

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 17226/2021

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

24 May 2022

.....

DATE

SIGNATURE

In the matter between:

MIDRAND RENTAL COMPANY (PTY) LTD

Applicant

(Registration Number: 2013/205992/07)

And

KAGISO KOBOEKAE

Respondent

(Identity Number: [...])

This judgment is handed down electronically by circulation to the parties' legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 24 May 2022.

JUDGMENT

INTRODUCTION

[1] The application before the court is an application to strike out and to set aside or dismiss the respondent's "Application for Appeal Date" which is dated 9 December 2020 and was issued on 10 December 2020. The respondent's "Notice of Leave to Appeal" also titled "Judgment" was dated 9 December 2020 and the "Notice to Appeal" was dated 17 December 2020. It is collectively referred to as the "leave to appeal". The respondent's leave to appeal lapsed on 15 February 2021 as the respondent did not prosecute the appeal within the time required. The applicant served the present application to strike out on 25 May 2021. The matter was initially unopposed. The applicant set the matter down on the unopposed roll on 27 July 2021 and served the notice of set down on the respondent. The respondent attended court and opposed the application.

[2] In view of the matter becoming opposed it was removed from the unopposed roll. The respondent was ordered to deliver his answering affidavit and heads of argument. The matter was to be enrolled on the opposed roll. The respondent filed an answering affidavit albeit late as well as a notice of opposition to oppose the application to strike out and heads of argument. The applicant filed and served a replying affidavit. The applicant seeks to strike out and to set aside or dismiss the application for leave to appeal dated 9 December 2020. In view of the opposition to the present application, the applicant seeks costs on an attorney and client scale.

FACTS

[3] It is appropriate to place the matter in context by sketching the background to the present application. The respondent is a tenant at the Carlswald Luxury Apartments, a property managed by the applicant. The applicant brought an application for the eviction of the respondent in the Randburg

Magistrates Court. The respondent requested legal representation and was referred to Legal Aid South Africa(Legal Aid) but did not secure legal representation at the time due to the offices being closed in the midst of the Covid pandemic. They only accepted telephone calls according to the respondent. He did not follow up with Legal Aid or other legal aid clinics to secure legal representation. Instead, he reported the matter to the housing tribunal in August 2020. Shortly thereafter his lease was cancelled on 8 September 2020. A meeting was held with the Housing Tribunal on 20 September 2020. The matter was postponed for a decision. The respondent alleged that his electricity was cut by the applicant when he had prepaid electricity. As the respondent sold meat during the Covid pandemic to secure an income, the produce deteriorated and he was unable to sell the meat. He blamed the applicant for this loss and for not paying his rent. On 25 November 2020, the Randburg Magistrates Court per Magistrate Etchell, granted an eviction order.

- [4] The respondent stated that he argued against the eviction matter. He filed no affidavit and provided evidence during the matter, apparently from the bar. After the order was granted he lodged an appeal. The appeal was lodged on 9 and 17 December 2020. The respondent did not prosecute the appeal timeously in terms of Rule 50(1) of the Uniform Rules of Court. The 60 days to prosecute the appeal lapsed on 15 February 2021. The respondent did not bring an application for condonation in the High Court.

THE LAW

- [5] Rule 50(1) of the Uniform Rules of Court provides that:

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

- [6] Counsel for the applicant submitted that the respondent had not complied

with the preliminary requirements prior to prosecution of the matter. He did not comply with the rules in terms of the Magistrates Court Act 32 of 1944 namely he did not request reasons for the magistrates' decision in terms of Rule 51(1) in terms of the Magistrate's Courts Act 32 of 1944 (The Rules). In addition, the respondent failed to serve and file a complete record of the proceedings nor has he furnished security for costs as provided for by Rule 51(4) of the Magistrates Court Rules. Counsel submitted that the respondent failed and/or refused to comply with every Rule relating to an appeal from the Magistrate Court, by failing to comply with Rule 50(4)(a) of the Uniform Rules of Court, which states that:

“(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.”

[7] in view of the non-compliance, the matter has not been allocated a date in the appeals division for adjudication. The delay enabled the respondent to remain on the property. In the absence of an application for condonation the applicant filed an application to set aside or dismiss the application. This application was opposed and the respondent raised new issues not dealt with by the court *a quo*. The respondent failed to provide reasons for the non-compliance with the Rules and why the appeal should not be dismissed alternatively struck out. These reasons ought to have been contained in a condonation application. No such application has not been forthcoming in the past year since the court granted the respondent an opportunity to file an answering affidavit.

[8] Counsel for the applicant submitted that for the court to consider whether there are prospects for success in proceeding with the appeal, the

respondent was obliged to launch an application for condonation. He was required to explain the delay. He has to date not set out an explanation in a substantive application nor has he done so in the answering affidavit. Counsel relied on the decision in *Derrick Grootboom v National Prosecuting Authority and Another* 2014(2) SA 68 (CC) at paragraph 23 where the 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.”

- [9] In relation to the affidavit filed by the respondent, counsel for the applicant relied on *Uitenhage Transitional Local Council v SA Revenue Services* 2004(1) SA 292 (SCA) at 297H, where the court laid down what should be averred in an affidavit in support of condonation:

“(6) one would have hoped that the many admonitions concerning what is required of an applicant in a condonation application would be trite knowledge among practitioners who are entrusted with the preparation of appeals to this Court: condonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the non-compliance is time-related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out.”

- [10] The applicant took issue with the format of the respondent’s notice of appeal which was a hybrid between a notice and an affidavit. It

commenced, “I, Kagiso Kaboekae do hereby make oath and state that” but was not commissioned by a Commissioner of Oaths. The applicant submitted that it was not properly before the court as such, relying on the decision of the court in *Absa Bank v Botha Absa Bank Ltd NO and Others* 2013 (5) SA 563, where the court exercised its judicial discretion in refusing to allow an affidavit which did not comply with the Regulations for Commissioners of Oaths. Counsel submitted that this was not a minor issue that could be condoned rather this matter where the document had not been commissioned at all rendered the affidavit and application fatally defective. She continued that the affidavit and application stood to be set aside or dismissed.

[11] The respondent did not have legal representation when the matter appeared and filed his notices with the assistance of the applicant. He addressed the court and then requested legal representation indicating he had not approached Legal Aid. He acknowledged that he ought to have made a more concerted effort to ensure he secured legal assistance in view of his failure to comply with the Rules. He proffered that the file in the matter was not available to him for uploading documents and filing purposes furthermore that the case number had changed. He informed this court that he had an appointment with the Deputy Judge President and court manager to address these issues in this matter which prevented him from pursuing the matter.

[12] During the hearing of the matter, the applicant displayed the Case lines audit of the file. It became evident that the case number did not change at any point in this matter. Having regard to the Case lines file audit it was apparent that the respondent had access to the Case lines file at all times. The email communication forwarded for my attention after the hearing of the matter indicated that the respondent did not have a meeting with the

Deputy Judge President or court manager. The meeting was with a clerk in the Registrar's office.

[13] The respondent informed the court that he expected more assistance from the applicant in getting his papers in order. He applied for the transcript which was almost ready. He conveyed that financial challenges prevented him from obtaining and filing it earlier. He alleged that he paid an amount for security. If he paid an amount of money, there was no indication on the file that he paid security and no explanation to who the money was paid to and for what purpose it was paid.

[14] Apart from the failure to comply with the Rules, the respondent's absence of an explanation was also unsatisfactory. The explanation that his electricity was cut by the applicant was not substantiated with proof. He made the allegation that the applicant was able to cut his prepaid electricity by allocating his rental to the pre-paid electricity that he purchased. In view of the electricity supplier being independent from the applicant this assertion did not appear to be plausible and appeared to be a view held only by the respondent. There was no corroboration for this view and no supporting affidavits either.

[15] The respondent had been in receipt of the applicant's application which set out the problems with his failure to comply with the Rules for some time. He also had the opportunity to approach and or to call Legal Aid. He conceded that he did not really pursue this option fully. Had he done so he may have been guided to apply for condonation setting out reasons for his failure to comply. At this stage, the reasons which he proffered during the hearing which are not under oath do not afford a sufficient explanation why he did

not request the magistrate's written reasons and record timeously. These are still not filed to date after he was furnished an opportunity to file an answering affidavit. He did not state why he did not seek legal representation earlier and he conceded that he did not make an effort in this regard. He ought to have sought assistance to address the various problems which led to him not prosecuting the appeal timeously. The respondent has not complied with the Rules and then sought to introduce new matter. This is indicative of his conduct throughout and his request for legal assistance from the applicant is misplaced.

[16] The respondent has not explained his non-compliance in his "notice to oppose application to strike out" and the supporting affidavit. I have noted the submission by counsel for the applicant that the respondent introduced new evidence from the bar during the proceedings in the court *a quo* and during this application. This is attributable to his lack of familiarity with the requirements. The transcribed record of the proceedings before the court *a quo* is not before this court. The respondent has not addressed this aspect, however, he does continue to raise new aspects that he deems relevant from his view as a lay litigant. He stated that he was unable to secure legal representation in the court *a quo* timeously and the matter proceeded without such legal representation. This does not explain why he has not addressed the situation in the interim and he conceded that he did not apply himself to this aspect in the interim. He appears to have relied on the applicant's legal representative unduly.

[17] The respondent's delay in dealing with the matter timeously and not seeking legal representation when afforded an opportunity to file his answering affidavit and to seek condonation is not adequately explained other than his being dilatory and raising new issues. It does not explain why the transcribed record has not been filed and why security has not

been furnished. In addition to the non-compliance with the Rules, the respondent did not file the required notice of appeal, setting out how the court *a quo* erred. He did not set out what the court should have found. The respondent has not complied with the Rules and has filed at least 3 documents upon which he relies for his appeal none of which afford any clarity to enable this matter to be deliberated upon. He has not made available further evidence or applied for condonation. If further evidence were accepted, it is not evident that it would lead to a different verdict.

- [18] The applicant's concern was that the respondent moved the goal posts on each occasion as warned in *S v N 1988 (3) SA 450 (A)* at 458E - 459A:

'It is a power which the Court exercises only in exceptional cases for:

"It is clearly not in the interests of the administration of justice that issues of fact, once judicially investigated and pronounced upon, should lightly be reopened and amplified. And there is always the possibility, such is human frailty, that an accused, having seen where the shoe pinches, might tend to shape evidence to meet the difficulty."

This concern is addressed with the presence of corroborating affidavits. These are absent in the present matter.

- [19] Considering the time that has passed namely more than twelve months, the respondent has not addressed the issues required which include compliance with the Rules of Court and has not sought legal assistance to properly prosecute the appeal as required in terms of Rule 50(1). The respondent wishes to continue with the appeal despite his non-compliance. He has not addressed this issue over a period of time. The application before the court is an application to strike out and to set aside or dismiss the "Application for Appeal Date" dated 9 December 2020 and

issued 10 December 2020; “Notice of Leave to Appeal/Judgement” dated 9 December 2020 and the “Notice to Appeal” dated 17 December 2020. I see no reason why the applicant’s relief should not be granted.

[20] The applicant has requested a punitive costs order in view of the opposition filed by the respondent. The respondent is a lay litigant and I see no need to burden the respondent with punitive costs in the matter.

[21] In the view of the above I make the following order:

1. The application for leave to appeal dated 9 December 2020 and issued on 10 December 2020 constitutes an irregular step and has now lapsed.

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JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Appearances:

On behalf of the Applicant : Adv V Olivier

Instructed by : Harrington Johnson Wands Attorneys

On behalf of the Respondent : In Person

Date of hearing : 28 February 2022

Date of judgment : 24 May 2022