

THE REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

- | | |
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| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: |

Date: **14th November 2022** Signature:

CASE NO: A5043/2021

In the matter between:

MOKADI, AUBREY TSHEDISO

Appellant

and

NATIONAL TERTIARY RETIREMENT FUND

Respondent

Coram: Molahlehi, Adams *et* Mahalelo JJ

Heard: 16 May 2022 – The ‘virtual hearing’ of the Full Court Appeal was conducted as a videoconference on *Microsoft Teams*.

Delivered: 14 November 2022 – This judgment was handed down electronically by circulation to the parties' representatives *via* email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 11:30 on 14 November 2022.

Summary: Appeal – application for condonation – for late prosecution of appeal – Uniform Rules 49(6)(a) and 49(7)(a) – inordinate delay – full explanation for delay to be given – if not, reasonable belief induced that order

unassailable – condonation after inordinate delay and in absence of reasonable explanation undermining principle of finality and not in interests of justice.

Civil procedure – setting aside of writ – writ will be incompetent if the amount payable under the judgment can only be ascertained after deciding a further legal problem – no prospects of success on appeal.

Condonation application refused.

ORDER

On appeal from: The Gauteng Division of the High Court, Johannesburg (Van der Linde J sitting as Court of first instance):

- (1) The appellant's application for condonation of his non-compliance with the provisions of Uniform Rule of Court 49(6)(a), read with Rule 49(7)(a), is dismissed with costs.
- (2) The appellant's appeal is struck from the roll.
- (3) The order of the court *a quo* is confirmed.
- (4) The appellant shall pay the respondent's costs of the appeal, such costs to include the costs consequent upon the employment of Senior Counsel.

JUDGMENT

Adams J (Molahlehi et Mahalelo JJ concurring):

[1] The National Tertiary Retirement Fund ('the Fund'), the respondent¹ in this appeal, brought an application in the Gauteng Division of the High Court, Johannesburg (the High Court), in which it sought an order setting aside a warrant of execution issued against its property by the appellant² ('Mr Mokadi') on 22 July 2016. The writ had been issued by the appellant pursuant to and on

¹ The applicant in the court *a quo*;

² The first respondent in the court *a quo*;

the basis of an award made by the Pension Funds Adjudicator ('the Adjudicator') on 19 September 2012, in terms of which the Fund was ordered to pay to Mr Mokadi his withdrawal benefit, together with interest thereon, less deductions, to be computed by the Fund 'in terms of its rules'. The Fund's computation of the amount due to Mr Mokadi – at the time – came to a total of R1 222 785.22, which they paid on 28 September 2012. Subsequently, the Fund established that, due to an administrative error on their part, the aforesaid amount was incorrectly calculated and that, in fact, the amount that should have been paid to Mr Mokadi was R843 231. This meant that, according to the Fund, the sum of R379 554.82 had been overpaid by it to Mr Mokadi. And on 26 July 2016, the Fund claimed back the said amount from Mr Mokadi.

[2] Mr Mokadi disputed that he had been overpaid and informed the Fund on 1 July 2016 that, according to his calculations, he was in fact still owed R705 245.24, which he then demanded from the Fund, failing which, so the demand read, he would be proceeding with the issue of a writ to recover the said sum. True to his word, Mr Mokadi, on 16 July 2016, issued a warrant of execution against the Fund's property. It is this writ which the Fund applied to have set aside in the High Court. And on 20 March 2018, Van der Linde J granted the order sought by the Fund and set aside the writ. Subsequently – on 10 May 2019 – Van der Linde J granted Mr Mokadi leave to appeal to this Full Court of the Division.

[3] In issue in this appeal is whether the high court was correct in setting aside the writ. Crystallized further, the issue to be considered in this appeal is whether the award by the Adjudicator possessed the degree of liquidity or certainty with respect to the amount of money which the Fund was ordered to pay to Mr Mokadi, as would have justified the issue of the writ of execution. Mr Mokadi's case in this appeal, as it was in the main application before Van der Linde J, was in essence to the effect that the amount contained in the writ, namely the R705 245.24, which was based on the Fund's own determination of the total of the withdrawal benefit due to him, was liquid and certain. These amounts were accepted as correct, so Mr Mokadi alleges, by the Fund throughout the litigation between the parties from the High Court all the way to

the Supreme Court of Appeal. It is therefore of no moment, so Mr Mokadi contends, that the Fund *ex post facto* ascertained that their initial calculations were incorrect.

[4] Prior to me dealing with the merits of the appeal, there is the not so small matter of an application for condonation by Mr Mokadi, which requires my consideration and which may very well be dispositive of the appeal. I now turn my attention to that issue.

[5] The condonation application relates to the fact that, by all accounts, the appeal has lapsed as a result of non-compliance by Mr Mokadi with the provisions of Uniform Rules of Court 49(6)(a) and 49(7)(a), which provides as follows: -

- '(6)(a) 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 at the same time furnish him with his full residential address and the name and address of every other party to the appeal and if the appellant fails to do so a respondent may within ten days after the expiry of the said period of sixty days, as in the case of the appellant, apply for the set down of the appeal or cross-appeal which he may have noted. If no such application is made by either party, the appeal and cross-appeal shall be deemed to have lapsed: Provided that a respondent shall have the right to apply for an order for his wasted costs.
- (b) The court to which the appeal is made may, on application of the appellant or cross-appellant, and upon good cause shown, reinstate an appeal or cross-appeal which has lapsed.
- (7)(a) At the same time as the application for a date for the hearing of an appeal in terms of subrule (6)(a) of this rule the appellant shall file with the registrar three copies of the record on appeal and shall furnish two copies to the respondent. The registrar shall further be provided with a complete index and copies of all papers, documents and exhibits in the case, except formal and immaterial documents: Provided that such omissions shall be referred to in the said index. If the necessary copies of the record are not ready at that stage, the registrar may accept an application for a date of hearing without the necessary copies if—
- (i) the application is accompanied by a written agreement between the parties that the copies of the record may be handed in late; or

- (ii) failing such agreement, the appellant delivers an application together with an affidavit in which the reasons for his omission to hand in the copies of the record in time are set out and in which is indicated that an application for condonation of the omission will be made at the hearing of the appeal.'

[6] Mr Mokadi's notice of appeal was duly delivered on 11 June 2019, which incidentally was delivered a few days out of time. There is however an application for condonation of the late filing of the said notice and my reading of the Fund's case is that they do not take issue with this application for condonation, which should be granted.

[7] The same cannot however be said of the non-compliance with the aforementioned rules. As indicated, the notice of appeal was delivered on 11 June 2019, which means that Mr Mokadi ought to have applied for a hearing date and filed the appeal record, or at the very least ought to have filed the application in terms of subrule 7(b)(ii), by about 2 September 2019. This was not done by Mr Mokadi. Instead, his application for a date for the hearing of the appeal in terms of rule 49(6)(a) was only filed on or about 5 July 2021 – therefore, about twenty months late. This then means that the appeal had lapsed as envisaged by the said rule.

[8] Mr Mokadi applies for condonation for his non-compliance with the provisions of rules 49(6) and 49(7) and, by implication, for an order in terms of rule 49(6)(b), reinstating the lapsed appeal. In support of his condonation application, Mr Mokadi proffers the following explanation for the delay in the prosecution of the appeal.

[9] He explains that after his notice of appeal was delivered on or about the 11 June 2019 and for the remainder of 2019, his attorney of record did not attend to the preparation of the appeal record as he was required to do in terms of the aforesaid rule 49(6) and (7). Thereafter, so Mr Mokadi's explanation continues, the country was plunged into the Covid-19 pandemic, which presumably explains the inactivity on the part of his legal representatives. The foregoing, according to Mr Mokadi, coupled with his 'precarious financial position that he found himself in due to the pandemic', which meant that he

could not place his legal representatives in funds to enable them to continue assisting him in the litigation, caused the delay in the appeal record only being prepared and acquired during 2021. Additionally, so Mr Mokadi avers, he suffered from 'severe emotional stress due to his financial position and the litigation', which is a further explanation for the undue delay in the prosecution of the appeal.

[10] This is the sum total of the explanation for the non-compliance by Mr Mokadi with the periods prescribed by the aforesaid rule in respect of the prosecution of the appeal. In essence, he blames Covid-19, his lack of funds and stress for his failure to apply for the hearing date before 2 September 2019. For starters, no explanation is proffered for why the said rule was not complied with on or before 2 September 2019. Even less is said about the reasons for the inactivity from September 2019 to March 2020, when the country was for the first time placed under lockdown. What is more is that neither Mr Mokadi nor his attorneys explain why he did not avail himself of the provisions of rule 49(6)(b).

[11] The question to be asked is whether this explanation is adequate for purposes of the reinstatement of the lapsed appeal, if regard is had to what was said by the Constitutional Court in *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)*³, in which the following was held: -

'[20] This court has held that the standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success.

... ..

[22] An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And, what is more, the explanation given must be reasonable. The explanation given by the applicant falls far

³ *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC);

short of these requirements. Her explanation for the inordinate delay is superficial and unconvincing.'

[12] The same can be said of the explanation by Mr Mokadi for the delay in the prosecution of the appeal, which is superficial and unconvincing. It amounts to nothing more than this. During the entire period of approximately twenty months the appeal was not prosecuted because his legal representatives did nothing from September to December 2019, whereafter the pandemic hit and then there were also financial difficulties. This explanation falls far short of the requirement that a full explanation for the delay must be given and it should cover the full period of the delay.

[13] This, in my view, means that the application for condonation should fail. There is another reason why the application for condonation should not succeed and that relates to the important principle, alluded to in *Van Wyk* (supra), that an inordinate delay induces a reasonable belief that the order had become unassailable. As was held by the Constitutional Court, '[a] litigant is entitled to have closure on litigation. The principle of finality in litigation is intended to allow parties to get on with their lives. After an inordinate delay a litigant is entitled to assume that the losing party has accepted the finality of the order and does not intend to pursue the matter any further. To grant condonation after such an inordinate delay and in the absence of a reasonable explanation, would undermine the principle of finality and cannot be in the interests of justice.'

[14] The only question remaining is whether there are any other considerations relevant to the application for condonation. In my view, there are none, excepting only the prospect of success on appeal. In that regard, it was submitted by Mr Van den Berg SC, who appeared on behalf of the Fund with Mr Lubbe, that the Court *a quo*'s judgment and its reasoning cannot be faulted. It relied extensively on the decision in *De Crespigny v De Crespigny*⁴, which held as follows: -

'In the result I think that it can be stated authoritatively that a writ of execution which has been issued will be held to be incompetent if the amount payable under the

⁴ *De Crespigny v De Crespigny* 1959 (1) SA 149 (N);

judgment can only be ascertained after deciding a further legal problem. (I need not decide what degree of factual uncertainty in a judgment renders execution incompetent.)’

[15] I agree with these submissions. In this matter, if regard is had to the conflicting versions of the opposing parties relative to the computation of the amount due to Mr Mokadi, there can be no doubt that a further legal problem requires to be decided before it can be said that the amount of the writ is payable to Mr Mokadi. The point is simply this. The determination of the Adjudicator ordered the Fund to ‘compute [Mr Mokadi’s] withdrawal benefits in terms of its rules, together with interests at the rate of 15.5% from 2 June 2010 ...’ and to thereafter make payment to him of the withdrawal benefit, ‘less any deductions permissible in terms of the Act ...’. From this it is abundantly clear that the amount payable in terms of the Adjudicator’s determination is one legal step removed from the said determination, that being the computation by the Fund. That computation was done, but same is not acceptable to Mr Mokadi, which, if anything, reiterates the point that the writ was incompetent because its amount cannot possibly be said to be certain.

[16] It bears emphasising that the amount of the writ, on first principles, was at variance with the Adjudicator’s determination – it was not for an amount according to the computation by the Fund, but for an amount according to Mr Mokadi’s computation. On this basis alone, the writ was incompetent and was therefore correctly set aside by Van der Linde J. As was correctly submitted by Mr Van den Berg, Mr Mokadi’s remedy is to apply for a ‘definition of his rights under the judgment’, which can be done by an application for a declarator or in the course of applying for leave to execute.

[17] The effect of the foregoing is that the consideration relating to the prospects of success on appeal also mitigates against Mr Mokadi’s condonation application, which falls to be dismissed.

[18] Finally, in his judgment on the application for leave to appeal, Van der Linde J expressed concerns about the fact that a related previous interim order by the High Court (per Reyneke AJ) contemplated that, in the application which

served before him (Van der Linde J), the issue of the Fund's indebtedness and the amount thereof, should be decided. In other words, he considered that he ought to have adjudicated the issue of the amount of the Fund's indebtedness to Mr Mokadi (if any). I cannot agree with this. The crucial issue which required adjudication by Van der Linde J was simply whether the writ was validly issued. And the order of Reyneke J was therefore not relevant.

[19] For all of these reasons, the appellant's application for condonation should be dismissed and the appeal should be struck from the roll.

Costs of Appeal

[20] The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so. See *Myers v Abramson*⁵.

[21] I can think of no reason to deviate from the general rule. The appellant should therefore pay the respondent's costs of the appeal. In that regard, Mr Van den Berg has urged us to order costs on a punitive scale. I am not persuaded that a case has been made out for such an order.

Order

[22] In the result, the following order is made: -

- (1) The appellant's application for condonation of his non-compliance with the provisions of Uniform Rule of Court 49(6)(a), read with Rule 49(7)(a), is dismissed with costs.
- (2) The appellant's appeal is struck from the roll.
- (3) The order of the court a quo is confirmed.
- (4) The appellant shall pay the respondent's costs of the appeal, such costs to include the costs consequent upon the employment of Senior Counsel.

⁵ *Myers v Abramson* 1951(3) SA 438 (C) at 455

L R ADAMS
Judge of the High Court
Gauteng Local Division, Johannesburg

HEARD ON: 16th May 2022 – in a ‘virtual hearing’ during a videoconference on *Microsoft Teams*.

JUDGMENT DATE: 14th November 2022 – judgment handed down electronically

FOR THE APPELLANT: In person

INSTRUCTED BY: In person

FOR THE RESPONDENT: Adv Pieter van der Berg SC, together with Advocate Jan Lubbe

INSTRUCTED BY: Shepstone & Wylie Attorneys, Sandton