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered'.

He warned:

'To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations ad misericordiam should not be allowed to become an invitation to laxity.'

But the present is not a case in which the client simply left it to the practitioner to get on with the case. On the contrary, the appellant's family took a keen and active interest in the prosecution of the appeal and kept themselves informed of developments. There was nothing they could have done to avoid the heads being late. In the event, the heads were filed 13 days out of time and eight days prior to the hearing. No doubt this would have caused much inconvenience, but the delay was not inordinate. Similarly, there was a delay in filing the application for condonation, but this, too, was no more than a matter of a few days. This does not seem to me to be an instance where the dilatoriness of the practitioner is to be visited on the client."

- [9] Postponements are not merely for the asking or taking. A party applying for a postponement is seeking an indulgence from the court. Save in exceptional circumstances a formal application on notice supported by affidavit should be made for a postponement. Good cause need to be shown for the interference with the opponent's procedural right to proceed and with the general interest of justice in having the matter finalised. This was not done in the present case. See: **Persadh v General Motors South Africa (Pty) Ltd** 2006 (1) SA 455 (SECLD).

[10] In **Vollenhoven v Hoenson and Mills** 1970 (2) SA 368 (C) it was stated:

“It is in the public interest that litigation should be disposed of as speedily as possible. There is such a thing as the tyranny of litigation, and in many cases it cannot be said that the mere offer of paying wasted costs would adequately compensate a respondent for any inconvenience suffered as a result of the granting of a postponement.”

See also: **Baron Camilo Agasim – Pereira of Fulwood v Wertheim Becker** [2006] 4 All SA 43 (E).

[11] The provisions of both Practice Directions 14 and 28 are peremptory. Unlike the Applicant, the Respondents filed heads of argument. This matter is therefore not ripe for hearing due to the non-compliance by the Applicant. I considered whether a postponement should be granted but decided against it.

[12] It is incumbent upon practitioners to adhere to the Practice Directions and Rules of Court. Non-compliance with the aforementioned will not be easily condoned unless good grounds exist for such non-compliance. Same is absent in this matter. I am of the view that this matter should therefore be struck from the roll with costs.

ORDER

[13] Consequently, the following order is made:

- (1) The matter is struck from the roll.
- (ii) The Applicant is ordered to pay the wasted costs.

**R D HENDRICKS
JUDGE OF THE HIGH COURT,
NORTH WEST DIVISION, MAHIKENG**