

REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE, PORT ELIZABETH**

**Case no: 1319/2013
Date heard: 16.5.2013
Reasons made available: 8.8.2013**

In the matter between:

MZIMKULU AMOS KETSE

Applicant

vs

NONQABA FLORENCE KETSE

First Respondent

NEDBANK LIMITED

Second Respondent

TELKOM RETIREMENT FUND

Third Respondent

REASONS FOR JUDGMENT

TSHIKI J:

[1] This matter was brought to me by way of urgency on 13th May 2013 and the grounds of urgency relied on by the applicant were as follows:

- “1. That the parties were divorced after an order granted by the Honourable Magistrate Koopman on 29 January 2013.
2. The Divorce Order is currently the subject of an appeal filed by the applicant in the Eastern Cape Division of the High Court at Grahamstown under case number CA122/2013.
3. The basis of the appeal is, *inter alia*, that the learned magistrate misdirected himself in not granting forfeiture of the benefits of marriage to the applicant/plaintiff in the lower court and that the learned magistrate erred in awarding a lifelong order for maintenance of the first respondent against the applicant/plaintiff.

4. Pursuant to clauses 4.5 and 6 of the Divorce Order, the third respondent paid out an amount of R1 200 000.00 to the first respondent as her half-share of the applicant's pension interest.
5. The applicant is being prejudiced by the payment from his pension fund in the following ways:
 - 5.1 The first respondent may dissipate the money out of her or part thereof before the appeal is finalised;
 - 5.2 The first respondent may have moved the funds or part thereof to another bank account;
 - 5.3 The applicant is losing compound interest on the amount for every day that the money is not invested with his pension fund.
6. The applicant has a reasonable prospect of success on appeal and in the event of the moneys being dissipated pending the appeal, judgment in the applicant's favour will be rendered nugatory."

[2] The case was then set down for hearing on 14th May 2013 at 09h30 being the next motion court day and applicant having been advised to serve the papers on the respondents.

[3] A notice of opposition was, together with the opposing affidavit, filed by first respondent on the morning of 14th May 2013 and at the same time the representatives of the parties Mr Abrahams for the applicant and Mr *Beyleveld* SC for the first respondent approached me in chambers. Times for the filing of the outstanding papers were set and the matter was set down for argument at the end of the motion court roll on Thursday 16th May 2013. When the date of argument was arranged only the applicant's founding and answering papers for the first respondent were filed. The third and fourth respondents did not oppose the application.

[4] The matter was then argued on 16th May 2013, applicant having elected not to file a replying affidavit. After the argument I made an order dismissing the

application with costs on an attorney and client scale. I further ordered that reasons for my decision would follow later. These are my reasons.

[5] According to the applicant's founding affidavit, applicant and first respondent were married to each other in community of property on 22nd August 1982. They were finally divorced on 29th January 2013 in the Regional Court in Port Elizabeth. For the purposes of this judgment only paragraphs 1, 2, 3.1, 4, 5 and 6 of the order of divorce, which are relevant to this application, will be stated. They read as follows:

"THIS court orders:

1. A decree of divorce.
2. That the plaintiff pays maintenance for the defendant in the sum of R4 000.00 per month commencing on 29th January 2013 and thereafter on or before the last day of each following month.
- 3.1 Division of the joint estate.
- 3.2 ...
4. An order directing that the defendant shall be entitled to 50% of the value of the plaintiff's pension interest in the Telkom Pension Fund determined as at the date of divorce, and that such amount be paid by the said Telkom Pension Fund to the defendant, in terms of section 7 of the Divorce Act 70 of 1979. The plaintiff's membership number with the Telkom Pension Fund is 4049532 and plaintiff's date of birth is 1952-08-03.
5. That the Telkom Pension Fund endorses its records, as contemplated in section 7(8)(a)(ii) of the Divorce Act that part of the plaintiff's pension interest concerned is so payable to the defendant and that the Administrator of the Telkom Pension Fund furnishes proof of such endorsement and payment to the defendant's attorneys of record i.e Cecil Kerbel Attorneys of 9 Bird Street, Port Elizabeth, fax no 041-585 7981, email: kerbel@mweb.co.za in writing within 30 days of the granting of the divorce herein.
6. That payment by Telkom Pension Fund to the defendant shall be made directly to the defendant by depositing the amount due to her in her account with Nedbank Greenacres as follows:

6.1 NF Mooi (defendant's maiden name)

Nedbank Greenacres

Savings account

Account no: 1216125341

Within 60 (sixty) days of the date of you receiving the Court order herein.

7. That plaintiff pays defendant's costs of this action."

[6] A litigant who has been unsuccessful in a litigation in the Magistrate's Court has a right to note an appeal against such judgment. The powers to appeal against the magistrate's Court judgment are provided for by section 83 of the Magistrate's Court Act¹ (the Act) which provides:

"Subject to the provisions of section 82², a party to any civil suit or proceeding in a Court may appeal to the provincial or local division of the Supreme Court having jurisdiction to hear the appeal against –

- (a) any judgment of the nature described in section 48³;
- (b) any rule or order made in such suit or proceeding and having the effect of a final judgment, including any order under Chapter IX⁴ and any order as to costs;
- (c) any decision overruling an exception, when the parties concerned consent to such an appeal before proceeding further in an action or when it is appealed from in conjunction with the principal case, or when it includes an order as to costs. "

¹ Act 32 of 1944

² Section 82 of the Act provides that no appeal shall lie from the decision of a Court if, before the hearing is commenced, the parties lodge with the Court an agreement in writing that the decision of the Court shall be final.

³ Section 48 of the Act lists the type of judgments or orders upon which an appeal shall lie.

⁴ Chapter XI deals with appeals and reviews from the magistrate's court to the High Court. Thus it refers to "the process by which, apart from appeals, the proceedings of the lower courts of justice, both civil and criminal, are brought before the High Court, in respect of grave irregularities or illegalities occurring during the course of such proceedings. See Jones & Buckle – The Civil Practice of the Magistrate's Courts in South Africa 9th ed Volume I p 343.

[7] Nothing was done by applicant until on 8th March 2013, twenty eight days after the order was granted, when his attorneys filed a request for reasons for judgment purportedly acting in terms of Rule 51 of the Magistrate's Court Rules which reads:

"51 APPEALS IN CIVIL CASES

- (1) Upon a request in writing by any party within 10 days after judgment and before noting an appeal the judicial officer shall within 15 days hand to the registrar or clerk of the Court a judgment in writing which shall become part of the record showing –
 - (a) the facts he or she found to be proved; and
 - (b) his or her reasons for judgment.
- (2) The registrar or clerk of the Court shall on receipt from the judicial officer of a judgment in writing supply to the party applying therefor a copy of such judgment and shall endorse on the original minutes of record the date on which the copy of such judgment was so supplied.
- (3) An appeal may be noted within 20 days after the date of a judgment appealed against or within 20 days after the registrar or clerk of the Court has supplied a copy of the judgment in writing to the party applying therefor, whichever period shall be the longer."

[8] It follows from the provisions of Rule 51(1) above that the applicant's request for reasons for judgment was out of time and therefore it was necessary for him to apply for an extension of time before making a request for reasons for judgment. More to this will be explained later in this judgment.

[9] Reverting back to the applicant's story he was informed by the Telkom Retirement Fund (the fund) that in the absence of a Court order or a notice of appeal the fund had to adhere to the existing Court order quoted in paragraph 5 *supra*. It should be noted that a request for reasons for judgment is not a notice of appeal and

the one that has been filed out of time cannot, even in the least, prevent the operation of a judgment of the Court. Applicant was then informed on 30th April 2013 that payment to the first respondent in terms of the divorce order had been authorised. Indeed the payment to the first respondent of a sum of R1 200 000.00 was made to first respondent on 26th April 2013. It is this payment which apparently caused applicant to move this application.

[10] Apparently the magistrate who heard the divorce action, and in response to the request for reasons for judgment, indicated that he had nothing to add to his judgment which he delivered in Court on 29th January 2013 consisting of 14 pages. I am surprised that applicant filed a request for reasons for judgment when in fact detailed reasons for judgment were pronounced by the divorce Court on 29th January 2013. Neither had applicant's request for reasons specified a particular point or points in the magistrate's judgment on which reasons were requested.

[11] In answer to the applicant's founding affidavit first respondent has denied that applicant's application is urgent. The answering affidavit also reveals that applicant was informed as early as March 2013 that the intended appeal by the applicant herein was out of time and therefore no valid notice of appeal could be filed in Court and this was confirmed by Mr *Abrahams* who appeared for the applicant in these proceedings. The record shows clearly that as far back as March 2013 both the attorneys for the applicant as well as his counsel Mr *Abrahams* were informed that their request for reasons for judgment as well as the purported notice of appeal were out of time. It is also apparent that applicant, notwithstanding communications by the first respondent's attorneys regarding the lateness of the intended appeal, never

thought it wise to make an application for extension of time⁵ within which to file the notice in terms of Rule 51(1).

[12] In a nutshell, applicant had filed a request for reasons for judgment 28 days after the trial Court granted the order, and thereafter applicant filed a notice of appeal 57 days after the judgment was granted. In response to the applicant's non-compliance with the Rules of the Court aforementioned first respondent filed a notice in terms of Rule 30 in the Grahamstown High Court challenging the irregular proceedings filed by the applicant herein which was the late filing of the notice of appeal.

[13] During argument of the application, Mr *Abrahams* for the applicant initially insisted that his client was entitled to an urgent order of interdict. He, however, later conceded that the procedure adopted by his client was irregular in that it does not comply with the rules of both the Magistrate's Court and the High Court. It is apparent that applicant did not disclose all the relevant facts in his founding affidavit and therefore applicant was not honest to the Court. Applicant simply proceeded to apply for an urgent interdict when he is aware that he has not filed either a valid request for reasons for judgment or a valid notice of appeal against the magistrate's order dated 29th January 2013.

[14] Mr *Beyleveld* SC for the first respondent contended that there was absolutely no urgency in this matter. The applicant had not been honest to the Court. In his

⁵ In terms of Rule 60(5) of the Magistrate's Court details of which are explained in para [17] *supra*

view, urgency in this case had been self created. He requested the Court to dismiss the application with costs on the scale as between attorney and client.

[15] In this matter the procedure adopted by the applicant reveals a disregard and lack of knowledge of the Rules and Acts applicable to both the Magistrate's and the High Courts. Such ignorance also displays a singular lack of knowledge of the applicable rules of both Courts by the legal representatives of the applicant herein.

[16] Rule 51(1) and (2) above deal specifically with the procedure before noting an appeal against the appealable judgment of the magistrate. Rules 51(3)-(12) deal with the procedure from noting an appeal against the magistrate's appealable judgment, the processing and prosecution thereof until the appeal is heard in the relevant local division of the High Court.

[17] The latest judgment I could lay my hands on which deals with the issue concerning the equivalent of the provisions of Rule 51(1) and (2)) of the current rules was decided in 1959⁶. In that case the equivalent of Rules 51(1), (2) and (3) applicable in 1959 were Rules 47(1), (2) and (3) of the Magistrate's Court Rules. In my judgment I will put emphasis only on Rule 51(1-3) and Rule 60(5). Rule 60(5) of the Magistrate's Court rules reads:

- "60 Non-compliance with rules, including time limits and errors
- (1) ...
 - (2) ...
 - (3) ...
 - (4) ...

⁶ Murray & Daddy (Pty) Ltd v Floros 1959 (4) SA 137 (N)

- (5) Any time limit prescribed by these rules, except the period prescribed in rule 51(3) and (6), may at any time, whether before or after the expiry of the period limited, be extended –
- (a) by the written consent of the opposite party; and
 - (b) if such consent is refused, then by the Court on application and on such terms as to costs and otherwise as it may deem fit.”

[18] Relative to the issue at hand which is the failure by the applicant herein to request in writing the written reasons for judgment within 10 days after judgment as provided by Rule 51(1), the applicant should have first applied for an extension of time to enable him to file his request in terms of Rule 51(1). His failure to do so makes his request irregular and cannot be complied with until he or she has been granted an extension of time within which to file the request for the reasons he seeks to obtain from the magistrate.

[19] The problems of the applicant were compounded by him taking other irregular steps in that, instead of requesting extension of time, he filed a notice of appeal which on its own was not only out of time but could not have been resorted to after he had realised that he is out of time relating to the provisions of Rule 51(1). On realising that applicant has not filed within the prescribed time his Rule 51(1) request for reasons he cannot resort to filing a notice of appeal in terms of Rule 51(3) with the hope that he will apply for condonation in the appeal Court when the appeal is argued. This is so because he is already out of time in the application in terms of Rule 51(1) which has not been finalised in the Magistrate’s Court. He is not allowed to leave the documents hanging in the magistrate’s court and run to the High Court with the hope that in that Court he will be granted condonation for the late filing of the notice of appeal. He is not allowed to file papers in Court and simply ignore them

when it suits him. He is already out of time even with respect to the notice of appeal and therefore cannot simply abandon the Rule 51(1) process and should first deal with his request in terms of Rule 51(1) to a finality. The Court cannot encourage a total disregard of the rules of the Magistrate's Court by allowing the applicant to abandon his irregular proceedings in the Magistrate's Court with the hope of convincing the appeal Court that he has good cause to be condoned by it. In dealing with a similar case on the same issue in ***Murray & Daddy (Pty) Ltd v Floros*** *supra* Fannin J at p 138 held as follows:

"The appellant, in my view, cannot take advantage of the provisions of the second part of Rule 47(3) and deliver his notice of appeal more than 21 days from the date of the judgment appealed against, unless he has complied with the provisions of Rule 47(1) and filed, within four days, the request in writing referred to. In this case, that was not done. The time within which this appeal ought to have been noted was therefore the 21 days referred to in the first part of Rule 47(3). The appeal was therefore noted late." (The equivalent Rule 47(10)-(3) is the current Rule 51(1)-(3)).

[20] The only available option for the applicant herein was to seek an extension of time within which to file his request for reasons for judgment⁷.

[21] Applicant herein had all the time to have approached the High Court to grant him condonation of the late filing of the appeal. In view of the magistrate's response indicating that he did not wish to add to the reasons already furnished could simply have withdrawn the request for reasons in the Magistrate's Court and deal with the appeal in the High Court in terms of Rule 51(3) which would have to be accompanied by a notice of condonation for the late filing of the notice of appeal. This, however, would depend on whether he succeeds in his application for condonation in the High

⁷ *Snyman v Crouse en 'n Ander* 1980 (4) SA 42 (O)

Court for the late filing of the appeal. From what I have read on the papers, I do not believe that he would have succeeded in such application.

[22] In terms of Rule 60(5), if the opposing party, the first respondent herein, refuses to grant the applicant a written consent to the extension of time, only the Magistrate's Court in which the case was tried has the power to grant or refuse the application for extension of time aforementioned. Rule 60(5)(a) and (b) require that in the event of the other party refusing to consent to the extension of time within which to take a further step, the Court may upon application on notice and on good cause shown, make an order extending or abridging any time limits prescribed by the rules⁸. The circumstances or 'cause' must be such that a valid and justifiable reason exists why compliance did not occur and why non-compliance can be condoned.

[23] Mr *Beyleveld* has also emphasized that the matter was not urgent. I agree with him in that even on the merits of the case there is no justification for bringing this matter by way of urgency. The parties were married in community of property and therefore, *prima facie*, there was proper justification for the division of the joint estate which is inclusive of the pension benefits. The judgment was delivered on 29th January 2013 and therefore applicant should have filed his interdict at least by then or immediately thereafter. He failed to do so and cannot blame any other person for his failure to act immediately especially when he was at all material times represented by his own attorneys.

⁸ *Snyman v Crouse en 'n Ander supra* fn 2

[24] In my view, the whole urgent application exercise was an abuse of the Court process more so when the applicant was throughout the proceedings represented by attorneys. It is not excusable and in my view the order of costs on a punitive scale is justified in the circumstances. Therefore, it is for the above reasons that I made the order dated 14th May 2013 in this matter.

P.W. TSHIKI
JUDGE OF THE HIGH COURT

<i>Counsel for the applicant</i>	:	<i>Adv R Abrahams</i>
<i>Instructed by</i>	:	<i>Coltman Attorneys and Notaries</i>
		<i>PORT ELIZABETH</i>

<i>Counsel for the first respondent</i>	:	<i>Adv A Beyleveld SC</i>
<i>Instructed by</i>	:	<i>Cecil Kerbel Attorneys</i>
		<i>PORT ELIZABETH</i>

No appearances for second and third respondents.