

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

Appeal number: A57/2013

In the matter between:-

MOTLHAGO FLORENCE MAKOLA

Appellant

and

IMPERIAL GROUP (PTY) LTD

Respondent

CORAM:

RAMPAL, AJP *et* SEPATO, AJ

JUDGMENT BY:

RAMPAL, AJP

HEARD ON:

18 AUGUST 2013

DELIVERED ON:

21 NOVEMBER 2013

- [1] This was an appeal by the erstwhile defendant against the judgment of the district magistrate. The judgment appealed against was delivered in the Bloemfontein Magistrate Court on 12 November 2008. The respondent, who was the erstwhile plaintiff in the court *a quo* opposed the appeal.
- [2] Before us there were also two condonation applications. The first was brought by the appellant since her appeal was filed out of time. The respondent opposed the application. The second was brought by the respondent since his heads of

argument were filed out of time. The appellant did not oppose the application.

- [3] In the first place I deal with the respondent's condonation application. The respondent's heads of argument were filed out of time. They were one day late. The appellant did not oppose the respondent's application. The respondent took immediate steps to address its failure to strictly comply with the rules. Its heads of argument were filed within the shortest possible time after the expiry of the formal time-line. The one day delay caused no serious prejudice to the appellant hence the application was unopposed. I would, therefore, condone the respondent's failure to comply with the rule.
- [4] In the second place I deal with the appellant's condonation application. She breached uniform rule 50(4) and uniform rule 50(7). The appeal was filed out of time and so was the record.
- [5] In terms of court rule 27 any time period maybe extended by agreement between the parties or by the court upon application and on good cause shown. In the instant matter there was obviously no agreement between the parties for the relaxation of the provisions of rule 54 or rule 57. That being the case, we were called upon to determine whether good cause has indeed been demonstrated by the appellant.
- [6] Although a hard and fast definition of the concept of good cause cannot be formulated our courts have in a number of decisions proclaimed certain principles in terms of which a

court may exercise its discretion in favour of a party applying for condonation. In Van Wyk v Unitas Hospital (Open Democratic Advise Centre *amicus curiae*) 2008 (2) SA 472 CC at 477 A – B, the court determined:

“This Court has held that the standard for considering an application for condonation is the interests of justice. Whether it is in the interest of justice to grant condonation depends upon the facts and circumstances of each case. Factors that are relevant to this enquiry include, but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success.”

- [7] The applicable factors are inter related. In considering an application of this nature the court will take into consideration that those factors should be collectively and not disjointly considered – United Plant Hire (Pty) Ltd v Hills 1976 (1) SA 717 (A). That then is the correct approach.
- [8] Upon closer examination of the written heads and indeed during the course of oral argument it became quite apparent that the thrust of the argument revolved around only a few of those factors. Therefore I consider it unnecessary in this matter to deal with a great variety of the applicable factors. Most of those factors were not in issue, in my view.

- [9] An applicant who applies for condonation must give a full explanation for the delay. The explanation so given must cover the entire period of the delay. Moreover, the explanation given must be reasonable – Van Wyk v Unitas Hospital, *supra* at 477E – G.
- [10] At the heart of the current matter was a crucial question pertaining to the reasonableness or otherwise of the explanation offered for the delay as well as the extent and cause of such delay.
- [11] Counsel for the appellant, Mr Williams, did not really deal with the substance of the issues other than to state that the circumstances which led to the delay were set out by appellant's attorney in the supporting affidavit. On the strength of such credentials of an attorney, counsel submitted that a proper case had been made out which justified that the appellant's default be condoned.
- [12] Counsel for the respondent, Mr Groenewald, sharply differed. He argued that no such case had been made out. He argued that the appellant's explanation for the delay since the order on the merits was granted was characterised by baldness, sketchiness and vagueness. He submitted that the explanation given by the appellant fell short of the requirements as stipulated in Van Wyk v Unitas Hospital *supra*. Accordingly counsel urged us to refuse the appellant's application for condonation.

[13] I now turn to consider the appellant's case as regards the condonation application. On her behalf it was averred that after receipt of the said order Krino Transcription Services was instructed to transcribe the record of the court proceedings in the court below. However, the appellant failed to disclose the dates on which, the court order was received. That was the first critique. The lack of details concerning the date on which Krino was accordingly instructed was the second critique. The appellant's attorney further stated that on receipt of the transcribed record he discovered that the record was incomplete. Again the date on which the transcribed record was received by the attorney was amiss. This was the third critique.

[14] In an attempt to reconstruct the record or to complete the record the appellant's attorney approached the trial magistrate who promised that she would try to locate her notes. Once again the appellant failed to indicate on which date the magistrate was approached. To that extent the appellant's explanation was indeed vague. Together with the respondent's attorney the appellant's attorney again approached the trial magistrate somewhere in June 2012.

[15] Time went by. On the 27 August 2012 the appellant's attorney wrote to the respondent's attorney to enquire whether the magistrate had completed the reconstruction of the record. I was amazed. I could not understand why the appellant's attorney did not directly enquire from the magistrate instead. During September 2012 the respondent's attorney advised the

appellant's attorney that the respondent was no longer prepared to wait for the reconstruction of the record. That response was not surprising. Subsequently and on 26 October 2012 the incomplete record was served on the respondent.

[16] Almost two months later, in December 2012 the respondent's attorneys received, from the appellant's attorney, handwritten notes of the trial proceedings together with a copy of the appellant's heads of argument.

[17] On 5th March 2013 the appellant served the current condonation application on the respondent. The appellant's application was accordingly filed almost 27 months since the order appealed against was made.

[18] The appellant did not comply with the rules. She failed to give a full explanation for the delay. The explanation given did not cover the entire period of the delay. The explanation was characterised by vagueness as well as inadequate reasons for the prolonged delay – See **Van Wyk v Unitas Hospital** *supra*. Accordingly I have come to the conclusion that the explanation for the delay lacked the required measure of reasonableness and adequacy. There were several unexplained gaps between the date of the order and the date of the filing of the application. That alone, however, does not dispose of the matter.

[19] The inquiry now shifts to another important consideration, namely whether in the light of all the factors relevant to the

adjudication of this condonation application we should nonetheless exercise our discretion in favour of the grant of the application – Van Wyk v Unitas Hospital *supra* and Santam v Melanie 1962 (4) SA 531 (A). It has to be borne in mind that the enquiry was not limited to the extent and cause of the delay and the reasonableness of the explanation for the delay. Important though those factors were, there were other equally important factors which also have to be taken into account. Notwithstanding the fact that I have found in favour of the respondent as regards the inadequate explanation pertaining to the extent and cause of the delay, as well as the unreasonableness of the explanation for the delay the application cannot be merely dismissed on the strength of those grounds only. The interests of justice require more.

- [20] The case of the appellant was primarily that the court *a quo* erred in apportioning, as it did, the respective blame or degree of negligence between the two drivers. That was the primary nature of the attack mounted by way of an appeal.
- [21] Any form of delay in the prosecution of an appeal entails inevitably adverse impact on the administration of justice and on the other litigants. Although this is always the case, in this instance the respondent did not challenge the condonation application on that ground. The result is that we were in the dark as to the actual effect the delay has had on the respondent as a litigant. The issue of actual prejudice to the respondent was never raised either in its written heads of argument or during the course of oral argument on appeal.

We therefore have to accept that prejudice, in whatever form it might have manifested itself, had very minimal adverse effects on the respondent.

[22] The important issue to be raised in the intended appeal was whether the respective negligence of the two drivers was correctly assessed and the degree of negligence justly apportioned. As regards that issue I hold a very firm view, that the appellant had good prospects of success on appeal.

[23] Having carefully considered all the relevant factors applicable to this application for condonation I am inclined to think that those factors favourable to the appellant such as the good prospects of success, substantially eclipse those factors unfavourable to her. In the circumstances I am of the firm view that good cause exists which requires that the appellant's default be condoned. I would, therefore, condone the appellant's failure to comply. The interests of justice dictate that we should.

[24] On appeal before us it was argued that the court *a quo* erred in finding that the appellant was the sole cause of the collision. It was submitted that the negligent driving of the respondent's driver was the contributory cause of the collision. The respondent, however, contended that the court *a quo* was correct in its finding that the collision was caused by the exclusive negligence of the appellant. It was argued that she failed to keep a proper look-out as a result of which she failed to stop at the stop sign, failed to yield and that she attempted

to cross the path of the respondent's driver at an inopportune moment when it was dangerous to do so.

[25] Mr Williams, counsel for the appellant argued that the court *a quo* erred in finding that the respondent's driver was completely not to blame for the collision. Counsel submitted that the respondent's driver was grossly negligent in the driving of the respondent's vehicle and that such negligence was the main cause of the collision between two sedans. Therefore, counsel urged us to uphold the appeal with costs.

[26] Mr Groenewald, counsel for the respondent, differed. He argued that the court *a quo* was correct in its finding that the collision was brought about by the exclusive negligence of the appellant. Counsel submitted that the court *a quo* had committed no misdirection. Accordingly he urged us to dismiss the appeal with costs.

[27] Recognising the universal truth that motor vehicles are potentially dangerous mobile machines, the courts have formulated a body of traffic rules that seek to define the general driving precautions which a motorist is expected to observe once she/he sets such a machine in motion.

[28] To keep a proper look-out is a basic duty of a motorist – **Butt v Van den Camp** 1982 (3) SA 819 (A).

[29] To drive at a reasonable speed is another basic duty of a motorist – **Santam v Strydom** 1977 (4) SA 899 (A).

- [30] To recognise the possibility of erratic driving behaviour by other motorist(s) and to regulate his or her driving conduct in a way that would reasonably allow a practical margin for safety – **Woods v Administrator Transvaal** 1960 (1) SA 311 (T) at 314F.
- [31] To exercise reasonable care when approaching dangerous crossing in order to avoid possible collision with another car entering a through street from a side street is an important duty of a motorist – **Robinson Bros v Henderson** 1928 AD 138 on 141 – 142.
- [32] To realise that traveling on a through street gives a motorist a relative and not an absolute right of way when approaching an intersection and to have careful regard to other cars coming from side streets – **Martindale v Wolfaardt** 1940 AD 235 on 242 – 245.
- [33] To take all reasonable steps to avoid a collision as soon as it becomes evident that another motorist's conduct created a hazardous situation on the road – **Solomon v Musset & Bright** 1926 AD 427 on 443 – 444.
- [34] I now proceed to examine the findings of the court *a quo* to ascertain whether there was rational connection between them and the proven facts.

- [35] Before I do so I deem it necessary to give some description of the two streets we are here dealing with. The respondent's driver was travelling southwards in the through street. He was familiar with the street. He knew perfectly well that it was a very busy street. It has to be accepted, therefor, that he also knew that there was a service street on the eastern side of the through street which ran parallel to it. The eastern service street, as he would have known, was primarily used for commercial purposes.
- [36] Moreover, there was also another service street running parallel to the through street on the western side. This too the respondent's driver must have known. The western service street primarily fulfilled a residential purpose.
- [37] The through street was intersected by a few side streets all the way down. One of those side streets linked up Lengau Centre on the western side of through street and Hamilton on the eastern side. The side street is commonly known as Gutsche Street. It is sandwiched by a residential neighbourhood in the north and the aforesaid provincial centre for the licencing of the vehicles and drivers in the south. The scene of the collision was at that particular point where the side-street intersects the through street.
- [38] I have mentioned all those fine and descriptive details about the streets and the scene of the collision to demonstrate that the respondent's driver was driving on a very busy road and

that he knew or ought to have known the danger spots found on that road.

[39] Now I turn to the substantive merits of the appeal. The evidence clearly showed that it must have been apparent to the respondent's driver that the appellant's car did not intend to stop between the two traffic streams after it had disobeyed a stop sign. The conduct of the appellant provided warning signals that would have been evident to any reasonable driver in the position of the respondent's driver that the appellant's conduct was creating a dangerous situation. Although the respondent's driver must have observed the offending Cressida driven by the appellant for some time before the collision he took no practical, reasonable and appropriate steps, in good time, in order to avoid the collision.

[40] I am persuaded that the finding of the court *a quo* to the effect that the actions of respondent's driver were adequate in those circumstances and that he took appropriate steps to avoid the collision, constituted a material misdirection. It was a finding which, on the facts and on appeal, I cannot support.

[41] The respondent's driver was driving a sedan, a Volkswagen Caddy. He was traveling in the southerly direction and on the inner lane of a dual carriage way. Prior to the collision he was travelling at an estimated speed of 70km/h at least or 80km/h at most.

- [42] The appellant was also driving a sedan, a Nissan Cressida, she was driving from west to east. Her intention was to cross Church Street. Church Street is one of the major arteries of the traffic network in the city. It carries by far bigger volumes of traffic than the small street on which the appellant was travelling before the collision. At this particular intersection the maximum speed limit in both streets was 60km/h.
- [43] The court *a quo* found: firstly, that the respondent noticed the appellant's car at the intersection; secondly, that he saw it proceeding across the north bound traffic lanes of Church Street; thirdly, that the appellant did not stop before crossing the north-bound traffic lanes; fourthly, that there was a stop sign which required the appellant to stop before entering Church Street; fifthly that the respondent's driver expected the appellant to stop in the middle of the intersection before proceeding across the south-bound traffic lanes of Church Street; and sixthly, that the appellant did not yield, let alone stop, before entering the south bound traffic lanes of Church Street.
- [44] I find it difficult to ascertain the basis of the expectation by the respondent's driver. The danger signals were all there. It was obvious that the appellant was unlikely to yield. After all, she had just flagrantly disobeyed a stop-sign.
- [45] The evidence showed that the respondent's swerved to his left at the intersection when he realised that the appellant was not going to let him pass first. There and then the Caddy and the

Cressida collided. The point of impact could not be precisely determined. However, it was common cause that the point of impact was in one of the two south bound traffic lanes. It was also common cause that the speed limit against the respondent's driver was 60km/h. It was also undisputed that at the time of the collision the respondent's driver was travelling at an excessive speed. Moreover, it was also common cause, that the respondent's driver did not slam the brakes of his vehicle in order to avoid the accident. His evident was that he was unable to apply the brakes of his vehicle in order to avoid an accident as a result of the speed at which he was travelling.

[46] Over and above that the respondent's driver took an evasive action by swerving to the left, the same direction in which the appellant was travelling. That, in my view, was an error of judgment. It is probable, in my view, that the accident might have been narrowly avoided had the respondent taken an evasive action to the right instead of going to the left, as he did. There was a chance, however slim, that he could have succeeded in his desperate last attempt to avoid the accident. His forced move to the outer lane was doomed to fail *ab initio*.

[47] It was also undisputed that the appellant first saw the respondent's vehicle approaching the intersection from her left. At that time, so she testified, the respondent's vehicle was approximately 200 metres away from the intersection. The appellant was aware that the driver of the respondent's vehicle had a right of way at the intersection seeing that Church Street was a principal street. Furthermore, the appellant was aware

that she had to stop before she could proceed across such major street. It was her case that she indeed obeyed the stop sign before she entered Church Street.

[48] She admitted though, that after taking off from the stop sign, she did not again stop in the middle of the intersection before she proceeded further in an attempt to cross the two south-bound traffic lanes of Church Street on which the respondent's driver was traveling. According to her she reckoned that it was safe for her to cross because, as she said, the respondent's vehicle was still more than 200 meters away from her at the time.

[49] Her evidence was that the respondent's vehicle crashed into the left front wheel of her car. Her version that she stopped before she crossed the north-bound traffic lanes was false, in my view. So was her evidence that the respondent's driver was still far away at the time she moved into his path of travel. The probabilities strongly suggest that she failed to yield before she entered the inner lane of the south bound traffic stream precisely because she had just disobeyed a stop-sign before she crossed the traffic lanes for the north-bound traffic stream. Her conduct indicated that she hopelessly failed to keep a proper look-out – **Butt v Van den Camp** *supra*.

[50] The court *a quo* found that the accident was occasioned by the exclusive negligent driving of the appellant. It was precisely that finding which precipitated the current appeal. The crucial question in the appeal was whether the aforesaid principal

finding of the court *a quo* was on the proven facts legally sustainable.

[51] On his own say-so, the respondent's driver was fully aware that the street in which he was driving was no ordinary street but a very busy street which carries heavy traffic volumes. The evidence showed that he saw the Cressida and that he kept it under surveillance from the moment he saw it ignoring the stop sign on the western side of the through street. The appellant's vehicle came from the direction of Lengau Centre. He was therefore aware of its impending crossing of his path of travel. The conduct of the appellant would have alerted any careful and reasonable driver that a potentially dangerous situation was developing ahead of him. The conduct of the appellant should have made the respondent's driver aware that something dangerous might happen ahead of him.

[52] He foresaw imminent danger, he had no reason to assume that the appellant, who had flagrantly disobeyed a stop sign, would obey a road marking to yield and to let him pass before she crossed the south-bound traffic lanes on which he was travelling. According to the evidence, the appellant had done nothing to justify the assumption made by the respondent's driver that she would respect his right of way. Notwithstanding his observation of a dangerously erratic driving behaviour ahead, he failed to regulate his driving conduct accordingly. He did nothing to allow a practical margin of safety – **Woods** *supra*.

- [53] As was to be expected the appellant's Cressida never slowed down in the middle of the two traffic streams, never yielded but simply proceeded across the path of the respondent's driver. In those circumstances any careful driver would have realised and would have foreseen the great possibility that the Cressida driven by the appellant was not going to stop before moving across the through street. In spite of the appellant clearly negligent driving, the respondent's driver made absolutely no attempt to reduce speed. He failed to slam the brakes of his vehicle at all. Instead he swerved to his left. Perhaps the collision could have been avoided had he taken an invasive action by veering to the right and not to the left.
- [54] In the circumstances I am persuaded that the court *a quo* materially erred in finding that the appellant's negligence was the sole cause of the collision. The conclusion which completely exonerated the respondent's driver could not be reconciled with the findings of the court itself. For instance the court *a quo* found that the respondent's driver was traveling at an excessive speed; that he saw the appellant's car at the intersection and that he noticed that the appellant's car disobeyed a traffic stop sign and that it proceeded across the through street without any effort to stop or to slow down.
- [55] If only he had obeyed the maximum speed or if only he had carefully reduced the excessive speed at which he was approaching the careless appellant inside the intersection – no swerving would have become necessary. Over and above that the court *a quo* correctly found that the respondent's driver did

not at all apply the brakes of his vehicle immediately before the collision. A careful motorist drives in such a way that he would be able to safely apply the brakes in a sudden emergency.

[56] Instead of slamming the brakes he belatedly swerved. By then the evasive action was hopelessly late and practically futile. The collision was imminent and unavoidable. In the light of those findings one would have expected the court *a quo* to have apportioned the degree of negligence between the two drivers. In my view the failure of the court *a quo* to do so, constitute a material and appealable misdirection. As I see it, the respondent's driver was certainly also negligent. His contributory negligent driving casually brought the collision about. Therefore, he too was delictually responsible for the collision. The respondent was vicariously liable for the delictual wrongs of its driver *qua* employee.

[57] The court *a quo* correctly identified the applicable principles as set out in **National Employers' General Insurance Company Ltd v Sullivan** 1988 (1) SA 27 (AD). However, its application of those principles to the facts was, with respect, unsound. The respondent's driver behaved as though he had an absolute right of way at the obviously dangerous intersection. He had no such absolute right – Martindale *supra*. The glaring neglect of the wrongdoer to give way always signals that the rightful user, is bound to re-adjust his conduct, and, if needs be, to forego his right of way in order to avoid a collision – **Solomon** *supra*.

[58] I am persuaded that the appeal should succeed. The appellant was not the sole cause of the collision. The respondent's driver was also negligent. His negligent driving significantly contributed to the eventual collision between the two sedans. The submission of Mr Groenewald that the court *a quo* was correct in finding that the appellant's negligence was the sole cause of the collision was not borne out by the evidence. Similarly the submission of Mr Williams that the respondent's driver was the main cause of the collision could not be justified on the facts.

[59] The respondent's driver, and not the appellant, had a right of way at the intersection. The appellant was obliged by the traffic rules to keep proper look-out before she ventured to cross the main street. However, she carelessly breached the rules. In the first place she failed to stop. In the second place she failed to yield. In the third place she failed to ascertain, in good time, the traffic situation in the through street she intended to cross. All those pieces of evidence were indicative of gross negligence. The respondent's driver must have been dangerously close when the appellant carelessly tried to cross his path of travel at an inopportune and unsafe moment.

[60] In the circumstances I believe that the appellant was substantially more to blame than the respondent's driver. In my view her share of the blame was 70%. It follows, therefore, that the negligence of the respondent's driver delictually contributed 30% towards the eventual occurrence of the

collision. Consequently I am inclined to apportion the comparative degree of negligence of the two drivers as follows 70% : 30% in favour of the respondent's driver.

[61] Now the issue of costs. The appellant has been successful on appeal. That being the case, she is entitled to the costs of the appeal.

[62] In the result I propose the following order:

62.1 The appeal succeeds with costs.

62.2 The order of the court *a quo* is set aside and it is substituted with the order set out bellow.

62.3 The defendant is 70% liable for the respondent's damages if any with costs.

62.4 The plaintiff is 30% liable for the defendant's damages, if any, with costs.

M. H. RAMPAL, AJP

I concur and it is so ordered.

R. M. SEPATO, AJ

On behalf of appellant: Adv. A. Williams
Instructed by:
N.W. Phalatsi
BLOEMFONTEIN

On behalf of respondent: Adv. W. J. Groenewald
Instructed by:
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