



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION – MTHATHA)**

CASE NO.: CA38/2021

Matter heard on: 21 October 2022

Judgement delivered on: 08 November 2022

In the matter between: -

MINISTER OF POLICE

Appellant

and

NIKI MNUKWA

1st Respondent

VUSUMZI JEME

2nd Respondent

BULELANI MABHUNGA

3rd Respondent

JAMA PHILLIP NAKUMBA

4th Respondent

SIYAVUYA MTIKRAKRA

5th Respondent

XOLILE MNGCINWA

6th Respondent

ZUKISANI ADDAM PITA

7th Respondent

THE SHERIFF, KING WILLIAM'S TOWN

8th Respondent

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

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Signature

Date

JUDGMENT

SMITH J:

[1] This is an appeal against the judgment of the Flagstaff Magistrate's Court, delivered on 26 February 2021, and dismissing the appellant's application for rescission of the default judgment obtained by the first to seventh respondents (the respondents) on 24 January 2020.

[2] Before I consider the merits of the appeal, I must first deal with the appellant's application for an order condoning the late prosecution of the appeal and reinstating the lapsed appeal.

[3] It is common cause that the appellant initially failed to prosecute the appeal timeously. He applied for condonation and on 9 November 2021, Govindjee J granted an order reinstating the appeal and requiring the appellant to prosecute it within 30 days from the date of the order. The appellant, however, again failed to prosecute the appeal within the timeframe stipulated in that order. He eventually only prosecuted the appeal on 25 May 2022, some five months out of time. He now again applies for the reinstatement of the lapsed appeal. I must also mention that the appellant had given notice of an application to be made on 21 October 2022, the day of the hearing of the appeal, for an order condoning the late noting of the appeal. However, that application was in respect of the same issue that served before Govindjee J and was consequently redundant. I mention that abandoned application merely because it may have certain costs implications for the appellant.

[4] The founding affidavit in support of the application for condonation and reinstatement of the appeal was attested to by Ms Lizalise Mbalekwa, an attorney employed by Notyesi Attorneys.

[5] Ms Mbalekwa explains that she had been under the impression that she had effectively prosecuted the appeal by filing a 'Notice of Prosecution' on 15 December 2021. She had become aware of this oversight and realised the need to bring an application for condonation and reinstatement of the lapsed appeal when the matter was raised by myself on 19 October 2022.

[6] While the respondents initially opposed the application for condonation, at the hearing of the appeal Mr *Bodlani* SC, who appeared on their behalf, confirmed that they had withdrawn their opposition. He stated, however, that the respondents persisted with their contention that the appellant must be held responsible for the costs of both applications.

[7] The following are the legal principles which underpin applications for condonation. The standard for considering an application for condonation is the interests of justice. This will depend on the facts and circumstances of each case. Factors which the court must take into account are, inter alia: 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 contested appeal; and the prospects of success. (*Van Wyk v Unitas Hospital (Open Democratic Advice Centre as amicus curiae)* 2008 (2) SA 472 (CC))

[8] In granting the condonation we took into account that the application was unopposed; that the appellant raised important issues regarding the rather generous sum of damages and the exorbitant interest rate awarded by the presiding magistrate; and that the extent of the delay was not so serious so as to cause any prejudice to the respondents which cannot be cured by a costs order.

[9] I now turn to consider the merits of the appeal. The material facts are briefly as follows. During December 2015, the respondents issued summonses against the appellant for damages arising out of their alleged unlawful arrest and detention. Even though the claims arose from the same incident, the respondents instituted separate actions, each claiming damages in the sum of R200 000, and ancillary relief. The appellant subsequently successfully applied for the matters to be consolidated.

[10] The appellant instructed the firm of Chitwa Sikunyana & Partners through the Mthatha State Attorney's office. The former duly filed appearances to defend and pleas on his behalf.

[11] On 28 September 2020, the Commander of the South African Police Services (SAPS) Civil Litigation Command Centre, Colonel Mbeki, learned that warrants of execution had been issued in respect of all the matters, pursuant to the judgment obtained on 24 January 2020. It was only then that he had become aware for the first time that the respondent had obtained judgment in the sum of R200 000 each, and interests at the rate of 5%, compounded monthly. He eventually spoke with Ms Sikhunyana, who told him that she had left the practice after she was appointed as a magistrate. She had informed the State Attorney accordingly and also advised the respondents' attorneys that all further processes should be served on the former.

[12] Colonel Mbeki thereafter approached the State Attorney's office where he spoke with one Ms Shumane. Although she could not explain how it came about that the respondents were allowed to obtain judgement against the appellant without his knowledge, she told him that the State Attorney's office had been plagued by serious institutional problems, to the extent that there had been intervention by the National Office.

[13] On 15 October 2020, the SAPS requested the State Attorney to instruct Mvuso Notyesi Attorneys to act on their behalf. Immediately after their engagement, Notyesi Attorneys wrote to the respondents' attorneys, requesting them to agree to rescission of the default judgment. When the latter refused, the application for rescission was instituted on 20 November 2020, some two months after the appellant had become aware of the default judgment.

[14] Although the application for rescission was purportedly founded on the provisions of Magistrates' Court rule 49(8), read with section 36(1)(b) of the Magistrates' Court Act, 32 of 1944, namely that the judgment was void *ab origine* or obtained by fraud or mistake, the appellant also relied on Rule 49(1). To succeed with an application under the latter rule, he was required to bring the application

within a period of 20 days from the date he had become aware of the default judgment and show good cause by establishing: (a) a reasonable and satisfactory explanation for the default; (b) that the application is bona fide and not made with the sole intention of delaying the respondents' claims; and (c) that he has a bona fide defence – which carries some prospect of success - to the respondents' claims. (*Zuma v Secretary of the Judicial Commission of Enquiry into allegations of State Capture, Corruption and Fraud in the Public Sector Including organs of State and Others* [2021] ZACC 28)

[15] Mr *Bodlani* submitted that the magistrate was precluded from adjudicating the rescission application in terms of rule 49(1) since it was filed outside the 20 day period prescribed by that rule and the appellant did not apply for condonation. The respondents had raised that point squarely in their answering affidavit, and instead of grasping the opportunity to apply for condonation for the late filing of the rescission application, the appellant asserted that he had in any event also relied on rule 49(8) and accordingly had one year within which to lodge the application. The unfortunate consequence of that stance for the appellant is that the application for rescission in terms of rule 49(1) was not properly before the magistrate and he consequently had to stand or fall by the averments intended to bring him within the ambit of section 36(1)(b) of the Magistrate's Court Act. He was therefore required to establish that the order was either void *ab origine* or had been obtained by fraud or mistake common to the parties. There has not been any suggestion on the papers that the default judgment was obtained by fraud or because of a common mistake. Mr Malala, who appeared for the appellant also did not advance such an argument. The only issue which therefore remains for determination is whether the order was void *ab origine*.

[16] In my view the appellant has not made out a case for rescission on the basis that the default judgement was void *ab origine*, as contemplated by section 36(1)(b) of the Magistrates' Court Act. In *Tódt v Ipser* 1993 (3) SA 577 (AD), at 587 A-D, Grosskopf JA said that '[t]he difficulty is that in our law the tendency is against holding that judgments are void. According to our common law authorities judgments are void in only three types of cases - where there has been no proper service, where there is no proper mandate or where the court lacks jurisdiction'.

[17] The appellant contended that the judgment is a nullity because: (a) the respondents did not comply with pre-trial procedures before setting the matter down; (b) the magistrate failed to hear oral evidence; and (c) the magistrate awarded interest at a rate which is contrary to the provisions of the Prescribed Rate of Interest Act, 55 of 1975. In my view none of these factors renders the judgment void *ab origine*.

[18] As mentioned, the magistrate has ordered the appellant to pay interest at the rate of 5% per month, in effect 60% per annum. Not only is this rate preposterously exorbitant, but it is also illegal. The prevailing interest rate prescribed by the Minister of Justice in terms of the Prescribed Rate of Interest Act is 7,5% per annum. In terms of section 2A of that Act, the amount of every unliquidated debt as determined by a court of law bears interest at the prescribed rate. However, the magistrate's misdirection in this regard, while it may constitute a ground of appeal, does not render the order void *ab origine*.

[19] The fact that a pre-trial conference was not held before the matter was set down also does not have the effect of rendering the order void *ab initio*. Section 54 of the Magistrate's Court Act provides that 'the court may at any stage in any legal proceedings in its discretion *suo motu* or upon the request in writing of either party, direct the parties or their representatives to be appear before it in chambers for a conference to consider certain issues in order to shorten proceedings. In this matter there has not been any such request from either party, neither has the magistrate directed that such a conference should be held.

[20] There was also nothing irregular about the magistrate's decision to accept evidence by way of affidavit. Rule 32(2) provides that where a defendant does not appear at the time appointed for the trial of an action, judgment may be given against him or her, with costs, 'after consideration of such evidence, either oral or by affidavit, as the court deems necessary'. The magistrate accordingly had a discretion to accept evidence by way of affidavit.

[21] It is indeed unfortunate that the appellant elected not to apply for condonation for his failure to bring the rescission application within the 20 day period prescribed by rule 49(1). The explanation for his failure to appear on the trial date was, in my

view, eminently reasonable. The functionary who attested to the supporting affidavit in the rescission application, namely Colonel Mbeki, explained that the appellant had been under the impression, at all material times, that the State Attorney and the attorneys' firm instructed by them had done everything they were supposed to do to defend the claims. This was not an unreasonable assumption in the circumstances.

[22] The appellant has also established a bona fide defence to the respondents' claims. Colonel Mbeki said that the arresting officer had a reasonable suspicion that the respondents had committed a Schedule 1 offence, namely the theft of fuel. That assertion is consonant with the appellant's pleaded case. In addition, there are also reasonable prospects that a court of appeal would interfere with the damages awarded to the respondents because it is exorbitant and in conflict with damages awarded by this Court in comparable cases.

[23] And as mentioned, the interest rate ordered by the magistrate was in conflict with the provisions of the Prescribed Rate of Interest Act. This was such a glaring and fundamental error that one would have expected the magistrate to correct it *suo motu* in terms of section 36(1)(c) of the Magistrate's Court Act. It seems, however, that even though it was brought to his attention, he was oblivious to the implications of that order. He appeared to have been of the erroneous view that the order was competent because the respondents had included a prayer for such relief in their particulars of claim.

[24] Even though we are concerned that the outcome of this appeal will allow such a fundamentally flawed judgment to stand, we are mindful of the fact that the appeal is not against the order granted on 24 January 2021, but against the magistrate's refusal to rescind it. Regrettably, we are not at liberty to interfere with the damages award, no matter how exorbitant and disproportionate it may be. However, those portions of the order dealing with interest, both in respect of the amount of damages and the costs, are patently wrong and should not be allowed to stand. While it may perhaps have been preferable to remit the matter to the magistrate to allow him the opportunity to correct the errors in terms of section 36(1)(c), one cannot be certain that this will happen. I am therefore of the view that this court has a duty to correct

those obvious errors in order to avoid the waste of public funds through usurious interest orders.

[25] Insofar as costs are concerned, I am of the view that both parties have been successful to some extent. It is consequently only fair that they should bear their own costs. The appellant's attorneys were, however, undeniably remiss in their failure to appreciate what constituted proper prosecution of the appeal. It is also only fair that the appellant should pay the respondents' costs in respect of the condonation application. This will include whatever costs the respondents had incurred in respect of the abandoned application for condonation, which was effectively a repetition of the application that served before Govindjee J.

[26] In the result the following order issues:

- 1) The appellant's failure to prosecute the appeal timeously is condoned and the lapsed appeal is reinstated.
- 2) The appeal succeeds to the following extent:
 - 2.1. Paragraphs 2 and 4 of the order granted on 24 January 2020 are hereby set aside and replaced with the following orders:
 - '2. Interest on the said amounts at the prevailing legal rate, 14 days from the date of judgment to the date of payment;
 4. Interest on taxed costs at the prevailing legal rate, 14 days from date of *allocatur* to date of payment.'
- 3) The parties shall bear their own costs.
- 4) The appellant must pay the respondents' costs in respect of the condonation application, including the abandoned condonation application dated 25 September 2022.

JE SMITH
JUDGE OF THE HIGH COURT

I agree

D. POTGIETER
JUDGE OF THE HIGH COURT

Appearances:

For the Appellant : Mr. L. Malala
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Counsel for the 1st-7th Respondents : Adv. A.M. Bodlani SC.
: Linyana & Somacala Inc.
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