

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2019/13587

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

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S.E. WEINER

23 JUNE 2022

In the matter between:

MAHENDREN MUNSAMY

First Applicant

LEEGALE FRANCESCA ADONIS

Second Applicant

and

RICHARD KEAY POLLOCK N.O.

First

Respondent

THE MASTER OF THE HIGH COURT, JOHANNESBURG

Second Respondent

This judgment was handed down electronically by circulation to the parties' and/or the parties' representatives by email and by being uploaded to Case Lines. The date and time for hand-down is deemed to be 10h00 on 23 June 2022.

JUDGMENT

WEINER J:

Introduction

- [1] Castle Crest Properties 16 (Pty) Ltd ("Castle Crest"). was placed under provisional liquidation on 21 October 2015 by order of this Court. The first respondent (Mr

Pollock) together with Mr Hashim Ismail (who is now deceased), were appointed the joint provisional liquidators (the joint liquidators) of Castle Crest on 16 November 2015 pursuant to that order. The provisional liquidation order was made final on 2 February 2017. Despite the final order of winding up Castle Crest having been granted over six years ago, there were substantial delays in the Master's office making a final appointment of a liquidator.¹ The first applicant (Mr Munsamy) is an erstwhile director of Castle Crest, and the second applicant was a member.

[2] On 20 June 2019 this Court, per Mia J, granted an order extending the provisional liquidators' powers. The applicants applied for the rescission of that order. Mr Pollock, now the sole provisional liquidator, filed a notice in terms of rule 6(5)(d)(iii) of the Uniform Rules of Court, in which he raised the following points *in limine*, which he contends are dispositive of this application for rescission:

- a. Firstly, he contends that the Applicants have failed to establish *locus standi*;
- b. Secondly, he contends that the application is considerably out of time, an abuse of Court process, and that condonation thus ought not to be granted for the applicants' failure to bring this application timeously.

Background

[3] According to Mr Pollock, the liquidation process, and his role as the provisional liquidator, has been frustrated by the conduct of the applicants, particularly Mr Munsamy, who has engaged in dilatory tactics, notwithstanding the fact that he has been divested of control and interest in the company since the order of 21 October 2015. This is evident from the myriad of applications launched by the applicants for rescission, postponement, and other relief.

[4] Mr Pollock contended that whether these delays have been facilitated by Mr Munsamy or the Master's Office, is irrelevant. The fact is that there has been a

¹ Mr Pollock was apparently appointed final liquidator on ... February 2022. I enquired from the parties whether this rendered this application moot. The applicants did not agree and sought to file further heads of argument dealing with mootness, and whether Mr Pollock's appointment is valid, which have been filed. That issue will be dealt with in a further application to be heard.

significant and substantial delay in the appointment of a final liquidator in respect of Castle Crest., which has prejudiced Castle Crest's creditors.

- [5] A first meeting of creditors and members was held on 24 November 2017. Only Standard Bank proved a claim and the only persons nominated at that meeting for the position of final liquidator were the joint provisional liquidators. Until February 2022, the Master failed to make a final appointment. Although Mr Munsamy claims that he is a creditor of Castle Crest, he has, to date, failed to prove a claim.
- [6] Castle Crest's major assets comprise three immovable properties, one of which (the Hyde Park property) has been occupied by the applicants since before the liquidation and still is so occupied. They refuse to pay rental or for services to the liquidators, while consuming services at the property at the cost of Castle Crest, which obviously remains liable to the City of Johannesburg, for payment in respect of these services. As a result of this, the indebtedness of the company continues to grow. Thus, the provisional liquidators concluded that they would have to apply for their eviction.
- [7] The provisional liquidators determined that it was necessary to sell one of Castle Crest's immovable properties in order to fund the costs of administering the estate, in particular the costs involved in seeking the applicants' eviction from the Hyde Park property.
- [8] The provisional liquidators lacked the necessary powers to sell any of the properties, or to seek the applicants' eviction from the Hyde Park property. In March 2019, they wrote to the Master's office requesting an extension of their powers as provisional liquidators in order to sell an immovable property, and seek the applicant's eviction from the Hyde Park property. No response was received and the provisional liquidators therefore issued an application in April 2019. On 20 June 2019 Mia AJ, granted an order that:

"1. The Applicants, in their capacities as the provisional liquidators of Castle Crest Properties 16 (Pty) Ltd (in liquidation) ("the company"), are authorised and empowered to:

- 1.1. bring proceedings in the name of the company for the eviction of any and all persons in unlawful occupation of the property described as Portion 1 of Erf 212 Hyde Park Extension 25 Township; and
- 1.2. dispose of the properties by public auction, tender, or private contract and to give delivery thereof.”

[9] The eviction application was launched on 9 July 2019. The Mia AJ order was attached to the application for eviction which was served on Munsamy personally and on him on behalf of the second applicant on 16 July 2019. The application for rescission was issued on 29 June 2020, nearly a year later. The applicants complained that they should have been cited and joined in the application before Mia AJ. It is common cause that although they were not cited, they were in Court that day, but erroneously appeared in the wrong court and the Mia AJ order was granted by default.

Condonation

[10] An application for rescission must be brought:

- a. within 20 days, in terms of Rule 31(2); alternatively
- b. within a reasonable period if it is brought in terms of Rule 42 or the common law.

[11] If an applicant for rescission fails to bring such proceedings timeously, condonation must be sought and the reasons relating to the failure to bring the application timeously must be explained in full. The applicant must provide a proper explanation of the causes of the delay and explain each of the periods of delay.² It is not sufficient for an applicant to set out a ‘number of generalised causes without any attempt to relate them to the time-frame of its default or to enlighten the Court as to

² *SA Express Ltd v Bagport (Pty) Ltd* (160/2019) [2020] ZASCA 13; 2020 (5) SA 404 (SCA); *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as amicus curiae)* [2007] ZACC 24; 2008 (2) SA 472 (CC) para 22; *Laerskool Generaal Hendrik Schoeman v Bastian Financial Services (Pty) Ltd* [2009] ZACC 12; 2012 (2) SA 637 (CC) para 15.

the materiality and effectiveness of any steps taken by the Board's legal representatives to achieve compliance with the Rules at the earliest reasonable opportunity.³ The court has a discretion which the applicant must show should be exercised in its favour.

[12] In *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and Others*,⁴ Ponnar JA summarised the factors which are relevant in determining whether condonation should be granted. He stated that they would include 'the degree of non-compliance, the explanation therefor, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the convenience of this Court and the avoidance of unnecessary delay in the administration of justice'. The prospects of success are also relevant in the analysis, subject to what is stated below.

[13] In *Darries v Sheriff, Magistrate's Court, Wynberg and Another*,⁵ Plewman JA stated:

'Condonation of the non-observance of the Rules of this Court is not a mere formality... In all cases some acceptable explanation ... must be given... In applications of this sort the appellant's prospects of success are in general an important though not decisive consideration. When application is made for condonation it is advisable that the petition should set forth briefly and succinctly such essential information as may enable the Court to assess the appellant's prospects of success.... But the appellant's prospect of success is but one of the factors relevant to the exercise of the Court's discretion, unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation obviously unworthy of consideration. Where non-observance of the Rules has been flagrant and gross an application for condonation should not be granted, whatever the prospects of success might be....'

[14] As set out above, condonation has been refused in circumstances where the prospects of success may be good, but the explanation for the delay is unsatisfactory. If the explanation tendered is 'unconvincing and inadequate',

³ *Uitenhage Transitional Local Council v South African Revenue Service* 2004 (1) SA 292 (SCA) para 7.

⁴ *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and Others* [2013] ZASCA 5; [2013] 2 All SA 251 (SCA) para 11.

⁵ *Darries v Sheriff, Magistrate's Court, Wynberg and Another* 1998 (3) SA 34 (SCA) at 40H-41D, cited in *SA Express* (note 2 above) para 14.

condonation can be refused, where an applicant is responsible for a 'flagrant' disregard of the Rules. In *Madinda v Minister of Safety and Security*,⁶ the Court, in dealing with the balance required when considering the explanation for the delay and the prospects of success, stated that:

'In addition, that the merits are shown to be strong or weak may colour an applicant's explanation for conduct which bears on the delay: an applicant with an overwhelming case is hardly likely to be careless in pursuing his or her interest, while one with little hope of success can easily be understood to drag his or her heels.'⁷

[15] In *Laerskool Generaal Hendrik Schoeman v Bastian Financial Services (Pty) Ltd*,⁸ the Constitutional Court held that, '...after the period specified by the rules of this court has elapsed, the successful litigant...may reasonably infer that the...judgment has become final.' In *Miles Plant Hire (Pty) Limited v Commissioner for the South African Revenue Service*,⁹ the Court held that an inadequate application for condonation will not succeed where [an opposing litigant] has an interest in the finality of the court a *quo's* judgment. The resultant prejudice is not only that which is suffered by [such litigant] but also the effect on the function of the courts and the administration of justice, as was held in *Commissioner, South African Revenue Service v Van der Merwe*.¹⁰

[16] In *Nkata v Firstrand Bank Ltd*¹¹, the Western Cape High Court, per Rogers J held that an application for rescission should be dismissed on the basis that the applicant had not "satisfactorily explained the lengthy delay in seeking rescission." Further, in *Ferris v Firstrand Bank Ltd*¹² the Constitutional Court held, in a matter where condonation for the late filing of a rescission application was not opposed, that "the mere fact that there is no opposition and no apparent prejudice does not necessarily warrant granting condonation. Condonation cannot be had for the mere asking. " The

⁶ *Madinda v Minister of Safety and Security* [2008] ZASCA 34; 2008 (4) SA 312 (SCA).

⁷ *Ibid* para 12.

⁸ *Laerskool Generaal Hendrik Schoeman v Bastian Financial Services (Pty) Ltd* [2009] ZACC 12; 2012 (2) SA 637 (CC) para 22.

⁹ *Miles Plant Hire (Pty) Limited v Commissioner for the South African Revenue Service* [2015] ZASCA 98; [2015] JOL 33326 (SCA) paras 20-23.

¹⁰ *Commissioner, South African Revenue Service v Van der Merwe* [2015] ZASCA 86; 2016 (1) SA 599 (SCA) para 18.

¹¹ *Nkata v Firstrand Bank Ltd* 2014 (2) SA 412 (WCC) paras 26-29.

¹² *Ferris v FirstRand Bank Ltd* 2014 (3) SA 39 (CC) para 11.

court however, stated further that ‘...lateness is not the only consideration in determining whether condonation may be granted ... the test for condonation is whether it is in the interests of justice to grant it. As the interests-of-justice test is a requirement for condonation and granting leave to appeal, there is an overlap between these enquiries. For both enquiries, an applicant's prospects of success and the importance of the issue to be determined are relevant factors.’

[17] Thus, it is incumbent on this court to consider whether it is in the interests of justice to grant condonation. Although the applicants submitted that they became aware of the application on 26 November 2019, it is clear that they must have or at the least, should have been aware of the judgment as early as 15 July 2019, when the eviction application was served on them. As set out above, a period of approximately a year lapsed between when the applicants became aware of the Mia AJ order and when this application was filed on 29 June 2020.

[18] The reasons for the delay from 26 November are set out, but not in great detail. There are large unexplained gaps. More of concern is that the applicants have failed to deal with the period from 15 July 2019 to 26 November in that year. No explanation is provided for why the applicants took no steps to seek the rescission of the Mia AJ order in that period.

[19] The applicants submitted that due to the second applicant having contracted Covid and having surgery during the period from March 2020 to June 2020, they were unable to do anything about the rescission before June 2020. This version is, however, belied by the fact that during that period, they were able to file affidavits opposing the eviction application instituted by the joint provisional liquidators, and launch an application seeking a postponement of the eviction proceedings.

[20] The delays in the present matter and those other matters associated with it, have obviously had a major effect on the administration of Castle Crest's estate. Provisional liquidators' powers are restricted. They cannot proceed with essential aspects of winding up the estate. Creditors have been waiting for the winding up to be finalised since 2015. This element and the lack of finality is an issue which plays heavily on the mind of a Court dealing with condonation. Only if the prospects of

success are overwhelming should the delays in launching this application be condoned in the interests of justice¹³

- [21] In dealing with the interests of justice, the merits of the rescission application, will be dealt with briefly. The onus to establish whether the applicants have *locus standi* and ought to have been joined by the provisional liquidators in the main application rests on the applicants. In regard to joinder, they must demonstrate a direct and substantial interest in the main application. The applicants relied on the fact that the first applicant is a shareholder and creditor of Castle Crest (although, as stated above, he has not proved any claim against the company), and that Pollock has mismanaged the estate. Even if it is accepted that Munsamy is a creditor, if he was entitled to participate in these proceedings, simply by virtue of his status as creditor, all creditors of a company in liquidation would have to be cited in all similar applications. This proposition is untenable.
- [22] Whilst a court may have regard to the views of the creditors in a compulsory winding-up, when a provisional liquidator approaches a court, the ultimate decision "rests with the Court and no authority, directions or leave is required from the Master or creditors or contributories to enable provisional liquidators to apply to Court under sec 130(3) for leave to raise funds'.¹⁴
- [23] The issue of the applicants' standing is dependent on whether the relief sought by the provisional liquidators affects any of the applicants' rights. No relief was sought, or granted, against either of the applicants. In regard to the second applicant's status as a shareholder is concerned, and insofar as Munsamy may at some time, prove a claim against Castle Crest, the order extending the provisional liquidator's powers has no effect on any of their rights (in such capacities) to seek Pollock's removal as the liquidator of Castle Crest. The applicants have failed to show how the extension of the provisional liquidators' powers, to enable them to institute eviction proceedings

¹³ See for instance, the related case of *Munsamy and Another v Astron Energy (Pty) Ltd and Others* (2019/27101) [2021] ZAGPJHC 612 (15 September 2021)

¹⁴ *Ex Parte Contemporary Refrigeration (Pty) Ltd* 1966 (2) SA 227 (D) 231. This dictum was approved in the context of the Companies Act of 1973 in *Fourie NO v Le Roux* 2006 (1) SA 279 (T).

and to sell the Hyde Park property, has any impact on their residual rights, including participating in any surplus remaining after the winding-up of Castle Crest.

[24] The rights of the applicants will only be affected in the eviction application. The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (the PIE Act) has the necessary safeguards to ensure judicial oversight over the application for eviction. Their rights are not affected by the order of Mia AJ. Accordingly, the applicants lack standing to intervene in the main application, or to challenge the Mia AJ order.

[25] In my view, condonation must be refused. The delay is not fully explained; the prejudice to the creditors and members of Castle Crest is self-evident. The merits of the application show no prospects of success and it is accordingly not in the interests of justice to grant condonation.

[26] Accordingly:

1. The application is dismissed with costs.

S.E. WEINER
Judge of the High Court
Gauteng Local Division, Johannesburg

Heard: 04 February 2022 and 5 May 2022

Judgment: 23 June 2022

Appearances:

For Applicants: SJ van Rensburg SC
Instructed by: Vathers Attorneys

For First Respondent: AC McKenzie
Instructed by: Vermaak Marshall Wellbeloved Inc.