IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE, HIGH COURT, CAPE TOWN)

Case no: A51/2011

2018/10 &1858/11

In the matter between:

ZOHRA SHABODIEN Applicant/Appellant

and

PAROW MOTORHANDELAARS (PTY) LTD Respondent

JUDGMENT DELIVERED THIS 19th DAY OF MARCH 2012

ERASMUS J,

[1] This matter serves before us styled as a civil appeal from the magistrate's court. The respondent obtained a default judgment against the appellant/applicant in the magistrates court at Wynberg on 20 November 2008. An application for the rescission of the judgment was unsuccessful and it is the refusal of this application that the appellant now wants to appeal against.

[2] Before we can however deal with the appeal, there is now an application before us for instatement of the appeal, which is opposed. It is therefore necessary to deal with the application for re-instatement first before dealing with the merits herein.

[3] For reasons that will become apparent during the summary hereof it is necessary to deal with the background to this matter in order to determine how it impacts on the application for condonation and re-instatement of the matter.

[4] During August 2008, the respondent instituted action in the magistrates court Wynberg on three claims totalling a capital amount of R1 276 553,93 (one million two hundred and seventy six thousand five hundred and fifty three Rand and ninety three cents). The appellant defended the action. During October 2008, appellant's plea was formally demanded and as a consequence of the appellant's failure to file a plea, default judgment was granted against the appellant on 20 November 2008.

[5] On 28 November 2008, the appellant brought an application for the rescission of the default judgment granted on 20 November 2008 in terms of the magistrate's court rule 41(1). This application for rescission of judgment was struck from the role with costs on 12 December 2008 due to the failure of the appellant's attorney to appear. The matter was then re-enrolled for 18 December 2008 and on that date the respondent agreed that the appellant obtain rescission of the judgment on an unopposed basis. It was then incumbent upon the appellant to act in terms of the rule and file a plea. This she failed to do.

[6] The plea was formally demanded on 19 January 2009, however on 27 January 2009, her attorney requested a further indulgence to 30 January 2009, for delivery of the appellant's plea. This request was acceded to by the attorneys acting on behalf of the respondent, however when no plea was forthcoming by 3 February 2009, a new application for default judgment was lodged. This resulted in a further default judgment being granted against the appellant on 16 February 2009.

[7] Four day later, on 20 February 2009, the appellant again applied in terms of Rule 49(1) for rescission of judgment and enrolled it for hearing on 12 March 2009. This application was opposed by the respondent.

[8] The matter was eventually heard on 15 April 2009, and after hearing argument the magistrate reserved judgment until 11 May 2009 and dismissed the application for rescission with costs.

[9] It needs to be noted, by that time the attachment of the immovable property concerned was already completed. The 14 May 2009 the appellant's attorney served a notice of appeal and filed a bond of security.

[10] No further steps were taken by appellant until 18 November 2009, when her erstwhile attorneys withdrew as the appellant's attorney of record. Appellant thereafter failed to prosecute her appeal within 60 days after the noting thereof and she failed to apply in terms of Rule 50(4)(a) to the registrar in writing and with notice to the respondent for the assignment of a date for the hearing of an appeal and at the same time make available to the registrar in writing a full residential and postal

address and the address of her attorney. She further failed to simultaneously lodge with the registrar two copies of the record in terms of Rule 50(7)(a).

[11] Due to the failure of the appellant to prosecute the appeal and to act in terms of the rules, respondent prepared documentation to proceed with the execution sale of the appellant's immovable property that was scheduled for 2 February 2010.

[12] On 1 February 2010, the appellant brought two urgent applications whilst represented by her current attorneys of record. The first application under case no: 1962/10 was an application to stay the sale in execution. The second application under case no: 2018/10, was an application to re-instate the appeal coupled with an application for condonation. Judgment was reserved and on 3 April 2010, an order was issued that prevented the respondent from proceeding with the execution sale of the immovable property pending the outcome of the appeal. The court also ruled that the application for re-instatement of the appeal and condonation was brought prematurely and directed that it should be placed before the court at the hearing of the appeal.

[13] Some 8 months later, on 31 January 2011, not having heard anything from the appellant, the respondent filed an application for declaratory relief under case no: 1858/11. By then it must have been abundantly clear to everyone that the appellant was flaunting the rules of court. She was also clearly making a mockery of the course of justice by allowing her application for re-instatement and condonation to remain alive and interdicting the respondent to executing the judgment which was obtained as long ago as 18 February 2009.

[14] Primarily, the appellant sought to put the blame for the delays and inaction on attorneys who were supposed to act on her behalf. She intimated that the filing of the record of the appeal was imminent. This could not be true and was merely a ruse as it is now apparent from an annexure to the affidavit in support of the condonation application that the record was collected from the contractor on 10 November 2010.

[15] On 24 January 2011, nearly a year after she gave the assurances, no application to the registrar for the assignment of a date of the hearing of the appeal had been filed; no notice of prosecuting the appeal had

been served on the respondent's attorneys; no record of appeal had been lodged with the registrar.

[16] When this appeal was eventually set down, the appellant simply failed to file heads of argument on time and to apply for condonation. This is a further indication of her flouting the rules of court. Not only did the appellant dismally fail to make out a proper case for a re-instatement of the appeal, or a condonation for a continued failure to prosecute the appeal, her behaviour throughout had been characterised by a policy of seeking to achieve delay and I am convinced that she lacks *bona fide*s in that, or particularly in as far as it relates to the obtaining of the record. The evidence is clear that it is a dishonest attempt to mislead the court.

[17] Not only was there at the application before the magistrate a mere vague and unsubstantiated statement of denying liability, which would affect the prospect of success, but ultimately the appellant's conduct in flouting the rules of court should not be condoned and therefore the appeal should not be re-instated.

[18] The respondent did as much it could to find a way of having its day in court which was frustrated by the appellant in more ways than one. This also had the result that the respondents had to incur costs under case no: 1858/11, wherein it asks for declaratory relief. Furthermore, the costs of the application to re-instate the appeal under case no: 2018/10 also stand to be adjudicated.

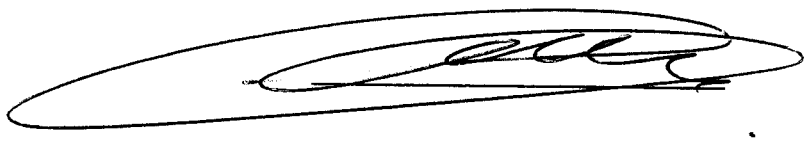
[19] I am of the view that in both these instances, the respondent incurred the costs due to the deliberate attempts by the appellant/applicant to frustrate the course of justice and the court should in these circumstances show its disapproval of this type of conduct by issuing cost on a punitive scale. The respondents however did not ask for a punitive cost order.

[20] I am of the view that the appropriate order should have been to remove the matter from the roll in that it has lapsed already in July 2009, and to order the appellant to pay the costs of the respondent herein and under case no:1858/11 and 2018/10, on an attorney and client scale. In the circumstances however, I make the following order.

Order

1) The matter is removed from the roll.

2) The appellant to pay the costs herein, and the costs under case no's: 1858/11 and 2018/10.



ERASMUS J

I agree

FORTUIN J