<u>IN THE HIGH COURT OF SOUTH AFRICA</u>
(ORANGE FREE STATE PROVINCIAL DIVISION)

Appeal No.: 439/2002

In the matter between:

<u>MBUTI JACOB CINDI</u> Appellant

and

<u>EASTERN FREE STATE CO-OPERATIVE LTD</u> Respondent

<u>CORAM:</u> **MALHERBE J.P. *et* VOGES A.J.**

<u>HEARD ON:</u> **23 FEBRUARY 2004**

<u>JUDGMENT BY:</u> **MALHERBE J.P.**

<u>DELIVERED ON:</u> **26 FEBRUARY 2004**

Appellant is a businessman from Lesotho. On 8 March 1995 respondent issued summons against appellant in the Magistrate's Court, Ladybrand claiming payment of the amount of R19 361,23, being the balance owing for goods sold and delivered. After the exchange of pleadings the matter was enrolled for trial on 5 December 1997. On 3 December 1997 appellant's attorneys withdrew as attorneys of record. On the trial date there was no appearance on behalf of appellant. According to the record of the proceedings respondent's attorney handed in an updated statement showing the balance owing (including interest since the issue of summons) as R51 419,46. (This updated statement does not form part of the appeal record). The Magistrate granted default judgment in the amount reflected in the statement, plus costs. Almost 4½ years later, on 31 May 2002, appellant applied for the following relief:

> "1. That the late bringing of this application be condoned.
>
> 2. That the judgment granted against the Applicant by default on the 5th December 1997 be rescinded.
>
> 3. That the warrant of execution issued herein be set aside.
>
> 4. That the Applicant pay the costs of this application unless the Respondent unsuccessfully opposes same."

Respondent opposed the application and on 7 August 2002 the Magistrate refused the application for condonation with costs. This appeal is directed against that judgment.

Appellant's explanation for his failure to apply timeously for rescission of the judgment appears from the following paragraphs of his founding affidavit:

> "
>
> 6.
>
> During 1997, following service upon Respondent's attorneys of my plea referred to above, I was advised by my attorneys, then Buys and Mare

attorneys, that the matter was to be heard on the 5th December 1997.

7.

On the 5th December 1997 I attended at the office of Buys and Mare attorneys with a view to consulting for purposes of preparing for trial. I was however informed by my said attorneys that they were no longer representing me and advised me to look for another attorney. I was shown their notice of withdrawal as attorneys of record a copy whereof is attached hereto and marked Annexure MJC A.

8.

I could not immediately raise any attorneys in Ladybrand who could assist me and on the grounds that the matter was to be heard on that day I resolved to go to court personally to advise the court of the predicament I was faced with.

9.

On my arrival at Court, I enquired from the clerk of the civil court about the matter and I was informed that the matter had already been dealt with. I was however not given any explanation as to how the matter was dealt with.

10.

As I am not resident in the Republic of South Africa and had not before dealt with the local attorneys I started enquiring from my friends in the RSA as to which attorneys I could go to for assistance and I was referred to Litheko and Associates Incorporated, of Thaba Nchu.

11.

During January 1998 I attended at the offices of Litheko and Associates Incorporated in Thaba Nchu where I consulted with an attorney known as Molefi Litheko. During consultation I then instructed him to assist me in this matter and he undertook to proceed with the defence of my case.

12.

Approximately two months after the consultation referred to in paragraph 11 above, Molefi Litheko called me to his office and informed me that he had perused the court file and discovered that on the 5th December 1997 when the matter was heard in my absence, judgment was granted in favour of the Respondent in the amount of **R51 419-46** in stead of the amount for which I was sued being the sum of **R19 361-23.**

13.

Molefi Litheko advised me that judgment should not have been granted in the amount in excess of the amount I was sued for and I then gave him instructions to apply for rescission of that judgment. I further informed him that I did not owe the Respondent the amount of R19 361-23 or any other amount whatsoever whereupon he undertook to do the necessary in connection with my instructions.

14.

After I gave Molefi Litheko instructions to apply for rescission of judgment in this matter, I consulted with him on various occasions and at all times he assured me that my case was being attended to as I had instructed.

15.

On or about the 26th October 2001 when I was travelling in a motor vehicle with Registration number BRX 081 FS belonging to my daughter and in her presence, we met die deputy-sheriff at the RSA-Lesotho border who had been instructed to execute the judgment granted in favour of Respondent in this matter. The deputy-sheriff there and then removed the said motor vehicle.

16.

On the 9th November 2001 I again went to Thaba Nchu to the offices of Litheko and Associates Incorporated to find out what my said attorney had to say regarding the execution steps referred to above.

17.

I did not find him on that day and I subsequently made several visits at his office all of which were fruitless as he was always not there. I was advised to go to the offices of Litheko Matsididi Motsoeneng Attorneys to make enquiries regarding my matter and there I was informed that Molefi Litheko is no longer practising as an attorney.

18.

Upon receiving information that Molefi Litheko is no longer practising, I then instructed the firm of Litheko Matsididi Motsoeneng attorneys to assist me in this matter. I was advised that the fact that a warrant of execution was served in connection with this matter on the 26th October 2001 is an indication that the application for rescission of judgment was either not successful or it was never brought before this Honourable Court.

19.

My attorney informed me that before an application could be brought before the court an application for condonation would have to be made to the Respondent or its attorneys seeing that the judgment was granted a long time ago. Further my attorney informed me that he would have to peruse the Court file to determine whether an application was in fact brought by Molefi Litheko or not and thereafter to determine what steps could be taken.

20.

During March 2002 my attorney informed me that he has had an opportunity of perusing the court file and has discovered that the application for rescission of judgment that Molefi Litheko had undertaken to bring on my behalf was never brought before court. I do not know why my instructions were never carried out.

21.

I have now instructed my attorney to apply for rescission of the judgment granted by default herein as it has always been my intention to defend the Respondent's claim as I have a defence thereto which is that I at no stage during my dealings with the Respondent bought from the Respondent any goods on credit. All the purchases I made at the Respondent were on the basis of cash on delivery."

Having quoted at length from appellant's affidavit, it is just as well that I quote extensively from respondent's answering affidavit that was deposed to by a Mr Dippenaar:

" 5.

Ek het die Beëdigde Verklaring van die Applikant behoorlik nagelees en wens die Agbare Hof op sekere aspekte uit te wys. Die Applikant voer aan dat hy gedurende JANUARIE 1998 (sien paragraaf 11 van verklaring) sy prokureurs Mnre LITHEKO & ASSOSIATE in THABA 'NCHU gaan spreek het wie onderneem het om sy saak te verdedig. Ongeveer TWEE (2) maande daarna in MAART 1998 het Applikant se prokureur hom na bewering geskakel en hom in kennis gestel van die Vonnis wat in Applikant se afwesigheid teen hom toegestaan is. Applikant beweer dat hy op hierdie datum sy prokureur instruksies gegee het om voort te gaan met die Aansoek om Tersydestelling van Vonnis. Dit is dus duidelik uit die Applikant se Beëdigde Verklaring dat hy reeds teen MAART 1998 kennis gedra het van die Vonnis.

6.

Applikant beweer in paragraaf 14 van sy Beëdigde Verklaring dat hy sedert APRIL 1998 sy prokureur by geleentheid geskakel het wie onderneem het dat hy besig is om aan die saak te werk. Die volgende datum waarna die Applikant in sy verklaring verwys is 26 OKTOBER 2001, by welke geleentheid daar op sy motorvoertuig met registrasienommer: BRX 081 FS beslag gelê is. Applikant beweer dat hy op 9 NOVEMBER 2001 weer na Mnr LECHEKO se kantore gegaan het om stappe te doen om die beslaglegging te bestry. Applikant sou daarna by sy huidige prokureur van rekord se kantore vasstel dat Mnr Litheko nie meer praktiseer as prokureur nie. Dit is nie duidelik uit die verklaring van die applikant waarom so 'n lang tydperk verloop het en sy opdrag aan sy prokureur nie uitgevoer is nie, alternatiewelik waarom hy nie daarop aangedring het nie.

7.

Dit is my respekvolle submissie dat die Applikant nie die volle toedrag van sake aan die Hof voorhou nie. Die Respondent/Eiser het reeds so vroeg as 29 OKTOBER 1999 via die Balju van LADYBRAND beslag gelê op 'n TOYOTA CRESSIDA motorvoertuig met registrasienommer: BRX 081 FS. Die Applikant in hierdie aansoek het op 3 NOVEMBER 1999 'n Ex-Parte aansoek teen die Balju in sy hoedanigheid *ex officio* gebring waarin tussentydse Regshulp gevra is dat die voertuig onmiddellik teruggegee word aan die eienaar Me. NELLY NANKOSI CINDI. 'n Afskrif van die

Applikant se aansoek gedateer 5 NOVEMBER 1999 word hierby aangeheg, gemerk Aanhangsels "A1" tot "A11". Die Respondent het die aansoek opponeer en het die Applikant die betrokke aansoek op 26 NOVEMBER 1999 teruggetrek en kostes aan die Respondent aangebied aangesien die Applikant nie die korrekte remedie gevolg het deur 'n Tussenpleit aanhangig te maak nie. 'n Afskrif van Respondent se Opponerende Verklaring word vir die Agbare Hof se aandag hierby aangeheg, gemerk Aanhangsel "B1" tot "B5". Op grond van die Applikant se *mala fides* soos uiteengesit in paragraaf 5 van die Applikant se verklaring het die Hof bevind dat die Applikant die Respondent se kostes moet betaal. Dit dien aan die Hof vermeld te word dat kostes getakseer is op 23 DESEMBER 1999 in die bedrag van R4 560,59. Sedert die kostes getakseer is het Applikant nog geen poging aangewend om die regskostes te vereffen nie ten spyte van verskeie versoeke deur Respondent se prokureur dat die kostes betaal moet word. Ek submiteer aan die Hof dat die Applikant nie by magte sal wees om verdere Regshulp aan te vra vir solank daar nog 'n uitstaande kostebevel teen die Applikant hangend is nie. Afskrifte van die getakseerde rekenings word vir die Agbare Hof se aandag hierby aangeheg, gemerk "C1" tot "C6".

8.

Dit is voorts my submissie aan die Hof dat die Applikant ten tyde van die bring van die Aansoek soos in paragraaf 7 na verwys, deeglik kennis gedra het van die feit dat daar 'n Vonnis teen hom gevel is maar het Applikant geen stappe geneem om die Vonnis tersyde te stel nie. Dit blyk onmoontlik te wees dat Applikant se prokureur die aansoek in NOVEMBER 1999 kon bring indien hy nie instruksies van sy kliënt gehad het nie. Dit dien as 'n verdere bevestiging dat Applikant en sy prokureur wel in kontak was met mekaar en seer sekerlik 'n Aansoek om Tersydestelling moes bespreek het indien daar enige sprake van so 'n aansoek was.

9.

Sedert NOVEMBER 1999 is die onderhawige aansoek die eerste verdere Regshulp wat die Applikant die Hof mee genader het. Ek is met respek teenoor die Hof van oordeel dat die Respondent sedert 26 NOVEMBER 1999 geen poging aangewend het om die Vonnis tersyde te stel nie. Eers teen 29 MEI 2002 versoek die Applikant die Hof om verdere regshulp vir Tersydestelling van Vonnis. Daar het dus bykans DERTIG (30) maande verloop vandat die Applikant se prokureur die vorige aansoek gebring het tot en met die onderhawige aansoek om Tersydestelling van Vonnis en is ek met respek van oordeel dat die Applikant nie kwalifiseer aan die tydsbepaling soos uiteengesit in Artikel 49 nie en kan die Hof nie sodanige growwe nalatigheid deur die Applikant en/of sy prokureur kondoneer nie.

10.

Die Applikant in die onderhawige saak het op 26 OKTOBER 2001 weereens kennis geneem van die feit dat Vonnis destyds teen hom toegestaan is toe die Respondent vir 'n tweede keer gepoog het om op 'n voertuig van die Applikant beslag te lê. By nadere ondersoek het dit geblyk dat dit wel dieselfde voertuig is as die een waarop beslag gelê is op 29 OKTOBER 1999 en het die Applikant die voertuig van beslaglegging vrygestel. Sedert 26 OKTOBER 2001 het daar 'n verdere tydperk van SEWE (7) maande verstryk voordat die onderhawige aansoek gebring is en dui dit weereens op die growwe nalatigheid van die Applikant in die onderhawige saak. Dit is duidelik dat ten spyte van twee beslagleggings op voertuie van die Applikant daar nog geen dringendheid aan sy kant te bespeur was nie aangesien sy huidige prokureur van rekord eers teen MAART 2002 na bewering by die Hof sou vasstel dat Applikant se eerste prokureur, Mnr LITHEKO, nooit 'n

> Aansoek om Tersydestelling van Vonnis gebring het nie.
>
> 11.
>
> Dit is derhalwe my submissie dat die Applikant nie die Hof in sy vertroue neem nie en nie die volle waarheid aan die Hof openbaar nie. Die enigste rede hiervoor is dat die Applikant probeer voorgee dat sy voormalige prokureur nie sy opdragte uitgeoefen het nie terwyl dit duidelik blyk dat die Applikant by verskeie geleenthede wel in kontak met sy prokureur was. Dit is onverskoonbaar dat 'n periode van bykans DRIE (3) jaar verloop en Applikant nie die kwessie rondom sy opdragte aan sy prokureur opgevolg het nie."

The following passage in the recent decision of the Supreme Court of Appeal in **UITENHAGE TRANSITIONAL LOCAL COUNCIL v SOUTH AFRICAN REVENUE SERVICE 2004 (1) SA 292 at 297 I – J** encapsulates the well-known criteria with which an application for condonation should comply:

> "condonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the non-compliance is time-related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out."

Appellant is an adult businessman. It is inexplicable that he did almost nothing to enquire from his attorneys why they were so remiss to carry out his instructions. If what he says is true, their almost unbelievable negligence should be imputed to him. His whole version lacks credibility: From his failure on 5 December 1997 to enquire in what manner

> "the matter had already been dealt with"

throughout the ensuing years. The strong impression is rather that he has been trying over the last almost 9 years to avoid his responsibility towards respondent. The obvious question is why a businessman would apply for credit and then make payments to his creditor in reduction of an indebtedness if he never bought on credit, as has been pleaded by appellant in the main action. Even his plea lacks conviction as it stands.

I agree with the Magistrate's finding that appellant's explanation for the long delay to apply for rescission of the default judgment is not at all satisfactory. Moreover, the following extract from **SALOOJEE AND ANOTHER NNO v MINISTER OF COMMUNITY DEVELOPMENT** **1965 (2) SA 135 (A)** quoted with approval in **DE WITTS AUTO BODY REPAIRS (PTY) LTD v FEDGEN INSURANCE CO. LTD** **1994 (4) SA 705 (ECD)** at pp.**713 – 714** is also applicable to this matter:

> "There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation

> tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court."

On behalf of appellant Mr Human submitted that even if the explanation for the delay is not convincing or satisfactory, the default judgment is so clearly wrong that it has to be rescinded and that the appeal, therefore, has to succeed. He developed his argument as follows: Appellant did not appear at the time appointed for the trial on 5 December 1977. In terms of Rule 32(2) the Magistrate could have given

> "judgment (not exceeding the relief claimed) against him with costs."

The relief claimed as set out in the particulars of claim, was:

> "a) Betaling van die bedrag van R19 361,23
>
> b) Betaling van rentes daarop teen 'n koers soos wat van tyd tot tyd van toepassing was.
>
> c) Betaling van invorderingskoste op die twee paaiemente reeds deur Verweerder betaal en ten aansien van enige verdere paaiemente wat Verweerder mag maak uit hoofde van Klousule 9 van Aanhangsel "A".
>
> d) Betaling van regskoste bereken op 'n prokureur en kliënt-skaal in terme van klousule 9 van Aanhangsel "A"."

By granting judgment in the amount of R51 419,46 plus interest at a rate of 28% p.a., the Magistrate granted relief "exceeding the relief claimed" and the default judgment should, therefore, be rescinded as being void *ab origine.* (Mr Human had calculated that the maximum amount that could have been outstanding on 5 December 1977 was R47 888,00 (R19 361,23 at 28% interest p.a. for 6 years, less R4 000,00 paid off before summons).

The argument that the outstanding amount had been calculated incorrectly was not raised at all by appellant in his application for rescission of the judgment in the Court *a quo,* as appears from the quotation from his affidavit. If it had been raised, respondent could have responded to it by filing an affidavit setting out how its calculations had been made. I doubt very much whether calculations made by counsel in heads of argument can carry much weight in the circumstances of this case.

Be that as it may, it is true that the Magistrate granted default judgment in an <u>amount</u> exceeding the amount claimed in the summons. However, that does not necessarily mean that judgment was given "exceeding the <u>relief</u> claimed". The relief claimed was payment of a specific sum of money plus interest thereon plus costs, and judgment was also granted for the payment of an amount of money plus interest plus costs. We do not know what the updated statement that was handed up on 5 December

1977 looks like because it does not form part of the appeal record. We are, therefore, completely in the dark as to how the amount that was allegedly then owing, had been calculated. It is quite possible that respondent's calculations cannot be faulted. In the result appellant has not shown that the default judgment was granted in contravention of Rule 32(2).

Appellant also seeks condonation of his failure to prosecute this appeal in accordance with the applicable rules. The appeal was noted on 20 August 2002. In terms of Supreme Court Rule 50(4)(a) appellant should have applied to the Registrar for a trial date within 40 days of noting the appeal, i.e. on or before 16 October 2002. He applied only on 18 November 2002. Rule 50(7)(a) provides that two copies of the record have to be lodged simultaneously with the application for the trial date and Rule 50(7)(c) requires such copies to be complete and properly indexed. It is common cause that the record is not even now complete as the updated statement does not form part of the record. Appellant's attorney says in his affidavit that he only filed a proper record on 4 September 2003 whereafter 23 February 2004 was assigned as date of hearing. It is also common cause that appellant's heads of argument were out of time.

Perhaps the most important omission is the failure to prosecute the appeal within 60 days of noting it. Such failure means that the appeal

> "shall be deemed to have lapsed".

(Supreme Court Rule 50(1)).

Appellant's present attorneys did not fare much better than their predecessors in attending to his affairs! Even if the appeal is reinstated and all these failures are condoned, the appeal has to fail for the reasons set out above.

In the result the appeal is dismissed with costs.

J.P. MALHERHE, JP

I CONCUR

M. VOGES, A.J.

<u>On behalf of Appellant:</u> Adv.C.A. Human
instructed by
Litheko Matsididi Motsoeneng Attorneys
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On behalf of Respondent: Adv. P.C.F. van Rooyen
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