

**FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA**

Case No. : A333/10

In matter between:

THABO MOFUTSANYANA DISTRICT MUNICIPALITY Appellant

and

UNCLE MASS TUCK SHOP Respondent

CORAM: KRUGER, et C. J. MUSI, JJ

HEARD ON: 31 October 2011

JUDGMENT BY: C.J.MUSI, J

DELIVERED ON: 31 October 2011

[1] This is an appeal against the judgment of the magistrate Lindley who dismissed the appellant's action in terms of Rule 27(5) of the Magistrates' Court Rules. The respondent does not oppose the appeal. It filed a notice wherein it indicated that it will abide by this court's decision.

[2] On 11 June 2008 the appellant instituted action against the respondent for the recovery of regional services council

levies in terms of the Regional Services Councils Act 109 of 1985 (the RSCA).

[3] On 24 June 2008 the respondent filed its plea wherein it denied that it did business under the name Uncle Mass Tuck Shop. It further denied that it owes the appellant any money in terms of the provisions of the RSCA.

[4] During August 2008 the respondent filed an application in terms of Rule 27(5) for the dismissal of the claim. The matter was set down for hearing on 29 September 2008. Belatedly, on 15 September 2008, the appellant filed a request for further particulars to the defendant's plea.

[5] The Rule 27(5) application was removed from the roll.

[6] On 22 October 2008 the appellant filed a notice of intention to amend its particulars of claim. The amendment was unopposed and effected on 20 November 2008.

[7] The Rule 27(5) application was again enrolled for hearing on 15 December 2008. On this day the application was, by

agreement, removed from the roll and the appellant was ordered to pay the wasted costs.

[8] The appellant was involved in litigation in a number of similar cases in various magistrates' courts in the Free State. Various exceptions were taken against the appellant's pleadings in the different courts, including in proceedings pending in this court.

[9] The appellant's attorneys approached various attorneys acting on behalf of other defendants, who took similar exceptions in other cases and suggested that the proceedings in the Magistrate's Court be held in abeyance pending this court's decision in the exceptions.

[10] Such an agreement was reached between the appellant and the respondent. On 3 July 2009 the appellant's attorneys sent a letter to the respondent's attorney wherein the agreement was recorded as follows:

“Ons bevestig dat hierdie saak soos die ander waar u by betrokke is sal oorstaan tot na afhandeling van die eksepsies in die Hoë Hof in Bloemfontein wat in September 2009

geargumenteer gaan word.

Ons bevestig voorts dat geen verdere pleistukke verwissel sal word nie en dat die partye mekaar nie oor en weer gebonde sal hou aan tyd nie.”

[11] On 23 February 2010 this court, per Mocumie J, handed down judgment in the exception proceedings. See **Thabo Mofutsanyana District Municipality v Steyn Enslin & Partners; Rudnat (Pty) Ltd; Afgri (Pty) Ltd** case number 4281/2008. The appellant filed an application for leave to appeal against the judgment.

[12] The respondent enrolled the Rule 27(5) application for 20 April 2010. It was opposed and postponed to 6 June 2010 for argument.

[13] The learned magistrate granted the application in terms of Rule 27(5) on the basis that the matter has been on the roll for a long time (more than two years) and that it is understandable that the respondent wants finality. He found that the exception proceedings in this court have been finalised (afgehandel). The magistrate was also of the view

that the appellant was entitled to apply for appropriate relief after this Court pronounced on the exception proceedings.

[14] Mr Van Rhyn on behalf of the appellant argued, before us, that the respondent, by consenting not to hold the appellant bound by the prescribed time periods, whether pending the exception proceedings in this court or not, waived its right to invoke the provisions of Rule 27(5), secondly that the noting of the appeal suspended the operation of Mocumie J's judgment, thirdly that the respondent ought to have given the appellant notice of its intention to invoke Rule 27(5) and afforded the appellant the opportunity to comply with the provisions of the Rule and lastly that the reasons given by the appellant for not enrolling the matter constituted good and sufficient reasons as envisaged by the Rule.

[15] Rule 27(5) as it stood before 15 October 2010 provided as follows:

"A Defendant, if the Plaintiff has not within 15 days after the pleadings have been closed given notice of trial either for a day not more than 20 days distant or for the first day obtainable from the Clerk of the Court, apply to the Court to dismiss the action

and the Court may on such application either dismiss the action with costs or make such other order in regard thereto and as to costs of the application as may be just.”

[16] It is common cause that the fifteen day period after the close of pleadings had elapsed and that the appellant did not give notice of a trial date at all, by the time the application was brought.

[17] The purpose of the Rule is to expedite litigation. If the plaintiff – as dominus litis – is kept to discernible and tight time frames, litigation may be finalised speedily. See **Vonck v Fraserburg Municipality** 1974 (1) SA 777 (CPD) at 785 A-B.

[18] A litigant who does not adhere to the time frames without an explanation or with a bad explanation will therefore be penalised by for example having his action dismissed. If the plaintiff has not adhered to the time frames he must place facts before the court in order to show why he has not proceeded with the action within the required time. See generally **Vonck v Fraserburg Municipality** supra at 784 G-

H.

[19] The rule gives the magistrate a discretion to dismiss the action or to make any other order that may be just. The discretion must be exercised judicially after taking all the facts and circumstances of the particular case into consideration. Dismissal of an action is not invariably required.

[20] Mr Van Rhyn, on behalf of the appellant, argued that the respondent waived its right to rely on Rule 27(5). I do not think that there was an intention to waive the right to invoke Rule 27(5) or any other time frames in this matter. It is clear that the parties intended to suspend the right to rely on non-compliance with time limits until the finalisation of the exception proceedings in this Court. A waiver of a right, once communicated to the other side by word or conduct, is irrevocable; it perishes. See **Glaser v Millnard** 1950 (4) SA 587 (W) at 588A-B. In this matter it is clear that the intention was not to renounce the right to rely on time limits irrevocably but only to suspend it until such time as the High Court proceedings have been finalised.

[21] The explanation given by the applicant, for not prosecuting the action further, is the agreement between the parties. The respondent does not deny the existence of the agreement. The crucial question to answer in this matter is what the intention of the parties was when they agreed to hold this matter in abeyance until the exception proceedings in this court are finalised. Put differently when will the proceedings in this court be finalised.

[22] The word “afhandel” or “afgehandel” is defined in the Verklarende Handwoordeboek van die Afrikaanse taal (HAT) 4th ed 2000 as follows:

“Afhandel ww. (afgehandel) klaarmaak, tot ‘n einde bring...”

[23] In **Cooper & Lybrand v Bryant** 1995 (3) SA 761 (A) at 767 E – 768 E the technique of interpreting written instruments was summarised as follows:

“According to the ‘golden rule’ of interpretation the language in the document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity, or some repugnancy or inconsistency with the rest of the rest of the

instrument... The mode of construction should never be to interpret the particular word or phrase in isolation (*in vacuo*) by itself... The correct approach to the application of the 'golden rule' of interpretation after having ascertained the literal meaning of the word or phrase in question is, broadly speaking, to have regard:

- 1) to the context in which the word or phrase is used with its interrelation to the contract as a whole, including that nature and purpose of the contract, as stated by Rumpff CJ *supra*;
- 2) to the background circumstances which explain the genesis and purpose of the contract, i.e. to matters probably present to the minds of the parties when they contracted. **Delmas Milling Co Ltd v Du Plessis** 1955 (3) SA 447 (A) at 454 G-H; **Van Rensburg en Andere v Taute en Andere** 1975 (1) SA 279 (A) at 305 C-E; **Swart's** case *supra* at 200E -201A and 202C, **Shoprite Checkers Ltd v Blue Route Property Managers (Pty) Ltd and Others** 1994 (2) SA 172 (c) at 180I –J;
- 3) to apply extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense

in which they acted on the document, save direct evidence of their own intentions. Delmas Milling case at 455A-C, Van Rensburg's case at 303A-C, Swart's case at 201B, Total South Africa (Pty) Ltd v Bekker NO 1992 (1) SA 617 (A) at 624G, Pritchard Properties(Pty) Ltd v Koulis 1986 (2) SA 1 (A) at 10C-D."

[24] If the word "afgehandel" is given its ordinary and grammatical meaning it would mean that the parties agreed that the matter is only held in abeyance until a judge of the High Court pronounces on the matter and not a day further. This would clearly lead to an absurdity, because it would fly in the face of the parties' clear desire to get a binding precedent on the issue from a higher court.

[25] The fact that an appeal is noted or an application for leave to appeal is made clearly mean that the matter has not yet been finalised (afgehandel). An appeal or an application for leave to appeal against an order has the effect of suspending the order in question pending the decision of the appeal or the outcome of the application for leave to appeal unless the court which gave such order, on application by a party, directs otherwise. See Rule 49(11) of the High Court Rules.

[26] The parties to the agreement were lawyers acting on behalf of their clients. It must be assumed, based on the context, that it must have been within their contemplation that one of the parties might apply for and be granted leave to appeal. When an application for leave to appeal is brought then clearly the proceedings are not finalised “afgehandel” until that application is dismissed and there is no petition or the Court of Appeal pronounced on the appeal. The Supreme Court of Appeal gave its judgment on 29 September 2011 in the matter. See **Thabo Mofutsanyana District Municipality v Steyn – Enslin & Vennote, Rudnat (Pty) Ltd Afgri (Pty) Ltd** (639/2010) [2011] ZASCA 168 (29 September 2011).

[27] When the appellant argued that it applied for leave to appeal there was nothing to gainsay it except the respondent’s denial. The magistrate also accepted the explanation that there was an application for leave to appeal pending. That being the case there was sufficient reason for the magistrate not to grant the order that he did. The magistrate’s conclusion that the agreement lapsed after the judgment of Mocomie J is clearly wrong. There is another reason why the

appeal ought to succeed.

[28] Rule 27(5) and similar provisions, if not applied judiciously has the potential of rendering a litigant's right entrenched in section 34 of the Constitution of the Republic of South Africa 1996 nugatory. Section 34 reads as follows:

“Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”

[29] A judicious approach to the application of Rule 27(5) must be informed by balancing the right to finality on the one hand and the right to have disputes resolved in a fair public hearing on the other hand. It must be just i.e. in the interest of justice, to dismiss the action. If such an approach is applied it would of necessity mean that the dismissal of an action should not be done lightly. It should not be a first resort. It must be invoked after an inquiry into all the facts and circumstances including less restrictive means to bring the matter to finality.

[30] It is clear from the magistrate's judgment that he did not consider any other option but the dismissal of the action. Rule 27(5) gives him a discretion to consider other options which are just under the circumstances. I can not find that the magistrate exercised his discretion judiciously. On this ground too the appeal ought to succeed.

[31] Mr Van Rhyn contended that the appeal should be upheld with costs, which costs to include the costs consequent upon the employment of two counsel. According to him this matter is of great importance to the appellant. There are factors that militate against such an order. This matter is unopposed. The issues argued, before us, were not complex. In my view it was not a "wise and reasonable precaution" for the appellant to employ two counsel. See **Henry v AA Mutual Association** 1979 (1) SA 105 (CPD) at 106H-107B.

[32] I accordingly make the following order:

- a. The appeal is upheld with costs
- b. The magistrate's order is set aside and replaced with the following:

"The application is dismissed with costs."

C.J. MUSI, J

I concur

KRUGER, J

On behalf of the Appellant:	Adv A.J.R. Van Rhyn SC
Assisted by:	Adv M. C. Louw
Instructed by:	Podbielsky Mhlambi Inc Welkom

On behalf of the Respondent:	No appearance.
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