

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case No: 20209/2019

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

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SIGNATURE

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DATE

In the matter between:

DRAGON CITY MANAGEMENT (PTY) LIMITED

First Applicant

ANCHOR PROJECTS (PTY) LIMITED

Second Applicant

And

THE ANGLICAN CHURCH OF SOUTHERN AFRICA:

DIOCESE OF JOHANNESBURG

Respondent

In Re:

THE ANGLICAN CHURCH OF SOUTHERN AFRICA:

DIOCESE OF JOHANNESBURG

Applicant

And

DRAGON CITY MANAGEMENT PROPRIETARY LIMITED

REGISTRATION NUMBER: 2016/351548/07

First Respondent

ANCHOR PROJECTS PROPRIETARY LIMITED**REGISTRATION NUMBER:** 2016/351555/07

Second Respondent

JUDGMENT

Matojane J

Introduction

[1] This is a condonation application to condone the first and second applicants' late filing of the replying affidavit to the applicants' condonation application for the late filing of the review of taxation.

[2] The taxation took place on 7 September 2021, resulting in a taxed bill of costs in the amount of R602,694.55. The applicants had 15 days within which they could bring an application for review of the taxed bill of costs. The last day being 29 September 2021.

Background facts relevant to the two applications

[3] The litigation between the parties has been long and arduous, spanning over about two years. The litigation commenced with an urgent application on 13 November 2018, which resulted in an order by the agreement being made that applicants would stop construction work on the respondent's property pending mediation. The mediation effort was unsuccessful. On 16 May 2020, this Court granted an order evicting the applicants from the respondent's properties. On 31 June 2020, the applicants unsuccessfully applied for leave to appeal the high court order. The application was dismissed with costs. Thereafter applicants unsuccessful sought to rescind the judgment and order of the high Court.

[4] after that, the applicants petitioned the Supreme Court of Appeal for leave to appeal, which was also dismissed with costs. The applicants then brought an application to the Supreme Court of Appeal for reconsideration, and the application was also dismissed with costs on 16 December 2020.

[5] The bill of costs was finally taxed on 7 September 2021, resulting in a taxed bill of costs in terms of which applicants are to pay an amount of R602,694.55. The

applicants did not respond to the defendant's attorney's letter demanding payment, and on 6 October 2021, another letter was dispatched by the respondent incorporating the additional taxed allocator for the failed application for reconsideration in terms of section 17(2)(f). The letter specifically stated that should payment not be forthcoming, a warrant of execution would be issued.

[6] The respondent instructed the sheriff to attach all the applicants' movable goods that were still being illegally stored on the respondent's property in contravention of the court order.

[7] On 18 October 2021, the sheriff attempted to remove the attached goods. The following day on 19 October 2021, a week after the attachment, the applicants brought the condonation application with the review application attached. After that, the applicants paid the amount of R602,694.55 to the respondent's attorneys in terms of the taxed bill of costs dated 7 September 2021.

[8] According to the sheriff's return of service in respect of the removal of the attached goods dated 28 October 2021, the applicants vacated the respondent's premises and unlawfully removed the goods that were under judicial attachment.

[9] The respondent filed its opposing affidavit to the condonation application on 29 October 2021. The *dies* for the applicants to file a replying affidavit lapsed on 15 November 2021 in terms of Rule 6(5)(e), and the applicants' heads of argument were due on 29 November 2021.

[10] On 13 December 2021, the respondent placed the applicants on teams to comply with the practice directive and file their heads of argument, failing which an application to compel would be launched. On 15 December 2021, the applicants sent an email to the respondent requesting an indulgence to file heads of argument on 14 January 2022 due to the closure of their offices that day for the festive period. The applicants were afforded an extension of time until 14 January 2022 to deliver heads of argument. The applicants filed heads of argument on 18 January 2022 instead. All along, the applicants gave the impression that no replying affidavit would be filed. It is not explained why the applicants chose to file the replying affidavit on 10 February 2022 and the condonation application only on 24 February 2022. The delivery of the replying affidavit was not only excessively out of time (72 days late), it was served a

month after both parties had filed their respective heads of argument, which is irregular.

Applicable legal principles

[11] The Constitutional Court restated the legal principles applicable to the granting of condonation in *Steenkamp and Others v Edcon Limited*¹ as follows:

[36] Granting condonation must be in the interest of justice. This Court in *Grootboom* set out the factors that must be considered in determining whether or not it is in the interests of justice to grant condonation:

"[T]he standard for considering an application for condonation is the interests of justice. However, the concept of 'interests of justice' is so elastic that it is not capable of precise definition. As the two cases demonstrate, it includes 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. It is crucial to reiterate that both *Brummer* and *Van Wyk* emphasise that the ultimate determination of what is in the interests of justice must reflect due regard to all the relevant factors, but it is not necessarily limited to those mentioned above. The particular circumstances of each case will determine which of these factors are relevant.

It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the Court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or Court's directions. Of great significance, the explanation must be reasonable enough to excuse the default.

The interests of justice must be determined with reference to all relevant factors. However, some of the factors may justifiably be left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party. As a general proposition the various factors are not individually decisive but should all be taken into account to arrive at a conclusion as to what is in the interests of justice."

¹ [2019] 11 BLLR 1189 (CC), See also *Melane v Santam Insurance Co. Ltd* 1962 (4) SA 531 at 532.

[12] The explanation provided by the applicants for the delay in filing the replying affidavit is unacceptable, unreasonable and unsatisfactory in a number of respects. First, the applicants allege that they had to procure the instructions of their managing director, Shuk Wa Lam ("Lam"), who, as of 12 November 2021, was in the process of preparing for a three-month trip to visit her minor children in Hong Kong on 19 November 2021. It is alleged that she could not find time during this period to deal with the replying affidavit as she was involved in numerous meetings in which arrangements were made for the running of her extensive business interests once she was away.

[13] The replying affidavit was due on 15 November 2021. There is no adequate explanation why applicants could not arrange to obtain instructions from Lam before her departure on 19 November 2021 when they knew that Lam would be out of the country for three months. In any event, Lam is not the deponent to either the founding affidavit or the replying affidavit in the condonation application for the review of the taxation. She would not have had insight into the taxation of the bill of costs. The applicants do not state what instructions were required from Lam or why these instructions could not have been obtained electronically or via email.

[14] Second, the allegation is made that once Lam arrived in Hong Kong, it was difficult to obtain proper instructions from her because of the time difference between Hong Kong and South Africa. There is no explanation to show how the attorneys could not obtain instructions from Lam based on time differences. There is no explanation for why the attorneys could not use accessible electronic means to obtain instructions. On the applicants' version, they could not obtain instructions, yet they delivered the replying affidavit five days before Lam arrived back in South Africa.

[15] Third, the applicants' attorneys state that they closed for the year-end break on 15 December 2021 and reopened on 10 January 2022 and that the attorney dealing with the matter on behalf of the applicants was extremely ill with Covid and only managed to return to work on 17 January 2022. The further allegation is made that the other attorney dealing with the matter was diagnosed with a severe lung infection and could only commence with work on 24 January 2022.

[16] The difficulty with these explanations is that the replying affidavit was due on 15 November 2021, which is a full month before any office closures. Accordingly, the office closure and the December rush played no role in the replying affidavit not being served timeously. The same applies to the attorneys handling the matter on behalf of the applicants being sick; according to the applicants, they were delivering their heads of argument on 14 January 2022 in the same matter. There is no suggestion that the attorneys were sick at the time the replying affidavit was due. The applicants have thus failed to provide an explanation that expounds the full duration of the period of delay. In *Uitenhage Transitional Local Council v South African Revenue Service*² 2004 (1) 292 (SCA), the Court held that

"...condonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility."

[17] Given the extent of the delay and the poor explanation for the delay, it is not, in my view, necessary to consider the applicants' prospect of success in the main application.

Condonation for late application for review of the taxed bill of costs

[18] Just like the explanation for the late serving and filing of the replying affidavit, the applicants were required to provide a reasonable explanation for the delay in serving and filing the review application.

[19] The applicants' attorney alleges that the applicants were only made aware of the taxed bill of costs on 8 September when the respondent's attorney sent a communication demanding payment of the taxed amount. The attorney consulted with the applicants on 13 September 2021 and was instructed to file a review application. The two attorneys, having been present in the consultation with the applicants, had mistakenly believed that the other team member would instruct the cost consultant. The applicant alleges that the cost consultant was formally instructed on 27 September 2021.

[20] It bears mentioning that the same expert tax consultant, Mr Fuls, who was allegedly instructed on 27 September 2021, attended to and opposed the taxation on behalf of the applicants for several days, starting on 23 June 2021 to 7 September

² 2004 (1) 292 (SCA)

2021. Mr Fuls raised the disputed points in the bill during the taxation; accordingly, there was nothing new to consider for purposes of preparing a review application. The applicants had failed to explain why it took 13 days to finalize the review application when only a portion of the bill of costs was being disputed.

[21] It is trite that invariably a litigant cannot be excused if the blame lies with the attorney. In *Saloojee and Another NNO v Minister of Community Development*³, the then AD stated the following about lack of diligence on the part of an attorney and how a litigant that chose that attorney as its representative should not be absolved from the normal consequences of such a relationship. The Court held:

"I should point out, however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with his attorney. There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence, or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect on the observance of the Rules of this Court. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity. In fact, this Court has lately been burdened with an undue increasing number of applications for condonation in which the failure to comply with the Rules of this Court was due to neglect on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the consequences of the failure are."

[22] The applicants have thus failed to provide a reasonable and acceptable explanation for the delay rendering the prospects of success immaterial. In any event, the prospect of success in a condonation application is one of the factors to be taken into account when assessing whether it is in the interests of justice to grant or refuse condonation. The Court must also weigh the following other factors against one another, the respondent's interest in the finality of the judgment, the convenience of the Court, and the avoidance of unnecessary delay in the administration of justice, the list is not exhaustive.

Every step taken by the applicants has been out of time. The replying affidavit in the condonation application for the late filing of an application to review taxation was filed out of time. The applicants delivered heads of argument out of time before filing their replying affidavit. They unlawfully removed goods that were under judicial

³ 1962 (2) SA 135 (A) at 141 C-E

attachment in contempt of the court order. This flagrant disregard for the rules of the Court and abuse of the court process is also a factor to be taken into account in assessing the interest of justice. In my view, the cumulative effect of all relevant factors is such that it would not be in the interest of justice to grant the condonation applications sought.

In the result, the following order is made.

1. The application for the condonation of the late serving and filing of the review of taxation application dated 18 October 2021 is refused.
2. The application for the late serving and filing of the replying affidavit dated 10 February 2022 is refused.
3. The applicants are ordered to pay the costs jointly and severally, the one paying the other to be absolved.

KE MATOJANE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

For the Plaintiff:

Advocate J Kaplan

Advocate L de Wet

Instructed by Ian Levitt Attorneys

For the Defendant:

Advocate S Jackson

Instructed by Cherry-Singh Inc. Attorneys

