

IN THE HIGH COURT OF SOUTH AFRICA  
(NORTH GAUTENG HIGH COURT, PRETORIA)

Case No: A834/2009

In the matter between:

1/4/2011

THE MINISTER OF SFATY AND SECURITY

APPELLANT

DELETE WHICHEVER IS NOT APPLICABLE (Defendant in the court a quo)

(1) REPORTABLE: YES/NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED.

And

2011-04-01

DATE

SIGNATURE

L. D. MASHIYA

RESPONDENT

(Plaintiff in the court a quo)

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JUDGMENT

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MAVUNDLA, J;

- [1] The respondent issued summons at the magistrate court in the district of Highveld Ridge held at Evander under case number 4048/2007 on 30 May 2007. The claim was for damages, against the 1st defendant, who being vicariously liable, for payment of the sum of R92, 567, 71 in respect of special

damages arising from an alleged assault upon him by the 2<sup>nd</sup> and 3<sup>rd</sup> defendant.

- [2] The summons was duly served upon the State Attorney on 20 August 2007. There was no appearance to defend entered on behalf of the defendants. On the 8 November 2007 default judgment in the amount of R42 567, 71 together with interest at 15.5% per annum plus attorney and client costs was granted against the defendants.
- [3] The plaintiff, who I shall henceforth refer to as the appellant on 10 May 2009 brought an application for the condonation of the late filing of the application for rescission of the judgment of 8 November 2007 in terms of Rule 60(5). The magistrate dismissed this application with costs to be taxed on attorney and client scale. The appellant is appealing this latter decision.
- [4] The following is common cause: The plaintiff remitted a letter of demand dated 22 January 2007 to the Provincial Commissioner Mpumalanga as required in terms of Act 40 of 2007. The

Provincial Commissioner of Mpumalanga responded per letter dated 15 May 2007 advising that the matter has been referred to the State Attorney Pretoria and will be attended to by Mr. B Mlangeni whose reference number is 2286/2007/Z50.

[5] Mr. Mlangeni, directed a letter dated 23 October 2007 to the Provincial Commissioner of Mpumalanga inquiring whether summons was served at their offices. The respondent's attorney forwarded copies of previous correspondence from his offices to the State Attorney regarding this matter per letter dated 17 December 2008. In response to this letter the State Attorney stated that their original file cannot be traced, nor is it reflected on the list of files that were being handled by Mr. Mlangeni, which required urgent attention, and advising of the fact that judgment was obtained on 8 November 2007. Mr. Mlangeni resigned from the 1<sup>st</sup> defendant's employ at the end of May 2008.

[6] The offices of the State Attorney were in disarray and no trace of the file pertaining to this matter could be traced. As late as

during December 2008 and January 2009 the respondent's attorneys of record were requested to supply the State Attorney's offices with copies of the pleadings in this matter and informed that it could not be found in the list of files that were handled by Mr. Mlangeni and handed over to Mr. T Chauke who took over the former's files.

- [7] It is common cause that the magistrate in his judgment dismissing the application for condonation found that Mr. Mlangeni on 25 March 2008 inquired from the clerk of the court in Evender whether judgment was granted or not. The clerk of the court, on 2 April 2008 responded to Mr. Mlangeni's inquiry, and advised that judgment was granted on 8 November 2007. The magistrate accepted that it may be so that the current attorney may have only come to know during January 2009 of the fact that judgment was granted in November 2007. The magistrate concluded that that does not negate that the offices of the State Attorney was made aware of the judgment on 2 April 2008. The magistrate further accepted the fact that the State Attorney's offices were in disarray as the result, *inter alia*,

of Mr. Mlangeni's resignation. He further found that there was no explanation why Mr. Mlangeni did not bring the application for rescission within 20 days as required by the rules. The magistrate further found that the offices of the State Attorney "had been at fault to which no bona fide excuse could be or has been offered."

[8] It needs mention that there was appearance on behalf of the respondent during the hearing of the appeal, although an affidavit opposing the application for rescission was filed. I have however not lost sight of the respondent's opposing affidavit.

[9] *In casu*, Rule 49 of the Magistrate's Court Act No 32 of 1944 requires that an application for rescission should be brought within 20 days upon becoming aware of the judgment. This Rule requires the applicant to "show good cause" or satisfy the court that there is "good reason" to rescind. In the matter of *Mutebwa v Mutebwa*<sup>1</sup> Jafta J (as he then was) referring to Rule

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<sup>1</sup> 2001 (2) SA 193 (Tk HC) at 197D-198A.

31(2)(b) stated that the Rule requires that the applicant, upon whom the *onus* rests:

- “(a) ... must give a reasonable and acceptable explanation for his/ her default;
- (b) ... must prove that the application for rescission is *bona fide* and not made with the intention of merely delaying plaintiff's claim; and
- (c) ... must show that he/ she has a *bona fide* defence to the plaintiff's claim.” *Vide Mnandi Property Development CC v Benmore Development CC*<sup>2</sup>.

[10] Jafta J (as he then was) in the same matter (*supra*) also cited with approval the matter of *Sanderson Technitool v Intermenua*<sup>3</sup> where Coetzee J referred to the matter of *Grant v Plumbers (Pty) Ltd*<sup>4</sup> where it was stated, *inter alia*, that: “An applicant, who claims relief under this Rule, should comply with, *inter alia*, the following requirements. His application must be *bona fide* and not made with the intention of merely delaying plaintiff's

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<sup>2</sup> 1999 (4) SA 462 (WLD) at 465 A-B.

<sup>3</sup> 1980 (4) SA 573 (W) at 575H-576A.

<sup>4</sup> 1949 (2) SA 470 (O) at 476.

claim. It is sufficient if he makes out a *prima facie* defence in the sense of setting out averments, which if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case or produce evidence that the probabilities are actually in his favour. See also *Brown v Chapman* 1938 TPD 320 at 325."

- [11] The question of condonation is a matter of the discretion of Court. The court must have regard to all the circumstances and the explanation proffered for the default and the delay in taking appropriate steps to comply with the Rules of the Court. The applicant must put at least something which will sufficiently justify the court in holding in the exercise of its discretion that sufficient cause has been shown justifying the relief sought to be granted. The court need not have regard to all the circumstances if it is of the view that there was gross negligence on the part of the applicant. However, to find *bona fides*, it is not necessary for an applicant to satisfy the court that he has a good defence. It suffices if he *bona fide* believes that

he has a good defence which requires to be pursued in court;  
*vide Evander Catereres (Pty) Ltd v Potgieter*.<sup>5</sup>

[12] In the matter of *Cavalinias v Claude Neon Lights S.A. Ltd*<sup>6</sup> the Appeal Court said:

“ In Silber’s case it was also decided that even if good cause is shown it is still in the discretion of the magistrate to grant or refuse relief (p. 352).

As this is a case involving fault of the litigant’s attorney it is necessary to consider the cases bearing on that. In *Rose and Another v Alpha Secretaries Ltd*<sup>7</sup> Tindal JA said:

‘ It seems to me undesirable to attempt to frame a comprehensive test as to the effect of an attorney’s negligence on his client’s prospects of obtaining relief under sub-rule (2), or to lay down that a certain degree of negligence will debar the client and another degree will not. It is preferable to say that the court will consider all the circumstances of the particular case in deciding whether the applicant has shown something which justifies the court in holding in the exercise of its discretion that sufficient cause for granting relief has been shown.”

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<sup>5</sup> 1970 (3) SA 312 (TPD) at 316G-317A.

<sup>6</sup> 1965 (2) SA 649 at G-652 A.

<sup>7</sup> 1947 (4) SA 511 (AD) at p.519.

[13] Remissness on the part of the attorney, in certain circumstances will not be condoned, *vide Sallojee and Another NNO v Minister of Community Development*<sup>8</sup>. However, a weak explanation seen against a strong defence may be accepted and condoned by the Court, *vide Smith v Saambou Bank Ltd*<sup>9</sup>.

[14] In exercising its discretion, the Court must not only look at the explanation regarding the remissness, but also the degree of non-compliance, the strength of the applicant's case and its prospects of success on trial, and balance the respective interest of the parties; *vide National Union of Metalworkers of SA v Jumbo Products CC*<sup>10</sup>; *Beria v Raphaely-Weiner and Others*<sup>11</sup>; *Ferriera v Nthsingila*<sup>12</sup>; *Dariies v Sheriff, Magistrate's Court, Wynberg, And Another*<sup>13</sup>.

[15] *In casu*, the reason for the defendants in not having entered an appearance to defend is attributable to firstly the fact that

<sup>8</sup> 1965 (2) SA 135 (A) at 141C-H.

<sup>9</sup> 2002 (6) SA 346 (SECLD) at 349B-E.

<sup>10</sup> 1996 (4) SA 735 (AD) at 741F-G.

<sup>11</sup> 1997 (4) SA 332 (SCA) at 337 D-E.

<sup>12</sup> 1990 (4) SA 271 (A) AT 281c-282A.

<sup>13</sup> 1998 (3) SA 34 (SCA) at 41 C-D.

Mlangeni who was handling the matter subsequently resigned from the State Attorney's office. The resignation was during May 2008. The second reason is the disarray that prevailed at the offices of the State Attorney during that period. Thirdly the attorney who took over that matter subsequent to Mlangeni's resignation only came to know of the default judgment during January 2009.

[16] In the matter of *Rennie v Kamby Farm (Pty) Ltd*<sup>14</sup> the Appeal Court said: "It has been pointed out (*Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein, and Others* 1985 (4) SA 773 (A) at 789C) that the Court is bound to make an assessment of the petitioner's prospects of success as one of the factors relevant to the exercise of the Court's discretion unless the cumulative effect of the other factors in the case is such as to render the application for condonation obviously unworthy of consideration.." vide *Mnandi Property Development CC v Benmore at Development*.<sup>15</sup>

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<sup>14</sup> 1989 (2) SA 124 (A) at 131H.

<sup>15</sup> (*supra* 465 A-I).

[17] *In casu*, the defence proffered on behalf of the appellant during the application for condonation, was that the respondent was on the relevant day of the alleged assault physically assaulting and verbally abusing his girlfriend. When the third defendant attempted to ascertain what the reason for the altercation was, the respondent, for no apparent and justifiable reason punched the 3<sup>rd</sup> defendant on his face with his fist. He had to be subdued as he also resisted arrested.

[18] Indeed the police would be within the parameters of the law when they have to use reasonable force to subdue a person resisting lawful arrest. It would seem, in my view, that the defendants had a *bona fide* defence, which on trial might succeed. It however does not appear from the reasons of the magistrate in refusing the application for condonation, that it was taken into consideration. The stronger the prospect of success of the defence, taken together with all other factors, should be a strong influence to sway the balance of the scale in favour of the applicant.

[19] Once the magistrate accepted that there was disarray on the offices of the State Attorney as the result of Mr. Mlangeni's resignation, the magistrate misdirected himself in holding that there was no good explanation for not bringing the application much earlier. Once the magistrate accepted the explanation that, Mr. Mlangeni resigned and still expects an explanation why Mlangeni did not bring the application earlier was, in my view, a misdirection. Whatever Mr. Mlangeni did or did not do could only be gleaned from the missing file. This explanation that the file is missing is a good explanation in my view.

[20] The State Attorney per letter dated 8 January 2009 annexure SMD 6 paginated page 34 informed the respondent's attorney that the file has not as yet been traced and requesting whether any evidence had been led and requesting copies of pleadings. The affidavit relied upon for the application was deposed to and commissioned on 30 January 2009. There is merit in the submission of Mr. Moosa that once the knowledge of the judgment came to the attention of the State Attorney in January 2009; steps were immediately taken to bring the application

within 20 days. The rest of the earlier period can be ascribed to the fact that the file could not be traced and Mr. Mlangeni had resigned. In my view, in these circumstances, the magistrate should have exercised his discretion in favour of the appellant.

[21] Further, it was quite correctly submitted on behalf of the appellant that the magistrate in awarding costs on attorney and client scale in the default judgment misdirected himself because that was not pleaded in the respondent's case. Further, there was no notice to the appellant that such costs order would be sought against it. I am in agreement with this submission

[22] In the premises I am of the view that the appeal should be upheld. Since there was no appearance on behalf of the respondent to oppose the appeal, I am of the view that the appellant should carry its own costs.

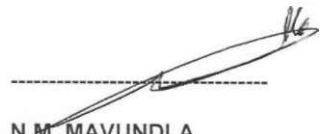
[23] In the result I propose that the following order should be made:

ORDER

1. That the appeal is upheld and the order of the magistrate

In the district Highveld Ridge held at Evander delivered on 7 May 2009 under case number 4048/2007 is set aside and substituted with the order set herein below under order 3.

2. That each party shall bear its own costs of this appeal;
3. "1. That condonation for the late filing of the application for rescission is granted.  
2. That the default judgment granted against the defendants on 8 May 2007 is set aside;  
3. That the costs of this application, shall be costs in the cause."



N.M. MAVUNDLA  
JUDGE OF THE HIGH COURT

I agree and it is so ordered



R. D. CLAASSEN

**JUDGE OF THE HIGH COURT**

**DATE HEARD : 29 MARCH 2011.**

**JUDGMENT DELIVERED : 1 APRIL 2011.**

**APPELLANT ATT : STATE ATTORNEYS OFFICE PRETORIA**

**APPELLANT ADV : MR. E.I MOOSA**

**RESPONDANT ATT : D.D. MASANGO**

**RESPONDANT ADV : NO APPEARANCE**