IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: A308/14

DATE: 16 SEPTEMBER 2014

In the matter between:

BALEMI CIVILS (PTY) LIMITED Appellant

and

MOLEFE ATTORNEYS Respondent

JUDGMENT

Tuchten J:

1. The appellant appeals against a decision in a magistrate's court refusing the appellant's application for rescission of a judgment, granted against the appellant at the instance of the respondent on 5 September 2013, for provisional sentence for R74 417,80, interest and costs. The true underlying dispute between the parties concerns the exact amount, if any, owed by the appellant to its erstwhile attorney, the respondent, for fees for professional services rendered. The respondent succeeded in obtaining provisional sentence against the appellant by default. It should never have done so because what was put up in the summons by the respondent as provisional sentence plaintiff did not constitute a liquid document. This however was not appreciated by the litigants. Except for a rather obscure reference in the answering affidavit to the absence of liquidity because "the cause of action arises out of services rendered the point was not taken by the appellant until counsel delivered supplementary written argument the day before this appeal was heard before us.

2. The sentence was granted on a bill of costs, taxed as between the respondent and its own client, the appellant. Provisional sentence is only competent in respect of claims made on liquid documents. But the authority in this Division is to the effect that a taxed bill of costs is only a liquid document when there is a signed authority on the strength of which the legal services are rendered, costs are incurred and the costs taxed.[1] The practice in this Division is to the effect that the existence of and reliance upon such a signed authority at the commencement of the action is mandatory.[2] In this case there was no reliance in the provisional sentence summons on any such signed authority. Counsel for the respondent asked us to follow the practice in the Cape court, pursuant to which the requirement of a written authority existing at the

commencement of the action for provisional sentence has been somewhat relaxed.[3]

3. The respondent relies in this regard on a power of attorney granted by the appellant not to the respondent but to his new attorney, whom he authorised (I summarise) to serve a notice of termination of mandate pertaining to all the appellant's instructions upon the respondent, to obtain all relevant information from the respondent and to negotiate a settlement with the respondent. The power given to the new attorney was put up by the appellant in his affidavit opposing the grant of provisional sentence.

4. In my view the decisions in this Division are more consistent with the principles of provisional sentence.[4] The essence of provisional sentence is that a creditor armed with a liquid document is entitled, subject to certain exceptions, to payment *before* the alleged debtor becomes entitled to enter into the principal case and rely on the facts underlying the issue of the liquid document. It seems to me that the approach in this Division better promotes the principle in s 34 of the Constitution, that everyone is entitled to have their dispute decided in a court or before other appropriate tribunal.[5]I therefore decline to follow the practice in the Cape courts.

5. On the facts, I do not think that this power given to the new attorney unequivocally admits the ambit of the mandate given previously to the respondent. At a factual level, perhaps, the existence of the new power would render it difficult for the appellant to argue that it had not mandated the respondent as alleged. But that, as I see it, is not the test in provisional sentence proceedings. It is the documents which must, standing on their own save for evidence of the fulfilment of simple conditions, satisfy the test of liquidity.

6. So the order made by the magistrate was incompetent and should never have been made. Because the document upon which the sentence was granted was not a liquid document, provisional sentence should have been refused.

7. The sentence was granted in the absence of the appellant's attorney. It is perfectly clear from the papers that the appellant always wanted to defend the case, even though he did not appreciate that his client had a defence to the claim which was procedurally unanswerable. The case was called on two occasions prior to that on which the sentence was granted. On both those occasions the attorney for the appellant was present but the case could not go on. The sentence was, as I have said, granted on 5 September 2013. The notice of set down for that date was served on the local correspondent of the appellant's attorney but by some oversight, the fact of the set down did not reach the appellant's attorney.

8. In these circumstances, the respondent's attorney, who knew full well that the appellant was not conceding the case, should have established why the appellant's attorney was not at court and alerted the presiding magistrate accordingly. It is improper to snatch a judgment under such circumstances.

9. A judgment so obtained by default may be rescinded if there is good cause. The stronger the defence, the less stringently a court will examine the cause of the default. Here the default has been explained and the defence is unanswerable. Counsel forthe respondent referred us to *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)*[6] ·The facts concerning the cause for the default are similar to the present case. The following appears at para 12 of the judgment:

I have reservations about accepting that the defendant's explanation of the default is satisfactory. I have no doubt that he wanted to defend the action throughout and that it was not his fault that the summary judgment application was not brought to his attention. But the reason why it was not brought to his attention is not explained at all. The documents were swallowed up somehow in the offices of his attorneys as a result of what appears to be inexcusable inefficiency on their part. It is difficult to regard this as a reasonable explanation. While the Courts are slow to penalise a litigant for his attorney's inept conduct of litigation, there comes a point where there is no alternative but to make the client bear the consequences of the negligence of his attorneys ... Even if one takes a benign view, the inadequacy of this explanation may well justify a refusal of rescission on that account unless, perhaps, the weak explanation is cancelled out by the defendant being able to put up a *bona fide* defence which has not merely some prospect, but a good prospect of success.

10. The present case is distinguishable from *Colyn* because the appellant has not merely a good prospect of success but an answerable case at the procedural level because provisional sentence should not have been granted on the documents put up by the respondent. The magistrate ought to have rescinded the sentence. Subject to a consideration of the appellant’s lamentable procedural failures in relation to the prosecution of the appeal, the appeal must succeed.

11. The procedural failures of the appellant are the following. Firstly, the appellant did not note the appeal within 20 days of the date upon which the magistrate formally furnished her reasons. The reasons were furnished on 2 December 2013 and the notice of appeal was only filed on 6 February 2014, some 23 days late. Secondly, the appellant should have filed two copies of the record with its application for a date for the hearing. It filed the record only on 15 August 2014. Thirdly, the heads of argument of counsel for the appellant were filed late.

12. These are serious breaches of the rules and there is no formal application for condonation. But neither the court nor the respondent has suffered any prejudice occasioned by the appellant’s breaches of the rules. The fact of the appellant’s non-compliance with the rules of this court was only raised in counsel’s heads of argument.

13. What are we to do with this (expensive) comedy of errors? We could strike the appeal from the roll. Or

we could grant condonation even in the absence of any application by the appellant痴 counsel, made orally and without formal notice from the bar.[7]And then, if we grant condonation, we could merely allow the appeal and thus bring the parties no nearer to the finality that the law seeks to achieve in relation to disputes.[8] Fortunately, in my view, the law as it stands does not compel us to dispose of the appeal in so arid a manner. As I see it, ss 19 and 22 of the Superior Courts Act[9] enable us to find a practical way of both doing justice and advancing the ultimate resolution of the real dispute between the parties. Under s 19(1)(d), this court is empowered to confirm, amend or set aside the decision which is the subject of the appeal and render any decision which the circumstances may require. Under s 22 (c) we are empowered to review any proceedings in a magistrate痴 court for gross irregularity.

14. I do not wish to encourage litigants to disregard the rules of this or any other court. If it were reasonably possible that the respondent could succeed in its action as presently procedurally formulated, I might well have come to other conclusions. However, as I have said, this is not the case. It weighs heavily with me that the respondent can never legitimately obtain provisional sentence on the bill of costs because that bill is not a liquid document.

15. Subrule 27(3) of the Uniform Rules empowers this court, on good cause shown, to condone any non-compliance with these rules. The subrule reads:

> The court may, on good cause shown, condone any non-compliance with these rules.

16. In *Minister for Safety and Security (now Minister of Police) v Scott and Another*[10] the Supreme Court of Appeal held:

> The principles relating to condonation are well established.
>
> The factors that this Court will have regard to when considering such an application include the adequacy of the explanation, the extent and cause of the delay, any prejudice to the parties, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the avoidance of unnecessary delay in the administration of justice and the applicant's prospects of success on the merits. Condonation is not to be had merely for the asking.
>
> A litigant who does not comply with the rules is required to show 堵ood cause・ why the rules should be relaxed.[11]

17. Rules 12(1), (2) and (3) of the Rules of the Supreme Court of Appeal read as follows:

> 1 In every matter where condonation is sought, the application shall be lodged in duplicate with the

registrar.

2 Every affidavit in answer to an application for condonation shall be lodged in duplicate with the registrar within one month after service of the application on the respondent.

3 The applicant shall lodge with the registrar any reply in duplicate within 10 days of receipt of the answering affidavit.

18. The SCA rule clearly requires any request for condonation which comes before it to be made in the form of a written application. The equivalent High Court rule does not require, as a jurisdictional prerequisite to its invocation, a formal application or, indeed, any application. Rule 27(3) is a powerful procedural tool available to the High Court in its efforts to attain justice. The rule operates within a spectrum in which litigants seek to obtain the leave of the court for departures from the prescriptions of the rules, otherwise described as procedural indulgences. In some categories, justice will generally require an explanation made on oath before the indulgence will be extended. An example of this is the request of a litigant that a trial or application be postponed, ie should not proceed and be heard on the day upon which it was set down for hearing. In such a case, the ostensible prejudice to the other side is generally so manifest that a rule of practice within this Division has developed under which applications for postponements made otherwise than pursuant to a written application are simply not entertained.

19. At the other end of that spectrum are those infractions of the rules which do not appear to have caused any prejudice and are raised for the most part for entirely tactical reasons. In my view, a court ought to be slow to lend its muscle to this kind of tactical manoeuvring. The rules exist for the court, not the court for the rules.[12] Each instance of non-compliance should be evaluated on its own facts and a determination made whether the case requires a formal application for condonation or other procedural indulgence or whether the non-compliance should summarily be disposed of.

20. Counsel for the respondent was invited to demonstrate, from the bar, any prejudice that might be occasioned the respondent if condonation were granted. No such prejudice was shown. Balancing the considerations I have discussed and with giving due weight to the procedural illegitimacy of the decision to proceed for provisional sentence, the fact that the judgment underlying the application for condonation was indeed provisional rather than final and the absence of any prejudice to the court or the respondent, I would condone the procedural shortcomings of the appellant in relation to the appeal.

21. But merely to allow the appeal and rescind the provisional sentence order would send the case back to the court below where the procedural misconceptions under which the parties have thus far laboured would probably carry on without any resolution of the true, underlying issue between the parties, which I identified

in the first paragraph of this judgment.

22. The order which I propose would prevent this and enable the court below to identify the real disputes between the parties and resolve them. In my view, this can be achieved by exercising the powers of the court both in relation to appeals from and the review of decisions of magistrates' courts. This will best be achieved if a procedural framework is created under which the case can go back to the court below and the true issue between the parties can be ventilated in that court.[13]

23. The question of costs remains for decision. I do not think that the appellant's undoubted success before this court should carry with it an order for costs. The appellant has been successful on a point never raised by it in the court below or before us until the day before the appeal was heard. It has required condonation of its failures to comply with the rules of this court. The respondent, for its part, has been unsuccessful in this court and proceeded in the court below on a cause of action which was procedurally incompetent. I would make no costs orders in relation to the proceedings both in this court and in the court below.

24. I propose the following order:

1. The appellant's non-compliances with the rules of this court are hereby condoned.

2. The appeal succeeds. The order of the court below is set aside and replaced with the following:

> The application for rescission is granted. The order for provisional sentence, interest and costs is set aside in its entirety. No order is made as to the costs of the application for rescission.

3. The provisional sentence summons in Pretoria magistrate's court case no. 32521/13 will stand as a simple summons as contemplated in rule 5(1) of the magistrates' courts rules and the notice of intention to defend dated 16 July 2013 will stand as notice of intention to defend the action.

4. The respondent (plaintiff in the court below) must within 20 days of this order, or such further time as may be agreed between the parties or allowed on application by the court below, deliver a statement of the material facts relied upon by the plaintiff for all the plaintiff's claims against the appellant (defendant in the court below). The plaintiff may include in such statement of facts all and any claims which the plaintiff wishes to bring against the defendant.

5. Thereafter, the magistrates' courts rules applicable to defended actions will apply to the further conduct of this case.

6. There will be no order as to costs in relation to the proceedings in this court.

NB Tuchten

Judge of the High Court

15 September 2014

I agree. It is so ordered

MW Msimeki

Judge of the High Court

15 September 2014

For the appellant:

Adv R Resenga

Instructed by Kekana Hlatshwayo Radebe Inc

Pretoria

For the respondent:

Adv WF Pienaar

Instructed by Molefe Attorneys

Pretoria

---

1 Herbstein & Van Winsen *The Civil Practice in the High Courts of South Africa*, 5th ed,1350

2 *Martens* v *Rand Share & Broking Finance Corporation (Pty) Ltd* 1939 WLD 159; *Morris & Benjamin v Cowan (1)* 1940 WLD 1

3 *Basil Maharaj & Co v East West Construction Co (Pty) Ltd* 1993 2 SA 822 C

4 This is also the view expressed in Herbstein & Van Winsen, *op cit* 1351

5 The approach to provisional sentence in the light of s 34 of the Constitution was comprehensively analysed in *Twee Jonge Gezellen (Pty) Ltd and Another v Land and Agricultural Development Bank of South Africa T/a the Land Bank, and Another* 2011 3 SA 1 CC. Whether the document relied upon by the plaintiff was or was not liquid did not, however, arise in that case.

6 2003 6 SA 1 SCA

7 Counsel痴 attitude during argument initially was, insupportably, that no condonation was required. Ultimately counsel saw the light and asked from the bar for condonation.

8 Section 34 of the Constitution speaks of 殿ny dispute that can be *resolved*・ and disputes being *電ecided"* [my emphasis]. The common law encourages the resolution of disputes without undue delay. This principle is expressed in the maxim that it is in the public interest that litigation be finalised without undue delay: *interest reipublicae ut sit finis litium.* This maxim has justly been described as fundamental.

9 Act 10 of 2013

10 [2014] 3 All SA 306 SCA para 16

11 Footnotes omitted.

12 *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 1 SA 773 A 783

13 An equivalent order was granted by this court in *Dyason v Main Pretoria Roiad Properties (Edms) Bpk. Dyason v Circle 鄭燃anching Co (Pty) Ltd* 1977 3 SA 177 T 180