THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

Reportable

CASE NO.

339/2001

In the matter between

MARK BYRON **Appellant**

and
DUKE INCORPORATED **Respondent**

CORAM: SMALBERGER ADP, OLIVIER, ZULMAN, MPATI JJA and LEWIS AJA

HEARD: 21 MAY 2002

DELIVERED: 30 MAY 2002

Condonation – validity of a writ of execution in respect of a taxed bill of costs issued in the name of the successful party, the proceeds of the bill having been ceded to the attorney of the successful party.

JUDGMENT

ZULMAN JA

[1] This is an appeal, with the leave of the court *a quo*, against an order dismissing an application brought by the appellant to set aside a writ of execution and an attachment made pursuant thereto. The writ was issued by the respondent. The respondent is a company which practises as attorneys. The appellant has brought a substantive application to this Court seeking condonation for his failure to comply with a number of rules of this Court. The application is opposed by the respondent.

[2] The principles governing condonation applications and the factors which weigh with this Court are well-known and have been often restated. The main principles are succinctly formulated in *Federated Employers Fire & General Insurance Co Ltd and Another v McKenzie* 1969 (3) SA 360 (A) at 362 F-H as follows:

> "[T]he factors usually weighed by the Court include the degree of non-compliance, the explanation therefor, the importance of the case, the prospects of success, 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;…"

[3] The material facts relating to the condonation application are the following:

3.1 On 22 August 2000 the respondent caused the Registrar of the

High Court to issue a writ of execution authorising the Sheriff to attach the appellant's movables in execution.

3.2 On 25 August 2000 the Sheriff, acting in terms of the writ, attached certain movables belonging to the appellant.

3.3 On 5 September 2000 the appellant brought an application to set aside the writ and attachment made pursuant thereto. The application was opposed.

3.4 On 27 October 2000 the application was dismissed with costs by the court *a quo*.

3.5 On 3 November 2000 the appellant delivered an application for leave to appeal against the order dismissing the application together with a request for reasons, no reasons having been furnished by the court *a quo* when the application was dismissed.

3.6 On 12 December 2000 the reasons were furnished.

3.7 On 16 February 2001 the court *a quo* granted leave to appeal to this Court.

3.8 On 14 March 2001 a Notice of Appeal was delivered to the respondent. On 16 March 2001 the Notice of Appeal was lodged with this Court by the appellant's Bloemfontein attorneys. This was one day after the last day provided for in the rules for lodging the notice (Rule 7(1)). On the same day the appellant's Bloemfontein attorneys wrote to the appellant's Johannesburg attorneys confirming that the Notice of Appeal had been lodged and that they were "tans in afwagting op die uitreiking van die saaknommer".

3.9 In terms of the rules of this Court the record of the proceedings in the court *a quo* were required to be lodged within three months of the lodging of the notice of appeal, namely on or before 15 June 2001 (Rule 8(1)). However Liezel van Niekerk, an attorney in the office of the appellant's Johannesburg attorneys, and the sole deponent to the appellant's founding affidavit in the condonation application, decided to wait for the case number before preparing the appeal record. It is not apparent to me why a case number was not allocated when the Notice of Appeal was lodged with the Registrar of this Court. The appellant's Bloemfontein attorneys have not chosen to enlighten this Court in this regard. Furthermore, why it was in any event necessary to obtain the case number, and why Van Niekerk could not simply have obtained the case number by making a

telephone call to her Bloemfontein correspondent or the Registrar of this Court, is not explained. Van Niekerk states that she "planned" to diarise her file "for the end of April 2001 for the purpose of attending to the preparation and lodging of the appeal record" which would have given enough time for preparation of the record. This notwithstanding, nothing was done because according to her "due to an oversight in the offices of the applicant's attorneys such file was never diarised". There is no explanation whatsoever as to whose "oversight" brought about this situation nor how it occurred.

3.10 On 12 June 2001 Van Niekerk's Bloemfontein correspondent telefaxed the case number to her. Due to "pressure of work" the telefax did not come to her attention and she took no steps to lodge the record notwithstanding the fact that the record was required to be lodged by no later than 15 June 2001.

3.11 The telefax apparently only came to her attention on 22 June 2001 because the respondent advised her that the appeal had lapsed and that execution was to proceed. Some three days later, on 25 June 2001, the appellant launched an application in the court *a quo* for an order staying execution. This order was granted on 7 August 2001.

3.12 It was only on 27 June 2001 that the appellant's attorneys gave

instructions for the judgment of the court *a quo* granting leave to appeal to be typed. According to Van Niekerk this was because the appellant's attorneys were attending to the application to stay execution. Van Niekerk does not state who of the appellant's attorneys were so occupied nor does she seek to explain why there was apparently no one in the appellant's attorneys' office who could be instructed to take the simple step of ordering the record during this period, even if Van Niekerk herself was fully occupied with the application to stay execution.

3.13 Although difficulties were experienced in obtaining the learned judge *a quo's* signature to the judgment granting leave to appeal, the judge eventually signed the judgment which was uplifted on 7 August 2001. On 13 August 2001 the appeal record was completed. On 15 August 2001 an application for condonation and re-instatement was lodged.

3.14 Nothing was done by the appellant's attorney to prosecute the appeal between 16 March 2001 until 27 June 2001 when attempts were made to obtain the judge *a quo's* signature to the judgment granting leave to appeal – a period of approximately 3 months. It is furthermore apparent that had the respondent not sought to execute on the judgment that it had obtained after the appeal had lapsed, the appellant's attorneys would probably have continued to do nothing.

3.15 Non-compliance with the rules did not cease here. The appellant's replying affidavit in the application for condonation was also lodged late.

[4] It is apparent from the aforegoing history that there were a number of instances where the rules of court were not complied with. Furthermore, inadequate and indeed, in some cases, no explanation is given for such non -compliance. I do not believe, however, that the non-compliances in question were so flagrant and gross that merely because of them the application for condonation should be dismissed without considering the appellant's prospects of success on appeal (cf, for example, *Ferreira v Ntshingila* 1990 (4) SA 271 (A) 281J – 282A and *Darries v Sheriff, Magistrate's Court Wynberg, and Another* 1998 (3) SA 34 (SCA) at 44H–J)

[5] I accordingly now turn to consider whether the appellant has shown a reasonable prospect of success on appeal. The material facts in regard thereto are:

5.1 On 11 August 1999 an agreement of settlement concluded between the appellant, Mr Derek Jackson and Absa Bank Limited was made an order of court. In terms of the order the appellant was to make payment of Jackson's "costs of suit within

seven days from date of taxation, without set-off or deduction".

5.2 On 11 August 2000 the amount of such costs was settled between tax consultants appointed by the attorneys acting for the appellant and Jackson in an amount of R48 612,44. On the same day the taxing master made his *allocatur* in accordance with such settlement.

5.3 On 11 August 2000 Mr Gary Duke of the respondent telefaxed a letter to the appellant's attorneys the material portion of which reads:

3. "We are in receipt of the Bill of Costs amended as per the agreement between our respective taxing consultants in terms of which the final amount as per the Bill is the amount of R48 612,44.
4.
5. We are advised by our taxing consultant that same was endorsed by the Taxing Master earlier today.
6.
7. Note that our client has ceded his rights to the proceeds from the Bill of Costs to ourselves for outstanding legal fees and we accordingly request that your client make payment of the amount of the Bill to our offices.
8.
9. Kindly acknowledge receipt hereof and we look forward to receiving your client's cheque in settlement thereof soonest."

5.4 Later on 11 August 2000 Duke telefaxed a further letter to the appellant's attorneys stating as follows:

"Kindly note that we no longer represent Mr Jackson.

We have no details of his present whereabouts."

5.5 On 15 August 2000 the appellant's attorneys acknowledged

receipt of the two letters of 11 August 2000. In the letter they record that the appellant disputes the cession and requires details of it. The letter also expresses the opinion that "given the disputed cession and the defences that my client has to such claim … you ought to institute action against my client should you persist with such cession".

5.6 On 17 August 2000 the respondent replied in a letter recording that there was no basis for the appellant disputing the cession, recording that the cession was oral and pointing out that it was a specific term of the settlement that the appellant would make payment of costs of suit within seven days from date of taxation without deduction or set-off. The letter concludes by stating that the respondent intends proceeding with a writ.

5.7 No payment was forthcoming. As previously mentioned the respondent then caused the Registrar to issue a writ of execution.

[6] As I understand the appellant's argument, he contends that the writ of execution is void for the following reasons:

6.1 The right or *locus standi* to institute execution proceedings in

terms of the costs order after the cession by Jackson remained with Jackson. The cession was only of the proceeds of the costs order and did not carry with it the right or *locus standi* to institute execution proceedings.

6.2 In the alternative, if after such cession the respondent acquired the right or *locus standi* to institute execution proceedings in terms of the costs order, the respondent could not issue a writ of execution in the name of Jackson, but had to substitute itself for Jackson as the execution creditor and institute such execution proceedings in its own name.

6.3 In the further alternative, even if after such cession the respondent had the right or *locus standi* to execute the costs order (as cessionary) in the name of Jackson (as cedent), the respondent lacked authority to issue the writ in the name of Jackson, as Jackson had terminated the respondent's mandate to do so.

(An argument raised in the appellant's heads of argument to the effect that the cession was in some way tainted with champerty was wisely not persisted in).

[7] A fair and sensible reading of the letter of 11 August 2000 which sets out the details of the cession makes it clear that this is a case of an out –and -out cession. Any suggestion of divorcing, as it were, the substantive rights contained in the cession from the procedural rights to act thereon is untenable. Such a construction would be totally unrealistic. To give a person a right to obtain the "proceeds" of a bill of costs but not to arm that person with the procedural ability to do so is, in my view, an absurdity. As pointed out by Van den Heever JA in *First National Bank of SA Ltd v Lynn NO and Others* 1996 (2) SA 339 (A) at 352C-D:

> "A right of action does not exist independently of the underlying right itself. The former is merely the procedural manifestation of the latter… [T]he procedural manifestation of the underlying right would acquire meaning only once the underlying right became exigible".

Equally apposite are the following remarks of Olivier JA in the same case at 356 D-E:

> "In the present case a suspended right to claim payment of the retention money came into being on 27 August 1990. As explained by *De Wet and Van Wyk (loc cit)* [Kontraktereg en Handelsreg 5th ed vol 1 at 150 –1], that right constitutes a legal reality and not a mere *spes*. *Inter alia*, it can be ceded…".

(See also *Brummer v Gorfil Brothers Investments (Pty) Ltd en Andere* 1999 (3) SA 389 (HHA) at 399F-H and 411D-E) and *Headleigh Private Hospital (Pty) Ltd t/a Rand Clinic v Soller & Manning Attorneys and Others* 2001 (4) SA 360 (W) at 366 J – 367 A.

It is plainly implicit, if not expressly stated, on a proper construction of the letter detailing the cession, that what was being ceded was not simply

the right to the proceeds of execution but also the procedural right to bring this about by way of the issue of a writ of execution.

[8] The contention that even if there was a right or *locus standi* to institute execution proceedings in terms of the costs order the respondent was precluded from issuing a writ in the name of Jackson but was obliged to substitute itself for Jackson as execution creditor and to institute such execution proceedings in its own name, is equally without substance. First, where a judgment creditor has ceded his rights it is not absolutely necessary for the cessionary to obtain his substitution on the record before he may sue out a writ in the name of the cedent. De Villiers J in *Schreuder v Steenkamp* 1962 (4) SA 74(O) at 76H put the matter in these brief terms:

> " Volgens die outoriteite is dit egter nie nodig vir 'n sessionaris om die naam van die sedent met sy naam te laat vervang nie: hy kan 'n lasbrief uitneem in die naam van die sedent."

(See also *Kourie and Another v Sasseen* 1965 (1) SA 490 (T) at 491 A-C and *Herbstein and Van Winsen The Civil Practice of The Supreme Court of South Africa* (4th Edition p 757) and *Headleigh Private Hospital (Pty) Limited (supra)* at 373E – 374B. Second, it is clear from authorities such as *Sachs v Katz* 1955 (1) SA 67 (T) at 72D that a writ must be in "strict conformity with the Court's order which warrants its issue".

[9] It is apparent from the writ in this case that:

9.1 It is issued in case number 98/31408 being the case number of the application which was settled.

9.2 It describes the plaintiff in the heading thereof as being Jackson, the appellant as the first defendant and Absa Bank as the second defendant.

9.3 The writ directs the Sheriff to attach and take into execution the movable goods of the appellant at an address stated, and to cause to be realized by public auction the sum of R48 612,44 together with interest thereon at the rate of 15.5% per annum from 11 August 2000 (the date of taxation of Bill of Costs) to date of payment.

9.4 The Sheriff is further directed to pay to the plaintiff or its attorneys the sum due to it as aforementioned.

9.5 The writ is signed by G Duke who is described as being of "applicant's attorney" Duke Incorporated (the respondent).

The writ is therefore in strict conformity with the Court's order which warranted its issue. The writ was accompanied by a letter to the Sheriff in which it was recorded that the proceeds of the writ had been ceded to the respondent. In any event the cession amounted to one which appointed the respondent as *procurator in rem suam* thereby entitling the respondent to sue in the name of Jackson if the respondent considered it "more

favourable for the more advantageous recovery of the settlement of the debt" (Sande *Commentary on Cession of Actions*, Anders' translation (1906) chapter 9 para 7 p 173).

[10] The final alternative argument to the effect that Jackson had terminated the respondent's authority to issue the writ in his name is also lacking in merit. The second letter written on 11 August 2000 advising that the respondent no longer represented Jackson is relied upon for this argument. As I have already pointed out the letter simply states: "Kindly note that we no longer represent Mr Jackson". It does not state that there was no existing authority to issue a writ in the name of Jackson so as to enable the respondent to proceed with the execution. This was plainly, for the reasons that I have previously indicated, part and parcel of the cession. There was no point in ceding the amount of the Bill of Costs without at the same time enabling the respondent to give effect to it.

[11] Accordingly the appellant has no reasonable prospects of success on the merits of the appeal. In the result the condonation application must fail.

[12] The question of costs remains for consideration. Although the conduct of the appellant's attorneys was not exemplary and exhibits a

disregard for the rules of this Court I do not regard such conduct as being of such a nature as to warrant the extreme order of penalizing the attorneys with a *de bonis propriis* costs order. I nevertheless believe that this Court should mark its displeasure with such conduct. The appellant's attorneys were in court during argument. At the request of the Court, counsel for the appellant obtained an agreement from them that they would not object to an order being made depriving them of any right to claim costs from their client in regard to the condonation application.

[13] In the result I make the following order:

13.1 The application for condonation is refused.

13.2 The appellant's attorneys are not entitled to seek to recover any costs from the appellant in regard to the application for condonation.

13.3 The appellant is ordered to pay the respondent's costs, including the costs incurred in relation to the appeal.

R H ZULMAN

JUDGE OF APPEAL

SMALBERGER ADP)

OLIVIER JA) CONCUR

MPATI JA)

LEWIS AJA)