REPUBLIC OF NAMIBIA

CASE NO.: CA 172/06

IN THE HIGH COURT OF COURT OF NAMIBIA

In the matter between:

NOELENE VAN DEN HEEVER **APPELLANT**

and

FERMINO CORREIA t/a FISHMAR **RESPONDENT**

CORAM: VAN NIEKERK, J

Heard on: 16 June 2006

Delivered on: 12 September 2008

JUDGMENT

VAN NIEKERK, J: [1] The appellant appeals against an order by the Magistrate of Walvis Bay on 10 May 2005 dismissing an application for rescission of a summary

judgment and costs on an attorney and own client scale granted to the respondent on 20 April 2004.

[2] Respondent had issued summons against appellant for payment of N$1 868 – 00, plus interest *a tempore morae* from 20 January 2004 and costs of suit for professional services rendered at appellant's special instance and request. Appellant filed a notice of intention to defend the action, where after respondent gave notice of an application for summary judgment. In the application he gave notice that he would apply for the costs of the application on an attorney and client scale. Appellant filed an opposing affidavit, which was not on the court file when the application for summary judgment was heard. In the absence of appellant, summary judgment was granted on 20 April 2004.

[3] On 31 March 2005 appellant filed an application in terms of section 36 of the Magistrates' Court Act, 32 of 1944, read with rule 49 of that court's rules ("the rescission application") in which condonation is also asked for the non-compliance with the magistrates' court rules with reference to the time limits regarding such applications.

[4] The matter was set down for hearing on 19 April 2005. Respondent filed an affidavit opposing the application and appellant filed a replying affidavit. It is common cause that appellant on 14 April 2005 paid an amount of N$1 027-50 into court as security for the costs mentioned in rule 49(3). On 31 March 2005 when the rescission application was set down for hearing on 19 April, respondent had already recovered the

total amount of N$1000 in terms of the summary judgment by way of a garnishee order against appellant's salary.

[5] On 19 April 2005 respondent's legal practitioner, Mr Thomas, took a point *in limine*, namely that the security was paid late. Mr Thomas also mentioned a second point *in limine*, but did not disclose what it was. Appellant, being a lay person and appearing in person, asked for a postponement to obtain legal representation in order to answer to the point *in limine*, of which she had not been given notice in advance. She also wanted legal representation to answer to the second point should counsel for respondent raise it. A postponement was granted to 10 May 2005.

[6] It is necessary to deal in some detail with what occurred on 10 May 2005 and with the arguments by both parties. On that date, appellant again appeared in person and applied for a further postponement for another month. She filed detailed written submissions and also addressed the court. She also filed a supplementary replying affidavit attaching copies of her bank statements from which documents it was evident that by 19 April 2005 the total sum of N$1500 had been deducted from her salary by way of the garnishee order. In support of her application for a postponement she placed certain facts before the court. She pointed out that the respondent would suffer no prejudice which could not be cured by a costs order and drew the magistrate’s attention to the fact that respondent had already recovered N$1500 from her. On the other hand, she submitted, she would suffer irreparable harm if she is not legally represented, because counsel for respondent was using “surprise tactics”, as she called it, by taking points *in*

limine without warning. She mentioned that respondent's counsel had alluded to a second point in *limine*, the details of which he did not disclose and which he would presumably take once the first point had been disposed of.

[7] Appellant further stated that she needed more time to obtain certain original documentation as objections had been raised in the respondent's answering papers to the fact that the documents were uncertified copies. It was clear that these documents were not in her possession and that she was dependent on the co-operation of third parties to obtain the originals or certified copies of them.

[8] Appellant set out what she had done in the meantime to obtain legal representation. She had applied for a loan to pay for legal representation, which had been granted only the day before. She was hampered in her efforts because of several public holidays and long weekends between 20 April 2005 and 10 May 2005. Although she had approached several lawyers, none were willing to begin with preparations to represent her before she was able to pay them. Mr Steyn of the firm De Jager and Van Rooyen was prepared to assist her if she could obtain a postponement to a later date. In fact, Mr Steyn had approached Mr Thomas to agree to a postponement, but it was refused.

[9] Regarding the first point in *limine*, she did come to court with some advice and argued the point. She specifically mentioned to the magistrate that, at the stage she had filed the application for rescission, respondent had already collected N$1000 as

deductions from her salary. She submitted that it was not necessary for her to have paid the security. She referred the magistrate to certain authorities.

[10] Respondent's counsel did not answer to these submissions directly. He objected to any further postponement as she was the applicant and highlighted the fact that the rescission application was by her own admission defective because of the problem with the documents. He asked that judgment be given on the point *in limine*, namely that the security was paid into court only after the application was set down. He continued: "It is therefore also abundantly clear that no application is on the roll at this stage. What the applicant should have done was to remove its application and again put a new application before this Court Your Worship. I therefore again request that this application of Applicant be dismissed with costs on an Attorney/own client scale." Counsel did not state in so many words on what basis he was seeking the special costs order. He did complain about the fact that the application was not in order and that applicant, being *dominis litis* should have seen to it that she was ready to proceed before putting the application down for hearing. He also complained about the costs because applicant was already granted a postponement and was again seeking a postponement.

[11] After hearing the submissions, the record shows the magistrate to have said the following:

> "The Court have heard what was said before it and without wasting time the Court have a few things to say, that the diffident [defendant] Applicant in this matter had an ample time to get a lawyer of her choice. If it was to say that week thereafter was over a long

weekend after the others, she could have brought her Attorney to Court for such Attorney to ask postponement in this regard but not submit a mere submissions to Court as if the case was postponed for argument. The case was postponed for the Applicant, Defendant in this matter to obtain a Legal Representative, therefore the Judgment *in limine* is granted as prayed for."

[12] On 16 May 2005 appellant requested the magistrate to provide her with a written judgment and costs order in which he states the facts he found to be proved and his reasons for judgment and the special costs order. Appellant was provided with a document signed by the magistrate and which reads:

"COURT

Judgment in lemine granted as prayed for Defendant had an ample time to engaged an attorney of her choice."

[13] Thereafter appellant filed the following notice of appeal:

"NOTICE OF APPEAL

KINDLY TAKE NOTICE that the Appellant give Notice of Appeal to **THE HIGH COURT OF NAMIBIA** against the whole of the Judgment and Costs Order made on the 10th May 2005 by the Honourable Magistrate in an Application for Rescission made by the Appellant in the terms of Rule 49 of the Magistrate's Court Rules. The Honourable Magistrate made and recorded the following judgment: ***"Judgment in lemine granted as prayed for Defendant had an ample time to engaged an attorney of her choice."*** and to pay the costs of such Application on an attorney/client scale. The Appellant appeals on the following grounds:

1. The Honourable Magistrate erred in law by making and recording the above-mentioned judgment. The judgment is ambiguous and vague in that it is not clear what a "judgment *in lemine*" is and as such also constitutes a second judgment in

the case. The Magistrate also refused to enlighten the judgment by reasons in terms of rule 51(1) of the Magistrate's Court;

2. If the judgment implies that the application for rescission was dismissed on the point ***in limine*** taken by the Respondent, namely: That security of costs provided for Rule 49(3) of the magistrate's court rules was paid in late and that it should have been paid *simul ac semel* with the lodging or filing of the Notice of Application for Rescission by the Appellant on the 31st March 2005 and that the Application is therefore defect; then the honourable magistrate erred both in law and fact.

3. The Honourable Magistrate erred in his implied rulings of law when he:

   3.1 Dismissed the Application without giving the Appellant an opportunity to address the court on the merits of the Application;

   3.2 Dismissed the Application instead of striking it from the roll on the technicality of security to be paid in terms of rule 49(3);

   3.3 Found that it was fatally defective for the Appellant not to have paid the security simultaneously with the lodging of the application for rescission.

   3.4 Ignored the fact that the amount of the costs awarded against Appellant were not taxed at the date of the hearing on the 19th April 2005 as provided for in rule 49(4) of the same rules;

   3.5 Ignored the fact that the Appellant paid an amount of N$1 027.5 as security on the 14th April 2005 as soon as it was assessed by the clerk of the court prior to the hearing.

   3.6 Ignored the fact that the Respondent already collected N$1 000.00 from the Appellant prior to the lodging of the above-mentioned application for rescission and/or found that this amount recovered could not be first appropriated to costs in favour of the Appellant relieving her from the obligation to pay security.

4. The Honourable Magistrate erred in his implied findings of fact when he found that:

   4.1 An amount of N$1 000.00 was not already collected by the Respondent from the Respondent on or before the 31st March 2005;

   4.2 The costs awarded was taxed prior to the date of the hearing on the 19th April 2005;

   4.3 That security was not paid in full as soon as the clerk of the court, prior to the hearing, assessed it.

5. The Honourable Magistrate further erred in fact and law not to allow a further postponement, under the circumstances, to allow the Appellant to obtain legal

representation or supporting affidavits from witnesses in foreign countries, as requested, on the following grounds:

5.1 The Respondent would have suffered no prejudice;

5.2 The Respondent did not disclose his points *in limin*e in his notice to oppose and presented his points *in limine* in a surprising manner and was thus partly responsible for the need to postpone;

5.3 The magistrate ignored the facts in the Appellant's Replying Affidavit dated the 19th April 2005, Supplementary Replying Affidavit dated the 10th of May 2005 and submissions dated the 10th of May 2005, made in this regard.

6. The Honourable Magistrate erred in law by making a costs order against the Appellant on an attorney/clients scale without allowing her an opportunity to address the court on that issue.

7. The Honourable Magistrate further erred in making the said cost order against the Appellant on an attorney/clients scale on the following grounds:

7.1 He erred in finding any facts to grant such a cost order against the Appellant;

7.2 He erred in not finding any contributory facts on the part of the Respondent causing the unnecessary costs;

KINDLY FURTHER take notice that it is the intention of the Appellant to amplify her grounds of appeal as soon as other or further grounds are found to exist subsequent to the filing of a statement by the magistrate in terms of rule 51(1) or (8) of the rules of this court."

[14] The magistrate then responded to the notice of appeal by furnishing reasons for judgment on 18 July 2005, in which he stated the following:

This case came to Court on the 19/04/2005 for hearing, but after submissions from both parties, the Court postponed the matter until the 10/5/2005 for the Applicant to engage an Attorney of her choice to represent her as she is not acquaints with the Court proceedings, and she wants to study some documents of the Respondent.

On the 10/5/2005, the Applicant again came to Court without an Attorney of her choice, and as a result, the other party ask the Court to grant the costs against her on the basis that she did not complied with the rules should she not managed to engage one.

> The judgment is not ambiguous and vague, for the reason that she knew the purpose of the proceedings for the latter date. In no way, and at no stage did I refuse to give her the reason for granting the judgment as prayed for in favor of the Respondent.
>
> The Applicant wasted the time of the Plaintiff in the main action, and the Court applied the rules of the Magistrate's Court as they were prayed for. It was not brought to the attention of the Court that the Appellant did pay the security with the Clerk of Court on the 15/05/2005.
>
> The Magistrate did not misdirected himself in any way by granting the judgment against the Appellant, and for her to pay the costs.
>
> In the premises, the Appeal to be dismissed with cost."

I note at this stage that the reference to the date 14/05/2005 fourth paragraph is clearly wrong and should have been 14/04/2005.

[15] I have difficulty in following the reasons, such as they are, given *ex tempore* by the magistrate when he granted judgment on the point *in limine*. The written reasons provided on 18 July 2005 do not assist the Court much either as they are vague. I can quite understand that the appellant was at a disadvantage when formulating her grounds of appeal, which she did with admirable thoroughness, having to rely on several possible inferences that might be drawn about the magistrate's reasoning. I agree with appellant's statement in paragraph 5 of her heads of argument that:

> "5
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> It appears from the judgment and reasons, provided on the 17th July 2005, that the learned Magistrate:
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> 5.1 Refused the Appellant a further postponement to obtain legal representation and to file further affidavits;

5.2 Dismissed the application for rescission of the Appellant on a point taken *in limi*ne by the Respondent, namely, that the Appellant did not pay the required security into court together with the lodging of the application for rescission;

5.3 Granted costs order on an attorney and client scale against the Appellant "on the basis that she did not comply with the rules should she not managed to engaged one." And further on: "Appellant wasted the time of the Respondent in the main action."

[16] Respondent did not oppose the appeal, which was argued by appellant in person. In her heads of argument she expanded upon the grounds of appeal and during the appearance in this Court highlighted certain aspects in the heads. I shall first deal with the ground of appeal dealing with the postponement.

[17] In regard to this issue I bear in mind the following principles in regard to an appeal on the issue of a postponement as set out in *Myburgh Transport v Botha t/a SA Truck Bodies* 1991 NR 170 (SC) at 174D-175H:

"1. The trial Judge has a discretion as to whether an application for a postponement should be granted or refused (*R v Zackey* 1945 AD 505).

2. That discretion must be exercised judicially. It should not be exercised capriciously or upon any wrong principle, but for substantial reasons. (*R v Zackey (supra); Madnitsky v Rosenberg* 1949 (2) SA 392 (A) at 398-9; *Joshua v Joshua* 1961 (1) SA 455 (GW) at 457D.)

3. An appeal Court is not entitled to set aside the decision of a trial Court granting or refusing a postponement in the exercise of its discretion merely on the ground that if the members of the Court of appeal had been sitting as a trial Court they would have exercised their discretion differently.

4. An appeal Court is, however, entitled to, and will in an appropriate case, set aside the decision of a trial Court granting or refusing a postponement where it appears that the trial Court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it has reached a decision which in the result could not reasonably have been made by a Court properly directing itself to all the relevant facts and principles. (*Prinsloo v Saaiman* 1984 (2) SA 56 (O); *cf Northwest Townships (Pty) Ltd v Administrator, Transvaal, and Another* 1975 (4) SA 1 (T) at 8E-G; *Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another* 1988 (3) SA 132 (A) at 152.)

5. A Court should be slow to refuse a postponement where the true reason for a party's non-preparedness has been fully explained, where his unreadiness to proceed is not due to delaying tactics and where justice demands that he should have further time for the purpose of presenting his case. *Madnitsky v Rosenberg (supra* at 398-9).

6. An application for a postponement must be made timeously, as soon as the circumstances which might justify such an application become known to the applicant. *Greyvenstein v Neethling* 1952 (1) SA 463 (C). Where, however, fundamental fairness and justice justifies a postponement, the Court may in an appropriate case allow such an application for postponement, even if the application was not so timeously made. *Greyvenstein v Neethling (supra* at 467F).

7. An application for postponement must always be *bona fide* and not used simply as a tactical manoeuvre for the purposes of obtaining an advantage to which the applicant is not legitimately entitled.

8. Considerations of prejudice will ordinarily constitute the dominant component of the total structure in terms of which the discretion of a Court will be exercised. What the Court has primarily to consider is whether any prejudice caused by a postponement to the adversary of the applicant for a postponement can fairly be compensated by an appropriate order of costs or any other ancillary mechanisms.

(Herbstein and Van Winsen *The Civil Practice of the Superior Courts in South Africa* 3rd ed at 453.)

9. The Court should weigh the prejudice which will be caused to the respondent in such an application if the postponement is granted against the prejudice which will be caused to the applicant if it is not.

10. Where the applicant for a postponement has not made his application timeously, or is otherwise to blame with respect to the procedure which he has followed, but justice nevertheless justifies a postponement in the particular circumstances of a case, the Court in its discretion might allow the postponement but direct the applicant in a suitable case to pay the wasted costs of the respondent occasioned to such a respondent on the scale of attorney and client. Such an applicant might even be directed to pay the costs of his adversary before he is allowed to proceed with his action or defence in the action, as the case may be. *Van Dyk v Conradie and Another* 1963 (2) SA 413 (C) at 418; *Tarry & Co Ltd v Matatiele Municipality* 1965 (3) SA 131 (E) at 137."

[18] It seems to me that the magistrate held it against the appellant that she did not come to court with a legal representative. It would seem that he was willing to consider a further postponement, provided it was requested by a legal representative on behalf of appellant. In my view the appellant placed sufficient and compelling facts on record to show what she had done to obtain legal representation. She mentioned in court that Mr Steyn was willing to represent her provided she could obtain a postponement and that he had asked Mr Thomas to agree to a postponement. Mr Thomas did not deny this. The magistrate mentions nothing about these facts. One therefore does not know why they were found wanting. He only mentions something incomprehensible about a long weekend. He blames appellant for not bringing her legal practitioner to court to ask for a postponement. However, he ignores her explanation. He does not say why it is

unacceptable, if indeed he did consider her explanation. If he did take those facts and explanation into consideration and nevertheless exercised his discretion to refuse a postponement, such exercise of discretion would be grossly unreasonable on the facts. I agree with appellant's submission that a further postponement should have been granted. There was no prejudice to respondent which could not have been cured by an order as to costs.

[19] After refusing to postpone the matter, the magistrate granted judgment "*in limine* as prayed for." Again he provided no proper reasons for this order. In fact he states in his written reasons that he was not aware that appellant had paid the security with the Clerk of the Court on 14 April 2005. I find this part of the reasons very hard to understand, as the very essence of the point *in limine* was that the security had been paid late. Even if he might not have been aware of the precise date on which it had been paid, his statement must be understood to mean that he was not aware that appellant did pay the security. It then becomes difficult, if not impossible, to understand on what basis he upheld the point *in limine*. I am constrained to conclude that he must have misconstrued its import. It would seem that the magistrate thought that if he refused the postponement the point *in limine* had to be upheld. The further conclusion is, inevitably, that he did not consider the facts and the legal submissions made by appellant when she addressed him on the merits of the point *in limine*, to which I now turn.

[20] Rule 49(3) and (4) provide as follows:

> "(3) Save where leave has been given to defend as a *pro Deo* litigant in terms of rule 53, no such application shall set down for hearing until the application has paid into court, or has secured to the satisfaction of the plaintiff, to abide the directions of the court, the amount of the costs awarded against him under such judgment and also the sum of N$600 as security for the costs of the application: Provided that the judgment creditor may, by consent in writing lodged with the clerk of the court, waive compliance with this requirement.
>
> (4) Where the amount of the costs awarded against he applicant under such judgment has not at the date of the hearing of the application been taxed the clerk of the court shall assess the approximate amount of such costs and the amount so assessed shall be paid into court."

[21] As I understand it Mr Thomas in the Court *a quo* submitted that because the security was paid into court after the application was set down, it was paid late and that therefore there is, in effect, no application on the roll. However, the words "the amount of the costs awarded" in Rule 49(3) must be taken to be a reference to taxed costs. Rule 49(4) clearly provides for the situation where, even at the date of the hearing, assessed costs may be paid into court. *In casu* appellant pointed out in her notice of appeal that the judgment costs had not been taxed at the date of the first hearing on 19 April 2005 and that assessed costs were paid on 14 April 2005. This was not disputed by the magistrate in his reasons, nor by respondent on appeal. The security was therefore not paid late, as appellant could still have paid the assessed costs on the date of hearing. The magistrate should therefore not have upheld the point *in limine*.

[22] By granting the judgment *in limine* without any qualification, the magistrate must be taken to have dismissed the rescission application with costs on an attorney and own client scale. The question which arises is whether this judgment is appealable in terms of section 83(b) of the Magistrates' Court Act, which provides that a party to any civil suit

or proceeding in a court may appeal against "any rule or order made in such suit or proceeding having the effect of a final judgment …… and any order as to costs."

[23] As appellant pointed out, the merits of the rescission application were not addressed during the hearing. The issue of the security was concerned with a procedural step which did not relate to the merits of the rescission application. As appellant submitted, the magistrate, having upheld the point *in limine*, should have struck the application from the roll, instead of dismissing it (Jones and Buckle, The Practice of the Magistrates' Courts in South Africa, (7th ed) Vol II, p371). However, the fact that the magistrate dismissed the rescission application did not mean that the appellant could not renew the rescission application in the magistrate's court (*Venmei Beleggings (Edms) Bpk v Bue* 1980 (3) SA 372 (TPD) 377A-H). The provisions of rule 49(9), in terms of which a judgment becomes final if the rescission application is dismissed, are no impediment to appellant renewing the rescission application, as the sub-rule applies only if the dismissal occurs after adjudication of the application on the merits (*Vleissentraal v Dittmar* 1980 (1) SA 918 (O) 921F; *Eldred v Van Aardt & Bell* 1924 SWA 79; *Ottens v Korf* 1927 TPD 58; *Venmei Beleggings* (*supra)*). The judgment on the point *in limine* did not have the effect of a final judgment as meant in section 83(b). It was a simple interlocutory order according to the well-known test stated in *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd* 1948 (1) SA 839 (A) 870:

> "……[A] preparatory or procedural order is a simple interlocutory and therefore not appealable unless it is such as to 'dispose of any issue or any portion of the issue in the main action or suit' or …… unless it 'irreparably anticipates or precludes some of the relief which would or might be given at the hearing.' "

[24] As the judgment dismissing the rescission application did not have the effect of a final judgment, it is not appealable. However, the accompanying costs order is appealable in terms of section 83(b). In determining whether the costs order is correct, the Appeal Court is bound to enquire into the correctness of the non-appealable judgment (*Gordon v Taub* 1942 SWA 17, 18; *Pretoria Garrison Institutes* (*supra*) 863). If the non-appealable judgment was wrong, the appealable costs order is also wrong, although the dissent expressed by the Court of Appeal on the correctness of the non-appealable judgment has no legal effect on it (*Pretoria Garrison Institutes* (*supra*) 846). The inevitable result in this case is therefore that the costs order made by the magistrate must be set aside.

[25] I pause as this juncture to mention that I did not raise the issue of the appealability of the magistrate's judgment with appellant at the time of the hearing as it did not occur to me at the time. However, I do not think that she is prejudiced by this fact for the following reasons. She probably would not have been able to address me on the legal issues without a postponement and incurring further expense. Some of the legal submissions she made in regard to her grounds of appeal proved to be relevant to this issue and in fact alerted me to the very question of appealability while preparing this judgment and I accepted those submissions in coming to my finding on the matter of whether the judgment has final effect. Furthermore, the appeal is partly successful and my finding that the judgment of dismissal is not appealable does not close the door in appellant's face. I point out again, for clarity's sake, that it is open to the appellant to

renew the rescission application in the magistrate's court, as the dismissal did not have the effect of a final judgment.

[26] I now come to the order to be made. Although appellant did not ask for the costs of the appeal, she must have had some disbursements in connection with the appeal. I think in the circumstances that it is just that she should be awarded the costs of the appeal, as it was the respondent who raised the point *in limine* and asked for the special costs order which led to this appeal. In the result I make the following order:

[27] The appeal against the costs order is allowed with costs. The costs order made by the magistrate is set aside.

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VAN NIEKERK, J

APPEARANCE FOR THE PARTIES:

For appellant:	In person