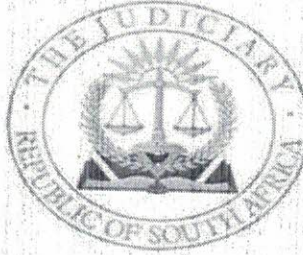
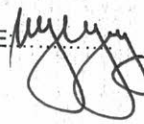


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO PROVINCIAL DIVISION, POLOKWANE)

CASE NO: HCA24/2017

(1)	REPORTABLE: YES /NO
(2)	OF INTEREST TO THE JUDGES: YES /NO
(3)	REVISED
DATE: 20/6/19	
SIGNATURE: 	

In the matter between:

AZWIHANGWISI PATRICK MAGADALELA

APPELLANT

And

FRANS GELDENHYS PROKURERS

RESPONDENT

JUDGMENT

MF KGANYAGO J

- [1] The appellant Mr. Azwihangwisi Patrick Magadagela was the client of the respondent who is a practicing attorney. The appellant has given the respondent instructions to institute a legal action against sheriff of the lower court Soutpansberg district Louis Trichardt. The parties had an agreement on how the respondent's professional fees will be paid.
- [2] The respondent proceeded to issue summons against the sheriff. The sheriff defended the appellant's action. The appellant was not successful with his action against the sheriff. According to the respondent, appellant failed to honour his agreement of paying him his full fees. That resulted in the respondent issuing summons in the magistrate court against the appellant claiming an amount of R85 000-00 for arrear instalment from 20th October 2008 to date of issue of summons.
- [3] The summons was duly served on the appellant. Upon receipt of the summons the appellant wrote a letter to the respondent requesting a breakdown of how he arrived at the amount of R85 000-00. The respondent did not respond to his request. On the 2nd June 2010 the respondent proceeded to obtain a default judgment against the appellant for the full amount claimed.

- [4] The respondent issued a warrant of execution of which on the 14th December 2010 he received a *nulla bona* return. The appellant alleges that he became aware of the default judgment on the 20th January 2015 when he consulted his present attorneys. The respondent alleges that he wrote a letter to the appellant on the 7th February 2014 notifying him of the default order and *nulla bona* return. The respondent contends that the appellant became aware of the default order on the 14th December 2010 alternatively on the 7th February 2014.
- [5] On the 2nd February 2015, the appellant launched an application for rescission of the default judgment obtained by the respondent. The respondent opposed the appellant's application for rescission of judgment. On receipt of the respondent's answering affidavit, the appellant filed his replying affidavit together with an application for leave to supplement his founding affidavit. The respondent filed a notice of application to strike out certain paragraphs in the appellant's replying affidavit. The respondent further filed two notices in terms of Rule 60A (2) (b) and Rule 60A (1) read with Rule 60A (2) (c) of the Magistrate's Courts Rules of Court (the Rules).

- [6] All the applications were set down to be heard on the same date. On the date of hearing of the applications, the respondent raised a point *in limine* from the bar in terms of Rule 29(4) of the Rules applying that the appellant's application for rescission of default judgment be dismissed on the basis that no application for condonation for the late filing of the application for rescission was made by the appellant.
- [7] The presiding magistrate upheld the respondent's point *in limine* and dismissed the appellant's application for rescission. It is this order that the appellant is appealing against. After the appellant has launched his appeal, he failed to prosecute it within the prescribed time limits, and that resulted in his appeal lapsing. The appellant has filed a detailed application for re-instatement of the appeal in terms of Rule 51(a) of the Rules. The respondent did not oppose that application.
- [8] It is trite that the factors to be considered in an application for condonation for failure to comply with the time frames specified in the rules are the degree of lateness, explanation for the delay, the degree of transgression of the rules concerned and prospects of success. The appellant in my view has adequately dealt with all the factors and his

failure to prosecute the appeal within the prescribed time period is condoned. The appellant's appeal is accordingly reinstated.

- [9] The appellant in the supplementary affidavit which he is seeking the leave of the court to file is introducing new grounds for rescission of default judgment which were not raised in his founding affidavit. In **Milne NO v Fabric House (Pty) Ltd 1957 (3) SA 63 (N)** at 64 H 65A Holmes J said:

"...the court has discretion, in a proper case to admit further affidavits. Various attempts have been made to formulate some rule, or to define the circumstances in which such affidavits will be permitted. Some decisions speak of "exceptional circumstances". Others speak of "substantial grounds" – as to which see Civil Practice of the Superior Courts by Herbstein and Van Winsen page 459. In my view it is neither necessary nor desirable to say more than the court has a discretion, to be exercised judicially upon a consideration of the facts of each case, and that basically it is a question of fairness to both parties."

- [10]. Fairness to both parties is a key factor to be determined in permitting further affidavits to be filed. The appellant had at no stage abandoned his application for leave to file a supplementary affidavit. In his supplementary affidavit he was seeking to introduce new evidence which might have had a bearing on the whole application in that one of

the ground for rescission was that the default judgment was *void ab origine*. The appellant was now relying on section 36(1)(b) of Magistrate Court Act 32 of 1944. It is trite that for rescission of judgment based on section 36 of the Magistrate Court Act, the applicant has a period of one year within which to bring the application from the date he /she became aware of judgment or order.

- [11] The court *a quo* was therefore duty bound to first determine whether the supplementary affidavit was relevant to the proceedings, and also be satisfied that no prejudice is caused by the filing of the supplementary affidavit which cannot be remedied by an appropriate cost order. In my view, the court *a quo* erred in hearing the respondent's point *in limine* without first determining the appellant's application for leave to file a supplementary affidavit to his founding affidavit. On this point alone the appellant's appeal stands to succeed.
- [12] The respondent has filed an application to struck out some of the paragraphs in the appellant's replying affidavit. In terms of Rule 19(2) of the Rules, where any pleadings contain averments which are scandalous, vexatious, or irrelevant, the opposite party may within the period allowed for filing any subsequent pleading, apply for the striking

out of the matter aforesaid, and may set such application down for hearing in terms of Rule 55(1).

- [13] From the reading of Rule 19(2) it is the court that must make an order for the striking out of any portion of the pleadings. **Herbstein & Van Winsen The Civil Practice of the High Courts of South fifth edition** at page 657 state that an application to strike out matter from an affidavit should not be brought as a separate interlocutory application prior to the hearing, but should be brought as a preliminary application at the hearing of the main application.
- [14] The respondent has at no stage withdrew or abandoned his application to struck out portion of the appellant's affidavit. His application should therefore have being heard before the rescission application since the respondent was attacking the very same papers upon which the rescission application was based. Therefore, in my view the court *a quo* erred in hearing the respondent's point *in limine* before the adjudication the application to struck out. On this point also, the appeal stands to succeed.

[15] The respondent has also served the appellant with notices in terms of Rule 60A (2) (b) and Rule 60A (1) read with Rule 60A (2) (c). Rule 60A is identical to Rule 30 of the Uniform Rules of Court. These rules regulate irregular or improper step proceedings. The appellant contends that the irregular step process must be finalized by the court and if a step is found to be irregular, no other process may be embarked on prior to compliance with the court order.

[16] Rule 60A (1) provides as follows:

“(1) 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.”

[17] In **Zoutendijk v Zoutendijk 1975 (3) SA 490 (T)** it was held that Rule 30 (1) of the Uniform Rules of Court was intended to deal with a situation where a party has taken a further step in the cause and thereafter seeks to make application to set aside an irregular or improper step. In **Market Dynamics (Pty) Ltd v Groger 1984 (1) SA 152 (W)** it was held that an irregular or improper step can be said to be some act which advances the proceedings one stage nearer completion.

- [18] In terms Rule 60A (2) (b) the opponent must be given 10 days notice to remove the cause of complaint. Should the opponent fail to comply with the notice, the party who served the notice is required in terms of Rule 60A (2) (c) to deliver an application within 15 days after the expiry of the 10 days notice. Rule 60A (3) provides that after the court has heard the application and it is of the opinion that the proceedings or step is irregular or improper, it may set it aside in whole or in part, and grant leave to amend or make any such order as it deems fit. Rule 60A (4) provides that if the court makes an order in terms of Rule 60A (3), the affected party shall not take any further step in cause until that order has been complied with. The only further step the party may take is to apply for an extension of time to comply with such order.
- [19] It is clear that once a party embarks on the procedure in terms of Rule 60A, the affected party must be afforded an opportunity to remove the cause of complaint. Failure to remove the cause of complaint will result with the other party bringing an application in terms of Rule 60A (2) (c) for the necessary relief. In my view, a Rule 60A process is a procedure which is available to any party who wishes to weed out unnecessary issues in the in the opponent's papers so that the real issues can be adjudicated upon.

[20] The respondent did not at any stage withdraw or abandon his Rule 60A notices. The appellant was also not afforded an opportunity to argue whether the respondent's notices had merit or not. Rule 60A has its own remedy for failure by the opponent to comply with the complaint raised by the other party. That remedy must be fully utilized. Therefore, in my view, the court *a quo* erred in hearing the respondent point *in limine* before the procedure provided for in Rule 60A was exhausted. On this ground also the appeal stands to succeed.

ORDER

[21] In the result the following order is made:

21.1 The appellant's condonation application is granted

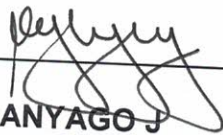
21.2 The appellant's appeal is reinstated

21.3 The appeal is upheld

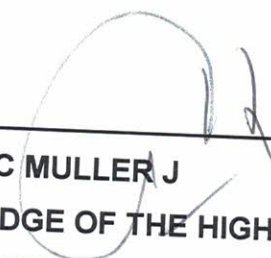
21.4 The order of the court *a quo* is set aside and substituted with the following.

"Respondent's point *in limine* is dismissed with costs".

21.5 The respondent is ordered to pay the costs of the appeal.


 MF KGANYAGO J
 JUDGE OF THE HIGH COURT OF
 SOUTH AFRICA, LIMPOPO
 DIVISION, POLOKWANE

I Agree


 GC MULLER J
 JUDGE OF THE HIGH OF SOUTH
 AFRICA, LIMPOPO
 DIVISION, POLOKWANE

APPEARANCES

- | | | |
|------------------------|---|----------------------------|
| 1. For the Appellant | : | Mr Mathivha |
| 2. Instructed by | : | Mathivha Attorneys |
| 3. For the Respondents | : | Mr Geldenhuys |
| 4. Instructed by | : | Frans Geldenhuys Attorneys |
| 5. Date of Argument | : | 10 May 2019 |
| 6. Date of Judgment | : | 20 th June 2019 |