

SOUTH AFRICA / JUDGMENT

Elrico Koen t/a Elrico Motors v Wuister (16750/2024) [2024] ZAWCHC 373 (18 November 2024) [2024] ZAWCHC 373

COURT

Western Cape High Court, Cape Town

BEFORE

A Bhoopchand

CASE / FILE NUMBER

16750/2024

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NUMBER: 16750/2024

In the matter between

ELRICO KOEN T/A ELRICO MOTORS

APPLICANT

and

ALBERT JH WUISTER

RESPONDENT

JUDGMENT

Date of hearing: 8 November 2024

Date of judgment: 18 November 2024

BHOOPCHAND AJ:

1. This is an application for the reinstatement of an appeal. The Respondent, as Plaintiff, instituted action proceedings against the Applicant out of the Bellville Magistrate's Court under case number 9539/2014 in 2014. The matter proceeded to trial, and judgment was handed down on 12 October 2023. The Magistrate found that the Respondent had prevailed on two of his claims and ordered the Applicant to make payments of R83 309.19 and R26 000, respectively, to the Respondent.
2. The Applicant noted an appeal to the judgment of the Magistrate. The record was mislaid between the Magistrates Court and the High Court, and the appeal lapsed. The Applicant seeks reinstatement of the appeal and has applied for condonation for the delay that has eventuated in prosecuting the appeal. The Applicant sought, in addition, a further sixty days from the order to prosecute the appeal and costs against the Respondent if the latter opposed the application. An appeal from the Magistrate's Court to the High Court is considered prosecuted when the Registrar of the High Court provides a date for the hearing of the appeal. The Respondent opposes the appeal.
3. The Magistrate's judgment is a damning indictment of the Applicant. The Respondent entrusted his vehicle to the Applicant for repairs after the latter claimed he was a specialist in the marque the Applicant owned. The Applicant suggested that the engine lost compression and required an in-frame overhaul, which meant the engine would not be removed from the vehicle. The Respondent agreed to have the engine repaired. Thus began a litany over a prolonged period whilst the vehicle remained in the Applicant's possession. Much expense and hassle followed. When the Respondent eventually received his vehicle, the engine failed catastrophically on a maiden trip. The Respondent recalled unauthorised and excessive usage of the vehicle by the Applicant, an engine knock that could not be fixed, repeated returns of the vehicle to the Applicant and finally, the development of a hole in the sump that rendered the vehicle unusable.
4. Two experts, lay witnesses, and the Applicant and Respondent testified. The experts provided extensive technical evidence. Expert evidence distilled to whether the engine failed from a lack of oil pressure or incorrect repairs that led to metal fragments dislodging from loosely fixed parts and blowing a hole through the sump. The experts found sand in the engine that could have only entered when it was dismantled, overhauled and improperly cleaned.
5. The evidence included accounts of illegally removing VIN plates from engines and allegations of stolen vehicles, the applicant's inability to remember the name of the only qualified mechanic he had employed, using unqualified personnel to work on vehicles, and altered invoices. After hearing and assessing the extensive evidence, the Magistrate found that the Respondent had proven his case. She rejected the evidence of the Applicant and his witnesses as far as they were inconsistent with that of the Respondent and those he called. The Court preferred the testimony of the Respondent's expert.

THE RULES RELATING TO CIVIL APPEALS FROM THE MAGISTRATES' COURTS

6. The Applicant sought to appeal the whole of the Magistrate's judgment. Rule 51 of the Rules Regulating the Conduct of the

Proceedings of the Magistrates' Courts of South Africa ("the Magistrates' Courts Rules", "MCR") applies to appeals in civil cases. The process begins with a written request within ten days of the judgment's delivery and before the noting of an appeal. The Magistrate responds by handing the written judgment containing the facts and reasons for it within fifteen days to the Registrar or Clerk ("the Clerk") of the Magistrate's Court.[1] The Clerk provides the judgment, which becomes part of the record to the prospective Appellant, and endorses the date on the original minutes of the court record.[2] A notice of appeal may be filed within twenty days of either the delivery of the judgment or after the Registrar or Clerk of the Court has supplied the written judgment.[3]

7. An Appellant attends to providing security, unless waived, before lodging copies of the record on appeal with the Clerk of the Court. A Respondent may lodge a cross-appeal within ten days after the delivery of the notice of appeal. The notice of appeal or cross-appeal specifies whether the whole or parts of the judgment are appealed and the grounds of appeal. Once a notice of appeal is filed, the judicial officer hands a written statement to the Clerk, if necessary, incorporating the proven facts and the ground informing

those findings and reasons for the ruling of law or the admission or rejection of any evidence appealed against.[4]

8. The party noting an appeal or cross-appeal shall prosecute it within the prescribed rules of the court of appeal, which is taken to mean the High Court. If the party defaults on prosecuting the appeal or cross-appeal, the appeal shall have lapsed unless the court of appeal sees it fit to order the contrary.[5] Subject to Rule 50 of the High Court's Uniform Rules of Court ("URC"), the Clerk of the Court shall transmit to the Registrar of the Court of Appeal the certified record in the action within fifteen days of receiving notice that the appeal has been set down for hearing.[6] That concludes the first leg of the process and the commencement of the next in the High Court.
9. An appeal against a magistrate's decision is prosecuted within sixty days of noting the appeal, failing which the appeal shall lapse.[7] Within forty days of noting the appeal, the Appellant shall apply to the Registrar, with notice to all other parties, for a date on which the appeal would be heard.[8] If the Appellant fails to secure a date, the Respondent may do so within the prescribed period of sixty days. Receiving the application for a date signifies that the appeal has been duly prosecuted. The Registrar of the High Court assigns a date for the hearing of the appeal at least forty days after receipt of the application for a date.[9] The Appellant or their attorney lodges at least two copies of the record certified as correct simultaneously with the application.[10]

THE APPLICANT'S PROSECUTION OF THE APPEAL

10. Lourens Barend Van Wyk (“Van Wyk”), the Applicant’s attorney, deposed to the founding affidavit. He recalled the steps he followed in the Applicant’s appeal. The notice of appeal was timeously filed on 8 November 2023, and proof thereof was supplied. Van Wyk contended that the Clerk had to transfer the matter, including the court file, to this Court to enable the Applicant to prosecute the appeal within sixty days. The sixty-day

period lapsed on 4 March 2024. Van Wyk attended the Magistrate’s Court on 14 December 2023 to file the security bond. He states that he intended to inquire whether the matter had been transferred to the High Court. Van Wyk does not reveal the outcome of his enquiry.

11. On 9 February 2024, the Respondent enquired whether the Appellant intended to proceed with the appeal. Van Wyk states that as no confirmation of the transfer of the matter had been received, he went to the Magistrates Court on 15 February to ascertain what had happened to it. He was informed that the court file had been sent to

the High Court but had been returned because of an unspecified error. Van Wyk spoke to two Clerks whose names he revealed but did not confirm those interactions. He urged them to attend to the transfer and obtained their assurance that they would do so promptly. Van Wyk communicated the position to the Respondent on 16 February. A candidate attorney from Van Wyk’s office attended this court on 23 February to establish whether the court file had arrived. The candidate attorney was informed that it had not. The exercise was repeated on 8 and 11 March 2024 with the same outcome. Van Wyk returned to the Magistrate’s Court on 15 March to be told that the court file had been transferred and that he should direct further enquiries to the High Court. He alleges that numerous enquiries to the High Court followed to no avail.

12. On 23 May 2024, the Sheriff sought satisfaction of a warrant of execution issued against the Applicant’s movable property. Van Wyk alleges that he immediately proceeded to the Magistrate’s Court to ascertain, once again, where the files were. Dissatisfied with the response from the Clerks, he approached the Magistrate, who adjudicated the matter for assistance. An email dealing with various issues was sent to the Respondent’s attorney. The attorney was informed, among others, of the Sheriff’s visit to the Applicant, that the notice of appeal had been served on them on 8 November 2023, that the Applicant intended to prosecute the appeal, that the delay in the transfer of the court file was under investigation, that condonation for the delayed prosecution would be sought from this court, and that the warrant of execution was premature with a request to stay it until clarity could be obtained of the whereabouts of the appeal papers.
13. The Respondent’s attorney replied on the same day. He reminded his counterpart that the appeal had lapsed and the Applicant should apply for condonation. The Respondent envisaged the Applicant would

apply for a Rule 27 extension of the dies to prosecute the appeal. The Respondent was willing to afford the Applicant till 4 June 2024 to institute the application for condonation and reinstatement of the appeal. The Magistrate copied the Applicant's attorney in an email she had circulated on 30 May 2024 to various personnel to investigate the matter. The Magistrate's email elicited the response that the court file had been delivered to this court on 20 February 2024. A copy of the route form confirming delivery of the appeal papers to this Court was provided.

14. On 10 June 2024, the Respondent's attorney communicated that unless the Applicant applied to stay the warrant of execution, they would proceed to enforce it. The Applicant's attorney lodged an urgent application. The Respondent indicated they would not oppose the application, provided that an application for condonation and reinstatement was made within fourteen calendar days of the stay order being granted. On 15 July, an order to stay the execution

warrant was granted. The appeal papers were eventually found in this Court on an unspecified date.

15. Van Wyk contended that the failure to prosecute the appeal timeously had been occasioned entirely by the delay in transferring the appeal papers to this court. No fault could be attributed to the Applicant.

Van Wyk then dealt with the Applicant's prospects of success and repeated the twenty-one grounds of appeal. Van Wyk

submitted that in light of the merits of the matter and how the Magistrate erred and misdirected herself, the Applicant has good

prospects of success in the appeal. He contended that by disallowing this application, an incorrect judgment would stand. He concluded by seeking condonation for the Applicant's failure to prosecute the appeal. He prayed that it be reinstated as the notice of appeal had been delivered timeously, and all steps were taken to track the appeal papers.

THE RESPONDENT'S SUBMISSIONS

16. The Respondent opposed the reinstatement of the appeal. He questioned the jurisdiction of a single Judge to hear the application for condonation. The appeal had lapsed, and there was no appeal pending.

The judgment of the Magistrate's Court stood as an application for condonation did not suspend it. The Respondent contended that the Judges assigned to hear the appeal were the only ones who could consider the application for condonation and the reinstatement of the appeal. After reading the record, they would have been able to pronounce on the prospects of success, which is an important element in granting condonation.

17. The Respondent asserted that the Applicant's attorney had pursued the appeal incorrectly and lethargically. Respondent referred to the Magistrates Court rules and the URC and pinpointed where the Applicant had failed to comply with them. It is unnecessary to repeat

each of those areas identified by the Respondent, but it suffices to say that the Court agrees with those submissions. The Respondent had to issue a warrant of execution to galvanise the Applicant into action. Although the warrant was stayed, the Applicant failed to pursue the recognised procedures to resurrect the appeal. The Respondent asserts that the Applicant should have applied under Rule 27 of the URC for an extension of time to prosecute the appeal. The Respondent cited the cases which enunciated the principles applicable to using rule 27.[11]

18. The Respondent criticised the Applicant's failure to explain why he needed another sixty days to prosecute the appeal. The Applicant has yet to provide the record and apply for a hearing date.

He could have applied for an extension of the period to prosecute the appeal from as early as 4 March 2024, when the appeal lapsed or at least when the warrant was issued. The Applicant's attorney shifted the blame to everyone else. The Applicant's

attorney should have collected the record from the Magistrate's Court to certify them and make copies for their lodgement in the High Court. The Applicant could have used the running record. The entire record had been transcribed when the Magistrate handed down her judgment. The Court agrees with these submissions as well.

FACTORS RELEVANT TO THE REINSTATEMENT OF AN APPEAL

19. An application for condonation is central to the application for the reinstatement of an appeal that has lapsed. The standard applied is the interests of justice. The facts and circumstances of a case determine whether condonation will be granted in the interests of justice. The Respondent identified the factors that are relevant to this enquiry, including the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issues to be raised in the intended appeal, and the prospects of success.[12] The list is not exhaustive. These factors are not individually decisive but are interrelated and must be weighed one against the

other. A strong prospect of success can offset a poor explanation and an inordinate delay, and vice versa.[13] An application for condonation must be made soon after the party fails to comply with the rules. [14]

20. The Appellant's inaction is relevant. Further factors relevant to an application for condonation include the Respondent's interest in obtaining finality of a judgment, the avoidance of unnecessary delay in the administration of justice and the convenience of the court. These factors are equally applicable to the reinstatement of an appeal. The Respondent submitted that when considering all the circumstances outlined by Van Wyk in the founding affidavit, there is an inescapable inference that the point has been reached where the Appellant cannot escape the conduct of his attorneys.

21. The Respondent acknowledged that condonation will not necessarily be withheld in every instance where the blame lies with the attorney.

There is a limit beyond which a litigant cannot escape the result of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Court rules. A sympathetic approach should not be a signal for laxity. A spike in the number of applications for condonation is increasingly attributable to the attorney's neglect. As the litigant has exercised a choice in the attorney he selects, there is little reason why the litigant should be absolved from the consequences of the attorney's failure to comply with the Rules.[15] The Respondent submits that upon proper consideration of Van Wyk's founding affidavit, serious negligence on the part of the Applicant's attorneys surfaced.

22. It is unacceptable for an attorney to, in effect, tell the Court that he is too busy to study the Rules and to properly supervise the prosecution of an appeal. The situation is aggravated if the attorney persistently fails to acquaint himself with the rules even after he has become aware that he did not know them. An attorney instructed to prosecute an appeal must acquaint himself with the procedure prescribed by the court rules to which a matter has been taken on appeal. There is an obligation on the defaulting party to provide a full and proper explanation which must also be reasonable.[16]
23. The Applicant has failed to place any facts before this Court to explain why the delay does not inconvenience this Court. Neither is there any indication why the Respondent's interest in the finality of the judgment and order of the Magistrate is not being undermined by the dilatory conduct of the Applicant and his legal representatives.[17] The Respondent is prejudiced as he is entitled to finality in the litigation that commenced in 2014.

EVALUATION

24. This application to reinstate the Applicant's appeal is characterised by the Attorney's tardiness in prosecuting it. The explanation provided by the Applicant's Attorney for the delay in prosecuting the appeal is underwhelming. The tendency to apportion blame to others is unfortunate. The facts speak to an ignorance of the rules relating to the prosecution of appeals and lethargy in complying with them. The Respondent had to prod the Applicant's legal team to galvanise them into lacklustre action. The Respondent is entitled to the finality of this matter, which has endured for over ten years.
25. The Applicant sought the Court's indulgence but displayed little humility in obtaining it. The Applicant audaciously accused the Respondent of being disingenuous in the extreme, ill-conceived,

bemusing, flippant, insincere, and unbecoming in circumstances where the Respondent has been more than accommodating of the Applicant's

delays and languorous conduct. The Respondent held off executing the judgment debt until he was forced to re-implement it. The

Applicant's attorney failed to explain the outcome of his alleged enquiry in December 2023 about transferring the record to the High Court. The attorney failed to explain his inaction between 4 and 12 June 2024, when he had to raise an urgent application to stay the reissued warrant of execution.

26. The Applicant delivered a box of five arch lever files to the Court to enable it to read the record to determine his prospects of success in the appeal. This occurred after the Respondent had reminded the Applicant that the prospects of success could only be determined after the Court had read the record. The record was not sequentially

numbered, nor was there a composite index. The Court asked the Applicant's Counsel about the Applicant's prospects of success in the appeal. It was evident that Counsel had not acquainted himself with either the Magistrate's judgment or the record. It is unacceptable for a party to expect the Court to read an unprepared record when its legal representative has not. The failure of the Applicant's attorney to prepare the appeal record corresponds to the complacency in prosecuting it. Applicant's Counsel could not expound on the grounds of appeal beyond repeating the issue of prescription, which was one of the twenty-one grounds raised by the Applicant. A survey of the grounds of appeal identified by the Applicant suggests that the "shotgun" approach that our courts deprecate was adopted in compiling them.

27. A court of appeal does not easily upset findings of fact or credibility findings against a party. The Magistrate was unimpressed with the Applicant's testimony for good reason. He was insufficiently qualified to comment on why the engine failed. Yet, the Applicant represented himself as a specialist in the marque owned by the Respondent. Aspects of the Applicant's testimony could not be corroborated. He could not explain the 20 000 kilometres

that the Respondent's vehicle had covered whilst entrusted to him. The Magistrate found that the Applicant was evasive and answered questions with questions. The Applicant's testimony about loose metals flying around in the engine was met with an incredulous response. She said one would hesitate to start a vehicle after listening to the Applicant. The Court found aspects of the Applicant's evidence improbable. In another instant, his evidence was contradicted by one of his employees, who testified. The Applicant was observed to refresh his memory from one cross-examination session to another by perusing his Counsel's

notes.

28. The Magistrate's judgment is a detailed exposition of the evidence about the physics and mechanics of a combustion engine, including the workings and repairs of pistons, rings and bearings. The evidence covered the forensic aspects of detecting poor workmanship in repairs, such as signs of increased wear and effects of friction from replaced parts that were improperly fitted. The Magistrate benefitted from listening to the witnesses and observing

their demeanour. She was unimpressed with the Applicant. The judgment is a patient and detailed account of complex evidence as well meticulous evaluation of lay witness testimony. The Respondent appointed a tribology specialist who was an expert in friction, wear, lubrication, and

the science of interacting surfaces in relative motion. He spoke about Poisson's Law, which states that pressure will be equal throughout a pressurised system. The Applicant's expert was a qualified fitter. He did not qualify as a motor mechanic. It is inconceivable how a court of appeal will upset the evidence of the Respondent's expert. It is further inconceivable as to how a court of appeal would prefer the Applicant-appointed expert whose evidence was less than convincing.

29. This Court need not delve into the evidence any further to pronounce on the Applicant's prospects of success in an appeal. There is none. Considering all of the factors determining whether the Applicant should be granted condonation for his failure to prosecute his appeal timeously, the Court cannot grant the application for condonation or reinstate the appeal.
30. Respondent's Counsel did not persist with the point on jurisdiction. He accepted that a single Judge could extend the dies relating to the prosecution of appeals. The Respondent had encouraged the Applicant to utilise rule 27 to obtain an extension to the period to prosecute an appeal. Rule 51 of the Magistrate's Court Rules refers to the court of appeal in generic terms. It does not specify that the referral is to the Judges who would hear the appeal. The certified record is transferred to the Registrar of the Court of Appeal. The prosecution of an appeal is a proceeding in the High Court. An appeal can only be heard by the Judges allocated to hear an appeal if it has been prosecuted, i.e., a date has been allocated for the hearing. The Respondent contended that the appeal had lapsed, and this Court accepts that it should remain so.
31. Condonation for failing to prosecute the appeal cannot be granted. Therefore, the application to reinstate the appeal must fail.

ORDER

32. The application is dismissed with costs. Counsel's agreed or taxed fees are to be determined on the B scale.

Ajay Bhoopchand

Acting Judge of the High Court

Western Cape Division

Cape Town

Judgment

was handed down and delivered to the parties by e-mail on 18 November 2024

[1] Rule 51(1) MCR

[2] Rule 51(2), MCR

[3] Rule 51(3), MCR

[4] Rule 51(8), MCR

- [5] Rule 51(9), MCR
- [6] Rule 51(10), MCR
- [7] Rule 50(1), URC
- [8] Rule 50(4)
- [9] Rule 50(5)
- [10] Rule 50(7)
- [11] Commissioner for Inland Revenue v Burger 1956 (4) SA 446 (A) at 449 E-H, Nbuluma v Xhosa Development Corporation Ltd 1978 (1) SA 681 (A) at 684 G-685 B, pe Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd 1980 (4) SA 794 (A) at 800 A-C, RAF v CF 2022 (6) SA 162(SCA) at para 20.
- [12] Van Wyk v Unitas Hospital
- [2007] ZACC 24; 2008 (2) SA 472 (CC) at para 20
- [13] United Plant Hire v Hills 1976 (1) SA 717(A) at 720F-G
- [14] Napier v Tsaperas 1995 (2) SA 665 (A) at 671 B-C
- [15] Saloojee and Another v Minister of Community Development 1965(2)SA 135 (A) at 141 C-E
- [16] Van Wyk v Unitas Hospital supra at 477, para 22, Van Abo v President of the Republic of South Africa 2009(5) SA 345 (CC) at 354, para 20, Minister of Agriculture and Land Affairs v Rance (Pty)Ltd 2010 (4) SA 109 (SCA) at 117, para 35
- [17] Rustenburg Gearbox Centre v Geldmaak Motors CC t/a MEJ Motors 2003 (5) SA 468 (T) at 471 G -H.

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