

SOUTH AFRICA / JUDGMENT

De Sausa v Van Huyssteen Architects (A3/2017) [2019] ZAMPMHC 23 (28 November 2019) [2019] ZAMPMHC 23

COURT

Middelburg High Court, Mpumalanga

BEFORE

HF Brauckmann, SS Mphahlele

CASE / FILE NUMBER

A3/2017

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IN

THE HIGH COURT OF SOUTH AFRICA,
MPUMALANGA
DIVISION, MIDDELBURG

(LOCAL
SEAT)

CASE

NO: A3/2017

In

the matter between:

AM
DE SAUSA
MAIA APPELLANT
And
VAN
HUYSSTEEN
ARCHITECTS RESPONDENT

JUDGMENT**HF BRAUCKMANN AJ**

- [1] This is an appeal from the Magistrate's Court Emalahleni ("the court a quo") in terms whereof the appellant, a firm of registered architects, seeks to have a judgment by Magistrate van Vuuren ("The Magistrate") set aside. The court a quo found that the appellant instructed ("mandated") the respondent to see to drawing of certain plans for a new home that the appellant intended to build in Bankenveld Estate in Emalahleni.
- [2] On 2 July 2014 the court a quo found in favour of the respondent and ordered the appellant to pay an amount of R39 900.00 together with interest and costs.
- [3] Aggrieved with the court a quo's finding and order the appellant filed a notice in terms of Rule 51(1) Rules in terms of the Magistrate's Courts Act 32 of 1944 (The Rules) on the clerk of the Magistrate's court requesting the magistrate to provide his written judgment which provide for:

3.1 The facts he found to be proved; and

3.2 His reasons for

judgment.

This notice was served and filed on 11 July 2014.

- [4] This is where the appellants' problems arose. The appeal was set down on 3 occasions. On 7 February 2019 the matter served before Acting Judge Vukeya AJ and myself. Due to the fact that there were no heads of argument on the court file, and the fact that the exhibits, referred to in the record of proceedings in the court a quo, did not form part of the appeal bundle, the matter was case-managed and postponed to 26 April 2019. Appellant tendered the wasted costs as it was clear that the matter was not ripe for hearing.
- [5] On 26 April 2019 the matter came before Mphahlele AJP and myself. The appeal was once again case-managed and postponed to 28 June 2019 as the court file was not properly indexed and paginated.
- [6] This matter came before Mphahlele J and myself again on 28 June 2019, where it appeared that the appeal has lapsed and an application for condonation was required to be brought by the appellant to cure his failure to comply with Rule 51(3) of the Rules. The notice of appeal was filed on 19 May 2017, while the judgment was granted on 2 July 2014. Further, it appeared that the appellant failed to comply with rule 51(4)(a) and (c) of the Uniform Rules of this Court (The Uniform Rules). The appeal was once again case managed and postponed to 18 October 2019 in order for the appellant to launch a condonation application.

[7] On 19 July 2019 the appellant's attorneys launched a condonation application seeking the following relief:

7.1 Condoning the late filing of the notice of appeal under case number A3/2017.

7.2 That the appeal be reinstated.

7.3 Costs only in the event of opposition.

[8] The respondent opposed the application and it was accordingly set down for hearing on 18 October 2019, on the same day that the appeal was scheduled to be heard.

[9] In his application, supported by documentation, appellant endeavoured to explain the lapse of time from date of judgment in the court a quo to date of the notice of appeal. Appellant stated that after the judgment was handed down by the magistrate, and his notice calling for reasons filed with the clerk of the court, Mr Le Roux, an attorney that was employed by Mr Van Heerder & Brummer Inc, the appellants' attorneys, attended the office of the magistrate regularly to establish when his reasons would be given. The magistrate replied that he was still busy. Apparently Mr van Vuuren, the magistrate was an acting magistrate and his contract ended 31 November 2015. Up and until that date no reasons were provided by the Magistrate, and handed to the clerk of the court.

[10] I pause to mention that there is no detailed reference of these attendances by Mr Le Roux in the founding affidavit, nor a

confirmatory affidavit by Mr Le Roux. One would have expected Mr Le Roux to keep note of these attendances and the magistrate's

replies in appellant's file. The attorney, and the appellant, for a period of more than two years sat idle, awaiting the

magistrates' reasons whilst they were well aware he was no longer a magistrate. Significantly this is not explained by Mr van Staden, the deponent of the appellant's founding affidavit for condonation, or the attorney Mr Le Roux.

[11] According to the appellant's attorney, on 19 April 2017, they received a letter from the respondents to which the magistrates

reasons were attached, without any explanation as to how respondent got hold of the Magistrate's "reasons". These

reasons were not stamped by the clerk of the court.

[12] The magistrate stated:

"The defendant filed a notice in terms of rule 51(1) of the Magistrates' Courts Act, Act 32 of 1944.

I do not have anything to add to the judgement (sic) delivered herein".

[13] On 19 May 2019, acting on the Magistrate's reasons received from the respondent, and not from the clerk of the court as provided for in Rule 51(2) of the Rules, appellant filed his notice of appeal and posted the required

security of R1 000.00.

[14] A period of 42 days lapsed before the appellants' attorneys' correspondent filed a letter, dated 17 July 2017, addressed and delivered only to the registrar of the court requesting that date for hearing of the appeal be allocated. This letter was not served on or sent to the respondent's

attorney who only withdrew as attorney of record for the respondent on 22 June 2017. During argument, counsel for the appellant

conceded that this was a fatal blow to the appellant's case.

[15] What happened subsequently is irrelevant for the purpose of this

judgment.

THE

ISSUES

[16] The court is faced with the following issues:

16.1 Whether the explanation by the appellant of the delay between 2 July 2014 and 19 May 2017 is full and reasonable and covers the entire duration thereof, the relevant factors which include the nature of the relief sought, the extent and cause of the delay, its effect on the administration of justice and other litigants, the importance of the issue he raised in the intended proceedings, and the prospects of success[1]?

16.2 Whether appellant complied with Rule 51(1) read with Rule 50(4) of this Courts Uniform Rules. ("The Uniform Rules").

[17] If the answer to both questions in paragraph 16 is in the negative, the application for condonation cannot succeed.

THE LAW

[18] Rule 51 of the Magistrates Courts' rules states:

'(1) Upon a request in writing by any party within 10 days after judgment and before noting an appeal the judicial officer shall within 15 days hand to the registrar or clerk of the court a judgment in writing which shall become part of the record showing—

(a) the facts he or she found to be proved; and

(b) his or her reasons for judgment.

- (2) The registrar or clerk of the court shall on receipt from the judicial officer of a judgment in writing supply to the party applying therefor a copy of such judgment and shall endorse on the original minutes of record the date on which the copy of such judgment was so supplied.
- (3) An appeal may be noted within 20 days after the date of a judgment appealed against or within 20 days after the registrar or clerk of the court has supplied a copy of the judgment in writing to the party applying therefor, whichever period shall be the longer.
- (4) An appeal shall be noted by the delivery of notice, and, unless the court of appeal shall otherwise order, by giving security for the respondent's costs of appeal to the amount of R1 000: Provided that no security shall be required from the State or, unless the court of appeal otherwise orders, from a person to whom legal aid is

rendered by a statutorily established legal aid board.'

[19] In terms of Rule 50(1) and 50(4) of the Uniform Rules, the following is stated in respect of the prosecution of appeals:

"(1) An appeal to the court against the decision of a magistrate in a civil matter shall be prosecuted within 60 days after the noting of such appeal, and unless so prosecuted it shall be deemed to have lapsed.

- (4) (a) The appellant shall, within 40 days of noting the appeal, apply to the registrar, in writing, and with notice to all other parties for the assignment of a date for the hearing of the appeal and shall at the same time make available to the registrar in writing his full residential and postal addresses and the address of his attorney if he is represented.
- (b) In the absence of such an application by the appellant, the respondent may at any time before the expiry of the period of 60 days referred to in subrule (1) apply for a date of hearing in like manner.
- (c) Upon receipt of such an application from appellant or respondent, the appeal shall be deemed to have been duly prosecuted." (Own emphasis).

[20] The Constitutional Court dealt with condonation as follows:

'It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default.[2]'

[21] I also referred to the Camps Bay-case earlier, setting out the requirements for condonation. One of the most important factors is the interest of justice.

DISCUSSION

[22] The appellant fails to explain sufficiently the delay since the court a quo handed down its judgment on 2 July 2014 up and until 19 May 2017, when appellant filed its notice of appeal. He simply states that the magistrates' reasons were requested in terms of Rule 51 of the Magistrate's Courts Rules, and then, apart from stating that Mr Le Roux "on a continuous basis approached Magistrate van Vuuren and requested reasons for the judgment. Unfortunately, nothing was

forthcoming. Mr Le Roux relayed that magistrate Van Vuuren simply indicated that he is still busy I also

made follow ups with magistrate Van Vuuren at court from time to time, but Mr Le Roux's follow ups were more frequent"[3]

[23] One would expect that an astute attorney to keep record, in the client's file, of the attendances at the Magistrate's

Office to enquire about the Magistrate's reasons. The delay is a very lengthy one. Full details of the enquiries made with the Magistrate concerned could have assisted the appellant in his quest for condonation. The application lacked detail especially on the dates or times the alleged approaches were made.

[25] I am of the opinion that the appellant's explanation does not cover the whole period of the delay and is furthermore not reasonable.

[26] When appellant realized that the reasons were not forthcoming he could have instructed his attorney to file an appeal based on the reasons in the ex tempore judgment by the court a quo. This was also not done, nor explained.

[27] A reasoned judgment was handed down in 2014 by the court a quo. It is in the interest of justice that litigation be finalised

speedily and finality be reached. This matter came before this court at various times, and in various stages of incompleteness of the court files. It is not in the interest of justice that this matter be dragged out any further.

[28] Firstly, the appellant failed to comply with Rules 50(1) and 50(4) of this court's Uniform Rules. As discussed earlier in this judgment, when the appellant "prosecuted" the appeal (that had already lapsed) it did so in a letter addressed to the Registrar of this court only. This despite the fact that the respondent was represented by Mr Anton Claassen, an attorney in eMalahleni. The letter is dated 17 July 2017, but only handed/filed with the Registrar on 19 July 2017[4]. Apart from being filed outside the 60 or 40-day period provided for in the Rules, it was not filed or served on the respondents'

attorneys, or the respondent for that matter.

- [29] In Erasmus[5], Superior Court Practice, it is stated that what is meant by prosecuting of an appeal, is that the appellant must apply in writing to the registrar, on notice to all parties, for a date of hearing in terms of Rule 50(4)[6].
- [30] It is clear that appellant failed to apply, as required by the rules, within 60-days for a date of hearing of the appeal.
- [31] The fact that the appellant failed in its application to deal with its non-compliance with Rule 50(4), is insurmountable. So much was conceded by advocate Coetzee acting for the appellants, during the hearing of the application. It is also not in dispute that no condonation was sought by appellant for non-compliance with Rule 50 of the Uniform Rules. Under the circumstances, the appellant failed to provide sufficient reasons why an indulgence should be granted to him.
- [32] It is therefore this court's finding that the application for condonation cannot succeed.
- [33] The following order is made:
1. The application for condonation for the late filing of the appeal is dismissed with costs.

HF BRAUCKMANN

ACTING JUDGE OF THE HIGH COURT

I agree

SS MPHAHLELE

ACTING DEPUTY JUDGE PRESIDENT

OF THE HIGH COURT

COUNSEL FOR THE APPELLANT : Adv Coetzee

INSTRUCTED BY:

Van Heerden & Brummer Inc.

COUNSEL FOR THE RESPONDENT : Adv Matika

INSTRUCTED BY:

Anton Claassen Attorneys

DATE OF HEARING:

18 OCTOBER 2019

DATE OF JUDGMENT:

28 NOVEMBER 2019

- [1] Camps Bay Ratepayers and Residents Association and Another vs Harrison and Another (560/08) [2010] ZASCA 3 917 February 2010.
 - [2] Derrick Grootboom v National Prosecuting Authority and Another 2014(2) SA 68 (CC) at paragraph [23].
 - [3] Paragraph 3.5 of founding affidavit in Condonation application.
 - [4] Condonation application p 53 (Annexure “G”)
 - [5] Erasmus, second edition, volume 2 D1-688.
 - [6] Condonation application p 53 (Annexure “G”)
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