IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

30/3/2015

APPEAL CASE NO: A894/13

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES / NO.~~

(2) OF INTEREST TO OTHER JUDGES: ~~YES / NO~~

(3) REVISED.

30/03/2015

DATE SIGNATURE

IN THE MATTER BETWEEN

THE MINISTER OF JUSTICE & CONSTITUTIONAL DEVELOPMENT — Appellant

and

SETUMO FORCE SECURITY CC — Respondent

JUDGMENT

LEGODI, J

[1] This is an appeal against the decision of Ismail J delivered on the 8 October 2012 in terms of which he dismissed the appellant's purported application for amendment of its plea. The appellant is the defendant in an action instituted by the respondent in terms of which the respondent claims payment against the appellant in the sum of R12 521 367.

[2] The appeal is with the leave of the court a quo, such leave having been granted on the 9 October 2012. The appellant however, failed to file the notice of appeal, deliver the record of the proceedings and request for trial date for the hearing of the appeal timeously as required in terms of Rule 49. There is thus an application for condonation in terms of which relief is sought in the following terms:

> *"1. That the late filing of the notice of appeal be condoned;*
>
> *2. That the appeal against the judgment of Honourable Justice Ismail delivered on the 9 October 2012 be reinstated;*
>
> *3. No order as to costs unless opposed by the Respondent; and*
>
> *4. Further and or alternative relief or both".*

[3] At the start of the hearing of this appeal, the attorney for the respondent persisted with his opposition to the granting of condonation. The appeal was therefor heard and argued at the same time with the application for condonation.

CONDONATION

[4] In terms of Rule 27(3), the court may on good cause shown, condone any non-compliance with the Rules of Court. The court has a wide discretion which must, in principle, be exercised with regard also to the merits of the case as a whole[1]. The applicant should file an affidavit satisfactorily explaining the reasons for the non-compliance with the prescribed time limits. In this regard the applicant must furnish a reasonable explanation sufficiently full to enable the court to understand how the non-

[1] *Gumede v Road Accident Fund* 2007 (6) SA 304 (C) at 307 C-308 A.

compliance really came about, and assess the applicant's conduct and motive[2]. The applicant must satisfy the court on oath that he is bona fide and not with the object of delaying the opposite party's case[3]. The applicant must satisfy the court that the claim or defence is not ill-founded, is based upon facts, which must be set in outline which, if proved, would constitute an action or defence[4]. The grant of indulgence to the defaulting party should not prejudice the other party in any way that cannot be compensated for by a suitable order as to the postponement and costs.

[5] There are therefore two requirements to be met in an application for condonation. These are the reasons for the delay or factors for the non-compliance with the Rules and on the other hand, the applicant for condonation must satisfy the court that there are prospects of success on merits, in this regard, on the merits of the present appeal.

REASONS FOR FAILURE TO COMPLY WITH SUB-RULES (2), (6) (a) AND (7) (a) OF RULE 49

[6] The application for leave to appeal was granted on the 9 October 2012. In terms of Rule 49 (2), if leave to appeal to the full court is granted, the notice of appeal shall be delivered to all the parties within 20 days after the date upon which leave was granted or within such longer as may upon good cause shown be permitted. The appellant delivered the notice of appeal only on the 9 November 2012. It is common cause that, the applicant was out of time by three days.

[7] In terms of subrule (6) (a) of Rule 49, within sixty days after delivery of a notice of appeal, an appellant shall make written application to the registrar of the division where the appeal is to be heard for a date for the hearing of such appeal and shall in terms of subrule (7) (a) at the same as the application for a date for the hearing of an appeal in terms of subrule (6) (a) of the rule is filed, file with the registrar three copies of the record for the appeal and shall furnish two copies to the respondent.

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[2] *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 353A.
[3] *Smith No v Brummer NO* 1954 (3) SA 352 (O) at 358A.
[4] *Ford v Groenewald* 1977 (4) SA 224 (T) at 226 A – C.

[8] The appellant failed to comply with all of the provisions of sub-rules (6) (a) and (7) (a) and thus the present application for condonation. The notice of application for a date of hearing of the appeal and the record were delivered simultaneously with this application on the 4 November 2013. The matter was initially on behalf of the appellant handled by the office of the State Attornet. The State Attorney was instructed by the appellant upon having been served with the summons. The deponent to the founding affidavit in the present application is an employee of the appellant. She is employed as a legal administrative officer. Initially, the file was handled by another administrative officer in the office of the appellant. The officer, one Mr Jiyane, was subjected to a disciplinary process and he subsequently resigned. There was no one in the office who specifically dealt with the matter. The case was ultimately allocated to the deponent during the beginning of September 2013. On the 11 September 2013, she received a letter from one Mr Modukanele who was handling the matter on behalf of the appellant at the State Attorney's office. She was informed that the matter had been set down for trial on the 11 November 2013. In other words, the respondent instead of setting down the appeal for hearing, or approaching the court for an order that the appeal has lapsed, set the matter down for trial.

[9] In the letter of 11 September 2013 Mr Modukanele asked the appellant to attend consultation with counsel on the 16 September 2013. The deponent tried to establish the circumstances under which the matter was set down for trial after leave to appeal was granted on the 8 October 2012. On several occasions, she could not get hold of Mr Modukanele until on the 16 September 2013 when they met for consultation with counsel. He conceded that he did not take the necessary steps to prosecute the appeal due to huge volume of files allocated to him in the State Attorney's office. The deponent was also informed that Mr Modukanele was previously admitted in a hospital for stress related illness.

[10] During consultation on the 16 September 2013, it also transpired that there was a pre-trial conference arranged for the 17 September 2013 before the Deputy Judge President. Mr Modukanele was then instructed to request for a postponement of the trial scheduled for the 11 November 2013. That was to enable the appellant to apply for the revival of the appeal. The pre-trial conference was held on the 17 September 2013 and minutes thereof were prepared and signed.

[11] Mr Modukanele had previously failed to respond to the enquiries by the respondent's attorney. As a result, a complaint was lodged with the Deputy Judge President. A preferential trial date was arranged. The letter of complaint to Deputy the Judge President is an annexure to the founding affidavit in this condonation application. It is clear that Mr Modukanele neglected his professional obligations towards the appellant, the respondent and the court and had failed to deal with the matter diligently on behalf of his client.

[12] Upon further perusal of the file, it emerged that Mr Modukanele had applied for the transcription of the record of the proceedings of the 8 and 9 October 2012 only on the 20 September 2013. The appellant was not privy to any communication between the State Attorney and the respondent's attorneys and the delays inherent in the conduct of Mr Modukanele.

[13] As a result of the conduct of Mr Modukanele in the State Attorney's office, its mandate was terminated and new private attorneys and counsel were instructed to take over the file. There were missing papers on the file and as a result the court's file had to be uplifted and further copies made. Within two weeks after having taken over the file, the record was prepared. The trial scheduled for the 11 November 2013 was ultimately postponed.

[14] The respondent moves from the premise that the explanation is inadequate. As a matter of principle, failure by an attorney to execute his or her mandate expeditiously and efficiently cannot be a good cause for condonation. However, it is unprofessional conduct for any attorney not to report promptly to his client about progress on any matter entrusted to him or her. For example, failure to timeously amend the appellant's plea resulted in the judgment of the 8 October 2012 when Ismail J dismissed the purported application for amendment of the appellant's plea. As if that was not enough, the State Attorney neglected to timeously note the appeal and to ensure that the time-limits set out in sub-rules (6)(a) and (7)(a) are met. This is not the case where client fails, refuses and or neglects to give proper instructions to the attorney. But, again, the mistakes by an attorney are often imputed on the client especially when it comes to costs. However, whilst the explanation for the default may not be satisfactory, the prospects of success on appeal in the present case are very strong. That is an important requirement for condonation. I prefer not to deal with the merits of the appeal now, but rather to deal

with the merits when dealing with the appeal hereunder. It suffices for now to mention that the condonation application should be granted.

THE APPEAL

[15] The judgment appealed against is the dismissal of the appellant's purported application for the amendment of its plea. The grounds of appeal can be summed up as follows:

15.1 That the court a quo erred in dismissing the appellant's application to amend its plea when there was no such application before it;

15.2 That the court a quo erred in refusing to grant the appellant the opportunity to bring an application for leave to amend its plea seen in the light of the respondent's notice of objection.

15.3 That the court a quo erred in law by finding that the appellant must proceed on trial with a plea that did not represent the true defence and or version.

15.4 Alternatively that the court a quo erred in law in finding that the trial should proceed under circumstances where the real issues would not have been ventilated, thereby leading to a miscarriage of justice and;

1.5 That the court a quo erred in law in making a finding that the delay in bringing the amendment was enough to refuse the amendment despite not having evidence before him on the reasons for the delay.

BACKGROUND

[16] During December 2004 the appellant issued a security tender referred to in the papers as "BID 29". The main purpose of the tender was to control access to prevent unauthorized access of person or persons, vehicles and dangerous objects onto the State property in order to safeguard people, property and premises referred to as "additional guarding services". The bid price was indicated as R31 303 440.00. The respondent participated in the bid and submitted all necessary documentations required

by the appellant. The respondent together with four other bidders were informed in a letter dated 18 February 2005 that they were nominated based on merits, to participate in the bid for the provision of the guarding services subject to certain conditions. The conditions were that they attend a briefing session on 23 February 2005 from 10h00 to 10h55. That at the meeting they will be issued with a contract for the services to be rendered which they will take back with them and if they agree to the contract they will provide the appellant with three original signed copies by no later than Friday 25 February 2005 at 12h00. That they were required to submit a letter at the meeting of the 23 February 2005 confirming that they will be able to put up the required R150 000 insurance fee per annum on the commencement date of service which was to be on the 1 April 2005.

[17] On the 3 March 2005, the appellant sent a letter to the respondent and it reads as follows:

> *"Our meeting of Wednesday 23rd February 2005 refers:*
>
> - *At this meeting representatives of your company were issued with a copy of the contract governing the condition of services relating to this Bid.*
> - *It is a condition of this contract document that your company must remunerate your employees in terms of Government Gazette no. 25075 dated 13 June 2003, as emended.*
> - *On perusal of your documentation the Department note that you do not comply with this requirement.*
>
> *In terms of the stipulation of this requirement the Department have no alternative but to inform you that the Department cannot continue with engaging your firm for the provision of said services (Memorandum of Agreement Regarding- The Security Service RFB No 2004 29- page 12 paragraph 12)"*

[18] On the 8 March 2005 the appellant sent another letter to the respondent. In the letter, is recorded:

> *"Your facsimile dated 7 March 2005 in respect of the above-mentioned matter refers:*

Due to the fact that Setumu Force Security CC was not awarded Bid No.:RFB 2004 29 this Department cannot reconsider your bid due to the fact that it has been discovered that your company does not comply with the terms and conditions as stipulated in the legislation governing the remuneration of employees. It is a condition of the contract, RFB 2004 29, that potential/nominated/short listed Service Providers to the Department must remunerate their employees in terms of the relevant legislation.

In view of the above-mentioned facts, your request cannot be favorably considered".

[19] Subsequent thereto, the respondent launched an application under case number 10290/05 against the appellant. In terms of the notice of motion, the respondent sought an order declaring and confirming the existence of the alleged contract between the appellant and the respondent, alternatively a claim for damages resulting from the appellant's alleged breach of the said contract. The applicant opposed the application. Its contention was that the respondent was never awarded the tender in question. The application against the appellant was dismissed with costs. According to the respondent, the court further stated that the dismissal of the application was tantamount to an absolution from the instance. I may mention that the proceedings under case number 10290/05 were not made available to us.

[20] On the 3 March 2008, the respondent instituted action proceedings against the applicant. It claimed payment in the sum of R12 521 376.00 in damages being for loss of profit due to the alleged cancellation of the contract. On the 25 September 2009 the appellant delivered its plea. In the plea, the appellant admitted the existence of the contract. It however pleaded that the contract has been cancelled due to the respondent's failure to comply with the special condition in terms of which the respondent was required to pay its security guards wages in accordance with Government Gazette No. 25075 dated the 13 June 2003. In other words, the respondent failed to set up a minimum monthly basic wage for its employees as prescribed for the area concerned for the security officer trade. That is, employees must be paid within seven (7) days in the new calendar month after the services has been rendered for the previous month, failing which the service will be terminated with

immediate effect. About 8 admissions of the existence of the contract are said to have been made in the appellant's plea.

[21] The trial was first set down for hearing on the 8 February 2012. On that date, and during the roll call, the matter was removed from the roll on the suggestion that the parties were entering into settlement negotiations or that the matter has been settled. The nature of the settlement was never divulged. During or about April 2012, the respondent enrolled the matter again for trial on the 8 October 2012. On the 5 October 2012 the appellant delivered its notice of intention to amend paragraphs 4 to 9 of its plea by substituting them in their entirety. In the proposed amendment, the appellant pleaded that there was no contract concluded and that the respondent was never awarded Bid 29. On the 8 October 2012, being the date of the trial, the respondent filed notice of objection to the proposed amendment. The ground of the objection was that the intended amendment of the appellant's plea seeks to withdraw admissions previously made. After a lengthy argument, the application for amendment was dismissed. It is against this dismissal that the appeal was noted. I now turn to deal with the grounds of appeal stated in paragraphs 15.1 to 15.5 of this judgment.

WAS THERE AN APPLICATION FOR AMENDMENT BEFORE THE COURT A QUO?

[22] Subrule (10) of rule 28 provides that the court may, notwithstanding anything to the contrary in this rule, at any stage before judgement grant leave to amend any pleading or document on such other terms as to costs or other matters as it deems fit. In terms of subrule (1) of Rule 28, a party desiring to amend any pleading or document other than a sworn statement, filed in connection with any proceedings, shall notify all other parties of his intention to amend and shall furnish particulars of the amendment. That is what the appellant did on the 5 October 2012 when it served notice of its intention to amendment. If no objection is delivered within 10 days of the delivery of the notice in terms of subrule (1), the amendment will be effected. The respondent delivered its objection on the morning of the 8 October 2012. In compliance with subrule (3), the respondent stated in the objection the grounds thereof. Subrule (4) provides that if an objection which complies with subrule (3) is delivered within the period referred to in subrule (2), the party wishing to amend may within 10 days lodge an application for leave to amend. This became the bone of contention in the court a quo.

[23] It is clear from subrule (4) that the 10 days referred to in the subrule and the application for leave to amend is only triggered if an objection is noted in terms of subrule (2) read with subrule (3). Secondly, the party objecting would also be bound by its ground of objection which in terms of subrule (3) must be clearly and concisely stated. Therefore once the respondent acted in terms of subrules (2) and (3), the trial was bound to be postponed in order to allow the appellant to bring an application on notice as envisaged in subrule (4). Such an application is an interlocutory application in terms of Rule 6(11). It provides as follows:

> *"(11) Notwithstanding the aforegoing subrules, interlocutory and other applications incidental to pending proceedings may be brought on notice supported by such affidavits as the case may require and set down at a time assigned by the registrar or as directed by a Judge".*

[24] This is what counsel for the appellant in the court a quo asked for. For example counsel for the appellant in the court a quo, expressed himself as follows:

> *"... When they then object, it is improper to then come and try to give evidence from the bar. When there is an objection, you must then bring an application and that is what I am saying. If there was no objection, we were proceeding today. That is why I am I am not asking for a postponement. If there is an objection, there must be an application and there is an objection, we know that. M'Lord I understand the frustration of the plaintiff. I would also be frustrated. It must be frustrating from 2005 and still there is no justice for you, but the affidavit will explain precisely what went wrong when. It is improper at this stage when there is objection, for a ruling to be made at this stage to be made that notice of amendment is not allowed. That would be irregular. There is a notice of objection, we can't withdraw a submission so we have to bring an application".*
> The underlining is my own emphasis.

[25] As regard the withdrawal of the admissions and possible mistakes that could have been made by the State Attorney and counsel so instructed by it, counsel for the appellant further argued in the court a quo as follows:

"*Secondly, your Lordship doesn't know who is at fault at this stage. Is it the attorney; your Lordship can't say that because there is no evidence and we can't give evidence from the bar, there has to be evidence under oath and we request the opportunity*". The underlining is my emphasis.

[26] It is clear from the quotations above that counsel for the appellant never argued for the hearing of the application to amend the appellant's plea. All what he asked for was the opportunity to file a substantive application as envisaged in subrule (4) of rule 28 and also if need be, the opportunity to withdraw the admissions.

[27] In my view, the court a quo dealt with this matter as if there was an application for leave to amend the appellant's plea. That appears from its judgment wherein is stated:

"What I have to consider in this matter is that there is an application for amendment before this court. Mr Mothepe had argued that the fact that there is a notice for amendment and an objection, the matter must be heard. He is correct in that, the rules state that".

[28] I have not been able to find on the papers such application for amendment. The proposed intention to amend in terms of subrule (1) is not an application to amend. The application to amend, is in terms of subrule (4), triggered by the objection in terms of subrule (2) read with subrule (3). Further in the judgment, the court a quo stated:

"Although Mr Mothepe on behalf of the defendant rightly urged that this is not an application for a postponement ... Mr Mothepe is correct when he said that there is no application for a postponement before me, however I must look at the cold facts and reality of the situation..."

[29] The closest to what is quoted above is found in the submission by counsel for the appellant in the court a quo. The submission went around like this:

"M'Lord, I should say that I am not asking for postponement and I will motivate why I say that. It happens in litigation that you bring intention to amend, the other party does not object, he allows the amendment, we proceed with the trial. If there was no objection, that is what would happened. It was anticipated that it

will be an objection, because we bring an amendment. One has to inform the other party, even if it was three weeks ago, we would still be in the same position because three weeks, coming back, we would still not be having enough days to file in terms of the rules. Rule 28(1) simply says, if you want to amend, give notice. Rule 28(2) says that you shall mention that they have ten days. You have not (sic) discretion there. When they then object, it is an objection, you must then bring an application and that is why I am not asking for a postponement. If there is objection, there must be an application..."

[30] At the risk of repetition, it is clear that the appellant's counsel in the court a quo never asked for the amendment. He might have wanted to suggest that he was not asking for a postponement. But, the effect of his submission in wanting to comply with the provisions of subrule (4) was to force a postponement. But clearly there was no application for an amendment of the plea. Therefore the court a quo had nothing to dismiss.

REFUSAL TO GRANT THE APPELLANT THE OPPORTUNITY TO APPLY FOR LEAVE TO AMEND ITS PLEA

[31] This ground has a bearing on the merits of the application for leave to amend which the appellant intends to launch in terms of subrule (4) of rule 28. On the first ground alone, the appeal should be disposed of in favour of the appellant. Effectively the appellant wanted to withdraw whatever admissions it could have made regarding the alleged existence of the contract between the appellant and respondent. In amending the plea and if need be in withdrawing the admissions, the appellant intends pleading that there was never a tender awarded to the appellant.

[32] The proposed plea must be seen in context. It is not a new thing to the respondent. It first surfaced in the letter of the 8 March 2005 addressed to the respondent. In that letter, the appellant specifically told the respondent that 'due to the fact that Setumu Force Security CC was not awarded Bid no RFB2004 29' and that the respondent cannot therefor reconsider the bid. Subsequent thereto and still in 2005, the respondent attempted to reassert its rights in terms of the alleged agreement. It applied for a declaratory order to confirm the existence of such alleged contract. The application against the appellant was dismissed with costs.

[33] I need to be careful not to express myself in such a manner that I am misunderstood to be making a final determination on the proposed amendment and the merits of the case as a whole. The cause of action as pleaded appears to be based on the nomination letter quoted in paragraph [16] of this judgment and the subsequent alleged award of the tender. The alleged award of the tender is not specifically pleaded in the particulars of claim, but is pleaded in paragraph [8] of the answering affidavit opposing the condonation application as follows:

> *"8. The respondent complied with all the set conditions, which included the completion and signature of the service level agreement. The respondent was awarded the tender in respect of Limpopo Province".*

[34] The alleged award of the tender contended for the respondent should be seen in context. The context is that the nomination or short-listing was subject to certain conditions some of which contained in annexure B, that is, the Memorandum of Agreement, in terms of which the appellant was to be satisfied that compliance with minimum wage in terms of Government Gazette no. 25075 dated 13 June 2003 has been met. In the proposed amendment paragraph 11 is couched as follows:

> *"11.1 The defendant denies that annexure "D" constitute a cancellation of the contract.*
>
> *11.2 Annexure "D" specifically states that the defendant "cannot continue with engaging" the plaintiff, meaning that the defendant cannot continue contracting the plaintiff despite it having been nominated or short-listed initially.*
>
> *11.3 The defendant pleads further that its legal position on the plaintiff's bid was further clarified in its letter dated 08 March 2005 attached hereto as annexure "X".*
>
> *11.4 Annexure "X" made it clear that other than being short-listed, the plaintiff's bid was never accepted by the defendant and there was consequently no binding agreement between the plaintiff and the defendant".*

[35] Annexure "X" is the letter quoted in paragraph [18] of this judgment. It therefore appears that it would be the appellant's case that the tender was not awarded to the respondent for failure to meet the criteria as set out in the Government Gazette aforesaid. The court a quo did not seem to have seriously considered the merits of the case and the defence the appellant wants to plead in the proposed amendment. That is, it overemphasized the delay in bringing the proposed amendment and in doing so, dealt with the matter as if there was an application for leave to amend before it. In its judgment, it stated:

> *"When I look at the notice of amendment on its own, I am inclined to agree that this is a matter that runs into the millions, but I cannot look at the amendment and ignore what transpired on the 8th February. On the 8th February, at the very best for the defendant, they were given an indulgence, at the very worse for the defendant, the matter was settled. Therefore, the hearing of the 8th February is of cardinal importance as to whether this amendment ought to be granted or not. Having said that, had it not been for what happened on the 8th February I would have granted the defendant the opportunity to amend and ordered the defendant to pay the cost, but for what transpired on the 8th February".*

[36] I do not think the defence raised in the proposed amendment can be said to be ill-founded or not bona fide. The attorney for the respondent further argued that the appellant is not entitled to substitute its plea and in doing so, introduce a new defence. He referred us to a number of authorities. I do not intend to deal with them specifically. It suffices to mention that the defence, if introduced, would not be a new defence. It is a defence that was raised previously in the other proceedings concerning the same parties. But for one reason or the other, the state attorney who delivered the plea, decided not to raise it as a defence. Instead, the state attorney on behalf of the appellant, acknowledged the existence of a tender agreement between the appellant and the respondent. The appellant is entitled to plead a defence which is in accordance with its evidence. To hold the appellant to a defence which is not in accordance with its evidence, will, in my view, be contrary to the provisions of section 34 of the Constitution. It provides that everyone has the right to have any dispute that can be resolved by the application of law, decided in a fair public hearing before a court, or where appropriate, another independent and impartial tribunal or forum. If it was to be proved that no tender was awarded, and or that the respondent did not meet the criteria attached to the

tender, that would constitute a good defence to the appellant's case. But, again, I am not making a final determination. The appeal must therefore succeed.

COSTS

[37] In paragraph [22] of this judgment I referred to the provisions of Rule 28(10). The appellant was entitled to bring the application for amendment at any time before judgment. On the 8 October 2012, parties spent several hours in the court a quo arguing whether or not the appellant should be given the opportunity to apply for leave to amend its pleas as envisaged in Rule 28(4). It was argument prompted by the filing of intention to amend the plea in terms of Rule 28(1). That notice was delivered on Friday the 5 October 2012 when the matter was scheduled for trial on Monday 8 October 2012. The appellant found itself in that position because its attorney from the State Attorney did not expeditiously and diligently ensure that the appellant's case is taken care of. It was for this reason that during argument on the 8 October 2012, counsel for the appellant tendered a punitive costs order for wasted costs occasioned by the late filing of notice to amend in terms of Rule 28(1). Mr Ellis SC, on behalf of the appellant, conceded that a punitive costs order would have been justified.

[38] As regards the application for condonation, the merits of the appeal are such that one would have expected the respondent not to persist with its opposition to the granting of the condonation. The stronger the prospects of success on appeal the lesser the emphasis on failure to give satisfactory explanation for non-compliance with the provisions of Rule 49. Therefore, the opposition was unwarranted. Ordinarily the innocent party in an application for condonation is compensated by an order of costs in his or her favour. That is, the guilty party seeks the indulgence of the court and any prejudice to the innocent party is compensated by an order of costs. However, the respondent in the circumstances should be denied of such costs. The order that each party should pay his or her own costs with regard to the application for condonation, would, in my view, be appropriate.

[39] Consequently I would make an order as follows:

39.1 The application for condonation for the late filing of the notice to appeal is hereby granted;

39.2 The appeal is hereby reinstated. Each party in the application for condonation to pay his or her own costs.

39.3 The appeal is hereby upheld with costs, such costs to include the costs of two counsel;

39.4 The decision of the court a quo dismissing the appellant's purported application for amendment of its plea, is hereby set aside and substituted as follows:

"39.4.1 The trial is hereby postponed sine die;

39.4.2 The defendant is hereby directed to deliver its application for the amendment of its plea in terms of Rule 28(4) within ten days from date hereof;

39.4.3 The defendant to pay the costs occasioned by the postponement on an attorney and own client scale."

M F LEGODI
JUDGE OF THE HIGH COURT

I AGREE

W R C PRINSLOO
JUDGE OF THE HIGH COURT

I AGREE

C PRETORIUS
JUDGE OF THE HIGH COURT

FOR THE APPELLANT: ADV. P Ellis SC, assisted by, ADV.JA Motepe

INSTRUCTED BY:	LINGENFELDER & BALOYI INC. Building 7, Atterbury Estate 19 Frikkie De Beer Street Menlyn, PRETORIA Tel: 012 348 5908 Ref: KS Baloyi/LK/KD0105
FOR THE RESPONDENT:	MR. I MOTLOUNG
INSTRUCTED BY:	MALULEKE SERITI MAKUME MATLALA INC. C/O LEDWABA INC. 614 Centenary Building 23 Bureau Lane Cnr Andries Street, PRETORIA Tel: 082 576 8497/082 86 7801 Ref: LLL/CIV/148/ERL