

SOUTH AFRICA / JUDGMENT

Nyabonda v Kosmos Ridge Home Owners Association (A740/2016) [2017] ZAGPPHC 605 (13 September 2017) [2017] ZAGPPHC 605

COURT

North Gauteng High Court, Pretoria

BEFORE

AC Basson, RE Monama

CASE / FILE NUMBER

A740/2016

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REPUBLIC
OF SOUTH AFRICA
IN
THE HIGH COURT OF SOUTH AFRICA
GAUTENG
DIVISION, PRETORIA
CASE
NO: A740/2016

DATE: 13/09/2017

REPORTABLE: NO
OF
INTEREST TO OTHER JUDGES: NO
BRIAN
NYASHAZASHE
NYABONDA
Appellant
and
KOSMOS
RIDGE HOME OWNERS
ASSOCIATION
Respondent

JUDGMENT

AC SASSON, J

- [1] This appeal concerns four matters. In each of the matters the respondent (Kosmos Ridge Home Owners' Association) obtained default

judgment against the appellant. The appellant applied for rescission in respect of each of the four matters as well as for condonation for the filing of the application outside of the time period permitted for in terms of the Magistrate's Court Rules. The four matters are interlinked. In each of the matters summons was issued and the claim of the respondent was for levies and other amounts due to the Kosmos Ridge Home Owners' Association.

- [2] The judgment appealed against was delivered by Magistrate Thamage in the Magistrate's Court for the district of Madibeng.

Brief

background

- [3] The appellant is the owner of a vacant stand in the Kosmos Ridge Township in respect of which the respondent constitutes the Home Owners' Association.
- [4] Once a person becomes an owner of a stand within the Kosmos Ridge Township, such owner automatically becomes a member of the respondent upon registration of the property into his or her name. All members are bound by the Articles of Association, Memorandum of Association, Rules and Regulations as well as the Memorandum of Incorporation of the respondent. In terms of the aforementioned documents - all of which regulate the contractual relationship between the owner and the respondent - the directors of the respondent are entitled and obliged to determine the levies, special levies and other related expenses and to charge same from the homeowner in furtherance of the main business objective of the respondent.
- [5] The member is obliged to pay the monthly levies as well as any other charge levied to their account, monthly in advance, on the first of each month
- [6] In the event that the members account remains in arrears, the directors of the respondent are entitled and obliged to hand over the account for debt collection to an attorney in order to safeguard the interests of the other paying homeowners.
- [7] All legal costs incurred by the respondent in the recovery of unpaid levies, fees and/or other outstanding amounts, may be debited to the applicable stand owner's account. In the event that this amount is not paid within one calendar month, interest on all outstanding amounts, including the legal costs, will be charged at a rate equal to ABSA Bank prime rate +2%.

- [8] Legal costs on an attorney and client scale will be charged to the applicable stand owners account and it will become a debt due to the respondent if not paid within one calendar month.
- [9] The appellant in this matter fell into areas of payment of his monthly levies and related charges in respect of his property. The facts pertaining to each matter are set out in the four matters and will not repeated here. Suffice to point out that the respondent had issued summons against the appellant in respect of each of the four actions:
- (i) In the first matter, summons was issued on 6 May 2011 for payment in the amount of R9 320.92. In this matter the appellant has been in arrears with his account since September 2006. A Bill of Costs in respect of this amount was taxed and allowed by the Taxing Master.
- (ii) In the 2nd matter summons was issued on 12 March 2012 for payment in the amount of R8 178.79. A Bill of Costs was similarly taxed and allowed. In respect of this account, the appellant submitted that no credit was passed for the benefit of the appellant for the judgment and costs of the first action. Furthermore, the balance being sued for includes amounts outstanding in respect of the first action. Accordingly, so it was submitted on behalf of the appellant, the judgment and costs constitute a duplication..
- (iii) In the 3rd matter summons was issued on 8 November 2012 for payment in the amount of R14 618.74. Similarly, it was submitted on behalf of the appellant that no credit was granted to the appellant with the judgment amount in the first action; and
- (iv) In the 4th matter summons was issued for payment in the amount of R30 672.12. In respect of this amount the appellant again submitted that the respondent had failed to credit the amount of the first action.
- [10] In the premises, the appellant submitted that it has a bona fide defence in respect of the above four matter.
- [11] As already pointed out, default judgment was granted in respect of all four matters (albeit on different dates) and in respect of all 4 matters rescission applications were simultaneously filed on 6 May 2016.
- [12] In his judgment, the learned Magistrate summarizes the facts pertaining to each of the four cases. In essence there were two

issues before the Magistrate. The first issue to be decided was an application for condonation for the late filing of the rescission application. The second issue to be decided was the rescission itself and more· in particular the appellant's contention that he has a bona fide defence in that the legal costs that were debited to his account and the legal costs that were included at the time of the granting of the default judgments, resulted in legal costs being duplicated.

Condonation

[13] There is a disturbing trend amongst litigants not to adhere to the Rules of Court. This much was unequivocally pointed out by the Constitutional Court in *Grootboom v National Prosecuting Authority and Another*[1] where the Court explained the rationale for having these procedural rules in place. The Court

also emphasised what should be considered by a Court in considering an application for condonation. More in particular the

Court emphasised the fact that condonation is not merely for the asking and that a full explanation for the non-compliance of the Rules must be advanced:

"[21] The failure by parties to comply with the rules of court or directions is not of recent origin. Non-compliance has bedevilled our courts at various levels for a long time. Even this court has not been spared the irritation and inconvenience flowing from a failure by parties to abide by the rules of this court.

[22] I have read the judgment by my colleague Zondo J. I agree with him that, based on *Brummer and Van Wyk*, the standard for considering an application for condonation is the interests of justice. However, the concept 'interests of justice'

is so elastic that it is not capable of precise definition. As the two cases demonstrate, it includes: 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 issue to be raised in the intended appeal; and the prospects of success. It is crucial to reiterate that both *Brummer* and *Van Wyk* emphasise that the ultimate determination of what is in the interests of justice must reflect due regard to all the relevant factors but it is not necessarily limited to those mentioned above. The particular circumstances of each case will determine which of these factors are relevant.

[23] 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.

[32] I need to remind practitioners and litigants that the rules and court's directions serve a necessary purpose. Their primary aim is to ensure that the business of our courts is run effectively and efficiently. Invariably this will lead to the orderly management of our courts' rolls, which in turn will bring about the expeditious disposal of cases in the most cost-effective manner. This is particularly important given the ever increasing costs of litigation, which if left unchecked will make access to justice too expensive.

[33] Recently this court has been inundated with cases where there has been disregard for its directions. In its efforts to arrest this unhealthy trend, the court has issued many warnings which have gone largely unheeded. This year, on 28 March 2013, this court once again expressed its displeasure in eThekweni as follows:

'The conduct of litigants in failing to observe rules of this court is unfortunate and should be brought to a halt. This term alone, in eight of the 13 matters set down for hearing, litigants failed to comply with the time limits in the rules and directions issued by the Chief Justice. It is unacceptable that this is the position in spite of the warning issued by this court in the past. In [Van Wyk], this court warned litigants to stop the trend. The court said:

"There is now a growing trend for litigants in this court to disregard time limits without seeking condonation. Last term alone, in eight out of ten matters, litigants did not comply with the time limits or the directions setting out the time limits. In some cases litigants either did not apply for condonation at all or if they did, they put up flimsy explanations. This non-compliance with the time limits or the rules of court resulted in one matter being postponed and the other being struck from the roll. This is undesirable. This practice must be stopped in its tracks.

'The statistics referred to above illustrate that the caution was not heeded. The court cannot continue issuing warnings that are

disregarded by litigants. It must find a way of bringing this unacceptable behaviour to a stop. One way that readily presents itself is for the court to require proper compliance with the rules and refuse condonation where these requirements are not met.

Compliance must be demanded even in relation to rules regulating applications for condonation."

See also the well-known case of *Melane v Santam Insurance Co Ltd*[2] where the Court summarized the principles that must be taken into account in considering an application for condonation:

"In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the

prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong

prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked. I would add that discursiveness should be discouraged in canvassing the prospects of success in the affidavits".

See also: *United Plant Hire (Pty) Ltd v Hills and Others*:^[3]

"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."

[14] In respect of the application for condonation in the present matter, the learned Magistrate - with reference to applicable case law - pointed out that condonation must be applied for as soon as possible after a party realizes that it is required to do so. The learned Magistrate also referred to the other legal principles that must be considered by a Court seized with an application for condonation. They are - the explanation for the delay that must be fully set out; the explanation for the delay that must be reasonable and which explanation must cover the entire period of the delay; and lastly, the fact that it would be fruitless to grant condonation if the prospects of success on the merits are poor. See in this regard: *Minister of Agriculture and Land Affairs v CJ Rance (Pty) Ltd* 2010

(4) SA 109 (SCA).

[15] The Magistrate accepted in favour of the appellant that he (the appellant) only became aware of the judgment on 3 June 2015. Despite having obtained knowledge on this date, the appellant only filed for rescission on 6 May 2016.

[16] The appellant advanced various reasons for the delay: One of the reasons advanced on behalf of the appellant for the delay is the fact that there had been an attempt to settle the matters and that, after the settlement discussions had failed in December 2015, it was the December holidays. Then in February and March 2016, the appellant's attorneys apparently searched for the record of the proceedings with a further delay of the matter until April 2016. On 20 April 2016 appellant's attorneys requested that the respondent condone the late filing of the rescission application. On 21 April 2016 the respondent's attorneys notified the appellant that such consent would not be forthcoming.

[17] The learned Magistrate duly considered the reasons advanced by the appellant for the delay and concluded that - if regard is had to the period of approximately 11 months that had elapsed from the date on which the appellant had obtained

knowledge of the default judgments and the subsequent filing of the rescission application and the reasons advanced for the delay - the applicant fell short of fully explaining the delay.

[18] I can find no reason to interfere with the learned Magistrate's reasoning nor with his conclusion to the effect that the appellant

had failed to satisfactorily and fully explain the delay during this lengthy period. There simply is no acceptable explanation for the delay and the Magistrate cannot be faulted in criticising the appellant's reasons for the delay. Furthermore, three periods within this period of delay are totally unexplained on the papers: The first period is the delay is from 10 December 2015 (when the settlement negotiations broke down) and 15 January 2016 when the attorneys' offices allegedly opened. The mere fact that this period fell over the Christmas holiday period does not absolve the appellant from taking the necessary steps to pursue his rescission application, particularly if regard is had to the fact that it is specifically stated in the letter of 10 December 2015 that the attorneys acting on behalf of the appellant hold instructions to proceed with the rescission application. The second period is from 1 April to 20 April

2016. In the founding affidavit in the application for condonation, the applicant points out that a search for the record of the proceedings were made during February and March 2016. Only on 20 April 2016 was a letter sent to the attorneys of the respondent requesting the respondent to consent to the late filing of the rescission. No explanation whatsoever is proffered for the inactivity of some 20 days from 1 - 20 April 2016. The respondent immediately responded on 21 April 2016 refusing the request. The appellant thereafter waited another 15 days (the third period of delay) before the rescission application was filed. There is no explanation for this further delay of 15 days.

[19] The learned Magistrate also considered the prospects of success. In respect of the submission made by the applicant that there has been a duplication of legal costs, the 'learned Magistrate correctly - in my view - concluded that, in light of what is contained in the Rules and Regulations pertaining to the respondent, any legal costs incurred by the Home Owners' Association in the recovery of unpaid levies fees or any other outstanding amounts, may be debited to the applicable stand owner's account. In this regard I am also in agreement with the learned Magistrate's conclusion that the legal costs are

essentially an issue of taxation and that the Taxing Master is obliged to take cognizance of the legal costs already debited. The remedy available to the appellant is therefore simply to ask for a taxation as was done in two of the four matters.

[20] In respect of the conclusion that there is no bona fide defence in these four matters, the learned Magistrate pointed out, and it is an observation that I am in agreement with, that the appellant never disputed that he was in arrears with his levies - he only disputed the legal costs debited on his account.

[21] Having regard to the conclusions reached by the learned Magistrate, and mindful of the various factors that must be taken into account in considering an application for condonation, I am therefore not persuaded that there has been a misdirection of fact by the court a quo nor that the conclusions reached are incorrect.

[22] In the premise I propose the following order:

"The appeal is dismissed with costs on an attorney and client scale as provided for in terms of the underlying contractual relationship between the parties."

AC BASSON

JUDGE OF THE HIGH COURT

I agree and is so ordered

RE MONAMA

[1]2014

(2) SA 68 (CC).

[2] 1962 (4) SA 531 (A).

[3] 1976 1 SA 717 (A) at 720E-F.

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