THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no:567/10

In the matter between:

VOTANI MAJOLA **Appellant**

and

NITRO SECURITISATION 1 (PTY) LTD **Respondent**

Neutral citation: *Votani Majola v Nitro Securitisation* (567/10) [2011] ZASCA 180 (30 September 2011)

Coram: BRAND, PONNAN, BOSIELO JJA AND PETSE AND PLASKET AJJA

Heard: 19 September 2011

Delivered: 30 September 2011

Summary: Dismissal of appeal for non-appearance – rule 13(3) of SCA rules – Default position is that appeal will be dismissed for non-appearance unless grounds exist for striking it from the roll or postponing it – factors to be considered in exercise of this discretion

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Van Eeden AJ sitting as court of first instance):

The appeal is dismissed with costs on an attorney and client scale.

JUDGMENT

PLASKET AJA (BRAND, PONNAN, BOSIELO JJA AND PETSE AJA concurring)

[1] This is an appeal against a judgment of the South Gauteng High Court, Johannesburg in which Van Eeden AJ granted summary judgment against the appellant, ordering him to return to the respondent a Jaguar S Type 3.0 SE motor vehicle and to pay the respondent's costs on an attorney and client scale. The appeal is with Van Eeden AJ's leave. In this court, the appellant failed to appear and his appeal was dismissed with costs on an attorney and client scale. These are the reasons for that order.

Background to the appeal

[2] This matter has an unfortunate history. The summary judgment was granted by the court below on 20 November 2009. Leave to appeal was granted on 29 July 2010. The matter was set down for hearing in this court on 10 May 2011 but neither the appellant nor a legal representative instructed by him appeared on that day. As a result, an order was made striking the appeal from the roll, ordering the appellant to pay the wasted costs on an attorney and client scale, ordering that the appeal was not to be set down unless the appellant had provided proof that the wasted costs had been paid in full and directing that when the appellant applied for the matter to be set down, he was required to give a full explanation for his absence.

[3] The appellant did not pay the wasted costs and took no steps to set the matter down. As a result, the respondent wrote to the President of this court to request that the matter be set down for hearing despite the appellant not having complied with the order. In effect, therefore, the respondent waived reliance on its right to be paid its costs prior to the appeal being set down again. It also tendered to reconstruct the record at its own cost.

[4] The matter was set down for hearing on 19 September 2011. In response to the notice of set down, the appellant wrote to the registrar of this court on 12 September 2011 to say that, in terms of the order of 10 May 2011, certain directives had to have been complied with before the matter could be set down and that, to his knowledge, they had not been fulfilled. He no doubt had in mind his obligation to pay the respondent's costs and to explain his failure to appear. He queried whether the set down was regular in these circumstances as he did not want to travel to Bloemfontein for the hearing only to be told that the set down was, indeed, irregular.

[5] On 14 September 2011, he wrote a further letter to the registrar in which he said:

'I refer to my letter to the Registrar dated 12/09/11 to which I have not received a reply. In that letter I expressed my doubts about the legality of setting this matter down before the directives that were specified in the order dated 10/05/11 had been complied with. I sought clarity from the Registrar which I have not received to date. Unless there is a different position which should be communicated to me before the end of business day tomorrow the **15/09/11 THE MATTER SHOULD BE REMOVED FROM THE ROLL OF THE 19/09/11.**'

[6] On the same day, the registrar replied. In his letter he stated:

'I refer to your letter of 14 September 2011. I confirm that the matter is set down for hearing on Monday 19 September 2011. I am instructed to inform you that the appellant's failure to appear may lead to dismissal of the appeal with costs.'

[7] When the matter was called on 19 September 2011, there was once again no appearance by or on behalf of the appellant. We were informed by Mr Becker, who appeared for the respondent, that his attorney had been informed by the appellant's

correspondent – who was not present in court when the appeal was dealt with – that the appellant had informed him telephonically that he did not intend attending court. Thereafter attempts to contact the appellant proved to be unsuccessful because his cellphone had been switched off. Brand JA, the presiding judge, requested that these details be reduced to writing and be handed to the registrar. An affidavit to this effect, deposed to by the respondent's attorney, was duly filed with the registrar.

[8] The net result is that the appellant has failed to appear in this court on the two occasions when his appeal has been set down for hearing and, on both occasions, he has neither given an explanation nor offered an apology for his failure to appear. These failures on his part are all the more serious when one considers that the appellant is an attorney – and hence an officer of this court.

The facts

[9] The respondent, in its particulars of claim, alleged that on or about 29 August 2006 Firstrand Bank Limited, trading as Wesbank, had entered into a written instalment sale agreement with the appellant in terms of which it had sold and delivered to him the Jaguar vehicle mentioned above. The purchase price of R604 494.00 was payable by the appellant in monthly instalments, over 59 months, of R8039.80 with a final payment of R130 145.80. Ownership of the Jaguar remained vested in Wesbank until the appellant had paid all amounts due by him.

[10] The appellant breached the agreement by failing to make the monthly payments. This gave Wesbank the right to cancel the agreement and, among other things, take the Jaguar back. In the meantime, Wesbank had ceded its rights in terms of the agreement, including its right of ownership of the Jaguar, to the respondent. It was entitled to do so in terms of clause 13 of the agreement which reads:

'You may not transfer your side of the agreement to any other party without getting the Seller's prior written approval but it is agreed that the Seller can transfer his side of the agreement (his rights in the agreement and goods) to another party. You agree that if the Seller does transfer his side you will continue to hold the goods and fulfil your obligations on behalf of and to the new party.'

[11] After having sent the appellant notice in terms of s 129 of the National Credit Act 34 of 2005, to his *domicilium* as it was reflected in the agreement, and following the appellant's failure to respond thereto, the respondent issued summons for the return of the Jaguar, the postponement sine die of its claim for damages pending the return and the valuation of the Jaguar, interest on the amount of damages awarded in due course and costs on an attorney and client scale.

[12] The respondent later applied for summary judgment in which it sought the return of the Jaguar and costs on an attorney and client scale. That application was opposed by the appellant who did not deny that he had breached the agreement but raised instead a number of technical points. They were that: (a) the s 129 notice had been sent to the incorrect address, as he had changed his *domicilium* in writing in accordance with clause 16 of the agreement; (b) the respondent had not complied with rules 18(4) and 18(6) of the uniform rules when it pleaded the cession, rendering the particulars of claim excipiable; (c) the person who instituted the action on behalf of the respondent lacked authority to do so; (d) Wesbank had not obtained the appellant's consent to the cession; and (e) the decision to institute the action was not valid because the respondent had not exhausted less drastic options to recover the Jaguar and the debt owed to it by the appellant. All of these points were found by Van Eeden AJ to have been without merit.

The issues

[13] The appeal was dismissed in the absence of the appellant. This court is entitled to follow such a course. Rule 13(3) of the rules of the Supreme Court of Appeal provides that if an appellant fails to appear on the date of the hearing of an appeal, it 'shall be dismissed for non-prosecution, unless the court otherwise directs'.

[14] In three cases dealing with the similarly worded predecessor of rule 13(3) – rule 7(2) of the rules of the Appellate Division – this court has held that the default position where an appellant fails to appear is that the appeal should be dismissed.

Trollip JA, in *Gumede v Protea Assurance Co Ltd*,[1] held that 'the sub-rule confers a discretion on this Court as to the appropriate order it should make, but ordinarily the appeal should be dismissed unless there are circumstances warranting the making of some other, less drastic order'. It is, therefore, only if sufficient grounds exist that a less drastic alternative, such as striking the appeal from the roll or a postponement, may be justified.

[15] Three sets of factors are relevant to determining whether the court ought to exercise its discretion in favour of an absent appellant and either strike the matter from the roll or postpone it. They are the facts and circumstances surrounding the appellant's absence, the position of the respondent and the appellant's prospects of success.[2] I proceed to consider these in turn.

[16] The facts and circumstances surrounding the non-appearance of the appellant are set out fully above. From them I can find nothing that operates in the appellant's favour. Indeed, everything points to this court exercising its discretion against him. Of importance are the following factors. First, this is the second time that the appellant has failed to appear in this case. Secondly, he has given the court no explanation for his non-appearance on either occasion. On this occasion, it appears from the information provided to the court by the respondent, that he simply chose to absent himself from the hearing. In so doing, he displayed discourtesy to both the court and the respondent and a contemptuous attitude towards the court. Thirdly, he is an attorney and, as such, an officer of the court. This court is entitled to expect a higher standard of professionalism than he has displayed. Finally, the appellant was warned in the registrar's letter of 14 September 2011 that if he failed to appear the appeal was in danger of being dismissed.

[17] It is plain that the respondent has suffered prejudice. Despite having obtained a judgment for the return of the Jaguar nearly two years ago, the appellant continues to possess it. (Indeed, the period of 59 months over which payments for the Jaguar were required to be made by the appellant is at an end: the last instalment was due on 28 August 2008.) By frustrating the respondent on both occasions on which the

[1] *Gumede v Protea Assurance Co Ltd* 1979 (2) SA 851 (A) at 852A-B. See too *S v Isaacs* 1968 (2) SA 184 (A) at 186 B-E; *S v Moshesh* 1973 (3) SA 962 (A) at 963G-H.
[2] *Gumede v Protea Assurance Co Ltd* (note 1) at 854A.

appeal was to be heard, the appellant has ensured that the respondent's financial prejudice arising from the breach of contract continues for as long as the appeal remains unresolved. If the matter was now to be struck from the roll, finality would not be achieved. The dismissal of the appeal in terms of rule 13(3) would avoid all of this prejudice to the respondent and achieve finality, an important consideration, it seems to me, that underpins rule 13(3).

[18] Finally, I turn to the merits. I do so in order to gauge the prospects of the appeal succeeding as this is 'usually an important factor in determining whether or not any non-compliance with the Rules in prosecuting an appeal ought to be condoned by this Court'.[3] I shall do so succinctly because the merits have been fully canvassed in the judgment of Van Eeden AJ. It stands out starkly that the appellant has not raised a defence on the merits and does not aver in his answering affidavit that he is not in breach of the agreement or that he is entitled to retain possession of the Jaguar.

[19] The first point that the appellant took was that the s 129 notice in terms of the National Credit Act was sent to the wrong address as he had changed his *domicilium*. The letter that he put up in an attempt to establish this point does not do so. It concerns negotiations to settle the present dispute (and appears to admit liability). It is headed 'Payment Plan', refers to a telephonic conversation with an employee of Wesbank in which she 'rejected the detailed proposals that I made in my letter' and reiterated 'once more that I am making the necessary arrangements to clear the outstanding debt under the circumstances that I find myself in'. The address of his attorney – which he opportunistically claimed in his answering affidavit to be his new *domicilium* – is prefaced with the words: 'As requested the details of my attorney are as follows'. Consequently, he never purported to change his *domicilium* in terms of the agreement. There was thus proper service of the s 129 notice on the appellant and the fact that he never received it does not render the notice invalid and the issue of summons premature.[4]

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[3] *Gumede v Protea Assurance Co Ltd* (note 1) at 853B-C.
[4] *Rossouw & another v Firstrand Bank Ltd* 2010 (6) SA 439 (SCA) paras 31-32; *Munien v BMW Financial Services (SA) (Pty) Ltd* 2010 (1) SA 549 (KZD) para 22.

[20] The second point was that when the respondent pleaded the cession it did not comply with rules 18(4) and 18(6) of the uniform rules and, as a result, its particulars of claim were excipiable. I am in agreement with Van Eeden AJ when he held that the fact that 'it was not stated whether the cession is written or oral; when, where and by whom it was concluded; and if the cession was reduced to writing, not attached to the pleading, does not render it excipiable as either vague and embarrassing or as failing to disclose a [cause of] action'.

[21] Thirdly, the appellant attacked the authority of one Venter to institute proceedings against him on behalf of the respondent. Venter's authority appears to me to have been conclusively established. A resolution of the directors of the respondent dated 27 March 2006 authorised certain classes of officers to institute proceedings on behalf of the respondent. It included a clause allowing certain of them, by way of a certificate, to authorise officers who had not been designated in the resolution to institute proceedings on behalf of the respondent. A certificate was issued by the Chief Executive Officer which authorised Venter to institute proceedings on behalf of the respondent.

[22] The fourth point was that the respondent's consent was required before Wesbank could cede its rights to the respondent. Clause 13 of the agreement states, however, that while the appellant could not cede his rights without the 'prior written approval' of Wesbank, it was free to cede its rights, no mention being made of it having to obtain the appellant's consent. In any event, when regard is had to the appellant's obligations in terms of the agreement, it can make no difference to him if the corresponding rights are enforced by the respondent or Wesbank.[5] His consent to the cession was not required.

[23] The fifth point was that the respondent was under a duty to exhaust less drastic alternatives, such as 'collection strategies and attempts to rehabilitate the account', before deciding to litigate. This point only has to be stated to be rejected.

[24] From the foregoing I conclude that there are no reasonable prospects of the appeal succeeding on any of the points raised by the appellant. When this factor is

[5] *Botha & another v Carapax Shadeports (Pty) Ltd* 1992 (1) SA 202 (A) at 215I-216A.

considered together with the facts and circumstances surrounding the appellant's failure to appear and the prejudice to the respondent, the result is inevitable: there is simply no basis upon which this court can exercise its discretion in favour of striking the appeal from the roll or postponing it. The appeal must be dismissed for non-appearance.

[25] It is necessary to say something regarding the grant of leave to appeal in cases in which summary judgment has been granted. The purpose of summary judgment is to 'enable a plaintiff with a clear case to obtain swift enforcement of a claim against a defendant who has no real defence to that claim'.[6] It is a procedure that is intended 'to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights'.[7] If a court hearing an application for summary judgment is satisfied that a defendant has no bona fide defence to a plaintiff's claim and grants summary judgment as a consequence, it should be slow thereafter to grant leave to appeal, lest it undermine the very purpose of the procedure. This case is a good example. If summary judgment had been refused nearly two years ago, and leave to defend had been granted, the trial would probably have been completed by now.

[26] An order of costs on an attorney and client scale was made against the appellant. While such a costs order would probably have been justified on account of the appellant's conduct in this matter, the basis for this order is, in fact, clause 14.1 of the agreement which provides that the respondent is entitled to such costs arising from the appellant's failure to comply with the terms of the agreement or any other default.

[27] For the reasons stated in this judgment, the appeal was dismissed with costs on an attorney and client scale.

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[6] Andries Charl Cilliers, Cheryl Loots and Hendrik Christoffel Nel *Herbstein and Van Winsen: The Civil Practice of the High Courts of South Africa* (5ed) Vol 1 (2009) at 516-517.
[7] *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA) para 31.

C Plasket
Acting Judge of Appeal

APPEARANCES

APPELLANT	No appearance
RESPONDENT	FJ Becker Instructed by Smit, Jones and Pratt Johannesburg Symington and De Kok Bloemfontein