REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NO: 2012/06638

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

20 February 2013 FHD VAN OOSTEN

In the matter between

DESBEL 20 (PTY) LTD **APPLICANT**

and

JOHANNES DOUGLAS RICHARDS **FIRST RESPONDENT**

JAMES HUMPHRIES DU RANDT **SECOND RESPONDENT**

Application for condonation and re-instatement of lapsed appeal in civil matter-requirements for-merits of the appeal-judgment appealed against containing irregularity that will result in injustice if allowed to stand-condonation granted and re-instatement of appeal ordered.

J U D G M E N T

VAN OOSTEN J:

[1] This is an application for condonation and reinstatement of an appeal. The appeal was noted on 3 September 2010 against the whole of the judgment and certain orders

made by the magistrate, Roodepoort, on 10 March 2010, in an action between the respondents, as the plaintiffs, and the applicant, as the defendant. I shall for ease of reference refer to the parties as in the action.

[2] The plaintiffs, as the lessees, sued the defendant, the lessor, for repayment of an amount of R22 500-00 plus interest at the rate of 2% in the sum of R787-50 and further interest at the *mora* rate, being the deposit paid to the defendant in terms of the agreement of lease concluded between the parties. The lease agreement was cancelled by the defendant, which was accepted by the plaintiffs, who became entitled to reimbursement thereof. The defendant in its plea admitted the plaintiffs' claim but instituted a counterclaim in respect of damages (in the amount of R31 648-22) allegedly resulting from the plaintiffs' failure to maintain the leased premises in good order. In the final paragraph of the plea the defendant pleads as follows:

'10. In the circumstances the defendant pleads that the amount of R23 287-50 (R22 500-00 plus R787-50) be set-off against the defendant's claim of R31 648-22, as a result of which the plaintiffs are indebted to the defendant jointly and severally in the amount of R8 360-72.'

The prayers in the counterclaim is then for payment of the amount of R8 360-72, interest thereon and costs.

[3] At the commencement of the trial before the magistrate, the plaintiffs sought a ruling that, in view of their claim having been conceded on the pleadings, they were entitled to judgment in their favour. The magistrate however, directed that judgment would only be entered simultaneously with the judgment on the defendant's counterclaim. The plaintiffs conceded that judgment be entered on the counterclaim as prayed for. Having heard arguments the magistrate reserved judgment. Judgment was subsequently delivered in terms of which, both the plaintiffs' claim (in the amount of R22 500-00 plus R787-50) and the defendant's counterclaim (in the amount of R8 360-72) were granted.

[4] It is abundantly clear from the judgment of the magistrate that the set-off, as pleaded by the defendant, was ignored. The end result of the judgment is that the plaintiffs will be paid the sum of R22 500-00 plus R787-50 (on their claim) and, in addition, that they will be entitled to the benefit arising from the defendant's set-off as pleaded, for that

very same amount. In effect therefore the plaintiffs would receive double the amount claimed while the defendant would only receive R8 360-72. The judgment in favour of the plaintiffs was accordingly wrongly granted. The result in my view leads to a manifest injustice to which I shall revert.

[5] Counsel for the plaintiffs, who had also appeared for the plaintiffs before the magistrate, vigorously defended the judgment of the magistrate. When it became clear that the set-off was arithmetically wrongly applied, counsel sought refuge in the way the defendant's plea was formulated and in particular that only the amount of R8 360-72 was claimed and not the full amount of the damages. The argument is fallacious and falls to be rejected. It plainly ignores the fact that the lesser amount was accounted for in the plea after set-off of the plaintiffs' claim, as I have alluded to. No amendment of the plea, as the magistrate has suggested in the reasons for the judgment (given on 22 June 2010) was necessary. The magistrate blindly, led by counsel for the plaintiffs, parroted the prayers in the plaintiffs' claim and the defendant's counterclaim without considering the effect of the set-off as pleaded. The glaring discrepancy resulting from the judgment should have been manifestly clear to the magistrate as well as to counsel for the plaintiffs, both before the magistrate and before this court.

[6] The question arising is what effect should be given, in the determination of this application, to the judgment which in my view constitutes and irregularity with a resultant injustice having occurred. It becomes important as the defendant, in my view, has clearly failed to satisfy the first requirement for obtaining condonation, which is a reasonable explanation for the lateness of the noting of the appeal. The explanation tendered relies on the attorney, who handled the matter, having left the employ of the defendant's attorneys of record and the matter not having received the required attention. Further mention is made of delays caused in an attempt to reconstruct the record of the proceedings, which is surprising in view of the fact that no evidence was led at the trial. Be that as it may, as rightly conceded by counsel for the defendant, there are no *bona fide* reasons for the delay. In the normal course, and on a long line of authorities such as *Blumenthal and another v Thomson and another* 1994 (2) SA 118 (AD) 121I, a refusal of condonation, on this basis alone, would have been justified. Different considerations do however apply where, as in this case, a judgment resulting in an injustice would be allowed to stand merely resulting from the absence of

reasonable grounds for granting condonation. I derive some support for the view I hold from the judgment of the Supreme Court of Appeal in *Uitenhage Transitional Local Council v South African Revenue Service* 2004 (1) SA 292 (SCA) para [46], where Heher JA held:

"The appellant's application for condonation is saved by the merits of the appeal."

[7] As to costs, I seriously considered awarding the plaintiffs the costs of their opposition to this application. On the other hand, as I have already dealt with, the plaintiffs consistently ignored the realities of this matter in obtaining and defending the judgment. In the exercise of my discretion I have decided that it would be fair, just and equitable if each party is to pay its or their own costs.

[8] In the result the following order is made:

1. The applicant is granted leave to reinstate the appeal noted in the above matter under case no A3041/2010.
2. The execution of the judgment in Roodepoort case no 2009/4141, between the above parties, is stayed pending the finalisation of the appeal referred to in paragraph 1 above.
3. No order as to costs is made.

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANT	***ADV A JACOBS***
APPLICANT'S ATTORNEYS	***MOODIE & ROBERTSON***
COUNSEL FOR RESPONDENTS	***ADV A BISHOP***
RESPONDENTS' ATTORNEYS	***DU RANDT & RICHARDS INC***

DATE OF HEARING	*18 FEBRUARY 2013*
DATE OF JUDGMENT	*20 FEBRUARY 2013*