



**IN THE LAND CLAIMS COURT OF SOUTH AFRICA**


**HELD AT RANDBURG**

**CASE NO: LCC205/2021**

**Before: The Honourable Acting Judge Muvangua**

**Heard on: 16 November 2022**

**Delivered on: 6 February 2023**

<b>DELETE WHICHEVER IS NOT APPLICABLE</b>	
(1) REPORTABLE: <del>YES</del> / NO	
(2) OF INTEREST TO OTHER JUDGES: <del>YES</del> / NO	
(3) REVISED: <del>YES</del> / NO	
..6.Feb.2023 DATE	 SIGNATURE

In the matter between

**MINISTER OF DEPARTMENT OF RURAL  
DEVELOPMENT AND LAND REFORM**

First Applicant

**DIRECTOR GENERAL OF DEPARTMENT OF  
RURAL DEVELOPMENT AND LAND REFORM**

Second Applicant

**CHIEF LAND CLAIMS COMMISSIONER**

Third Applicant

**REGIONAL LAND CLAIMS COMMISSIONER:  
EASTERN CAPE PROVINCE**

Fourth Applicant

and

**KHOLEKA GLADYS POIT**

First Respondent

**NOMBULELO MAVIS GENGE**

Second Respondent

**MARGARET NOUZOLA QUMA**

Third Respondent

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## **JUDGMENT**

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**MUVANGUA AJ.**

### **Introduction**

- [1] The applicants seek an order from this court condoning the late filing of their answering affidavit in review proceedings before this court and under the same case number. I will refer to those proceedings as the main proceedings in this judgment.
- [2] The application for condonation arises out of the following background. On 6 December 2021, the respondents, who are the applicants in the main proceedings, filed an application for the review and setting aside of: a decision to pay them (respectively) compensation of R36 000.00 in respect of claims lodged by the applicants (in the main proceedings); as well as for the review and setting aside of the respective settlement agreements that were signed by the first and second respondents.
- [3] The applicants (who are respondents in the main proceedings) filed their notice of intention to oppose the review application on 10 January 2022. In

terms of rule 35 of the Land Claims Court,<sup>1</sup> the applicants ought to have dispatched the record of decision within 15 days. The record was dispatched two months later, and it was indexed on 31 March 2022. The respondents then prepared and filed their supplementary affidavit on 6 April 2022. This set in motion the *dies* for the filing of an answering affidavit by the applicants. It was common cause between the parties before me that the answering affidavit was due to be filed by 29 April 2022.

- [4] The respondents served the applicants with a notice of bar on 12 May 2022, which required them to file an answering affidavit by 19 May 2022. The applicants filed their answering affidavit 15 days out of time, on 26 May 2022.

### **Legal Principles Applicable to the Granting of Condonation**

- [5] The principles applicable to the granting of condonation are settled in law. The Constitutional Court in *Mphephu-Ramabulana*<sup>2</sup> summarised the legal position as follows:

“... compliance with this Court's Rules and timelines is not optional, and ... condonation for any non-compliance is not at hand merely for the asking. The question in each case is "whether the interests of justice permit" that condonation be granted. Factors such as the extent and cause of the delay, the reasonableness of the explanation for the delay, the effect of the delay on the administration of justice and other litigants, and the prospects of success on the merits if condonation is granted, are relevant to determining what the interests of justice dictate in any given case.”<sup>3</sup>

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<sup>1</sup> Land Claims Court Rules GN 300 contained in Government Gazette 17804 of February 1997, as amended.

<sup>2</sup> *Mphephu-Ramabulana and Another v Mphephu and Others* (CCT 121/20) [2021] ZACC 43; 2022 (1) BCLR 20 (CC); 2021 JDR 2796 (CC).

<sup>3</sup> *Mphephu-Ramabulana* at para 33.

[6] The court may take the following factors into account when determining whether the interests of justice permit the granting of condonation: the nature of the relief sought;<sup>4</sup> the extent and cause of the delay;<sup>5</sup> the reasonableness of the explanation for the delay;<sup>6</sup> the importance of the issue to be raised;<sup>7</sup> the effect of the delay on the administration of justice and other litigants;<sup>8</sup> and the prospects of success on the merits if condonation is granted.<sup>9</sup>

[7] The Constitutional Court in *Mphephu-Ramabulana* also noted that “*the extremity of the delay, coupled with the paucity of the explanation provided, justify the immediate refusal of condonation*”, but “*lateness and inadequacy of the explanation provided are not necessarily dispositive of the question of condonation. This is because the other factors relevant to condonation may favour its granting and tilt the interests of justice to the other side of the scale.*”<sup>10</sup>

### **Reasons for the delay**

[8] The reasons provided for the late filing of the applicants’ answering affidavit all concern their legal representatives. The first reason is that although they received the supplementary affidavit on 6 April 2022, their counsel was not available to consult for three weeks. Counsel was only able to consult with clients for purposes of preparing answering affidavit on the day that it was due – on 29 April 2022. There is no explanation in the founding affidavit for

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<sup>4</sup> *Grootboom v National Prosecuting Authority and Another* (CCT 08/13) [2013] ZACC 37; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC); [2014] 1 BLLR 1 (CC); (2014) 35 ILJ 121 (CC) at para 22.

<sup>5</sup> *Brummer v Gorfil Brothers Investments (Pty) Ltd* [2000] ZACC 3; 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC) at para 3

<sup>6</sup> *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)* [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) at para 20.

<sup>7</sup> *Grootboom* at para 22.

<sup>8</sup> *Brummer* at para 3.

<sup>9</sup> *Mankayi Mankayi v AngloGold Ashanti Ltd* [2011] ZACC 3; 2011 (3) SA 237 (CC); 2011 (5) BCLR 453 (CC) at para 8.

<sup>10</sup> *Mphephu-Ramabulana* para 38.

why the attorney could not, in the interim, consult with the clients, or why another counsel who had availability could not be briefed to prepare answering papers. On the appointment of another counsel, the applicants state boldly in the replying affidavit that the State Attorney relies on a tender process in the appointment of counsel, and that the administrative process of appointing counsel “is long and tedious”. However, the applicants provided no detail that explains what the appointment process entails, how long it takes, and whether there are ways of appointing counsel expeditiously. During oral argument, I sought to enquire from counsel for the applicants whether/how the State Attorney appoints counsel in urgent matters. She was not able to provide an answer.

- [9] The second reason is that the attorney at the office of the State Attorney who was seized with the matter was too ill and needed to be off work for about two weeks – from 6 May 2022 to 19 May 2022. She was only able to return to work on 23 May 2022. On her return to work, she found an email from counsel with an attached draft answering affidavit. There is no allegation about when the draft was sent or what the date stamp on the email attaching the affidavit was. She also realised then that she had received a notice of bar from the respondents. She “put pressure on the clients to have the affidavit commissioned so that it could still be served and filed”. As a side observation – I note that there are no allegations about the clients having been afforded an opportunity to consider and apply their minds to the draft affidavit. They were pressurised to sign the affidavit and have it commissioned, without more. Clients had the affidavit commissioned and returned it to the attorney on the same day, 23 May 2022. However, the affidavit was not served and filed with the same urgency that clients were required to sign and have it commissioned.

[10] The attorney for the applicants explains in the founding affidavit that she then took time to attend to urgent issues that needed her attention. In other words, the attorney had a commissioned affidavit that was already late and that needed to be served and filed. Instead of requesting the messenger to attend to it, she elected to let it sit there for more time. Inexplicably, and while in possession of an affidavit that was commissioned and ready for dispatch, the applicants' attorney wrote an email to the respondents' attorneys on 25 May 2022, requesting for more time to file her clients' answering affidavit, on account of her having been unwell and off work for two weeks, from 6 May 2022 to 20 May 2022. The affidavit was in fact due on 29 April 2022, a week before she went on sick leave. There is no explanation in the papers to cover that period.

[11] The applicants' attorney explains in her replying affidavit that another attorney could not be appointed to facilitate the processing of the answering affidavit in her absence because *she* was seized with the matter. There are no allegations on the papers to suggest that she participated in the drafting of the answering affidavit, or the reviewing of the draft answering affidavit. This indicates to me that another attorney could have been assigned to do the administrative processing of the answering affidavit.

### **Interest of Justice Override**

[12] I was unpersuaded by applicants' explanation for the delay in the filing of their answering affidavit. In my view, the explanation provided fell short of the required standard of good cause. I am, however, minded to grant the application, because it is (in the circumstances of this case), in the interests of justice to do so. Disallowing the applicants' answering affidavit would mean that the matter would proceed without hearing from them. That cannot

serve the proper administration of justice. More so because the Minister had nothing to do with the late filing of the answering affidavit.

[13] It is in the interests of justice for a court to adjudicate a dispute on the basis of the fullness of all the evidence before it. It would not be in the interests of justice for the court to determine the review application without the views and evidence of the applicants.

### **Costs**

[14] The delay in the filing of the applicants' answering affidavit was solely the result of their legal representatives. This is rather unfortunate. However, the respondents were justified in opposing the application for condonation on the grounds that they did. They ought to be entitled to costs, especially given that the reasons for the delay were simply not satisfactory.

[15] The circumstances of this case justify a departure from this court's practice of not ordering costs. The applicants in this case must bear the costs of the application for condonation.

### **Order**

[16] The following order is made:

16.1 The applicants' failure to file their answering affidavit timeously is condoned.

16.2 The applicants are granted leave to file their answering affidavit within five (5) days from the date of this order.

16.3 The applicants are to pay for the costs of this application.



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**N Muvangua**

Acting Judge

Land Claims Court

Appearances

**Counsel for the applicants:**

L Hesselman

**Instructed by:**

State Attorney

**Counsel for the first respondent:**

AM Maseti

**Instructed by:**

Maci Incorporated