

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

Appeal No. : A133/2013

In the appeal between:-

C C VAN ZYL

Appellant

and

OLD MUTUAL LIFE ASSURANCE COMPANY

Respondent

CORAM:

MOCUMIE, J *et* LEKALE, J

HEARD ON:

21 OCTOBER 2013

DELIVERED ON:

31 OCTOBER 2013

JUDGMENT

MOCUMIE, J

- [1] This is an appeal against the whole judgment of the magistrate court, Bloemfontein. The respondent (plaintiff in the court *a quo*) instituted action against the appellant (defendant in the court *a quo*) for payment of an amount of R64 204.89 based on the *conditio indebiti*, alleging that it had paid the proceeds of four life assurance policies incorrectly to the appellant, whilst it was under a *bona fide*, reasonable but mistaken impression that such payment were due to the

appellant whereas there was no legal or natural obligation to make such payments to the appellant.

Points in limine

- [2] The respondent raised two points in limine. The first was the late lodging and prosecution of the appeal in breach of Rule 50(7)(c) of the Uniform Rules of Court¹. The second, the late filing of documents by the appellant.
- [3] The appellant filed its Notice of Appeal on 22 March 2012 and allegedly experienced difficulties in procuring the mechanical recording of the proceedings in the court a quo. The respondent took it upon itself to address this problem. On 25 September 2012 it provided the appellant with the record of the trial proceedings which were recorded by the respondent's instructing attorney. Due to some technical problems the appellant experienced, again, the respondent came to the appellant's rescue and had the transcription done and made available to him. The appellant's attorney of record confirmed receipt of the transcribed record on 24 January 2013. Despite being in possession of the transcribed

¹ Rule 50(4) of the Uniform Rules of Court provide:

“(4) (a) The appellant shall, within 40 days of noting the appeal, apply to the registrar in writing and with 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 addresses and the address of his attorney if he is represented.

(b) In the absence of such an application by the appellant, the respondent may at any time before the expiry of the period of 60 days referred to in subrule (1) apply for a date of hearing in like manner.

(c) Upon receipt of such an application from appellant or respondent, the appeal shall be deemed to have been duly prosecuted.

[Subrule (4) substituted by GN R2164 of 2 October 1987, by GN R2642 of 27 November 1987 and by GN R185 of 2 February 1990.]

record since January 2013, the appellant only delivered his notice in terms of R50(4) on 14 June 2013. Way outside the prescribed period of ninety days.

- [4] In its application for condonation for the late filing of the appeal, the appellant failed to give any clear and plausible explanation why it took so long to process the appeal except what Mr Louw proffered from the bar. In his submission Mr Louw was constrained to concede that the appellant failed to set the process in motion within the prescribed period. He cited at least one reason that contributed to this failure on the appellant's part. i.e. that the magistrate who presided over the matter had lost the record. He, however, could not explain with clarity what transpired after the respondent had provided the appellant with a transcribed record. To that extent he conceded that what he submitted in Court, including the explanation of the inordinate delay after the respondent came to the appellant's rescue, was not encapsulated in the affidavit accompanying the application for condonation as is the norm in applications of this nature. It is clear from the plethora of communication between the appellant and the respondent that the submission that the delay was caused by the record getting lost was far from the truth.

- [5] The Supreme Court of Appeal recently reiterated the legal principles applicable in an application for condonation in **Detenge Holdings Pty Ltd vs Southern Sphere Mining and Development Company Ltd & Others** (619/12) [2013] ZSCA 5 (11 March 2013) at para [11] as follows:

“Factors which usually weigh with this court in considering an application for condonation include the degree of non-compliance, the explanation therefor, the importance of the case, a respondent’s interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice (per Holmes JA in *Federated Employers Fire & General Insurance Co Ltd & another v Mc Kenzie* 1969 (3) SA 360 (A) at 362F-G.)”

- [6] Apart from not disputing that the appeal was prosecuted out of time, there is simply no tangible explanation why the appellant took a year and a few months since the application was launched to prosecute the appeal. The appellant did not even deem it fit to supplement its application for condonation application of 17 July 2012 to explain exactly what had happened since the said application was launched.
- [7] In our discretion, however, we considered that the interests of justice and all the parties dictated that we proceed to hear the second leg of this application and bring the matter to finality. We thereafter proceeded to hear the second leg of the application for condonation which is whether there were prospects of success if the appeal proceeded.
- [8] Secondly, the appellant filed documents which Mr Louw submitted were relevant to the determination of this appeal, late. i.e. long after heads of arguments had been filed. Mr Van Aswegen, on behalf of the respondent submitted that the admission of such documents was highly prejudicial to

the respondent as not only had the respondent based its case on what was the appellant's case during the trial in the court a quo but also what was his case after lodging the appeal until he introduced those documents. Mr Louw was constrained to agree that the documents could safely not be admitted as these were actually only relevant during the preparations for this appeal. We deemed it fair not to admit those documents to the extent that they would have been prejudicial to the respondent and because they were really not relevant in this appeal as Mr Louw was constrained to acknowledge.

- [9] Having disposed of the two points in limine the question remained whether there were any prospects of success in this appeal. The appellant alleged that the respondent's claim prescribed on 23 February 2009 on the basis that the respondent was contacted and informed by a Ms Van Biljon, an insurance broker who testified on behalf of the appellant during the trial, that during October 2006 one of the policies was still on the appellant's profile after all policies had been surrendered. Therefore the respondent was warned then and should have been diligent in acquiring knowledge about this anomaly and taken steps to reverse it.

Prospects of success.

- [10] In addressing this second leg we deliberately did not go into the legal principles applicable to the defence of prescription to avoid going in depth into the merits of this appeal. Suffice

to state the following. The respondent alleged that it only became aware of the undue payments on 5 January 2009 when Mr Christiaan Christoffel Van Zyl of Ellisras, the correct owner of the policies, called to enquire why he was not receiving any communication on his policies from the respondent. Upon investigation, the respondent discovered that the policies were paid out to Mr Coenraad Christoffel Van Zyl of Bloemfontein, the appellant. The process of instituting action to recoup the money from him was then set in motion. Summons was thereafter issued during 2010.

- [11] The evidence that was led during the trial showed clearly that the respondent could not reasonably have had the knowledge a reasonable man could have had at the time the appellant alleged it could have. The fact that Ms Van Biljon called the respondent's Call Centre to enquire or inform the respondent about this anomaly could not reasonably have raised the respondent's eyebrows so as to send it enquiring after the matter. No evidence was led to the effect that the respondent itself was made aware. Or that this information was recorded anywhere or for that matter that the appellant or the very same Ms Van Biljon made a follow up on her report or call to confirm that either the information has been updated in that the policies have been removed from the appellant's portfolio or that the respondent as a company or one of its managers was made aware of this. Instead when this information came up on Ms Van Biljon's computer she just erased it without any further ado.

- [12] It is clear that if the real policy holder did not raise a query during January 2009 the respondent would not have picked up this anomaly. The reasons the respondent provided for this anomaly are reasonable and would never be found otherwise by any court. The appellant's turn around in this appeal that the respondent was expected to have exercised more diligence, set up some form of back up system to pick up such anomalies was not the case before the trial court and can simply not fly in the appeal. In any event the appellant is barred from raising a new issue in an appeal.
- [13] The superficial manner in which the application was prepared and the lack of attention to matters which obviously called for an explanation, taken together with the undoubted prejudice that the respondent will suffer and the non-existent prospects of success in this appeal renders it impossible the grant of condonation. The appeal ought to fail on that basis alone.
- [14] Mr Van Aswegen requested an order of costs against the appellant including travelling and subsistence costs for the respondent's Cape Town attorney. There exists no cause in equity for such a special cost order because the respondent had a Bloemfontein correspondent attorney at all material times.
- [15] In the result, the following order is granted.

ORDER

1. The application for condonation is dismissed with costs.
Costs to include costs of the lapsed appeal.
2. The applicant for condonation is ordered to pay the costs incurred by the respondent in opposing the lapsed appeal.


B.C. MOCUMIE, J

I concur.


L.J. LEKALE, J

On behalf of appellant: Adv M C Louw
Instructed by:
Stander and Partners
BLOEMFONTEIN

On behalf of respondent: Adv W A van Aswegen
Instructed by:
MacGregor Stanford Kruger
c/o Phatshoane Henney Inc
BLOEMFONTEIN

BCM/sp