

IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE LOCAL DIVISION – MTHATHA]

CASE NO.3044/14

In the matter between:-

KWEBI CREATIVE CC

PLAINTIFF

And

ALFRED NDZO DISTRICT MUNICIPALITY

DEFENDANT

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

HINANA AJ

[1.1] On 26 March 2015 this matter appeared before me in the Motion Court. The Plaintiff was represented by Mr. Sambudla and the

Defendant was represented by Mr. Mfeya. A draft Order was handed from the Bar and it was made an Order of Court. The Order that was granted is the following:

- “1. The Defendant be and hereby directed to pay a sum of R10 989 433-39 (Ten Million Nine Hundred and Eighty Nine Thousand Four Hundred and Thirty Three Rands and Thirty Nine Cents) within fourteen (14) days from the date of service of this Order upon the Defendant;*
- 2. The Defendant is ordered and directed to pay the interest on the aforesaid amount at the prevailing legal rate of 9% from the date of judgment to date of final payment;*
- 3. The Defendant is ordered and directed to pay costs of this application on a party and party scale;*
- 4. Such costs to include the costs consequent upon the preparation of heads of argument and the reserved costs of 19 February 2015;*
- 5. The execution of the Order will take effect fifteen (15) days after the grant of this Order”¹.*

1.2 I shall refer to the parties as cited in the main action.

¹ See Court Order dated 26 March 2015.

[2] Summons were issued on 22 October 2014 against the Defendant for the payment of the amount of R10 989 433-39 (Ten Million Nine Hundred and Eighty Nine Thousand Four Hundred and Thirty Three Rand Thirty Nine Cents) and other ancillary reliefs². The Defendant filed its Notice to Defend on 20 November 2014, duly represented by **Messrs C.S Magazi Attorneys, Mthatha.**

[3] On 23 January 2015 the Defendant's attorneys issued a notice titled **"OFFER OF SETTLEMENT"**. The Notice reflects

"BE PLEASED TO TAKE NOTICE that "Without Prejudice" or admission of liability and by way of an offer in full and final settlement of the Plaintiff's claim, and Defendant hereby offers the following:

1.

1. *Payment to the Plaintiff in the sum of R10 989 433-39 (Ten Million Nine Hundred and Eighty Nine Thousand Four Hundred and Thirty Three Rand Thirty Nine Cents);*
2. *That 14% being VAT thereon be waived by Plaintiff;*
3. *Kindly take notice that each party will pay its own costs".*

² Page 6 of the Index to Pleadings.

[4] On 26 January 2015, the Plaintiff served and filed a Notice titled **“NOTICE OF ACCEPTANCE OF OFFER”** which reads as follows

“BE PLEASED TO TAKE NOTICE THAT the Plaintiff hereby accepts the Defendant’s offer of settlement in the sum of R10 986 433-39, which amount is inclusive of VAT.

Kindly effect payment to the undermentioned account within five (5) working days from the date of receipt hereof.

ACCOUNT NAME: DAYIMANI SAKHELA INC. TRUST ACCOUNT

BANKING INSTITUTION: FIRST NATIONAL BANK

ACCOUNT NUMBER: [.....]

BRANCH CODE: 260553

AMOUNT PAYABLE: R10 986 433-39”.

[5] On 10 February 2015 the Plaintiff served and filed a Notice in terms of Rule 34 (7)³ and the Notice reflects the following amongst others

“WHEREAS, the Plaintiff did on 26 day of January 2015 served upon the Defendant an acceptance of the said offer as it stand/stood, in which acceptance the Plaintiff sought the Defendant to settle the said amount offered within five (5) days from the date of receipt of such offer.

³ Page 1 of Notice in terms of Rule 34 (7).

AND WHEREAS the abovementioned Defendant has failed, ignored and/or refused to comply therewith despite the lapse of the period of ten (10) days from the date of receipt of the Notice of Acceptance of the Offer.

NOW THEREFORE the Plaintiff will make an application to this Honourable Court on 09 February 2015 at 10H00 or so soon thereafter as the matter maybe heard for (an) Order as per the offer of settlement in the following terms:

1. The Defendant is ordered and directed to pay a sum of R 10 989 433-39 (Ten Million Nine Hundred and Eighty Nine Thousand Four Hundred and Thirty Three Rand Thirty Nine Cents) to the Plaintiff;
2. Directing the Defendant to pay interest on the aforesaid amount at the legal rate from date of judgment to date of payment.
3. That its party pays its own costs in respect of the main action and the Defendant pays costs of this application.
4. Such further and/or alternative relief as the Court may deem grant⁴.

[6] The Rule 34 (7) Notice accompanied by an affidavit in support of an application to make an offer on Order of Court was served on the Defendant's attorneys on 10 February 2015. The Defendant's attorneys filed a Notice to oppose on 19 February 2015 and never filed any opposing papers.

⁴ Page 2-3 of the Notice.

[7] On 19 February 2015 the application to make an offer an Order of Court appeared in Court and it was removed from the roll and costs were reserved⁵.

[8] The Plaintiff prepared a Notice of Set Down of the application in terms of Rule 34 (7) which was served on the Defendant's attorneys on 13 March 2015. The Order that I granted on 26 March 2015 was an Order pursuant to the facts stated above.

[9] It is worth mentioning that on 16 April 2015 Messrs C.Z Magazi Attorneys withdrew as attorneys of record of the Defendant and filed a Notice as such⁶ and the Notice reflects that all processes and Notices should be forwarded to M. Magigaba Incorporated, Durban c/o Nkele Attorneys, Mthatha. Further a Notice of Acting as attorneys of record for the Defendant was served and filed on the 17 April 2015.

⁵ Court Order dated 19 February 2015.

⁶ Page 24.

[10] On 20 April 2015 a Notice of Application for Leave to Appeal was filed with the Registrar and the followings are grounds upon which the Application for Leave to Appeal was sought

- (a) *The Learned Judge erred in failing to condone the Respondent's non-compliance with the time periods prescribed for the filing of an answering affidavit in the Uniform Rules of Court.*
- (b) *The Learned Judge erred in refusing the Respondent's application for adjournment of the matter in order to file an answering affidavit to the founding affidavit filed in support of the application instituted by the Applicant pursuant to the provision of the Rule 34 (7) of the Uniform Rules of Court.*
- (c) *The Learned Judge erred in failing to give the Respondents leave to file its answering affidavit in the said application.*
- (d) *The Learned Judge erred in failing to allow the Respondents the opportunity to place its defence to the application before Court.*
- (e) *The Learned Judge would, had he allowed the Respondent leave to file an answering affidavit to the application, been aware of the fact that the purported offer made by the Respondent's attorneys of record pursuant to the provisions of Rule 34 (1) of the Uniform Rules of Court was made in circumstances where the said attorney had not been authorized by the Respondent in writing to make such offer.*

- (f) *The Learned Judge erred in granting judgment in favour of the Applicant in circumstances when he was not aware of the fact that the Respondent had a valid defence to the said application.*
- (g) *The Learned Judge erred in granting judgment in favour of the Applicant in circumstances where there had been non-compliance with the provisions of Rule 34 (1) of the Uniform Rules of Court.*
- (h) *The Learned Judge accordingly erred in failing to dismiss the application instituted by the Applicant pursuant to the provisions of Rule 34 (7) of the Uniform Rules of Court, with costs.*

WHEREFORE *the Respondent seeks an Order in the following terms:*

- (a) *That the Respondent is hereby granted leave to appeal to the Supreme Court of Appeal, Bloemfontein, alternatively the full court of the Eastern Cape Division, Grahamstown, against the whole of judgment and order handed down by his Lordship Mr Acting Justice Hinana on the 26th of March 2015.*
- (b) *That the costs of the application for Leave to Appeal be costs in the cause of the appeal.*

TAKE NOTICE FURTHER THAT *application will be made to this Honourable Court, simultaneously with the hearing of this application, for the Respondent's non-compliance with the time*

*period prescribed in Rule 49 (1) (b) of the Uniform Rules of Court
for the filing of this application to be condoned”.*

[11] On 08 May 2015 the Application for Leave to Appeal was simultaneously heard with an application in terms of Rule 49 (1) (b) of the Uniform Rules of the Court. In support of the application, the Defendant submitted that the Application for Leave to Appeal should have been filed within fifteen (15) days of the grant of the Order. The fifteen (15) days would have lapsed on 16 April 2015. However, the Application for Leave to Appeal was filed on 20 April 2015.

[12] A number of grounds have been alleged by the Defendant in the Application for Leave to Appeal and I need not deal with such grounds. The Defendant tendered costs occasioned by the application for condonation, such costs included costs of two Counsel i.e. Senior and Junior counsel.

[13] However, Mr. Mtshaulana (together with Mr. L.L. Sambudla) argued that the application for condonation is without merit and should be dismissed.

[14] The only issue that was argued before me in the Application for Leave to Appeal by Mr. Topping (with Mr. Kuzwayo), is that there are reasonable prospects of success of the appeal because had an affidavit been filed, the Court would have not made the Order. Further, so the argument went, the attorney making the offer must have been authorized to make the offer and the Defendant must have signed the offer. He further argued that the Plaintiff failed to inform the Court that the attorney who made the offer had no authority to sign it. He submitted that the Court was obliged to satisfy itself that the attorney who made an offer was authorized to do so. Because the Court did not satisfy itself, then the Court erred in granting the Order. All other grounds that were sought to be relied on in the Notice of Application for Leave to Appeal were abandoned by Mr. Topping.

[15] On the other hand Mr. Mtshaulana argued that the Application for Leave to Appeal should be refused because there are no prospects of success. Relying on Annexure “B”⁷, Mr. Mtshaulana argued that there are no prospects of success if one considers the contents of annexure “B”. Annexure “B” reflects the following:

“ From: Mpho Mhlanti

Sent: Thursady, December 18, 2014 3:21 PM

To: ‘luthandop@yahoo.com’

Cc: ‘kraaim@andm.gov.za’

Subject: KWEBI CREATIVE (LEGAL OPINION)

Dear Sir

- 1. Please find the attached legal opinion as prepared for MM's office.*
- 2. Further, as per our telephonic discussion just now with regard to the envisaged Out of Court Settlement of this matter, may we have a ‘Without Prejudice’ communique to the Plaintiff’s attorneys with regard to the following:*

(aa) That an amount of R10 986 433-39 be paid upon acceptance of this offer.

(bb) That 14% being VAT thereon be waived by the Plaintiff.

(cc) That each Party to pay its own legal costs.

Kind regards

Adv. Mpho. P. Mhlanti

Advocate of the High Court of South Africa

Commissioner of Oaths

Manager: Legal Services: Alfred Ndzo District Municipality”

⁷ Page 26 of Application for Condonation.

[16] It will be noted that the deponent of the affidavit in support of the application for condonation, Mr. Mthetheleli Sonindeni Armstrong Kraai was forwarded with an email that originated from Adv. Mpho P. Mhlanti of the Legal Services of the Defendant. Further, it will be noted the email is dated 18 December 2014.

[17] Mr. Kraai does not deal with annexure “B” in his affidavit save to state the following:

“In the present instance the Respondent’s erstwhile attorney of record had only been requested in writing to address ‘A Without Prejudice’ communique to the Plaintiff’s attorneys with regard to an envisaged ‘Out of Court Settlement of the matter. I annex hereto marked “B”, a copy of the email addressed by the Respondent’s Manager: Legal Services to its erstwhile attorneys of record in this regard on the 18th December 2014”⁸.

[18] On the papers, Mr. Kraai does not tell this Court what he did after having been forwarded with annexure “B” which ultimately was sent to the Plaintiff’s attorneys of record. In my view he was aware of the

⁸ Page 11 para 25 of the Application for Condonation.

offer that was made or suggested by the Legal Services and ultimately such an offer was forwarded and accepted by the Plaintiff's attorneys.

[19] Further, the contentions by Mr. Kraai that C.S Magazi attorneys were not authorized to make an offer of settlement is fallacious. With the existence of annexure "**B**" referred to above, I find it very difficult to understand why he was inactive and seek to challenge annexure "**B**". Accordingly, I find that the Defendant is estopped from raising the authority of C.S Magazi attorneys⁹

[20] The legal trite position for the Application for Leave to Appeal to be successful, the Applicant has to establish reasonable prospects of success on appeal, and in my view, it has failed in this case.

[21] Further, as the Municipal Manager, Mr. Kraai was expected to have taken a step one way or the other upon receipt of annexure "**B**" and

⁹ MEC for Economic Affairs, Environment & Tourism: Eastern Cape v Klaas Kruizenga Henque 2189 CC t/a Wimrie Boerdery (169/2009) [2010] ZASCA 58 (1 April 2010)

his inaction, is interpreted to mean that he agreed to the proposed out of Court settlement. In my view, the Defendant was aware of the proposed offer of settlement, did not object to it being communicated to the Plaintiff. The Defendant cannot argue that it was not aware of the proposed offer. It came from its office and the Municipal Manager is aware.

[22] Taking into account that the deponent of the affidavit in support of the application for condonation, Mr. Kraai was aware of the existence of annexure “B” referred to above coupled with the offer and subsequent acceptance made, I am of the view that the application for condonation must succeed. The Defendant is out of time for a period of 2 days and has tendered the costs of the application for condonation. Further, I find that there are no prospects of a successful appeal. In any event there is no application to rescind the Order of 26 March 2015.

[23] In the result the following Order is made:

1. The application for condonation is granted.

2. Alfred Ndzo District Municipality is directed to pay costs occasioned by the application for condonation, such costs to include costs of two Counsel i.e. Senior and Junior Counsel.
3. The Application for Leave to Appeal is dismissed with costs, such costs to include costs occasioned by the engagement of both Senior and Junior Counsel.

M.N. HINANA

ACTING JUDGE OF THE HIGH COURT

APPEARANCES

ADV. P.M. MTSHAULANA SC (WITH HIM L.L. SAMBUDLA)

COUNSEL FOR THE PLAINTIFF

DAYIMANI SAKHELA INC.

MTHATHA

ADV. I.L. TOPPING SC (WITH HIM B.S. KUZWAYO)

COUNSEL FOR THE DEFENDANT

INSTRUCTED BY MAGIGABA INC.

c/o NKELE A. & SONS

MTHATHA

HEARD ON 08 MAY 2015

DELIVERED ON 21 MAY 2015