FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 1021/09

In the case between:

MATTHEUS JOHANNES LOTTER Appellant

and

K S O FINANCIAL SERVICES (PTY) LTD Respondent

CORAM: EBRAHIM J et *LEKALE, AJ*

JUDGMENT: LEKALE, AJ

HEARD ON: 8 MARCH 2010

DELIVERED ON: 18 MARCH 2010

INTRODUCTION:

[1] This judgment deals, *ante omnia*, with an application for condonation of the late prosecution of an appeal against a summary judgment granted against the appellant in the Magistrate's Court, Koppies on the 14^{th} August 2008.

[2] The respondent opposes the application on, primarily, the grounds that no adequate and acceptable explanation for the delay involved has been furnished and that the appeal enjoys no reasonable prospects of success.

BACKGROUND:

[3] On or about the 18th February 2008 the respondent issued summons for the recovery of an amount of R1 238 000,00 against the appellant on the basis of a Deed of Suretyship and a Finance Agreement concluded with a company viz. African Spirit of which the appellant used to be the sole director.

[4] The appellant entered appearance to defend the said action and the respondent proceeded to apply for summary judgment. In opposition of the application in question the appellant delivered an affidavit.

[5] After hearing the application the Magistrate granted the same and found that:

> **"Dit is so dat die verweerder kan gee die geskiedenis oor die verloop wat met African Spirit gebeur het, maar**

> **die aard van sy verweer en die gronde van sy verweer is so vaag dat ek nie kan bevind dat hy enigsins 'n verweer het nie. Hy erken die bestaan van die ooreenkoms met KSO maar dan later in sy opponerende eedsverklaring kom ontken hy nou weer die regsgeldigheid van hierdie dokumente. Hy wil op twee stole gelyk sit. Die feit wat geopenbaar is in hierdie verklarings openbaar nie 'n bona fide verweer nie."**

[6] Feeling aggrieved by the judgment the appellant caused a notice of appeal to be delivered on the 15th August 2008 and, further, had a request for the reasons for the judgment made in terms of Rule 51 of Magistrate's Courts rules on the same date.

[7] The record of the proceedings was made available by the transcription services provider on the 6th November 2008.

[8] On the 18th February 2009 the appellant became aware that his attorney had omitted to prosecute the appeal by requesting a date for the hearing of the same within 40 days from the date of noting the appeal as prescribed by Rule 50(4) (a) of the Uniform Rules of Court (the Rules).

[9] The application for condonation was, thereafter, launched by way of motion on or about the 27th February 2009. The reason for the delay in prosecuting the appeal is attributed solely to the applicant's attorney in the papers.

MERITS OF THE APLICATION:

[10] The onus is on the appellant, as the applicant, to show good cause for condonation in terms of Rule 27(3) of the Rules.

[11] As the Court observed in **Shawzin v Laufer 1968(4) SA 657 (A) @ 663 B** :

> **"[g]ood cause … is ex natura rei impossible to define and always depends on the circumstances of each case."**

[12] Among the circumstances that may be considered in determining whether or not good cause exists for condonation are the reason or the explanation for the delay and the prospects of success in the appeal.
(see generally **Melane v Santam Insurance Co. Ltd 1962(4) SA 531 (A))**.

REASONS FOR THE DELAY:

[13] The degree of lateness involved herein is excessive insofar as the appellant was required to prosecute the appeal within 40 days calculated from the 15th August 2008 and the condonation application was filed on the 27th February 2009. The 40 day period expired on the 13th October 2008.

[14] The reason for the delay is effectively given as ignorance of the law on the part of the appellant's attorney insofar as he (the attorney) deposed that he was under the impression that he had taken all the steps necessary to prosecute the appeal timeously.

[15] **Mr. Cothill** for the respondent contends, in effect, that there was flagrant disregard for the rules and gross negligence warranting dismissal of the application without further ado.

PROSPECTS OF SUCCESS:

[16] **Mr. Cronje** for the appellant submitted at length that, although the appellant's opposing affidavit which served before the Magistrate was not a model of clarity and consistency, its effect was that both the appellant and African Spirit were not indebted to the respondent because the debt had been paid in full.

[17] **Mr. Cothill**, on his part, effectively contended on behalf of the respondent that it was not evident from the relevant affidavit that the appellant's case was that the debt had been extinguished.

[18] For the appellant it was, further, pointed out that the magistrate applied too strict a test when he determined whether or not the appellant had a bona fide defence to the respondent's claim.

[19] It was, further, common cause between the parties that no certificate of balance referred to in the Finance Agreement and the Deed of Suretyship was before the magistrate when the relevant judgment was granted.

[20] Rule 14(1)(c) of the Magistrate's Court Rules requires the defendant, in the appellant's position, to satisfy the court by affidavit that he has a **bona fide** defence and, further,

prescribes that such an affidavit should disclose the **nature and grounds of the defence** or counterclaim.

[21] The parties were, further, in agreement that what is required of the defendant in summary judgment proceedings is **"to set out in his affidavit sufficient facts which, if proved at the trial, will constitute an answer to the plaintiff's claim."**
(see **<u>Marsh and Another v Standard Bank of SA Ltd</u> 2000(4) SA 947 (w) @ 949 C**).

<u>FINDINGS:</u>

[22] When all is said and done the Court is satisfied that none of the remissness and ineptitude involved in the prosecution of the appeal is attributable to the appellant.

[23] The question is, however, whether or not there has been a flagrant disregard for the Rules and lack of acceptable explanation of the same such as to expose and saddle the appellant with the consequences of **"his attorney's lack of diligence or the insufficiency of the explanation tendered."**
(see **<u>Saloojee and Another NNO v Minister of Community Development</u> 1965 (2) SA 135 (A) @ 141 C** and **<u>Blumenthal</u>**

<u>and Another v Thomson NO and Another</u> 1994 (2) SA 118 (A) @ 121I-122B)

[24] The Court is satisfied that the facts **in casu** are distinguishable from the facts in **<u>Saloojee and Another</u> (supra), <u>Blumenthal and Another</u> (supra) and <u>Darries v Sheriff, Magistrate's Court, Wynberg and Another</u> 1998(3) SA 34 (SCA)** insofar as:

[24.1] in Darries (supra) the attorney never asserted in his affidavits that he was unacquainted with the relevant Rules of Court. He, in fact, lied about the relevant matters;

[24.2] in Blumenthal (supra) the attorney's neglect to observe the Rules of Court persisted even after he had become aware of the fact that he did not know them;

[24.3] in the present matter the attorney effectively asserted his ignorance of the Rules but acted within a reasonable time after discovering his handicap. Although he was, at all times material to the appeal, under the duty to acquaint himself with the relevant Rules, his bona fides is evidenced by the demonstrable intention to prosecute the appeal exhibited by the steps taken, albeit insufficient, in order to bring the matter to finality.

[25] The aforegoing, however, does not relieve a practitioner who accepts instructions, of the duty to familiarise himself with applicable law.

[26] With regard to prospects of success it is clear from case law that **"… a Court can only exercise its discretion in the defendant's favour** [in an application for summary judgment] **on the basis of the material placed before it and not on the basis of mere conjecture or speculation."**
(see **Soil Fumigation Services v Chemfit Technical Products 2004(6) SA 29 (SCA) @ 39J-40A**).

[27] As **Mr. Cronje** correctly conceded, the fact that the appellant vacillated in his affidavit submitted in opposition of the application for summary judgment has a bearing on the **bona fides** of his defence.

[28] The history that the appellant painstakingly sketched out in the said affidavit does not support the conclusions he reached when he effectively deposed, inter alia, that he questions the validity and enforceability of the **Finance Agreement** and the **Deed of Suretyship**. In this regard it should be noted that, as a background, he effectively pointed out that a finance agreement was concluded with African Spirit and he also signed as surety.

[29] The appellant blew hot and cold in his opposing affidavit. He approbated and reprobated at the same time when he, inter alia, deposed that the respondent agreed to collect from the company's clients and, in the same breath, maintained that both him and the company were not indebted to the respondent in any amount whatsoever.

[30] His affidavit is, with respect, a model of inconsistency insofar as he, inter alia, deposed that he did not know what happened with regard to collection of debts owing to African Spirit because he and other members of staff attached to the company were sidelined and left out but, on the other hand, he maintained that no money was owing to the respondent.

[31] Most, if not all, of the appellant's material averments are collectively destructive and cannot stand together insofar as he,

inter alia, effectively raises prematurity as a dilatory plea to the claim but still maintains that no money was owing by him or the company. In this regard it is worth noting that the appellant deposed to the relevant affidavit that he was assured that no steps would be taken against him until collections had been made.

[32] In short the Magistrate's Court was effectively left to speculate and glean the appellant's defence from the affidavit without the appellant coming out clearly on the nature and grounds of his defence. It is not apparent, **ex facie** the appellant's opposing affidavit, that his defence is that the debt has been paid in full.

[33] The contention that no certificate of balance was before the magistrate when the judgment was granted does not, in my view, advance the appellant's case any further. The aforegoing prevails because such a certificate was not, in law, a pre-requisite for the granting of the relevant judgment. It was meant, in the court's judgment, to assist the respondent where it so elects to secure provisional sentence or summary judgment. For the purposes of summary judgment, what was required by Rule 14(2)(a) of the Magistrate's Court Rules, was an affidavit verifying the cause of action and the amount claimed.

(see generally **Nedbank Ltd v Van der Berg and Another 1987(3) SA 449 (W)**).

[34] The absence of such a certificate of indebtedness or balance before the court simply meant that the respondent, as the applicant for summary judgment, was not relying on it in its quest for judgment. A verifying affidavit was, instead, delivered in support of the application as required by Rule 14(2)(a).

[35] There, thus, exist no reasonable prospects of success in the appeal. To grant condonation in *casu*, when no such prospects exist, would be an exercise in futility.
(see **Rashavha v Van Rensburg 2004(2) SA 421(SCA)**).

ORDER:

[1.] For the aforegoing reasons the application for condonation is dismissed.

[2.] The appeal is dismissed with costs.

[3.] Summary judgment in the sum of R1 238 000-00 together with interest at the rate of 15,5 % p.a calculated from 4th of August 2006 to date of payment and costs on an attorney and client scale entered in favour of the Respondent is confirmed.

L.J LEKALE, AJ

I agree,

S Ebrahim, J

For the appellant: Adv R Cronje
Instructed by:
Stander,venter &
Kleynhans

For the respondent: Adv C Cothill
Instructed by:
Kramer Weihmann &
Joubert