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|---|---|
| Reportable: | YES / **NO** |
| Circulate to Judges: | YES / **NO** |
| Circulate to Magistrates: | YES / **NO** |
| Circulate to Regional Magistrates: | YES / **NO** |

**IN THE HIGH COURT OF SOUTH AFRICA**

**(NORTHERN CAPE DIVISION, KIMBERLEY)**

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| Case no: | CA&R 2/2018 |
| Date heard: | 18-02-2019 |
| Date delivered: | 17-05-2019 |

In the matter between:

**RAMMUKU JOHN SENG** Appellant

and

**EXPERATO (PTY) LTD** Respondent

*Coram: Phatshoane ADJP et O'Brien AJ*

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**JUDGMENT**

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**O'BRIEN AJ**

[1] On 9 June 2017 the Magistrate's Court sitting at Kimberley granted the following order:

*"After due consideration the court grants costs on a punitive scale de bonis propriis on an attorney and own client scale including the costs of travelling and costs of junior counsel in favour of the….. (sic)."*

[2] The respondent obtained a default judgment against the appellant on 21 May 2012 in the Kimberley Magistrate's Court under case number 15136/2012. On 24 August 2016 the default judgment was rescinded by that Court.

[3] Notwithstanding the above, the appellant, represented by NJ du Plessis & Associates Inc., filed a second rescission of judgment application under the same case number on 10 April 2017.

[4] Because of the duplicitous nature of the second application the respondent requested the appellant, through its attorneys, to withdraw the second rescission application. The appellant's attorneys were informed that the second rescission application was superfluous; had already been rescinded and that should a withdrawal of that application not be forthcoming the respondent would seek a cost order in respect of the dismissal of that application. Furthermore, the appellant's attorneys would have to pay costs *de bonis propriis* in the event of non-withdrawal.

[5] The second rescission application was improper and should have been withdrawn when the appellant's attorneys were alerted that the matter was re judicata. One would have thought it would have been the end of matter in that the appellant would withdraw the second rescission application and tender the wasted costs.

[6] Undeterred, the appellant's attorneys, having been warned, had the unmitigated temerity to persist with the second rescission application. In light of their persistence, as already alluded to, the learned Magistrate granted a punitive cost order (as set out in paragraph 1 of this judgment) *de bonis propriis* on an attorney and client scale, including the travelling costs and the cost of the employment of a junior counsel, against the appellant.

[7] However, the appellant's attorneys, out of time and without an application for condonation, filed a notice of appeal against the cost order granted by the Magistrate.

[8] What follows can only be described as a litany of errors, mistakes and downright gross negligence which exhibits conduct unbecoming of an attorney. What it also shows, is exactly the opposite of what an attorney should be doing when representing clients. Du Plessis & Associates Inc and by extension Mr N J du Plessis ("du Plessis") had a complete disregard for the court rules in a flagrant and abusive manner.

**The notice of appeal**

[9] In an attempt to recoup and enforce the cost order against N J du Plessis & Associates Inc, the respondent's attorneys addressed a letter requesting them to make payment as per the cost order. This prompted the appellant to file a notice of appeal dated 16 October 2017 which was faxed to the respondent on 17 October 2017. In terms of Rule 50(1) of the Magistrate's Court Rules a notice of appeal must be delivered within 10 (ten) days after the date of judgment appealed against. Because the judgment was handed down on 9 June 2017 the appeal should have been noted by 23 June 2017.

[10] Bearing in mind that an appeal lies against an order granted by a court and not the reasoning, it is interesting to note that one of the grounds in the appellant's notice of appeal is that the Magistrate had erred in finding that he had launched more than one rescission application. This is patently incorrect as the appellant had filed two applications for rescission of judgment. This instance is indicative of how this appeal was dealt with.

**The failure to provide security for the appeal**

[11] Under Rule 51(4) of the Magistrate's Court Rules 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 cost of appeal in the amount of R1,000.00. In cases where the State is involved or the court of appeal orders otherwise or when Legal Aid is rendered by the Legal Aid Board, no security shall be so required.

[12] During argument on appeal, the appellant's representative stated from the Bar that the necessary security for the prosecution of the appeal was provided, but no proof therefor was handed up.

**Failure to timeously prosecute the appeal**

[13] Rule 50(1) of the Uniform Rules of Court stipulates that an appeal to the court against the decision of a Magistrate in a civil matter shall be prosecuted within 60 (sixty) days after the noting of such appeal, and unless so prosecuted, it shall be deemed to have lapsed. Rule 50(4)(a) places an obligation on an appellant to apply within 40 (forty) days after noting the appeal to the registrar in writing and on 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 address and the address of his attorney, if he is represented.

[14] The appeal was noted on 16 October 2017 and would have lapsed on 11 December 2017 when calculating the 40 day period. The appellant had failed to apply for a date within that period. The sixty-day period to prosecute the appeal had lapsed on 16 January 2017. However, the appellant, on 27 July 2018 filed an application condoning the late noting and failure to prosecute the appeal.

**The correspondence**

[15] An applicant shall, when applying for a date for the hearing of an appeal, lodge two copies of the record of the lower court's proceedings with the Registrar.

[16] In a letter dated 30 January 2018, the respondent's attorneys informed the appellant's attorneys of their failure to file the record of appeal. The record was eventually served on the respondent's attorneys on 31 January 2018.

The appellant's attorneys were advised that the appeal had lapsed for failure to prosecute and that the delivery of the appeal record is a nullity. The respondent reserved its client's rights. As at 31 January 2018 no application for condonation for non-compliance with the Rules of Court or failure of the appellant to prosecute and/or reinstate the appeal had been served and filed.

[17] Instead of addressing the issues raised in the letter, the appellant's attorneys recorded in an e-mail addressed to the respondent's attorneys that any attempt by the respondent to execute the judgment would be improper and bad in law.

[18] Approximately six months later, following the filing of the record of appeal, the appellant applied for condonation of the late noting and prosecution of the appeal. In his application for condonation, Du Plessis goes to great lengths in explaining how the default judgment was granted against the appellant by the Kimberley Magistrate's Court, which is situated more than a few hundred kilometres from where the appellant is ordinarily resident and employed; and that there was non-compliance with the provisions of the National Credit Act, 34 of 2005.

[19] Du Plessis goes into much detail to explain the already rescinded judgment but fails to address the rescission itself. His reason for doing so is not hard to surmise. In my view, this appeal is a ruse which is more about the cost order granted against the appellant's firm than the judgment itself.

[20] What is further remarkable is that it is not the appellant who deposed to the affidavit seeking condonation. Mr Du Plessis is the deponent. There is a dearth of explanation why it took a lengthy period to file the application. An application for condonation must clearly set out the reasons for the delay and the prospects of success. Neither the appellant nor Du Plessis dealt with these aspects.

[21] The above notwithstanding, there is a more fundamental reason why the appeal cannot succeed. Du Plessis states that he has the requisite *locus standi* to file the appeal. This was gainsaid by the respondent who explained that Du Plessis does not have the necessary mandate to prosecute the appeal. The respondent filed a notice in terms of rule 7 of the Uniform Rules calling upon Du Plessis to provide proof of his authority to bring the appeal. The respondent argues that the appellant, who is a consumer, has no interest in the appeal. Furthermore, the appellant did not file a confirmatory affidavit concerning the merits of the appeal.

[22] During argument, Du Plessis could not provide any proof that he has a power of attorney to proceed with the appeal and to bring an application for condonation regarding the lapse of the appeal. The application for condonation to note and prosecute the appeal should be dismissed. It lacks clarity, and information regarding the degree of lateness and prospects of success. Likewise, no proper authority as far as it was requested in terms of the rule, was provided.

**The declarator**

[23] On 24 April 2018 the respondent brought an interlocutory application for a declarator that the appeal be dismissed. In the alternative, the respondent asked for an order that the appellant deliver an application for condonation for non-compliance with the Rules of court. The declarator was issued out of this court on 4 May 2018 and the application for condonation by the appellant was only brought on 27 July 2018. This shows a lack of understanding, or willingness to prosecute the appeal. Because of the order I propose it is not necessary to decide whether to grant a declarator or not.

**Summary**

[24] Du Plessis has flagrantly disregarded the Rules of Court. Furthermore, there are numerous delays in the prosecution of this appeal unaccounted for. The appeal was solely pursued on the basis that a cost order *de bonis propriis* was awarded against Mr Du Plessis's firm.

[25] The Registrar of this Court is ordered to submit a copy of this case and judgment to the Legal Practice Council of the Eastern Cape for further investigation.

[26] On the issue of costs, regard being had to the conduct of the appellant's attorneys, this is a case where the Court should mark its displeasure by means on an appropriate costs order. There was no basis for NJ Du Plessis & Associates Inc to bring a second rescission application. It was forewarned that the default judgment was already rescinded, yet it persisted in unnecessary litigation without an authority and out of time. I make the following order.

**Order**

1. **THE APPEAL IS DISMISSED WITH COSTS ON AN ATTORNEY AND CLIENT SCALE TO BE PAID BY THE FIRM OF ATTORNEYS NJ DU PLESSIS & ASSOCIATES INC;**

2. **THE REGISTRAR OF THIS COURT IS DIRECTED TO FORWARD A COPY OF THIS JUDGMENT TO THE LEGAL PRACTICE COUNCIL OF THE EASTERN CAPE FOR AN INVESTIGATION INTO THE CONDUCT OF MR NJ DU PLESSIS OF NJ DU PLESSIS & ASSOCIATES INC.**

**O'BRIEN AJ**

Northern Cape High Court, Kimberley

I concur.

**PHATSHOANE, ADJP**

Northern Cape High Court, Kimberley

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| For the Appellant: | Mr N J Du Plessis |
| Instructed by: | Lulama Lobi Inc. |
| For the Respondent: | Adv R J Groenewaldt |
| Instructed by: | Duncan & Rothman |