IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE, MTHATHA

CASE NO. CA&R 53/2013

REPORTABLE

In the matter between:

SIPHO ALPHA KONDLO **Appellant**

and

EASTERN CAPE DEVELOPMENT CORPORATION **Respondent**

JUDGMENT

ALKEMA J

[1] This is an appeal against a judgment of the Butterworth Magistrates' Court granting summary judgment in favour of the Plaintiff/Respondent. The appeal raises important issues of interpretation of the Rules of the Magistrates' Court, particularly Rule 14 thereof which deal with summary judgment applications. The Defendant in the Court *a quo* is the Appellant in the appeal, but for the sake of continuity and clarity I will continue to refer to him as the Defendant. Similarly, I will refer to the Respondent in the appeal as the Plaintiff.

[2] Mr *Nkubungu*, who appeared on behalf of the Defendant, handed in from the bar a formal application for condonation for the late prosecution of the appeal. The condonation application is opposed, but in view of the decision we have arrived at, the parties agreed that it is unnecessary to consider, at this stage, the condonation application.

[3] The facts giving rise to the appeal are the following:

[4] During March 2012 the Plaintiff instituted action against the Defendant for, *inter alia*, his eviction from certain business premises in Butterworth, payment of R218 682, 72 in respect of arrears rentals, damages and costs of suit. The Defendant gave notice of his intention to defend, and on 11 April 2012, within the 15 day period allowed for in Rule 14 (2) of the Rules of the Magistrates' Court, the Plaintiff gave notice of application to apply for summary judgment. Attached to this application is an affidavit purportedly in compliance with Rule 14 (2) of the said Rules. I will later return to this affidavit.

[5] It appears from the papers in the Court file that on the same date, namely, 11 April 2012, the Plaintiff also filed a second document entitled *"Affidavit in support of an application for default judgment"* which is, as the name indicates, an affidavit. This affidavit follows essentially the same wording as the first affidavit in support of the summary judgment application, save that it adds that the lease agreement in respect of the premises *"... has been misplaced or lost and notwithstanding a diligent search it cannot be found."*

[6] Notwithstanding the above assertion, the written lease agreement was filed in the Court file although it is unclear how or when or under what circumstances it was filed and/or served. It is, however, common cause in this appeal that the written lease agreement was not attached to the Plaintiff's particulars of claim in compliance with Rule 6(6) of the said Rules. The filing of the written agreement is therefore an irregularity, and this Court cannot have any regard to it.

[7] In response to the Plaintiff's application for summary judgment the Defendant filed an opposing affidavit in terms of the Rule 14(3)(b) of the said Rules. The only defence raised in the affidavit is that the Plaintiff failed to comply with the said Rule (6)(6) in that it failed to attach the written lease agreement to the particulars of claim, thereby rendering the combined summons *"fatally defective."*

[8] The application for summary judgment was subsequently argued, pursuant to which the learned Magistrate dismissed the defence of non-compliance with Rule 6(6) and granted summary judgment. *"... as prayed'*

[9] The Notice of Application for summary judgment filed on 11 April 2012 contains the following prayer:

> *"(a) An order cancelling the lease agreement;*
>
> *(b) Payment of the sum of R218 632.72;*
>
> *(c) Damages for the period which the defendant occupied the property after the cancellation of the lease agreement calculated at the rate of R2 236.89 per month;*
>
> *(d) Costs of suits;"*

(e) Further and//or alternative relief."

[10] Summary judgment may in terms of Rule 14(1) only be granted in respect of the following claims:

"(a) on a liquid document;

(b) for a liquidated amount in money;

(c) for delivery of specified movable property; or

(d) for ejectment."

[11] It will be noted that there is no prayer for the eviction of the Defendant from the premises, and we were told during argument on appeal that it is now common cause that the Defendant had vacated the premises and eviction was no longer an issue.

[12] Secondly, it is now trite that the service of a summons claiming cancellation of an agreement constitutes proper notice to a defendant of the cancellation of that agreement, provided that the necessary allegations are made in the summons or particulars of claim that the Plaintiff is entitled, in law, to the cancellation of such agreement. In *casu* the necessary allegations are made and for purposes of this judgment I accept that the lease agreement was duly cancelled by the Plaintiff and that notice of such cancellation was duly given to the Defendant. The claim for cancellation under prayer (a) above is therefore not only unnecessary, but is in any event not covered by Rule 14(1) which specifies the only claims in respect of which summary judgment may be granted.

[13] Claim (c) in the prayer is for damages which are yet to be quantified and proved. It is not permissible under Rule 14(1) to grant summary judgment for damages, and it follows that the appeal must succeed in respect of at least claim (c).

[14] This leaves only claim (b) which is a liquidated amount in money (arrear rentals) in respect of which summary judgment may be granted under Rule 14(1)(b). As indicated, the defence is based on the Plaintiff's non-compliance with Rule (6)(6) Rules. Rule 6(6) reads as follows:

> *"(6) A party who in such party's pleading relies upon a contract shall state whether the contract is in writing or oral, when, where and by whom it was concluded, and if the contract is in writing a copy thereof or of the part relied on in the pleading shall be annexed to the pleading."*

[15] The Rule is couched in peremptory terms. The Defendant/Appellant argued, which argument was rejected by the learned Magistrate, that the written agreement constitutes a material part of the Plaintiff/Respondent's cause of action. Therefore, non-compliance with Rule 6(6) renders the cause of action incomplete, resulting in a fatally defective summons. In rejecting the argument, the learned Magistrate agreed with the Plaintiff's submission that in the absence of any denial on the part of the Defendant in his opposing affidavit that the agreement was in fact concluded and breached, the non-compliance with the requirement to attach a copy of the written agreement to the particulars of claim in terms of Rule 6(6) constitutes a mere *"technical"* shortcoming capable of being condoned. The absence of a copy of the

written agreement therefore has no effect on the cause of action, and the summons is not fatally defective.

[16] The above arguments deserve closer examination and consideration. Rule 6 (13) provides:

> *"(13) If any party fails to comply with any of the provisions of this rule, such pleading shall be deemed to be an irregular step and the opposite party shall be entitled to act in accordance with rule 60A."*

[17] The words *"... shall be deemed to be an irregular step..."* can leave no doubt that the legislature intended non-compliance with Rule 6(6) as an irregularity and that the remedy is to act in terms of Rule 60 read with Rule 60A. I should perhaps add that Rule 18 of the High Court Rules follows substantially the same wording as Rule 6 of the Magistrates' Court Rules and contains the same deeming proviso and remedy for non-compliance.
The question is whether or not Rule 60 of the Magistrates' Court Rules confer a general power of condonation on Magistrates' Courts.

[18] It is convenient to set out fully the provisions of Rule 60. It reads as follows:

> "***60 Non-compliance with rules, including time limits and errors***
>
> *(1) Except where otherwise provided in these Rules, failure to comply with these Rules or with any request made in pursuance thereof shall not be ground for the giving of judgment against the party in default.*
>
> *(2) Where any provision of these Rules or any request made in pursuance of any such provision has not been fully*

complied with the court may on application order compliance therewith within a stated time.

(3) Where any order made under sub-rule (2) is not fully complied with within the time so stated, the court may on application give judgment in the action against the party so in default or may adjourn the application and grant an extension of time for compliance with the order on such terms as to costs and otherwise as may be just.

(4) The court may, on application under sub-rule (2) and (3) order such stay of proceedings as may be necessary.

(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.

(6)(a) Where there has been short service without leave, of any notice of set-down or notice of any application or of process of the court the court may, instead of dismissing such notice or process, adjourn the proceedings for a period equivalent, at the least, to the period of proper notice upon such terms as it may deem fit.

(b) If the proceedings are adjourned in the absence of the party who received short service, due notice of the adjournment must be given to such party by the party responsible for the short service.

> *(7) Subject to sub-rule (8) no process or notice shall be invalid by reason of any obvious error in spelling or in figure or of date.*
>
> *(8) If any party has in fact been misled by any error in any process or notice served upon him or her, the court may on application grant that party such relief as it may deem fit and may for that purpose set aside the process or notice and rescind any default judgment given thereon"*

[19] It is necessary to deal briefly with each of the above sub-rules.

[20] The words *"Except where otherwise provided"* in sub-rule (1) refer to sub-rule (3) where it is *"otherwise provided*." Sub-rule (3) gives the Court the power to grant judgment against a party where such party has not fully compiled with an order made in terms of sub-rule (2) directing compliance with a specific Rule. This power has nothing to do with the power to grant condonation, and no power of condonation is conferred on a Magistrates' Court under Rule 60(1)-(4).

[21] The Court may order compliance with any Rule under sub-rule (2). The power to order compliance should not be confused or conflated with the power to set aside an irregular step under Rule 60A, which is a completely different procedure, and to which I shall shortly return. The power under sub-rule (2) has also nothing to do with condonation.

[22] As stated in para 20 above, the discretion to grant judgment against the defaulting party does not include a discretion to grant condonation. The discretion under Rule 60(3) is confined to choose between granting a

judgment on the one hand; or to extend the time period to comply with the order made under Rule 60(2) on the other hand. Such discretion must be exercised judicially. Rule 60(3) therefore does not contain any general power of condonation.

[23] The discretion conferred on a Magistrates' Court under Rules 60(4), (5) and (6), refer to the stay of proceedings or the extension of time periods respectively. Such discretion clearly does not include any discretion to condone non-compliance with the form or substance of a rule.

[24] Rule 60(7) is confined to any obvious error in spelling or in figures or of date and does not affect the form or substance. Rule 60(8) relates to the power of rescission and variation of judgments and must be read together with Rule 49 and section 36 of the Magistrates' Court Act, and has nothing to do with the power of condonation.

[25] Rule 60A relates to an application for the setting aside of an irregular step. In practice, such an application is usually combined with an application under Rule 60(2) and (3). In such case the order setting aside the irregular step is asked for only in the event of the other party failing to comply with the order under Rule 60(2).

[26] Rule 60A(3) confers wide powers of discretion on the Magistrates' Courts. It may set aside the irregular step **and** grant leave to amend; **or** it may *"... make any such order as it deems fit."* Rule 60A(3) reads as follows:

> *"(3) If at the hearing of an application in terms of sub-rule (1) the court is of the opinion that the proceeding or step is irregular or improper, it may set it aside in whole or in part, either as against all the parties or as against some of them, and grant leave to amend or* ***make any such order as it deems fit****."* (Emphasis is mine).

[27] The words in the section are couched in extremely wide terms. The question is whether the *"order"* contemplated includes a general power to order condonation of the irregularity. The answer depends on a proper contextual interpretation of the Rule.

[28] First, it is clear from the plain grammatical meaning of the words that such discretion can only be exercised during the hearing of an application to set aside an irregular step. Such an application must be made by an aggrieved party in terms of Rule 60A(2), and it is only at the hearing of that application that the discretion may be exercised.

[29] It does not appear from the papers before us that the defendant had applied, either timeously or at all, for the setting aside of the plaintiff's particulars of claim by virtue of its failure to attach thereto a copy of the agreement as provided for in Rule 6(6). There was therefore no *"hearing"* as contemplated by Rule 60A(3) and no discretion arose to condone non-compliance with Rule 6(6), if such discretion exists at all.

[30] For the sake of completion I should add that even if there was such a *"hearing,"* I do not believe the discretion to condone could properly have been exercised on the facts of this case. My reasons are these.

[31] Obviously, if a Rule requires compliance with its terms, and visits non-compliance with deemed irregularity, as rule 6(6) read with 6(13) does, then the first step in the exercise of the discretion is to set aside the irregular step and to order compliance with the rule. We know today that the plaintiff is in possession of the written lease agreement and that it can be attached to the particulars of claim. Therefore, if there was an application and hearing, the proper order would have been to order the plaintiff to comply with Rule 6 (6) and to amend by attaching a copy within a specified time in terms of Rule 60(2); failing which, the particulars of claim may be set aside as irregular. If, on the facts of a particular case, an amendment is unnecessary, a court may order compliance with a specified time under Rule 60A(3).

[32] There may be a possible exception to the general rule enunciated above. If the non-compliance is so trivial that it cannot cause any prejudice to the opposing party, then the court acting under its wide discretion in terms of Rule 60(A)(3) may deem it fit not to set aside the non-compliance, but rather to condone non-compliance. If it is merely an obvious error in spelling or in figures or of date, the court may condone non-compliance under Rule 60(7). This exception does not arise on the facts of this case.

[33] It follows that I do not believe that either Rule 60 or Rule 60A(3) contain a general power of condonation. In context the *"order"* contemplated by Rule 60 (A)(3) excludes the power to grant condonation.

[34] One would have thought that if the legislature had intended to confer general powers of condonation to dispense with the form and substance of any Rule in appropriate circumstances, it would have done so in express

terms and would not have hidden it in another form, such as under Rule 60 A(3). The appropriate Rule within which to house such power would be Rule 60 read with Rule 60A, but as indicated, these Rules do not contain such power. The inference is therefore that the legislature had no such intention.

[35] The only other possible Rule which may have been invoked by the learned magistrate in condoning non-compliance with Rule 6(6), is Rule 1 (3). Rule 1(3) cannot be read in isolation, and must be interpreted against the backdrop of Rules (1) and (2). Those Rules read as follows:

> ***"1 Purpose and application of rules***
>
> *(1) The purpose of these Rules is to promote access to the courts and to ensure that the right to have disputes that can be resolved by the application of law by a fair public hearing before a court is given effect to.*
>
> *(2) These Rules are to be applied so as to facilitate the expeditious handling of disputes and the minimisation of costs involved.*
>
> *(3) In order to promote access to the courts or when it is in the interest of justice to do so, a court may, at a conference convened in terms of section 54(1) of the Act, dispense with any provision of these Rules and give direction as to the procedure to be followed by the parties so as to dispose of the action in the most expeditious and least costly manner."*

[36] Rule 1(3) must also be read together with s.54 of the Magistrates' Court Act which deals with the pre-trial procedure for formulating issues to

be decided during the trial. I believe it is clear from the wording of s54(1)(e) that the parties must first reach agreement on the issues which may aid in the most expeditious and less costly manner to dispose of the trial – which may include condonation for non-compliance with any rule – before the court may make an order in terms of rule 1(3) to dispense with any provision of the rules.

[37] Rule 1(3) must therefore be read subject to the limitation placed by thereon s.54; namely that the order of a Court to dispense with compliance with any of the rules, is subject to the agreement and consent of all parties. Since no s54 conference was held, or rule 1(3) order was made at such conference, the learned magistrate had no legislative power to dispense with Rule 6(6) or to condone non-compliance therewith under Rule 1(3).

[38] I also do not believe, with respect, there is any merit in Defendant's argument that non-compliance with Rule 6(6) has resulted in an incomplete cause of action and a fatally defective summons. An irregularity does not necessarily result in a lack of a cause of action. The cause of action in this case is the breach of contract, giving rise to the remedies of eviction, claim for arrear rentals, and damages as may be proved. There is no doubt that the rental agreement in the particulars of claim is a prerequisite to an allegation of a breach of that agreement. It is a vital link in the chain of the cause of action. In this case such an allegation is made in the particulars of claim. The fact that the written agreement was not attached to the particulars of claim undoubtedly renders the particulars of claim irregular giving rise to the remedy under Rule 60A(2) and (3), but it does not in any way affect the validity of the cause of action as pleaded. There is a great difference

between an irregularity and an exception based on a lack of a cause of action. The question remains if the learned Magistrate had the authority to grant condonation for non-compliance of Rule 6 (6).

[39] It is trite that Magistrates' courts are creatures of statute. As such, they have no inherent jurisdiction and their powers must be deduced from the four corners of the statute or, in this case from the Rules. Unless the Rules or the Magistrates Court Act empowers a Magistrates' court to overlook or condone an irregularity, it has no power to do so. In this case the learned Magistrate appears to have viewed the irregularity created by Rule 6(13) as a *"…technical irregularity…"* which he was entitle to condone. For the reasons mentioned I believe the learned Magistrate has erred in this respect. He simply had no general power of condonation.

[40] I find some support for my approach in three judgments. The first is *Hip Hop Clothing Manufacturing CC v Wagener NO and another* 1996 (4) SA (CPD) where *Van Reenen* J said at 228 G-H:

> *"The only Rule that permits a magistrate to condone non-compliance with the Rules of the Magistrates' Courts is Rule 60 which, on my reading thereof, does not empower a magistrate to permit a deviation from the* ***form*** *of proceedings prescribed by such Rules."* (emphasis is mine).

See also *Barens en 'n ander v Lottering* 2000 (3) SA 305 (C) at 311D – 312A; and *Setlai v Road Accident Fund* 2008 JDR 1065 (O) at para 7

[41] The notion that Rule 60(A)(3) may confer a discretion on the Magistrates' Court to order condonation for strict compliance of a rule – in

this case dispensing in totality with any compliance under rule 6(6) – is to some extent supported by *Jones and Buckle, The Civil Practice of the Magistrates' Courts in South Africa,* 10th Ed.), Vol II, Van Loggerenberg, (Commentary on Rule 60A(3)). With reference to a number of High Court judgments the learned authors state:

> *"…The court is entitled to overlook in proper cases any irregularity which does not work any substantial prejudice to the other party."*

[42] With respect, I do not believe the judgments referred to support such a proposition. Whereas the High Court has a wide and general power of condonation under Rule 27 of the High Court Rules, the Magistrates' Court's power of condonation can only be exercised in the circumstances and in the manner prescribed by a particular rule, and only within the four corners of that specific rule. Reliance on High Court judgments in the exercise of its discretionary powers by a Magistrates' Court to order condonation can therefore be misleading and misplaced, and I do not believe the judgments referred to by the learned authors constitute authority for the proposition that the Magistrates' Court have any powers of condonation of form or substance of the Rules.

[43] It follows that unless a specific Rule empowers the magistrate to condone non-compliance with the form or substance of that specific Rule, the magistrate has no such power.

[44] Rule 14 deals with summary judgment applications and refers specifically to the various orders a court may make (14(5)-14(10)), and an order for condonation is not one of them. Rule 6 which deals with the rules

relating to pleadings generally, specifically provides (6(13)) that failure to comply with its terms – which includes the failure to attach a copy of the written agreement – shall be deemed to be an irregular step. It contains no empowerment to condone such irregularity.

[45] The end result is that the learned magistrate erred in finding that he had the power to condone non-compliance with rule 6(6), and summary judgment should not have been granted.

[46] The findings in this judgment have startling consequences. It would result in a situation where, as originally thought in this case, the written agreement has either been lost or destroyed and cannot be attached to the summons, the proceedings may be held to be irregular under Rule 6 (13) and in the absence of any power of condonation, a plaintiff may be non-suited or the claim be set aside either under Rule 60(3) claim or 60A(3). And this occurs in circumstances where the plaintiff has otherwise a perfectly legitimate and enforceable claim and is able to prove such claim even in the absence of the written agreement. It also has the absurd result that if a plaintiff in these circumstances instituted his claim in the High Court where the court has a general power of condonation, he may have been successful whereas if he instituted in the Magistrates' Court where the court has no such power, he will be unsuccessful.

[47] It is clear that in the absence of a general power of condonation to wave compliance with the form or substance of a Rule, the result may lead to an injustice and absurdity in the Magistrates' Courts. I therefore intend to refer this judgment to the Rules Board to consider a re-visit to Rule 60 to include

a general power of condonation with the form or substance of any Rule on good cause shown.

[48] A final observation: The affidavit accompanying the summary judgment application must contain three allegations (Rule 14(2)), namely;
(1) That the deponent has personal knowledge of the facts;
(2) That the deponent swears positively to the facts verifying the cause of action and the amount claimed; and
(3) That in the deponent's opinion there is no *bona fide* defence to the action and that notice to defend has been filed solely for the purpose of delay.

[49] As usual, there is no problem with requirements (1) and (3) above, but the problem relates to the second requirement. In his affidavit in support of the summary judgment application, the deponent states:

> *"I confirm the Defendant is indebted to the Plaintiff in an amount of R218 632, 72 on the grounds set out in the Plaintiff's summons."*

[50] The second requirement calls on the deponent to swear positively to those facts *"verifying"* the cause of action and the amount claimed. At first blush it may appear that the allegation that the deponent *"confirms"* the amount of the indebtedness *"...on the grounds set out in the summons ..."* satisfies the requirement but on closer scrutiny this is not so. First, there is the total absence of an allegation that he swears *"positively"* to the amount of the indebtedness on the grounds set out in the summons, but, more importantly, there is a difference in meaning between *"... facts verifying the cause of action ..."* on the one hand, and *"confirm(ing)* the indebtedness *"... on the grounds set out in the summons,"* on the other hand.

[51] As I said, the facts to which the deponent swears positively, are those facts which he verifies to constitute the cause of action and the amount claimed. In other words, he verifies as true and correct the grounds upon which the cause of action is based and set out in the summons and in respect of which he has personal knowledge. This is the meaning ascribed to *"verify"* and *"verification"* in the Shorter Oxford English dictionary.

[52] On the other hand, to *"confirm"* the indebtedness on the grounds set out is merely to affirm, corroborate or verify the ground in the absence of personal knowledge of the truth or correctness of such grounds. This is also the meaning ascribed to *"confirm"* and *"confirmation"* in the same dictionary.

[53] Since summary judgment proceedings are regarded as a drastic remedy for reasons well known, it is imperative in my view, that the cause of action (and amount claimed) must be *"verified"* and *"confirmation"* is not sufficient. It follows that for these reasons I do not consider that the second requirement of the affidavit had been met and the summary judgment application was fatally defective in this respect.

[54] To simply uphold the appeal, set aside the summary judgment and grant leave to the defendant to defend on the only ground of irregular particulars of claim, will be a waste of time and legal costs for the reasons mentioned. The real issues will not be addressed and the result may be a travesty of justice.

[55] In the exercise of its inherent appeal jurisdiction and in the interest of justice, I believe this Court should set aside the summary judgment and refer the matter back to the magistrates' court with leave to the plaintiff/respondent to amend its particulars of claim. In regard to costs, and in view of the uncertainty of the eventual outcome of the case, I suggest that the costs be reserved to be decided by the court finally determining the action.

[56] The following order is made:

(1) The summary judgment proceedings in, and order by, the magistrates' court in this matter be and are hereby set aside;

(2) The trial is referred back to the magistrates' court with leave to the plaintiff/respondent to amend its particulars of claim by attaching a copy of the written lease agreement thereto in compliance with Rule 6(6) of the Rules of the Magistrates' Court;

(3) The plaintiff/respondent is ordered to effect the said amendment in para 2 above within 10 days of the date of this order;

(4) In the event of the plaintiff failing to comply with para 3 above, the defendant/appellant will be entitled to act in terms of rule 6(13) read with rules 60 and 60A of the Magistrates' Court Rules;

(5) Notwithstanding anything contained in this order, or any steps taken by either party to these proceedings including the summary judgment proceedings, all the rules of the Magistrates' Courts Act, including rules 14, 60 and 60A will continue to govern the further conduct and procedure in this action between the parties:

(6) The costs of the abortive summary judgment proceedings, including the costs of this appeal, are reserved for decision by the court hearing the action.

(7) The Registrar of this Court is requested to transmit a copy of this judgment to the Chairman of the Rules Board.

_____

ALKEMA J

I agree :

_____

HINANA AJ

Heard on	:	22 October 2013
Delivered on	:	27 February 2014
Counsel for Appellant	:	Mr Nkubungu
Instructed by	:	B. Makade Incorporated
Counsel for Respondent	:	Adv. Hobbs
Instructed by	:	Messrs Ross G.M. Sogoni & Co.