

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Appeals No,: A280.2003
A281/2003
A282/2003

In the appeals between:

ROAD ACCIDENT FUND

Appellant

and

A.J.C. BLIGNAUT

Respondent

ROAD ACCIDENT FUND

Appellant

and

J. BLIGNAUT

Respondent

ROAD ACCIDENT FUND

Appellant

and

M.S. MOTALE

Respondent

CORAM: **MALHERBE JP *et* VAN DER MERWE J**

HEARD ON: **26 JULY 2004**

JUDGMENT BY: **MALHERBE JP**

DELIVERED ON: **29 JULY 2004**

These 3 appeals were heard together at the request of appellants'

attorneys. They were argued together in the court *a quo* and the same firm of attorneys represents the 3 respondents.

Each of the respondents instructed a firm of attorneys from Vereeniging, Messrs. Steyn Lyell & Marais, to institute action against appellant in the Magistrate's Court, Sasolburg for the recovery of damages arising from injuries sustained in two separate motor vehicle accidents. In each case default judgment was granted against appellant. In each case appellant's application for rescission of the default judgment was late. In each case appellant's application for condonation of its failure to apply timeously for rescission of the default judgment was dismissed with costs. These appeals are against the Magistrate's order refusing condonation.

The applications in the court *a quo* contain virtually identical allegations regarding the reasons for the failure to comply with the Rules of court. The parties agreed to argue these appeals with reference to the facts in the MOTALE appeal. In what follows I also refer to those facts.

Summons was served on appellant on 3 October 2001. Default judgment was granted on 16 November 2001. Appellant received notice of this judgment on 11 December 2001. In terms of Rule 49(1) of the Magistrate's Court Rules appellant could apply for rescission of that

judgment within 20 days of obtaining knowledge thereof. This period

expired on 14 January 2002. Although the application was served on the respondent's attorneys on 14 January 2002 it was only filed with the Clerk of the Court on 17 January 2002. It was, therefore, not "served and filed" within the prescribed period as required by Rule 49(1). In any event, this application was withdrawn before it was to be heard on 13 February 2002. On 19 March 2002 appellant served and filed an application for

"condoning the late filing of the Applicant's application in terms of Rule 49," as well as a separate application for rescission of the default judgment. This latter application repeated almost *verbatim* the allegations contained in the first application for rescission.

Before this Court can consider the merits of the appeal, it has to consider an application to reinstate the appeal (application number 2607/2003) because it had lapsed on account of appellant's failure to prosecute it in accordance with Uniform Rule of Court 50(1). (In his Heads of Argument counsel for appellant mistakenly refers to Rule 49(6)(b). Rule 49 deals with appeals from the Supreme Court whereas Rule 50 deals with appeals to the Supreme Court from Magistrates' Courts. This is

such an appeal). Rule 50 does not contain a provision similar to Rule 49(6) relating to reinstatement of an appeal from the Magistrate's Court.

In my view such an application can be made in terms of Uniform Rule of Court 27 which provides for extension of any time prescribed by the Rules "on good cause shown".

Rule 50(4) requires an appellant to apply for the assignment of a date for the hearing of an appeal within 40 days of noting the appeal. The appeal was noted on 13 December 2002. (Appellant mistakenly refers to 6 December 2002 being the date of the notice. It was only served on respondent's attorneys on 13 December 2002 and filed with the Clerk of the Court on the same date). The 40 day period lapsed on 13 February 2003. Appellant applied for a trial date only on 28 July 2003, i.e. more than 5 months late.

Appellant relies on the affidavit of his attorney, Mr Malatji, in support of the application to reinstate the appeal. I quote the relevant paragraphs from this affidavit which was delivered with the Notice of Motion on 28 July 2003:

“ 2.

The Appellant noted an appeal in this matter per notice dated 6 December 2002. The appeal was required to be prosecuted on or before 6 March 2003. The Appellant has not prosecuted the appeal within the aforementioned period and requests this Honourable Court to revive the appeal and the date of hearing thereof.

3.

The application for Rescission of Judgment by the Appellant was eventually argued on 15 October 2002 and our correspondent attorneys in Sasolburg forwarded the Magistrate's reasons to us on 14 November 2002. I prepared recommendations to the Appellant recommending that the decision of the Court *a quo* should be taken on appeal and this recommendation was provided to the Appellant on 6 December 2002.

4.

The Appellant was engaged in a restructuring process. The process entailed separating the functions of the Appellant insofar as defended and undefended matters are concerned. The Applicant was in the process of establishing litigation departments which would be responsible for dealing with defended matters and liaising with applicant's attorneys whereas the claims department would then be charged with the responsibility of investigating and settling claims which were not defended.

5.

The restructuring process involved the transfer of files from claims departments to litigation departments in all of the respondent's various branches across the country. As a safety measure, I filed a notice of intention to appeal in this matter pending receipt of formal instructions from the applicant to prosecute an appeal on the aforementioned date of 6 December 2002. However, the applicant was unable to locate their file timeously to provide me with formal instructions to proceed with the appeal and to provide

me with a power of attorney in this regard.

6.

I eventually impressed upon the Appellant's to consider my recommendation and to locate their file and on 18 February 2003 I received formal instructions to prosecute the appeal. I immediately proceeded to instruct Messrs Taxco Transcribers in Bloemfontein to attend to the preparation of the appeal record. A copy of my instructing letter is attached hereto marked Annexure "A". I also attach in this regard a copy of a fax received from Taxco Transcription Services marked Annexure "B" hereto.

7.

I had received an undertaking from the transcribers that the record would be ready prior to the date on which we would have needed to prosecute the appeal. However, despite the aforementioned undertaking and numerous telephone calls, I did not receive the record timeously. I eventually received the record as prepared by them on 8 May 2003. On receipt of the aforementioned record, I realised that they had made a grave error in that they had retyped all the documents (including affidavits filed in the court *a quo*) that were filed in the court file instead of simply preparing the record and typing only the judgments as given by the court *a quo*.

8.

I requested them to forward the files back to me so that I could make alternative arrangements for preparation of the record. I then proceeded to make alternative arrangements for the record to be prepared by Sneller

Transcriptions (Pty) Ltd and they prepared the relevant record on 3 July 2003 after it had been forwarded to our correspondents on 29 May 2003.

9 .

This matter has been to a large extent a comedy of errors. It is my humble submission that the Appellant should not be unduly penalised by the court as a result of the comedy of errors that occurred in regard to the matter. The Appellant is desirous of having the appeal determined by this court. The issues raised in regard to application for rescission of judgment are quite substantial and the Appellant seeks this court's guidance in future dealings relating to similar matters and thus judgment in regard to this matter and the two other related matters will be of great substance and assistance to the Appellant's future functioning.

10 .

I humbly request the above Honourable Court to grant the order as prayed for.”

I have already mentioned that Mr Malatji obviously does not know the relevant Rule or did not read it properly. When he received instructions to prosecute the appeal on 18 February 2003, the period of 40 days after noting the appeal had already lapsed. According to his letter to Taxco dated 18 February 2003 he was under the impression that it would be in order to receive the record shortly before 6 March 2003. There is nothing to substantiate his allegation that the transcribers had undertaken to have

the record ready by a certain date. (Paragraph 7 of the affidavit).

The allegations in paragraphs 4 and 5 relating to appellant's restructuring process are clearly hearsay. Mr Malatji is an attorney in private practice and must have obtained his knowledge about appellant's so-called restructuring process from officials in appellant's employ. In this regard appellant's counsel submitted that respondent did not deliver an answering affidavit alerting appellant that the hearsay argument would be put forward, so that appellant could tender first hand evidence in reply. This submission is entirely unconvincing. An applicant who bases an application for condonation on pure hearsay, does so at his own peril. Why must his opponent alert him that his evidence is hearsay? The use of hearsay by Mr Malatji is only further evidence of the incompetence with which he has handled these matters. In any event, he does not say when the restructuring process started or how long it lasted. It seems strange that litigation departments were being created by appellant, apparently for the first time, incidentally during the period November 2002 to February 2003. What happened to defended matters during the previous decades since appellant came into existence? Moreover, this matter was undefended because appellant had not entered appearance to defend. There would, therefore, on Mr Malatji's version, have been no reason to transfer this file from the claims department, where Mr Miller

had been dealing with it throughout, to any other department. Most important, Mr Malatji does not explain why or how the file presumably got lost. He does not explain why appellant was unable to locate the file timeously. He does not say what happened to the file or why it was presumably mislaid. It is also strange that an attorney delivers a notice of intention to appeal without instructions from his client. Be that as it may, what Mr Malatji says in his affidavit shows clearly that this is not so much a comedy of errors as that he does not know the applicable Rules of court and that appellant was grossly negligent in handling this matter.

Apart from the above considerations, on Mr Malatji's own version appellant had to prosecute the appeal on or before 6 March 2003. There is no allegation that he approached respondent's attorneys to agree to late prosecution. Once 6 March 2003 had come and gone appellant should have sought condonation without delay. There is nothing that prevented it from approaching the Court for an extension of time within which to prosecute the appeal according to the Rules and explaining under oath, corroborated by the various transcribers, the difficulties with regard to the record. In this regard it is difficult to understand what Mr Malatji intended to convey in paragraph 7 of his affidavit about the so-called "grave error". The relevant part of his letter to Messrs Taxco Transcribers dated 18 February 2003 reads as follows:

“We confirm having requested you to compile an appeal record for us on the following civil cases, which were heard in the magistrate court for the district of Sasolburg:

- M.S. MOTALE / ROAD ACCIDENT FUND – 4308/01
- J BLIGNAUT / ROAD ACCIDENT FUND – 4571/01
- AJC BLIGNAUT / ROAD ACCIDENT FUND – 4573/01

Kindly note that all we require is the following:

- All the documents used in the Application in an appeal record format;
- The judgement of the court of the 24th April 2002;
- Notices of Appeal.”

I fail to understand that the transcriber made a “grave error” by re-typing all the documents, including affidavits filed in the court *a quo*. How else is an appeal record “compiled in an appeal record format”? Do “all the documents used in the application” not include affidavits?

My conclusion is that appellant’s explanation for its failure to prosecute the appeal timeously is entirely unconvincing and unsatisfactory. The explanation in each of the appeals is exactly the same. It follows that not one of the appeals can be re-instated.

Respondent’s counsel submitted that the Court should order appellant to pay the costs of appeal on the attorney and client scale as a mark of its

disapproval of the manner in which these matters have been handled by appellant. Although incompetence is plainly evident, I find no evidence of *mala fides* and decline to make a punitive costs order.

The following order is issued in each of the 3 appeals:

1. The appeal is removed from the Roll.
2. Appellant is ordered to pay respondent's costs.

J.P. MALHERBE JP

I CONCUR

C.H.G. VAN DER MERWE J

On behalf of Appellant:

A.G. South
Instructed by
Honey & Partners
Bloemfontein

On behalf of Respondent:

D.A. Louw
Instructed by
Rossouws
Bloemfontein