REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 10972/2018

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

SIGNATURE ..... DATE 24/5/19

In the matter between:

MEDIA DEVELOPMENT AND DIVERSITY AGENCY	Applicant
and	
BONGINKOSI TREVOR BOQO	1st Respondent
MOGALE FM	2nd Respondent
THE SHERIFF: ROODEPOORT SOUTH	3rd Respondent
THE MAGISTRATE FOR THE REGIONAL DIVISION: GAUTENG – KAGISO N.O.	4th Respondent

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JUDGMENT

MATOJANE J

Introduction

[1] The applicant has brought an application seeking to review and set aside the interpleader proceedings that took place before the Magistrate, (the fourth respondent) in the Kagiso Regional Court, Mogale City. The applicant further seeks an order declaring that the applicant is the owner of certain assets attached by the third respondent, the Sheriff for Roodepoort North. These assets were attached by the Sheriff at the premises of the second respondent, Mogale FM, on the instructions of the Mr Boqo, the first respondent.

[2] The applicant contends that the Magistrate's decision was reviewable on the ground of gross irregularity in the proceedings, because even though it was a claimant, it was never served with the summons and was also never cited as a party. Mr Boqo, on the other hand, avers that the applicant was aware of the attachment of the assets by the Sheriff as well as the subsequent interpleader summons, and that it was represented in the proceedings.

Background facts

[3] In 2017 the first respondent, Mr Boqo, instituted an action against Mogale FM for breach of a contract. On 7 September 2017 judgment was granted in favour of the Mr Boqo. A writ of execution was issued, pursuant to which the Sheriff attached and removed various movable assets found on the premises of Mogale FM.

[4] The applicant attended the offices of the Sheriff to inform it that the attached assets belonged to it and not to Mogale FM. Mr Madzhara, an attorney, also delivered an affidavit to the Sheriff; this affidavit was deposed to Mr Mathobo, the applicant's supply chain officer. The affidavit stated that the applicant was the true owner of the movable assets that were attached by the Sheriff.

[5] The Sheriff proceeded to issue an interpleader summons which was served on the execution creditor, the execution debtor, and the offices of Madzhara Attorneys. No service was effected on the applicant who was a claimant. Instead, the

Sheriff served the summons on Madzhara Attorneys, who it believed to be acting on behalf of applicant. The applicant was not cited as a party in the interpleader summons. The hearing was set down for the 18 January 2018.

[6] At the commencement of the hearing of the interpleader proceedings on the 18 January 2018, Mr Madzhara informed the court as follows:

'MR MADZHARA: Thank you, Your Lordship. Mr T R Madzhara, I will be appearing on behalf of the claimant in this case, which is Mogale FM.
PRESIDING OFFICER: Thank you, proceed.
MR MADZHARA: Mogale FM is not the claimant, apology for that Your Worship. It is MDDA which is the claimant. I have a witness who is before the court, who is authorised by resolution to represent the company as such.'

[7] The Magistrate never sought clarity from Mr Madzhara whether he was appearing on behalf of the applicant or Mogale FM. Mr Madzhara proceeded to lead the evidence of Mr Mathobo, the employee of the applicant (referred to as 'MDDA' in the excerpt above), as a witness. At the end of the proceedings the Magistrate found that the attached movable assets belonged to the execution debtor, being Mogale FM, and that no nexus existed between the attached movable assets and the items claimed by the applicant. The Magistrate dismissed the claim and ordered the applicant to pay the costs of the application.

Application for condonation for late filing of a supplementary affidavit

[8] The applicant is seeking condonation for the late filing of its supplementary affidavit. The application for condonation is opposed by the first respondent. The first respondent argues that the applicant fails to show good cause for the granting of condonation and that there is no bona fide reason for the delay. The first respondent further contends that the applicant fails to provide an explanation for the entire period of the delay.

[9] On 26 March 2018, an urgent court order was granted by agreement, directing that the sale in execution that had been scheduled for 27 March 2018 be halted pending the hearing of the current application.

[10] After the urgent court order was granted, the first respondent was aware of any steps taken by the applicant in respect of the review application. As a result, on 6 April 2018, the first respondent's attorney's directed an email to the applicant's attorneys (Mketsu and Associates Inc), enquiring as to whether a copy of the record had been obtained, and when the applicant intended to deliver its supplementary affidavit. On 24 April 2018, the same query was addressed via email to the applicant's attorneys, to which there was no response.

[11] On 6 June 2018 the applicant's attorneys dispatched an uncommissioned supplementary affidavit to the first respondent's attorneys by email. At this stage, the first respondent's attorneys had not yet been provided with a copy of the record, which was in the applicant's possession. Upon receipt of this email, the first respondent's attorneys responded with a request that they be provided with the Magistrate's reasons and a commissioned copy of the supplementary affidavit. They also enquired as to when condonation would be sought for the late delivery of the supplementary affidavit.

[12] Although the commissioned supplementary affidavit was delivered to their offices the next day, the first respondent's attorneys did not receive any response from the applicant. On 21 June 2018, the first respondent's attorneys addressed a letter to the applicant's attorneys, once again requesting a copy of the record and the condonation application. The applicant's attorneys replied, in a letter dated 25 June 2018, advising the first respondent that the absence of the record and condonation application did not prevent him from finalising his answering affidavit in the review application.

[13] In the same letter, the applicant undertook to deliver the record to the first respondent's attorneys. It stated that it had been notified that the record had been filed with the Registrar on 9 April 2018. However, the applicant appears to have made a typing error, as it later refers to 9 May 2019 as the date of filing. The documents attached to the letter show that the record and Magistrate's reasons had been filed on 9 May 2018, and that the applicant's attorneys were notified of this in the late afternoon on 10 May 2018. The applicant states that it was in possession of the record the following day.

[14] On 27 July 2018, the applicant's attorneys were again advised that a condonation application had not yet been received and that in the absence of such a condonation application, the supplementary affidavit was not properly before the court.

[15] The applicant eventually delivered the condonation application. The condonation application is dated August 2018. The founding affidavit attached to it is undated. The copy of the condonation application on the court file has not been stamped by the Court. There is no confirmatory affidavit attached.

[16] Rule 53 of the Uniform Rules of Court sets out the procedure to be followed in bringing a review from the Magistrate's Court. Rule 53(4) provides as follows:

'The applicant may within ten days after the registrar has made the record available to him or her, by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of his or her notice of motion and supplement the supporting affidavit.'

[17] The first respondent's attorneys contend that the supplementary affidavit should have been delivered by 23 April 2018. The applicant maintains that the supplementary affidavit was due on or before 25 May 2018. The first respondent is mistaken in the calculation of the *dies*. Rule 53(4) makes it clear that the applicant has ten court days, after the record being made available to it, to file its supplementary affidavit.

[18] As stated above, the documents indicate that on 10 May 2018 at 15:57, the applicant received notice via email that the record and Magistrate's reasons had been filed. One cannot have expected the applicant's attorneys to obtain a copy of the record that day. If one calculates the *dies* using 11 May 2018 as the starting date, the applicant's supplementary affidavit had to be delivered by 25 May 2018. The applicant's attorneys are therefore of the view that the supplementary affidavit was out of time 'by approximately 6 days'.

[19] The applicant's supplementary affidavit was delivered on 7 June 2018, being the day on which the commissioned version was served and filed. It was delivered eight days late.

[20] In the condonation application it is stated that the supplementary affidavit was prepared and sent to the client for signature on 4 June 2018. It was not signed immediately, given that the deponent was out of the country. The attorneys for the applicant stated that they collected the signed affidavit on 6 June 2018 and served it on the first respondent by email on the same day. As stated earlier, this affidavit attached to the email was not commissioned.

[21] The applicant's attorney fails to provide an explanation for the entire period of the delay. In the condonation application, the deponent to the founding affidavit, Sydwell Mketsu, a director of applicant's attorney, states that, 'The said Supplementary Affidavit was duly prepared and forwarded to client for signature on 4 June 2018.' By that time, the supplementary affidavit was already overdue. The applicant's attorney fails to account for the delay prior to 4 June 2018.

[22] Condonation is a discretionary matter, which discretion is to be exercised by a Court judicially upon consideration of all the facts, and is, in essence, a question of fairness to both sides.[1] Condonation for non-compliance with the rules of the court is not a mere formality, and it cannot be assumed that, where non-compliance was due entirely to the neglect of the appellant's attorney, condonation will be granted.[2] In the particular circumstances of this case, I am inclined to grant the condonation

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[1] *United Plant Hire (Pty) Ltd v Hills and Others* 1976 (1) SA 717 (A) at 720E-G.
The Court stated as follows: 'It is well settled that, in considering applications for condonation, the Court has a discretion, to be exercised judicially upon a consideration of all of the facts; and that in essence it is a question of fairness to both sides. In this enquiry, relevant considerations may include the degree of non-compliance with the Rules, the explanation therefore, the prospects of success on appeal, the importance of the case, the respondent's interest in the finality of his judgment, the convenience of the Court, and the avoidance of unnecessary delay in the administration of justice. The list is not exhaustive.
These factors are not individually decisive but are interrelated and must be weighed one against the other; thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong....'

[2] *Darries v Sheriff of the Magistrates' Court (Wynberg) & Another* [1998] JOL 2154 (A) at p8-10.
The Court stated: '....Condonation of the non-observance of the Rules of this Court is not a mere formality.... In all cases some acceptable explanation, not only of, for example, the delay in noting an appeal, but also, where this is the case, any delay in seeking condonation, must be given. An appellant should whenever he realises that he has not complied with a rule of court apply for condonation as soon as possible.... Nor should it simply be assumed that where non-compliance was due entirely to the neglect of the appellant's attorney that condonation will be granted.... In applications of this sort the appellants' prospects of success are in general an important though not decisive consideration. ... But appellant's prospect of success is but one of the factors relevant to the exercise of the court's discretion, unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation obviously unworthy of consideration. Where non-observance of the rules has been flagrant and gross an application for condonation should not be granted, whatever the prospects of success might be ....'

application because the appellant's prospect of success renders the matter worthy of consideration.

The review application

[23] Section 22 of the Superior Courts Act 10 of 2013 provides for the circumstances under which judgments of a magistrate's court may be reviewed.[3] Section 22(1) affords a High Court the jurisdiction to review the proceedings of Magistrates' Court within its area of jurisdiction on specified grounds. As per s 22 (1)(*c*) this includes the ground of a 'gross irregularity in the proceedings'.

[24] Gross irregularity as a ground of review refers to "an irregular act or omission by the presiding judicial officer . . . in respect of the proceedings of so gross a nature that it was calculated to prejudice the aggrieved litigant, on proof of which the court would set aside such proceedings unless it was satisfied that the litigant had in fact not suffered any prejudice."[4] A 'gross irregularity' includes cases in which the lower court has exceeded its powers as set out in the Magistrates' Court Act 32 of 1944.[5] The court will not set aside proceedings on review if it is satisfied that no substantial wrong was done to the applicant. See *Hip Hop Clothing Manufacturing CC v Wagener NO and Another*.[6]

[25] The onus of proof is on the applicant to prove not only the existence of the irregularity but that it was so gross that it was calculated to prejudice him. If he

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[3] 22 Grounds for review of proceedings of Magistrates' Court
(1) The grounds upon which the proceedings of any Magistrates' Court may be brought under review before a court of a Division are-
(a) absence of jurisdiction on the part of the court;
(b) interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;
(c) gross irregularity in the proceedings; and
(d) ....

[4] *Magistrate Pangarker v Botha & Another* 2015 (1) SA 503 (SCA) at 509B-D. Quoted by the Court with approval from Van Loggerenberg et al *Erasmus: Superior Court Practice* (2013) at A1 – 71.

[5] See *Minister of Police v Regional Civil Magistrate, Oudtshoorn and others* [2014] JOL 32567 (WCC) para 6.

[6] *Hip Hop Clothing Manufacturing CC v Wagener NO and Another* 1996 (4) SA 222 (C) at 230C-D. The Court, quoting *Building Improvements Finance Co Ltd (Pty) Ltd v Additional Magistrate, Johannesburg, and Another* 1978 (4) SA 790 (T) at 793A-B stated: '(I)t is an established principle that the Court will not set aside proceedings on review if it is satisfied that no substantial wrong was done to the applicant, ie that the irregularity was not likely to prejudice the applicant."

succeeds in discharging the onus, the respondent must satisfy the court that the applicant suffered no prejudice.[7]

[26] Section 69 of the Magistrates' Court Act provides for the institution of interpleader proceedings in a situation where a person, other than the judgment debtor, claims property attached or about to be attached; or for the situation where two or more persons make competing claims to property in the custody or possession of a third party. It provides:

69. Interpleader claims.—
(1) (a) Where any person, not being the judgment debtor makes any claim to or in respect of any property attached or about to be attached in execution under the process of any court, or to the proceeds of such property sold in execution, his claim shall be adjudicated upon after issue of a summons in the manner provided by the rules.
(b) Upon the issue of such summons any action which may have been brought in any court whatsoever in respect of such property shall be stayed and shall abide the result of the proceedings taken upon such summons.
(2) Where two or more persons make adverse claims to any property in the custody or possession of a third party such claims shall be adjudicated upon after issue of a summons in the manner provided by the rules.

[27] The section makes provision for interpleader proceedings in two different sets of circumstances, the first of which is applicable here. The reference in section 69 to the rules of the Magistrates' Court Act is a reference to Rule 44 of the Magistrates' Court Rules. Rule 44(2) deals with interpleader proceedings in the context of the attachment and execution of property by the Sheriff. It reads as follows:

'44 Interpleader claims

(1) ...

(2) (a) Where any person other than the execution debtor (hereinafter in this subrule referred to as the 'claimant') makes any claim to or in respect of property attached by the sheriff in execution of any process of the court or where any such claimant makes any claim to the proceeds of property so attached and sold in execution the sheriff shall require from such

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[7] Ibid at 230D-E. See also *Geidel v Bosman NO and Another* 1963 (4) SA 253 (T).

claimant to lodge an affidavit in triplicate with the sheriff within 10 days from the date on which such claim is made, setting out—

(i) the claimant's full names, identity number and occupation;

(ii) the claimant's residential address and business address or address of employment; and

(iii) the nature and grounds of his or her claim substantiated by any relevant evidence.

(b)(i) Within 15 days after the date on which the claim is made the sheriff shall notify the execution creditor and all other sheriffs appointed for that area who have submitted certificates referred to in rule 39(2)(c) of the claim.

(ii) Simultaneously with the notice referred to in subparagraph (i), the sheriff shall deliver one copy of the claimant's affidavit to the execution creditor and one to the execution debtor.

(c)(i) The execution creditor shall, within 10 days of receipt of notice of the claimant's claim and affidavit, advise the sheriff in writing whether he or she admits or rejects the claimant's claim.

(ii) If the execution creditor gives the sheriff notice within the period stated in paragraph (i) that he or she admits the claim, he or she shall not be liable for any costs, fees or expenses afterwards incurred and the sheriff may withdraw from possession of the property claimed.

(3) (a) If the execution creditor gives the sheriff notice that he or she rejects the claim, the sheriff shall within 10 days from date of such notice prepare and issue out a summons in the form prescribed for that purpose in Annexure 1 calling upon the claimant and the execution creditor to appear on the date specified in the summons to have the claim of the claimant adjudicated upon.

(b) The sheriff shall notify all other sheriffs appointed for that area who have submitted certificates referred to in rule 39(2)(c) of the date specified in the summons sued out under paragraph (a) and of the judgment of the court.

(c) The registrar or clerk of the court shall sign and issue the summons.

(4) ...'

[28] The interpleader summons does not comply with section 69(1) of the Magistrates' Court Act, read with Rule 44(2), as it was not prepared in accordance with Annexure 1, Form 36. The applicant, who is a claimant, is not summoned to appear before court to state the nature and particulars of its claim. Only the execution creditor (Mr Boqo) and the execution debtor (Mogale FM) are cited on the face of the summons. Service of the summons was effected on the attorneys of the judgment creditor, Madzhara Attorneys, which the interpleader summons states acts on behalf of the claimant.

[29] At the commencement of the interpleader proceedings, Mr Madzhara stated that he appeared on behalf of the claimant, Mogale FM. Mogale FM was not the claimant. He then corrected himself, stating that the applicant, 'MDDA', was the claimant. However, it was only Mogale FM who had been cited in the interpleader proceedings (as the judgment debtor). Despite the applicant, MDDA, not being properly before him, the Magistrate proceeded to decide the matter and concluded that the applicant has failed to prove that it was the owner of the assets under attachment.

[30] It is trite that Magistrates' Courts are creatures of statute. As such, they have no inherent jurisdiction, and their powers must be deduced from the four corners of the statute or rules under which they operate. The Magistrate has no general power to condone non-compliance with the form or substance of the rules, and cannot exercise powers which are not expressly provided for in the Magistrates' Court Act. In *Hip Hop Clothing Manufacturing CC v Wagener NO* Van Reenen J said:

'...The only Rule that permits a magistrate to condone non-compliance with the Rules of the Magistrates' Courts is Rule 60 which, on my reading thereof, does not empower a magistrate to permit a deviation from the *form* of proceedings prescribed by such Rules....'[8]

[31] The Magistrate should have satisfied himself that the applicant was properly summonsed to appear before him. In condoning the non-compliance with section 69(1) of the Magistrates' Court Act, read with Rule 44(2), the Magistrate exceeded his powers and committed a gross irregularity. The learned Magistrate has erred in this respect, and the proceedings before him fall to the reviewed and set aside as being grossly irregular given that the applicant was not afforded a hearing.

Costs

[32] The first respondent sought an order that the applicant's legal representatives, Mketsu and Associates Inc, pay the costs of the condonation application and the review application de bonis propriis on an attorney and client scale. Such order was sought based on how both applications had been conducted by the attorney acting for the applicant.

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[8] *Hip Hop Manufacturing CC* (note 6 above) at 228H-I.

[33] Throughout the proceedings, the first respondent's attorneys attempted to address any procedural issues directly with Mketsu Inc to avoid delays and costly interlocutory applications. They were largely rebuffed. Mketsu Inc ignored correspondence from the first respondent's attorneys which drew attention to the defects in their papers. Mketsu Inc refused to amend a defective Notice of Motion in the review application, which asserted that the assets were in possession of Mogale FM. This resulted in the first respondent not being sure whether the applicant was seeking the release of the assets from Mogale FM.

[34] Mketsu Inc failed to timeously provide the first respondent with a certified copy of the record despite repeated requests to do so. Mketsu Inc repeatedly stated in its correspondence that the first respondent should deliver his answering affidavit, despite his attorneys not having received either the condonation application or the record.

[35] Rule 53(3) of the Uniform Rules of Court provides that when the applicant receives the record, he must 'thereupon cause copies of such portions of the record as may be necessary for the purposes of review to be made and shall furnish ... each of the other parties with one copy thereof ... certified by the applicant as true copies.'

[36] In terms of the Rule 53(5)(b), the respondent would have 30 days to file a response to the applicant's supplementary affidavit. It fell due on 6 July 2018. The first respondent only received the record on 26 June 2018. Mketsu Inc cannot justify this delay in light of the numerous requests the first respondent made for the delivery of the record which it had in its possession since 11 May 2018.

[37] Mketsu Inc was aware that the supplementary affidavit was overdue, and that condonation would have to be sought in respect of the late delivery. Mketsu Inc ignored correspondence sent to their offices by the first respondent attorneys, and failed to deliver the condonation application and record of the proceedings within a reasonable time. The supplementary affidavit was delivered out of time and without a condonation application for the late delivery of the affidavit.

[38] In respect of the condonation application, Mketsu Inc has attempted to place an affidavit before the Court that has not been properly commissioned and despite being alerted to it, have not sought to rectify the defect. It has also failed to advance an explanation for the entire period of the delay in delivering the supplementary affidavit. They only attempted to explain a portion of the delay, which represents three of the total eight day period. Mketsu Inc only sent the supplementary affidavit to the client for signature after it had already become due.

[39] Despite their duty to prepare a consolidated index, as required by this Court's Practice Manual, Mketsu Inc have failed to ensure that the consolidated index and bundles are duly prepared and placed in the court file.

[40] In *Multi-Links Telecommunications v Africa Prepaid Services Nigeria Ltd* 2014 (3) SA 265 (GP)[9] the principles relating to costs de bonis propriis were set out as follows:

'Costs are ordinarily ordered on the party and party scale. Only in exceptional circumstances and pursuant to a discretion judicially exercised is a party ordered to pay costs on a punitive scale. Even more exceptional is an order that a legal representative should be ordered to pay the costs out of his own pocket. It is quite correct, as was submitted, that the obvious policy consideration underlying the court's reluctance to order costs against legal representatives personally, is that attorneys and counsel are expected to pursue their client's rights and interests fearlessly and vigorously without undue regard for their personal convenience. In that context they ought not to be intimidated either by their opponent or even, I may add, by the court. Legal practitioners must present their case fearlessly and vigorously, but always within the context of set ethical rules that pertain to them, and which are aimed at preventing practitioners from becoming parties to a deception of the court. It is in this context that society and the courts and the professions demand absolute personal integrity and scrupulous honesty of each practitioner.

...

It is true that legal representatives sometimes make errors of law, omit to comply fully with the Rules of Court or err in other ways related to the conduct of the proceedings. This is an everyday occurrence. This does not however per se ordinarily result in the court showing its

[9] Multi-links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd and Others, Telkom SA SOC Ltd and Another v Blue Label Telecoms Ltd and Others 2014 (3) SA 265 (GP) paras 35-36.

displeasure by ordering the particular legal practitioner to pay the costs from his own pocket. Such an order is reserved for conduct which substantially and materially deviates from the standard expected of the legal practitioners, such that their clients, the actual parties to the litigation, cannot be expected to bear the costs, or because the court feels compelled to mark its profound displeasure at the conduct of an attorney in any particular context. Examples are, dishonesty, obstruction of the interests of justice, irresponsible and grossly negligent conduct, litigating in a reckless manner, misleading the court, and gross incompetent and a lack of care.'

[41] Taking into account the particular circumstances of this case, I am not persuaded that costs de bonis propriis are warranted. Although the applicant's attorney has conducted himself in an irresponsible and negligent manner in relation to the two applications, in my view such conduct does not justify an award of costs from its own pocket to mark the court's disapproval of the conduct.

In the result, I make the following order:

1. The late filing of the applicant's supplementary affidavit is condoned.
2. The decision of the fourth respondent sitting in the Kagiso Regional Court on 15 February 2018 is reviewed and set aside.
3. Each party is pay their own costs in the application.

K E MATOJANE
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of hearing:	26 April 2019
Date of judgment:	24 May 2019

Appearances:

Counsel for the Applicant:	Adv. M M Majozi
Instructing Attorneys:	Mketsu & Associates Inc.
Counsel for the First Respondent:	Adv. M C Scheepers
Instructing Attorneys:	Coetzee Attorneys