

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

REPUBLIC OF SOUTH AFRICA



CASE NO: A3099/15

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

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SIGNATURE

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DATE

In the matter between:

NI-DA TRANSPORT (PTY) LTD

Appellant

And

MACSTEEL SERVICE CENTRES SA (PTY) LTD

Respondent

J U D G M E N T

MASHILE J:

[1] On 21 February 2014, the court *a quo* declined to grant an application by the Appellant for the postponement of the trial. Having refused the postponement, the court *a quo* subsequently gave judgment against the Appellant. It was that judgment that became the subject of a rescission application on 4 March 2015. During the hearing, the court *a quo* upheld two points *in limine* raised by the Respondent and dismissed the rescission application.

[2] The court *a quo* dismissed the application for the rescission of the judgment granted on 21 February 2014 under the following factual background:

2.1 The trial was set down to be heard on 21 February 2014. Mr Ferdinand Labuschagne (“Labuschagne”), the then legal representative of the Appellant, fell sick with pneumonia on 20 February 2014 and was booked off from work for 20 and 21 February 2014;

2.2 Consequently, Mr Marais (“Marais”) from a firm of attorneys in Vereeniging that acted as correspondents for Labuschagne could not proceed with the trial on 21 February 2014 as he was not conversant with the facts of the matter;

2.3 Labuschagne instructed Marais to seek a postponement of the matter. Marais was to advance, as a reason for such postponement,

Labuschagne's illness that resulted in him being booked off for 20 and 21 February 2014 and was to present a medical certificate to court as proof;

2.4 Marais presented the medical certificate and argued that the matter be postponed as a result of Labuschagne's inability to attend court due to his illness. The court *a quo* considered the reasons presented in favour of the postponement, ~~however~~ and declined to grant the postponement. Since there was no one who could continue with the trial on behalf of the Appellant, the court proceeded to enter judgment against the Appellant;

2.5 Labuschagne apparently stopped practicing as an attorney on 31 August 2014 and took up new employment with the Appellant on 1 September 2014;

2.6 For the sake of completeness, I mention that the trial was set down for hearing on 2 September 2014. This was for the determination of the quantum of compensation payable to the Respondent, liability having been disposed of by the judgment granted against the Appellant on 21 February 2014. On 2 September 2014 the trial was postponed to 18 September 2014.

2.7 It was not until 5 September 2014 during a telephonic conversation with Marais that he discovered that the merits of the Respondent's claim had

been disposed of on 21 February 2014 and that the only outstanding issue was the quantum of the Respondent's claim;

2.7 On 18 September 2014 and having had regard to the circumstances under which judgment was granted against the Appellant, the court *a quo* granted a postponement and afforded the Appellant an opportunity to launch a rescission application on or before 2 October 2014;

2.8 The Appellant complied with the order of the court *a quo* and the hearing of the rescission application ultimately came before the court *a quo* on 4 March 2015. At the commencement of the hearing of the rescission application, the Respondent took two preliminary points and they were that:

2.8.1 The founding affidavit did not meet the requirements of a valid affidavit as are contained in Regulation 3(1) of the Regulations made under section 10 of the Justices of the Peace and Commissioners of Oath Act, Act No. 16 of 1963, which are the regulations which govern the administration of an oath or affirmation. The Regulation stipulates that the deponent shall sign the declaration in the presence of the commissioner of oaths;

2.8.2 The replying affidavit was out of time as it did not comply with the provisions of the Magistrates' Court Rule 55(1)(g) and (h) dealing with time lines for the filing of opposing and replying affidavits. It being common cause that the Respondent served its answering affidavit timeously, the replying affidavit was served on 14 November 2014 instead of 6 November 2014 and was not accompanied by an application for condonation enlightening the court of the circumstances surrounding the late filing of the application.

2.9 The court *a quo* upheld the two preliminary points which meant of course that the notice of application for the rescission application was not supported by a founding affidavit and that there was no replying affidavit to the answering affidavit;

2.10 An inexorable upshot of the upholding of the two points was that the rescission application had to fail. The Appellant is now appealing to this court to have the decision of the court *a quo* overturned on the grounds that:

2.10.1 The court *a quo* erred by not accepting the illness of Labuschagne, the legal representative of the Appellant, as a legitimate excuse for the postponement of the matter on 21 February 2014. The court *a quo*'s refusal to postpone the

matter was despite the fact that Labuschagne's correspondent, Marais, presented a medical certificate to court as proof that he (Labuschagne) was booked off for 20 and 21 February 2014 and could therefore not attend court;

2.10.2 The court *a quo* erred by accepting that there was a legal basis to deny the postponement of the case on 21 February 2014;

2.10.3 The court *a quo* erred by granting default judgment against the Appellant on 21 February 2014;

2.10.4 The court *a quo* erred on 4 March 2015 by upholding the Respondent's point *in limine* that the Appellant's replying affidavit, which was filed 16 days after the filing of the opposing affidavit could not be considered , more specifically, in light of the fact that there was no formal objection or notice in terms of Rule 60(A) against the filing of such opposing affidavit;

2.10.5 the court *a quo* erred on 4 March 2015 by finding that the Appellant's founding affidavit was not properly before court and could not be considered in light of the fact that seemingly the deponent signed on 29 September 2014 while

seemingly the commissioner of oaths signed on 26 September 2014 and thereby making the commissioning of it invalid;

2.10.6 The court *a quo* erred by not accepting that the difference in dates was a mere typing error;

2.10.7 The court *a quo* erred by dismissing the Appellant's application for rescission of judgment with costs on 4 March 2015.

[3] The Respondent submitted that the court *a quo* was right in ignoring the replying affidavit and finding that no proper founding affidavit was delivered in support of the rescission application. In the event that this Court finds that the court *a quo* erred in not accepting the founding affidavit, the Respondent will maintain that the replying affidavit should not be taken into account. The rescission application must be adjudicated by having regard to the founding affidavit and the answering affidavit only.

[4] The Respondent submitted further that if this Court is to determine the appeal on the basis that there was no replying affidavit, the Appellant failed to satisfy the elements of good cause, comprising willful default, a *bona fide* defence and *bona fides*.

- [5] Lastly, the Respondent submitted that the issue of the postponement is so interwoven with the rescission such that the matter can be dispensed with by having regard to the rescission application.
- [6] The issues for determination are to establish whether or not the court *a quo*:
- 6.1 Was correct in refusing to grant the Applicant postponement on account of Labuschagne's sudden inability to attend court on account of illness which was due to him being booked off for 20 and 21 February 2014;
- 6.2 Was correct to uphold the two preliminary points raised by the Respondents on 4 March 2015.
- [7] I shall deal with the issues in the order they appear above. The Respondent has pointed out that insofar as the court *a quo*'s refusal to postpone the matter on 21 February 2014 is concerned, the Appellant has failed to comply with Magistrate's Court Rule 51(8)(b), which provides that "*a statement referred to in Rule 51(8)(a) shall become part of the record before the appeal court.*"
- [8] Strangely the Appellant did not contest this allegation in any manner. The wording of the Rule is peremptory, which is normally an indication that lack of observance should attract intolerance from the court. In consequence, the court accepts as a fact that indeed the Appellant did not do so. For that reason, this

Court cannot consider that issue. In the circumstances the Court accepts that the postponement application was correctly dismissed by the court *a quo*.

[9] Having said that and for what it is worth, the Court holds the view that having regard to the fact that Labuschagne fell ill the day before he was to appear before in the court *a quo* in Vereeniging and that he was booked off for both days, the court was wrong in not granting the postponement. The facts in this matter are different from a situation where one falls sick three or two weeks before the hearing. In this latter instance, a party can still arrange to have a different legal representative to appear. It can hardly be stated that the Appellant had sufficient time to arrange to be represented by an alternative legal representative in this instance. In this regard, **Cosmetic Distributing Co. v Industrial Products 1944 WLD 201** is ‘on all fours’ with the current case. Contrast the **Cosmetic** case supra with **CENTIRUGO A G v FIRESTONE (SA) LTD 1969 (3) SA 318 (T)** where the court dismissed a postponement application on the basis that the applicant had sufficient time to arrange for other legal representation, but failed to do so.

[10] However in the present circumstances because the Appellant failed to comply with Magistrate’s Court Rule 51(8)(b), the court *a quo* cannot be faulted for the dismissal of the application for postponement on 21 February 2014, I turn to consider the second issue, which is twofold – the founding affidavit does not comply with the pertinent Regulations and that the replying affidavit was out of

time in that it was filed after 16 days instead of on or before 10 days from the date of the filing of the Respondent's answering affidavit.

[11] It is common cause that the replying affidavit was filed outside of the time prescribed in Magistrate's Court Rule 55(1)(g) and (h) being sixteen days after due date and that the replying affidavit was not accompanied by a condonation application when it was finally filed. It is convenient to deal first with the non-compliance relating to the replying affidavit. In this regard, the Appellant has submitted that the court *a quo* erred by not considering the replying affidavit exclusively on the ground that it was filed out of time.

[12] In an endeavor to shore up that view, the Appellant referred this Court to the case of **PANGBOURNE PROPERTIES LTD v PULSE MOVING CC AND ANOTHER** 2013 (3) SA 140 GSJ where this Court was seized with the same question but in the context of the high court. I shall revert to this case below but for now, it should suffice to state that the facts in that matter are distinguishable from the instant case.

[13] Insofar as condonation of the late filing of the replying affidavit is concerned, the Appellant asserted that a condonation application was not necessary because the Respondent had failed to invoke the procedure laid down in Magistrate's Court Rule 60A. That being the case, the late filing was obliquely condoned. In this respect it is instructive to cite Magistrate's Court Rule 60A(1), which stipulates:

“A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside.”

[14] Magistrates’ Court Rule 60(5)(a) provides that:

“Any time limit prescribed by these rules, except the period prescribed in 51(3) and (6), may at any time, whether before or after the expiry of the period limited, be extended –

- (i) By the written consent of the opposite party;
- (ii) If such consent is refused, then by the court on application and on such terms as to costs and otherwise as it may deem fit.

[15] In the **Pangbourne** case *supra*, the court stated that where a party is dealing with the late filing of an affidavit by another, such party ought to utilize Uniform Court Rule 30A. The Respondent has submitted that the **Pangbourne** case *supra* must be differentiated from the current for various reasons.

[16] Some of the reasons referred to are that Rule 60(5) of the Magistrate’s Court Rules prescribe an exact procedure to which parties ought to adhere insofar as extension of time limits are concerned. It is precisely for that reason that the Rule is so dictatorial that it ought to be satisfied before a court can be charged with the requisite jurisdiction to adjudicate upon a condonation application.

**Premier Music Saloon and another v Loggie Bros 1948 (2) SA 421 (N);
Kismet Cycle Works (Pty) Ltd v Abrahamson Ltd 1961 (3) SA 33 T**

- [17] The innate power of the high court to protect and regulate its own process and the Magistrate's Courts' limitations imposed by legislation drew the court's attention in **Kondlo v Eastern Cape Development Corporation [2014] 2 All SA 328 (ECM)** where it articulated the subject in the following terms:

"[42] With respect, I do not believe the judgments referred to support such a proposition. Whereas the High Court has a wide and general power of condonation under Rule 27 of the High Court Rules, the Magistrates' Court's power of condonation can only be exercised in the circumstances and in the manner prescribed by a particular rule, and only within the four corners of that specific rule. Reliance on High Court judgments in the exercise of its discretionary powers by a Magistrates' Court to order condonation can therefore be misleading and misplaced, and I do not believe the judgments referred to by the learned authors constitute authority for the proposition that the Magistrates' Court have any powers of condonation of form or substance of the Rules."

- [18] Accordingly, the court's reference to Uniform Rule of Court 30A in the **Pangbourne** case must be appreciated in the context of the High Court's exercise of its inherent power to control and protect its process as outlined in the **Kondlo** case *supra*. In short, that power cannot, as a result of what is delineated in legislation, be extended to Magistrates' Court. The Appellant's reference to

the **Pangbourne** case *supra* is therefore misguided and stands to be rejected. The court *a quo*, was in the result correct to refuse to accept the replying affidavit as its late filing was neither condoned by the Respondent nor buttressed by a condonation application

[19] I agree with Counsel for the Respondent that once this Court resolves to exclude the replying affidavit, the rescission application can be decided by reference only to the founding and the answering affidavits. Insofar as failure of the founding affidavit to comply with Regulation 3(1) or of the regulations governing the administration of an oath or affirmation, which provides that the deponent shall sign the declaration in the presence of the commissioner of oaths is concerned, the Appellant argues that the court *a quo* should have ruled that the regulation is directory and accepted that the discrepancy in the dates of signature by the commissioner of oaths and the deponent was a mere typing error.

[20] The peremptory nature of the Regulations persists even if one determines the issue in terms of Regulation 4(1) as the Appellant does. Regulation 4(1) of the administering of an oath or affirmation provides:

“4.1 Below the deponent’s signature or mark the commissioner of oaths shall certify that the deponent has acknowledged that he knows and understands the contents of the declaration and shall state the manner, place and **date** of taking the declaration.”

The peremptory nature of the regulation is indicated by the use of the word, 'shall'. Regulation 3(1) too uses the same word to deliver the same message.

[21] The Appellant's contention that the court *a quo* should have accepted the explanation contained in the replying affidavit would probably hold if the affidavit were part of the papers before this Court. Now that this Court, like the court *a quo*, has excluded it, the explanation describing the circumstances under which the discrepancy of the dates came about is inaccessible to this Court, and the founding affidavit must be what it purports to be. Accordingly, on the face of it, the commissioner of oaths signed it on 26 September 2014 while the deponent appended his signature on 29 September 2014, three days later.

[22] Taking the founding affidavit as is, it is defective because it does not comply with the requirements for the making of valid affidavits as contained in Regulations 3(1) and 4(1) of the Administration of an Oath or Affirmation. I differ sharply with the Appellant's assertion that the Regulations are merely directory. It is beyond my comprehension why, on the face of such strongly worded regulations, any person would venture to argue that they are not peremptory. The dates of 26 and 29 September 2014 shown as dates on which the commissioner of oaths and the deponent respectively signed the affidavit manifestly expose the invalidity of the founding affidavit.

[23] In the absence of the founding and replying affidavits, **PLASCON-EVANS PAINTS LTD V VAN RIEBEECK PAINTS (PTY) LTD 1984 (3) SA 623 (A)** finds

application. The matter will therefore be determined on facts as contained in the answering affidavit. Since there is no founding affidavit supporting the rescission application, this Court must shut its eyes to the reasons furnished by the Appellant why he failed to attend court on 21 February 2014. Similarly, there is no good cause for the rescission of the judgment in the application.

[24] For the above reason I see no need to consider any of the elements of good cause because they are not part of this application. In the result, grounds 1, 2 and 3 are dismissed merely on a technical basis – that the reasons for the court *a quo*'s ruling are not part of the appeal record due to the Appellant's failure to comply with Magistrates' Court Rule 51(8)(b). With regard to the other grounds, they too fail because of the legal findings that the court has made in this judgment.

[25] Against that background I make the following order:

1. The decision of the court *a quo* is upheld and the appeal is dismissed with costs.

B A MASHILE

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree,

S K HASSIM

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances:

For the Appellant: Mr Marais

Instructed by: H W Smith & Marais

For the Respondent: Adv de Beer

Instructed by: Whalley Van der Linth Inc

Date of hearing: 02 February 2016

Date of Judgment: 30 March 2016