

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No. : A6/2013

In the matter between:-

GOUS VERTUE & ASSOCIATES

First Applicant

C KARAMANOLIS & ASSOCIATES

Second Applicant

and

GMA FINANCE CC

Respondent

CORAM:

RAMPAL, J *et* MOLOI, J

ENROLLED FOR:

17 MARCH 2014

JUDGMENT BY:

RAMPAL, J

DELIVERED ON:

20 MARCH 2014

[1] This is an application for leave to appeal. The judgment under attack was delivered on 13 June 2013. I concurred in the judgment written by Zietsman AJ. The respondent opposes the application.

[2] Besides the aforesaid application, the first and the second applicants also apply for condonation for the late filing of their application for leave to appeal. The respondent opposes the

second application as well. By agreement the written instead of oral argument was used to adjudicate the matter.

- [3] The first applicant was the third respondent and the second applicant the second respondent during the hearing of the appeal. The then first respondent, Ms Elsie Leonard, is not before us in these current proceedings. The present respondent was the appellant. I shall refer to the applicants as the defendants and the respondent as the plaintiff in these proceedings.
- [4] In the summons the plaintiff alleged that the Bloemfontein District Court had jurisdiction to hear the action. However the plaintiff did not make specific averments in its particulars of claim in support of that bold allegation.
- [5] The first defendant, Ms Elsie Leonard, was the principal debtor of the plaintiff. She was originally indebted to the plaintiff in the capital amount of R50 000.00 in respect of money lent and advanced in Kimberley on 17 November 2008. She resided at 36 Broadway Street, Beaconsfield, Kimberley in the Northern Cape.
- [6] The second defendant was C. Karamanolis & Associates, a law-firm of attorneys practising as such at 1A-C Rooper Street, Kimberley in the Northern Cape. The first defendant, seemingly worked as an estate agent and chose the second defendant's address as her *domicilium citandi et executandi* - *vide* plaintiff's annexure "a".

- [7] The third defendant was Gous Vertue & Associates, a law-firm of attorneys practising as such at 15 President Steyn Avenue, Westdene, Bloemfontein in the Free State.
- [8] The second and the third defendants, in other words, the two law-firms, specially pleaded that the Bloemfontein District Court had no jurisdiction over the legal *persona* of either of them. They alleged that the whole cause of action, as contemplated in section 28(1)(d) of the Magistrates Court Act 32 of 1944, did not arise out of the jurisdiction of the Bloemfontein District Court.
- [9] The plaintiff reacted to the special plea of the second and the third defendants in two ways. Firstly the plaintiff replicated. In its replication it averred that the Bloemfontein District Court had jurisdiction to entertain the matter on the grounds that:
- the third defendant carried on business in Bloemfontein;
 - the principal business of the third defendant was conducted from the magisterial area of the court;
 - the third defendant was the proprietor of the second defendant;
 - the second defendant, who carried on business in Kimberley beyond the magisterial area of the Bloemfontein District Court, constituted a branch office of the third defendant;
 - the second defendant's general administration and operational superintendence were conducted together with those of the third defendant from the principal place of the third defendant in Bloemfontein.

- [10] In the premise the plaintiff replicatively pleaded that the Bloemfontein District Court had jurisdiction over the second defendant as well, seeing that the second defendant was operationally a mere satellite of the third defendant. The replication was filed on 13 November 2011.
- [11] In the second place the plaintiff reacted to the special plea by applying for an amendment of its particulars of claim. The plaintiff filed notice of the intended amendment on 15 March 2012. The essence of the averments, which the plaintiff sought to introduce in the particulars of claim, was substantially the same as that of the averments introduced by way of the replication. They concerned the question of jurisdiction.
- [12] The defendants objected to the plaintiff's proposed amendment. Although the defendants opposed the plaintiff's application, their grounds of opposition or objection were not explicitly spelt out in the opposing affidavit, which was deposed to by their attorney, Mr C.L.H. Vertue. He merely stated that the opposition was founded on a legal argument, which would be orally presented in court in due course.
- [13] The application in terms of rule 55A(4) Magistrates Court Rules, was initially enrolled for argument on Thursday, 3 May 2012. On 5 September 2012 the district magistrate court dismissed the application, but reserved the costs. Lamentably, the *ex tempore* judgment of the magistrate did not form part of the appeal record.

[14] On 1 October 2012 and before the proceedings were terminated, the plaintiff filed notice of appeal. Among others, one of the grounds of its appeal was that the learned district magistrate erred in finding that the proposed amendment would oust the jurisdiction of the Bloemfontein District Court. If that was indeed the finding of the district magistrate, it was patently and logically unsound. Therefore it was plainly incorrect. The real purpose of the proposed amendment was the very opposite of such a finding. The amendment was intended to confer and not to oust the jurisdiction of the Bloemfontein District Court.

[15] The question before us on appeal was whether the district court order was appealable or not. On behalf of the applicant, in other words the plaintiff, it was submitted that the order effectively terminated the proceedings in the court below. Because it did, so the argument went, it immediately became appealable. On behalf of the respondent, in other words the defendants, it was submitted that the order was not appealable, because the matter was still pending before the district magistrate court at the time the notice of appeal was filed. Counsel for the defendant also contended that since the order had not finally disposed of a substantial part of the issue, it was not appealable. The submission was that the order and the application from which it stemmed were interlocutory in nature.

- [16] Zietsman AJ found for the appellant. I concurred. The reasons were given in the judgment. We abide by it.
- [17] The respondents were aggrieved, hence the current application for leave to appeal. The notice of their intention to appeal was filed on 27 August 2013. The main ground of appeal was that we erred in finding that the midstream order granted by the district magistrate was appealable.
- [18] Since Zietsman AJ was no longer acting as a judge, I invited Moloi J to consider the defendants' application for leave to appeal, as well as the condonation application, together with me. We decided to deal with the latter first.
- [19] The judgment was delivered on 13 June 2013, as I have already indicated. As is the custom the attorneys were telephonically notified in advance that the judgment would be delivered on that particular day. Obviously nobody from the defendants' office attended to note the court order, let alone to obtain a copy of the judgment.
- [20] The deponent of the defendants basically advanced a few reasons as to why their application for leave to appeal was belatedly filed on 27 August 2013, some six weeks out of time.
- [21] At paragraph 9.2 Mr Vertue stated:

“Judgment was delivered on 13 June in the Motion Court. I was not present in court on that day as I was attending to matters outside of Bloemfontein.”

He did not say precisely when he left and returned to his office. Where he was only he knew. A prudent attorney would have sent a clerk to note such an important order. He did nothing. He did not precisely say when he received the order, let alone the full text of the judgment.

[22] At paragraph 9.6 Mr Vertue stated:

“Mr Gous was at that stage hunting in Vivo, and could not be contacted at all. Out of necessity, I had to defer the decision to apply for leave to appeal at that stage until such time as we could discuss the matter properly.”

Precisely where his partner, Mr Gous, was hunting, he did not say. When his partner left Bloemfontein, was not disclosed. Although his partner returned from a hunting spree on 10 July 2013, it took the two partners five more days to discuss an urgent matter. By then thirty two days had gone by since the critical date on which the appeal judgment was delivered. All these acts of omission created the impression that they did not regard the outcome of the appeal as an important matter.

[23] They then decided to obtain legal opinion on the prospects of success. We have no idea as to when they approached counsel for an opinion. What we do know, is that the unnamed counsel wasted no time. He immediately advised then that

they had some reasonable prospects of success. The advice notwithstanding, they, out of abundance for caution, approached a senior counsel for a second opinion.

[24] Again it appeared nowhere in the supporting affidavit as to precisely when the unidentified senior counsel was briefed. We were given to understand that the senior and junior counsels discussed the matter on 16 August 2013, some 64 days since the judgment was delivered. Four more days went by. No explanation was given. Four more days later the senior counsel confirmed the earlier opinion of a junior counsel. On 22 August 2013 they had consultation with the junior counsel. They then provided him with the reasons for the delay. Four more days went by again. The condonation application was then drafted and filed on 27 August 2013, some 75 days since the appeal judgment.

[25] During all that inordinate delay, not a single attempt was made to communicate with the opposite party, at least, in order to ask for indulgence, as is the custom among attorneys. Meanwhile, their opponent had gone to the trouble of drawing up its bill of costs and disbursement for taxation. Needless to say that those unnecessary steps would probably have been avoided if only the defendants had courteously intimated to the plaintiff that they intended appealing against the judgment. The drawing of the bill was simply occasioned by the remissness and carelessness of the defendants. It must be borne in mind that the defendants are not lay litigants. They are lawyers. They know or ought to know the rules of

engagement. They must have known that their neglect to take appropriate steps in accordance with the rules would have adverse consequences. Their actions tend to indicate that they were reckless as to whether such consequences ensued or not.

[26] It appeared to me that the defendants never had any serious and honest intention to appeal or to apply for leave to appeal. I get the impression that it was the service of the notice of taxation of the plaintiffs' bill of costs which precipitated their belated application. Their affidavit in support of the condonation application was fraught with vagueness, inexcusable remissness and pathetic acts of neglect.

[27] At paragraph 8 of his affidavit, Mr C.L.H. Vertue clearly appreciated that the defendants had shown no good cause to justify condonation of their long delay. He said:

"I endeavour to set out the reasons for the delay below, and for insofar as the court may consider this to be tenuous; heads of argument will be filed on the applicants' behalf before the hearing of the matter in relation to the merits. I pray that those arguments raised be incorporated herein, so that they may compensate for a belief that the delay has not been adequately explained."

[28] At paragraph 1.3 of their heads of argument the following was stated by their counsel:

"The respondent has also required the filing of a condonation application by the applicants in that the notice of intention to seek

leave to appeal was filed belatedly. The application for condonation is vehemently opposed. It will be dealt with in the conclusion of these heads.”

- [29] At paragraph 7.6 Mr Grobler, counsel for the applicants, in other words the defendants, revisited the onerous task, imposed on him by Mr Vertue. He tersely commented as follows about the condonation application:

“It is submitted that a proper case is made out for condonation. The court is asked for leave to appeal to the Full Bench of this court, the costs of these proceedings to be costs in the proposed appeal.”

This terse comment in no way augmented the acute deficiencies of the defendants’ explanation. There was virtually nothing in the defendants’ heads of argument to compensate the material inadequacies of their explanation for the delay. Their reasons for their delay were indeed very tenuous. This much their deponent realised. The material defects were not cured by the promised legal argument as he had hoped.

- [30] In my view no good cause has been shown to have the defendants’ six week delay condoned. To make matters worse, the defendants’ deponent, Mr Vertue, had the audacity to be prescriptive to us as judges. He wrote:

“The respondent has not and cannot be prejudiced by the late filing of this application for leave to appeal. The interest of

justice moreover dictates that the issue be dealt with decisively between the parties and given especially that the learned Judges had ordered the applicants to pay the costs associated with the appeal. The cost account has since been served upon the applicants for taxation and amount to approximately R100 000.00 which amount is almost double the claimed amount in the main proceedings.”

[31] It has been said, on more than one occasion, that a condonation application should not be regarded as a mere formality which is there for the free asking –

- **Reeders v Jacobsz** 1942 AD 395 at 396;
- **Estate Woolf v Johns** 1968 (4) SA 492 (A) at 497B – F;
- **Uitenhage TLC v SARS** 2004 (1) SA 292 (SCA) at 297 H – J.

[32] It is my considered opinion that if we were to condone the defendants’ delay, their unsatisfactory explanation notwithstanding, then our decision would not have been compatible with proper exercise of judicial discretion – **Melane v Santam Insurance Co Ltd** 1962 (4) SA 531 (A). I would, therefore, be inclined to refuse to have the delay condoned.

[33] In view of the aforesaid conclusion, it follows, as a matter of logic, that the defendants’ application for leave to appeal cannot be considered. It has to be struck off. No proper case has been made out in the condonation application to enable us to consider their application for leave to appeal.

It follows, therefore, that the application for leave to appeal falls to be struck off with the effect that the judgment appealed against remains effective - **S v Senkhane** 2011 (2) SACR 493 (SCA).

[34] There remains one aspect to comment about. It is procedural in nature. The two defendants applied for leave to appeal to the full bench of this division. The court whose appeal judgment aggrieved the defendants consisted of two judges as earlier pointed out. Such two member appeal bench constituted and represented a full bench. Procedurally no appeal lies from the appeal decision of a bench of two to a bench of three in the same division.

[35] Accordingly I propose the following order:

35.1 The application of the defendants for condonation is dismissed with costs.

35.2 The application of the defendants for leave to appeal is thus struck off the roll with costs.

M. H. RAMPAL, J

I concur and it is so ordered.

K.J. MOLOI, J

On behalf of defendant: Adv S. Grobler
Instructed by:
Gous Vertue & Associates
BLOEMFONTEIN

On behalf of respondent: Adv N.F. de Jager
Instructed by:
Honey Attorneys
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