

SOUTH AFRICA / JUDGMENT

Osman v Anirudhra and Another (19620/17) [2018] ZAWCHC 55 (2 May 2018) [2018] ZAWCHC 55

COURT

Western Cape High Court, Cape Town

BEFORE

DM Thulare, CM Fortuin

CASE / FILE NUMBER

19620/17

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IN THE HIGH COURT OF
SOUTH AFRICA
(WESTERN CAPE DIVISION,
CAPE TOWN)

Case number 19620/17

In

the matter between

LIYAQAT

OSMAN APPLICANT

And

GANES

ANIL ANIRUDHRA FIRST

RESPONDENT

XIUYAN

LI SECOND

RESPONDENT

CORAM:

FORTUIN J; THULARE AJ

DATE:

JUDGMENT

THULARE AJ

- [1] The applicant sought a declaratory order that the respondents' appeal from the magistrates' court had lapsed. The respondents conceded that the appeal had lapsed. The applicant is no longer proceeding with his application, and only asks that the respondents be ordered to pay the costs thereof. What remains to be decided in this matter now is a counter application brought by the respondents for the reinstatement of the appeal.
- [2] Applicant issued summons against the respondents on 7 November 2016 which was served on 14 November 2016. On 16 November 2016 the respondents filed a notice of intention to defend. The applicant filed an application for summary judgment which the respondents opposed. The application was argued on 28 February 2017 and the magistrate delivered her judgment on 11 April 2017.
- [3] The respondents noted the appeal against the judgment of the magistrate on 2 May 2017 and filed their notice of appeal and the requisite bond of security. On or about 30 May 2017 a candidate attorney, Ricardo Abrahams attended to the magistrates' courts in Cape Town to uplift the record in order to have them transcribed. Abrahams was advised to request the record by e-mail from Ms Lorraine Mafa, a clerk of the court, and dispatched the request the same day.
- [4] Abrahams attended to the offices of the clerk of the court at the courthouse a number of times and followed up with e-mails, and according to him received no response to his request for the record. It was only when he elevated his request to the Court Manager on 5 October 2017, that a day after his e-mail to the Court Manager, the Court Manager informed him that there is no recording and that the attorney was informed of same. On 12 October 2017 Abrahams attended to the office of the clerk of the court to attend to the court file and provided same to the transcribers and on 27 October 2017 the respondents launched their counter-application.
- [5] On the other hand, when applicant noticed that the respondents did not apply for a date for hearing of the appeal within 40 days, which is by 29 June 2017, and further did not prosecute the appeal within 60 days, which is by 27 July 2017, the applicant sought to execute the judgment. On 5 September 2017, advised that the appeal had lapsed, Muhsin Jaffer on behalf of the applicant attended to the magistrates' court to lodge a warrant of execution. Various visits followed but the applicant was unsuccessful in the endeavours to get the warrant issued, and the clerks would not issue the warrant. Jaffer was informed that the magistrate insisted that he produce proof that the appeal had lapsed as there were no notes from the typists at the High Court that the appeal had lapsed. Jaffer was informed later by an unnamed clerk of the court that the magistrate had advised that the warrant could only be granted if an application is granted by the High Court, declaring that the appeal had lapsed. Applicant avers that his application is being brought as a result of advice received from the

clerk of the magistrate's court, Cape Town. He avers that that court is refusing to issue the warrant without the granting of the current application. This, avers applicant, is done despite the advice received from counsel, that the appeal had lapsed ex lege, and that such an application is not strictly necessary.

- [6] The papers and heads of arguments submitted by the parties raise three issues, in my view, to wit:
- (a) which Rule of the Uniform Rules of Court applies to what the parties elected to term an application for the reinstatement of an appeal from the Magistrates' Courts' which had lapsed,
 - (b) what test is to be applied to such application, and
 - (c) whether the respondents have met that test.
- [7] Rule 51(9) of the Magistrates' Courts Rules of Court provides as follows:

"51 Appeals in civil cases

- (9) A party noting an appeal or a cross appeal shall prosecute the same within such time as may be prescribed by rule of the court of appeal and, in default of such prosecution, the appeal or cross-appeal shall be deemed to have lapsed, unless the court of appeal shall see fit to make an order to the contrary."
- [8] Rule 50(1) of the Uniform Rules of Court provides as follows:

"50 Civil appeals from magistrates' courts

- (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."

The prosecution of an appeal means, within 40 days of noting the appeal, an application by the appellant 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 the making at the same time available to the registrar in writing his full residential and postal addresses and the address of his attorney if he is represented [Rule 50(4)(a) of the Uniform Rules of Court].

- [9] In the absence of such an application by the appellant, the respondent in the appeal may at any time before the expiry of the period of 60 days referred to in subrule (1) apply for a date of hearing [Rule 50(4)(b)]. Upon such application from the respondent, the appeal shall be deemed to be duly prosecuted [Rule 50(4)(c)]. [10] The applicant, who is the respondent in the appeal, is trying his best to shift the focus of the judicial spotlight to the court personnel at the magistrates' court Cape Town. What applicant fails to do, is to set out facts with sufficient particularity to enable the court to understand why he did not or was unable to apply to the registrar in writing and with notice to all other parties for the assignment of the date for the hearing of the appeal and at the same time make available to the registrar in

writing his full residential and postal addresses and the address of his attorney. In the absence of any explanation, I can arrive at no other conclusion than that the applicant had no reason as to why he did not prosecute the appeal, which was an avenue available to him.

- [11] It is a sad day to learn that legally trained officers of the court are allegedly being led, on legal processes, by the administrative support services, in particular clerks of the court, at the courthouse. I use the word “allegedly” as the applicant could have done more if he wanted me to accept his version as set out in the papers, to wit, that the clerk of the court refused to do an act which by law she was empowered to do. There is nothing on the papers before me, which is a record of the decision of the clerk of the court, to refuse to issue a warrant.
- [12] The record shows that where the attorneys had difficulty with the work ethic or output of the clerks of the court, such was elevated to the Court Manager, Mrs Talip-Temoore, and that she intervened expeditiously. In my view, there is no reason to doubt that if indeed the clerk had refused to issue the warrant, there would either be a record of such refusal communicated in writing to the attorneys as the Court Manager did in other instances, or she would have intervened to assist the attorneys. The Court Manager’s

direction to the clerk of the court to issue the warrant would have resolved the matter instantly. I have no doubt that where the clerk still refused to execute what she may have deemed as an unlawful direction by the Court Manager, armed with a refusal by the clerk of the court, the applicant would have either ex parte or on notice applied to the magistrates’ court for the review of the decision of the clerk of the court in terms of Section 13(2) of the Magistrates’ Courts Act 32 of 1944. This did not happen and remain unexplained by the applicant.

- [13] I am not persuaded that the applicant’s steps have been shown to have been frustrated by the Cape Town magistrates’ court staff. I am not inclined to accept that an attorney at law would accept instructions from a clerk of the court on how to go about to enforce a judgment. I am not persuaded that the applicant has shown that a magistrate at the magistrates’ courts had ordered that a warrant could only be granted if an application is granted by a High Court, declaring the appeal to have lapsed, where the appeal had lapsed by operation of law. Applicant’s own version hereon is based on hearsay, and there is no court order to that effect from a magistrate. If there was one, I am sure that the applicant would have delivered it. As a result I am not persuaded that the applicant has shown that an application to the High Court to declare the appeal order to have lapsed was a necessary step to execute upon the judgment, under the circumstances.
- [14] Rule 50 of the Uniform Rules of Court, which regulates civil appeals from the magistrates’ courts, does not have a provision similar to a provision in Rule 49 which regulates civil appeals from the High Court. Rule 49(6)(b) reads as follows:

“49 Civil appeals from the High Court

(6)(b) The court to which the appeal is made may, on application of the appellant or cross-appellant, and upon good cause shown, reinstate an appeal or cross-appeal which has lapsed.”

[15] Rule 51(9) of the Magistrates’ Courts Rules of Court places the prosecution of a civil appeal from the magistrates’ courts within the timelines as provided for by the rules of the court of appeal, and further that the court of appeal may in default of timeous prosecution of the appeal, make an order contrary to the lapse of that appeal, which lapse is by operation of law. It follows that an order to reinstate an appeal or cross - appeal which has lapsed, is an order ordinarily made on application by an appellant or cross – appellant. Notice of such application for reinstatement to the clerk of the court is sufficient for the clerk to refuse to issue a warrant of execution based on a judgment which is the subject matter of the appeal.

[16] The relief sought by the respondents in the counter-appeal, to wit, the restatement of the appeal which had lapsed, is a matter that directly affects the appeal as its consideration determines whether the respondents have a right to proceed with the appeal or not. It necessarily involves a consideration of the merits of the appeal. The respondents in effect seek an extension of the time period provided by Rule 50(1) of the Uniform Rules of Court, and underlying that extension an order to cancel the results of the expiry of the time provided as prescribed, which result flow from the non-compliance. The object of this application is for the respondents to get the leave of the court to pursue an appeal, and if successful to pursue their defense. The respondents seek both the extension of time and the removal of the bar (the lapse of the appeal) to enable them to pursue the appeal.

[17] Rule 27(1) and (2) of the Uniform Rules of Court provides as follows:

“Extension of time and removal of bar and condonation

- (1) In the absence of agreement between the parties, the court may upon application on notice and on good cause shown, make an order extending or abridging any time prescribed by these rules or by an order of court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet.
- (2) Any such extension may be ordered although the application therefor is not made until after expiry of the time prescribed or fixed, and the court ordering any such extension may make such order as to it seems meet as to the recalling, varying or cancelling of the results of the expiry of any time so prescribed or fixed, whether such results flow from the terms of any order or from these rules.”

The applicant opposes the respondents’ application. There is no agreement between the parties on the extension of the time periods provided by Rule 50(1) of the Uniform Rules of Court, and there is no agreement for the removal of the results of the expiry of those time periods prescribed, which results flow from non-compliance with the rule. In my view, Rule 27 (1) and (2) is the rule that applies to an application of the nature sought by the respondents. The rule itself sets out the test, to wit, that the respondents must show good cause.

[18] The relief sought is a procedural relief. The respondents must at least furnish an explanation of their default sufficiently full to enable the court to understand how it really came about that they did not comply with the timelines prescribed by the rule, and to assess their conduct and motives [Silber v Ozen Wholesalers (Pty) Ltd 1954(2) SA 345 (A) at 353A]. Inherent in this application is the lifting of the bar placed by the lapse. Discussing applications for procedural relief, it was said in United Plant Hire (Pty) Ltd v Hills and Others 1976(1) SA 717 (A) at 720E-G:

“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. The list is not exhaustive.

These factors are not individually decisive but are interrelated and must be weighed one against the other; thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong.”

The position of a litigant who is out of time but has not been barred and seeks an extension of time to comply with the timeline for furtherance of the court process, is not different from the position of one who has been barred [Dalhouzie v Bruwer 1970(4) SA 566 (CPD) at 571H].

[19] The conduct of the respondents after the judgment was granted, indicate a desire on the part of the respondents to appeal the decision of the magistrate. It cannot be gainsaid that it was only late that they discovered that they were pursuing production of an electronically or digitally constructed record of proceedings which did not exist, and that as soon as the Court Manager advised them that the proceedings were not electronically or digitally recorded, they proceeded with action in furtherance of their desire to appeal the decision of the magistrate. Despite the criticisms that can be leveled against them, I am satisfied with the respondent's substantive explanation for the delay.

[20] The dispute between the parties arose out of a written agreement for the purchase of immovable property and further agreements entered in relation thereto. In their opposition to summary judgment the respondents placed the purchase price as alleged by the applicant in dispute. The payments made by the respondents and already received by the applicant were placed in issue. The respondents raised the question whether the National Credit Act was applicable to that credit agreement. The other question raised was whether the applicant should have been registered as a credit provider in terms of the Act and the effect of failure to register on the agreement between the parties. The other issue raised related to whether the amounts other than the capital amount charged in the sale of the immovable property was interest or not and, therefore whether the agreement was a credit facility or an incidental credit agreement.

- [21] In a summary judgment application, all that the Court enquires into is: (a) whether the defendant had “fully” disclosed the nature and grounds of his defense and the material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defense which is both bona fide and good in law [Maharaj v Barclays National Bank (Ltd) 1976(1) SA 418 (A) at 426. It is not for the court to determine, in that application, the issues so crystallised.
- [22] In my view, another court may find that the defendants have set out material facts upon which their defenses are based with sufficient particularity to establish a bona fide defense and are entitled to defend the claim. There are prospects of success on the appeal. The weight of the explanation for the delay and the prospects of success in the circumstances are sufficient to meet the good cause which the respondents had to show. My assessment of the opposition to this counter-application is that I am not persuaded that the applicant has placed before me facts which could reasonably be expected to affect my discretion with regard to the granting of the relief sought by the respondent, for these reasons I would make the following order:
1. In respect of the applicant’s application for a declaratory order, no cost order is made.
 2. The time period prescribed by Rule 50(1) of the Uniform Rules of Court is herewith extended for a further period of 20 days from the date of this judgment.
 3. The lapse of the appeal, noted by the respondents against the decision of the magistrate, is cancelled.
 4. The respondents are granted leave to prosecute the appeal.
 5. No cost is order made.

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DM THULARE

ACTING JUDGE OF THE HIGH COURT

I agree.

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CM FORTUIN

JUDGE OF THE HIGH COURT

Counsel

Appellant: Advocate R Acton

Respondent: Advocate A Titus

Instructing Attorneys

Appellant: MZ Barday and Associates

Respondent: Raseroka and Associates

JUDGMENT

READ AND DAY(S) IN COURT: 02 May 2018

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