

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case Number: 51712/2017

(1)	REPORTABLE: YES NO
(2)	OF INTEREST TO OTHER JUDGES: YES NO
(3)	REVISED: YES ☒
6/3/2019	
DATE	SIGNATURE

COMMISSIONER FOR THE SOUTH AFRICAN
REVENUE SERVICES
SOUTH AFRICAN REVENUE SERVICES

First Applicant

Second Applicant

and
JACOB PETRUS JACOBUS NAUDE

Respondent

In re:
JACOB PETRUS JACOBUS NAUDE

Applicant

and
COMMISSIONER FOR THE SOUTH AFRICAN
REVENUE SERVICE
SOUTH AFRICAN REVENUE SERVICES

First Respondent

Second Respondent

JUDGMENT

MOLEFE J

[1] This is an application in terms of rule 27¹, for an order condoning the late filing of an answering affidavit by the Commissioner of the South African Revenue Service ("SARS"), the respondent in the main application, and extending the date of its filing to include the date on which it was filed, being 30 January 2018.

Background

[2] The main application was launched by the applicant (the respondent in this application), against SARS on 26 July 2017, wherein the applicant seeks the following orders²:

2.1 setting aside SARS's decision to disallow certain refunds claimed by the applicant in respect of fuel levy (which includes diesel) in terms of section 75(1A) of the *Customs and Excise Act, 91 of 1994*;

2.2 declaring that the applicant would be entitled to the diesel refunds;

2.3 declaring further:

2.3.1 that SARS failed to issue a notice of assessment in respect of the disallowed diesel refunds for the contended period of assessment;

2.3.2 that in those circumstances the purported tax debt relied on by SARS is not due and payable; and

2.3.3 that all collection steps taken by SARS against the applicant are null and void, alternatively irregular and should be set aside;

¹ Uniform Rules of Court

² Supporting Affidavit pages 7-9, para 5

2.4 that SARS be ordered to pay the amount of R664 637.46 in respect of funds collected by it through a third party agency procedure; and

2.5 that pending the outcome of the above, SARS is interdicted and restrained from proceeding with any further collection steps and/or appointments of third parties as contemplated in section 179 of the *Tax Administration Act 28 of 2011*.

[3] The main application was served on SARS on 2 August 2017. On 24 August 2017, the State Attorney filed a notice of intention to oppose on behalf of SARS and thus the answering affidavit was to be delivered on 14 September 2017.

[4] SARS did not file its answering affidavit when it became due. As a result, the applicant set the main application down on the unopposed roll on 19 December 2017. On the date of the hearing, the parties agreed, which agreement was made an order of court by Baqwa J that SARS would file its answering affidavit on 22 January 2018, together with an application for condonation if any, failing which the applicant would be entitled to set the matter down on the unopposed roll.

[5] Although SARS's answering affidavit was signed and commissioned on 22 January 2018, it was filed on 30 January 2018, six days later than it was due in terms of the agreed court order. The answering affidavit was filed without an application for condonation.

[6] On 19 March 2018, the applicant's attorneys of record, Messrs Malan & Nortje attorneys, addressed a letter to the State Attorney in which it was indicated *inter alia* that unless they received SARS's application for condonation for the late filing of its

answering affidavit within 14 (fourteen) days thereof, they will proceed to set the matter down for hearing on the unopposed roll.

[7] The applicant is opposing this application on these grounds, namely that:

7.1 the answering affidavit in the main application was filed extremely late;

7.2 SARS's conduct and that of its attorneys of record in this regard was grossly negligent, inexcusable and is in contempt of the court order dated 19 December 2017;

7.3 as a result, the applicant has suffered immense prejudice.

The applicable law

[8] Rule 27 of the Uniform Rules of Court provides that:

"(1) In the absence of agreement between the parties, the court may upon application on notice and on good cause shown, make an order extending or abridging any time prescribed by these rules or by an order of Court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet.

(2) Any such extension may be ordered although the application therefore is not made until after expiry of the time prescribed or fixed, and the court ordering any such extension may make such order as to it seems meet as to the recalling, varying or cancelling of the results of the expiry of any time so prescribed or fixed, whether such results flow from the terms of any order or from these rules.

(3) The court may, on good cause shown, condone any non-compliance with these rules".

[9] In *Gumede v Road Accident Fund*³, the court stated the following:

"[7] Condonation of the non-observance of Court orders and rules is not a mere formality. A party seeking condonation must satisfy the court that there is sufficient cause for excusing the non-compliance. Whether condonation should be granted or not is a matter of discretion that has to be exercised having regard to all the circumstances of the particular case".

[10] In general, applications for condonation/extension of time have been dealt with in terms of the requirements in *United Plant Hire (Pty) Ltd v Hills and Others*⁴, where the Appellate Division, as it then was, identified the necessary jurisdictional factors to be taken into account where a Court exercises its discretion in relation to an application for condonation, namely:

10.1 the degree of non-compliance;

10.2 the adequacy of the explanation for such failure;

10.3 the prospect of success;

10.4 the importance of the case;

10.5 the respondent's interest in the finality of the judgment;

10.6 the convenience of the Court and avoidance of delays in the administration of justice.

It was stated in this case that the list is not exhaustive and that these factors are not individually decisive, but are interrelated and the one is weighed against the other,

³ 2007 (6) SA 304 (C) at page 307 D

⁴ 1976 (1) SA 717 (A)

so that the strength of one or more may compensate for the weakness of one or more of the other.

[11] The applicant's counsel⁵ raised a point *in limine* in the heads of argument, a point not taken in the papers and he submitted that I should consider and make a finding on same before the merits of the application are considered.

[12] The order of 19 December 2017 by Baqwa J read that:

"The respondents (SARS) shall file their answering affidavit(s) if any, on or before 22 January 2018, together with their condonation application(s), if any".

Counsel for the applicant submits that the wording and the meaning of the order is that if SARS wanted to deliver an answering affidavit in the main application, it had to do so on or before 22 January 2018, and same had to be accompanied by a condonation application, seeking condonation for being late in the first place. Counsel contends that SARS needs condonation for the late delivery of their condonation application but no relief is sought to that effect in the Notice of Motion. Accordingly, the application is fatally flawed and stands to be dismissed with costs.

[13] The applicant's counsel seeks to suggest that for purposes of this application, SARS ought to have sought condonation not only for the six days, but also for the period prior to the court order of 19 December 2017. I agree with the submission made by SARS counsel⁶ that the provisions of rule 27(1), only requires condonation application in the circumstances where there is no agreement as to the late filing of the court documents. In this application, the parties had on 19 December 2017,

⁵ Advocate P Ellis

⁶ Advocate MPD Chabedi

agreed that the answering affidavit may be filed later than 14 September 2017, the date on which it became due in terms of the Uniform Rules of Court.

[14] What makes the applicant's argument more untenable is that on 1 March 2018, the applicant's attorneys of record addressed a letter to the State Attorney in which it stated that⁷:

"We refer to the above matter and your answering affidavit that was served on 30 January 2018. We refer to the court order dated 19 December 2017, in terms of which you were obliged to file your answering affidavit on or before 22 January 2018.

We therefore confirm that we are not going to reply to your affidavit, unless we receive your application for condonation for the late filing of your answering affidavit within 14 (fourteen) days of receipt of this letter".

[15] It is clear from the wording of the above-mentioned letter that the applicant's complaint, which necessitated this application, was due to the failure by SARS to serve its answering affidavit on 22 January 2018, as directed by the Court Order. In light of the above, the applicant's point in *limine* cannot succeed and is therefore dismissed.

The reasons for the delay

[16] The reasons proffered by SARS for the delay in filing the answering affidavit on 14 September 2017 are that, due to internal bureaucratic processes required for the appointment of counsel, the State Attorney only received instructions from SARS to appoint counsel on 11 October 2017 and 18 October 2017. The decisions sought to be reviewed and set aside in the main application were taken by Mr Sangweni, an auditor stationed at SARS offices in Standerton, which is the office which has

⁷ Supporting affidavit page 10, para 12, annexure "NM1" at page 5

jurisdiction over the applicant's business activities⁸. Part of the input required for purposes of putting together the answering affidavit, came from the officials responsible for the implementation of the diesel rebates policy at SARS head office.

[17] The first consultation with counsel was held with Mr Sangweni on 29 November 2017 and on 14 December 2017, counsel circulated the first draft affidavit. At that time, the applicant had already placed the matter on the roll of 19 December 2017 and on that day, the parties' agreement that SARS will file its answering affidavit on 22 January 2018, was made an order of court.

[18] Due to the holiday period, the officials of SARS who were relevant to review the affidavit, were already on leave and this occasioned further delays, with counsel only being able to consult again with the relevant officials on 12 January 2018. The additional work on the first draft took a considerably longer time than it was anticipated, which was exacerbated by the fact that some of the documentation had to be physically sourced from the SARS offices in Standerton.

[19] The answering affidavit spanning some 147 pages including annexures, was signed and duly commissioned on 22 January 2018 and was delivered to the State Attorney at 12h00⁹. On 23 January 2018, the secretary delivered the copies of the answering affidavit to the Registry Office for urgent service and filing. Mr Mashabela expected and understood that the answering affidavit was delivered on 22 January 2018. It was only when he received the letter dated 19 March 2018 that he realized that the answering affidavit was not delivered on 22 January 2018.

⁸ Bundle pages 11-12, par 16, 17 and 18

⁹ Bundle page 17

[20] An inquiry into the reasons why the answering affidavit was not filed on 22 January 2018, found that the State Attorney Registry Service is understaffed and under capacitated with only three messengers servicing 80 attorneys. Mr Mashabela is also responsible for approximately 1448 files, 850 of which require his personal attention almost on a daily basis.

[21] Counsel for the applicant submitted that SARS and the State Attorney were both culpably remiss and indifferent to the consequences of their failure to attend to this case diligently and timeously. In light of the judgment in *Grootboom v The National Prosecuting Authority and Another*,¹⁰ counsel submits that such conduct can simply not be condoned. It was further argued that by the time the matter was in court on 19 December 2017, (almost five (5) months after the application was served) a final draft of the answering affidavit was not even ready. Even though SARS knew that its answering affidavit was late, they ignored even the basic principles of collegiality of a request for an extension of time. It is submitted that on this basis alone the application for condonation should fail.

The degree of non-compliance

[22] The parties agreed to extend the filing of SARS answering affidavit on or before 22 January 2018, and this agreement was made an order of court on 19 December 2017. SARS only filed the affidavit on 30 January 2018, six (6) days late. Applicant contends that SARS's answering affidavit was filed extremely late.

[23] It is submitted on behalf of the SARS that the delay of six days is not an extreme delay, in particular when one considers that the answering affidavit was signed on 22 January 2018, the date on which it became due.

¹⁰ 2014 (2) SA 68 CC at page 69

Prospects of success and the importance of the case

[23] As stated above, the applicant in the main application seeks an order setting aside SARS's decision to disallow certain fuel levy refunds previously claimed by the applicant in respect of diesel allegedly used by him in terms of section 75(1)(A) of the *Customs and Excise Act*. The main issue in dispute between the parties in the main application is whether the applicant was entitled to the diesel claims he made during the period under review¹¹.

[24] In order to qualify for the diesel refund claims, the applicant ought to satisfy the commissioner that: (i) he himself purchased the diesel; (ii) he used the diesel for qualifying activities; and (iii) he kept sufficient records showing that the diesel dispensed and claimed for, was in fact used for qualifying activities¹².

[25] The applicant is a sole proprietor and a registered user for farming and forestry activities in terms of the *Customs and Excise Act*. The dispute in the main application follows an audit undertaken by SARS on the applicant's activities. Counsel for SARS submits that SARS has demonstrated in its answering affidavit, *inter alia*, that (i) the applicant did not purchase the diesel in respect of which refunds were claimed; (ii) the diesel was purchased by Bonnie Brooks, who is not the User and VAT vendor for the purpose of the *Customs and Excise Act*; (iii) the applicant kept one logbook to register diesel usage in respect of the activities of both the applicant and Bonnie Brooks; (iv) the documents attached to the founding affidavit as proof of keeping a proper logbook are not the same as those made available to SARS for the audit.

¹¹ Bundle page 20 para 44

¹² Section 75 read with item 670.04 of Schedule No 6 of the Customs Act

[26] It is therefore submitted that in light of the above, the applicant will not on the basis of his founding affidavit alone, be able to prove that SARS's decision to disallow the diesel rebate claims falls to be reviewed and set aside and SARS's prospects of success are high.

[27] Counsel for SARS further submits that the case is important to SARS in that policy issue raised in the answering affidavit need to be fully adjudicated in order to ensure that the current regime of diesel refunds introduced in 2000 is effective. The current diesel refund regime was introduced specifically to curb the abuses that were prevalent in the previous scheme. This included the linking of the claims for diesel refund to the administration of the VAT system and to limit the entitlement to claim the refund to the primary producer (user), in order to make such a producer more internationally competitive by reducing its input costs through the grant of the refund. It is contended therefore that the main application is an important case for the court to determine whether diesel refunds in respect of diesel purchases made by another entity and used by the user may be allowed.

Applicant's interest in the finality of the case; the convenience of the Court and the delays in the administration of justice

[28] In the main application the applicant also seeks an interdict in terms of which SARS is restrained from proceeding with any further collection steps and/or appointments of third parties as contemplated in section 179 of the *Tax Administration Act*, pending the finalization of the main application. This interdict was granted in terms of the court order of 19 December 2017. The amount of money already collected from the applicant through this procedure is R664 637.46, and the collection of this money precedes the main application. No monies were

collected from third parties subsequent to the launching of the main application, and significantly, after the interdict. The third party notice authorizing SARS to undertake further collection steps was also withdrawn on 4 May 2018¹³.

[29] Counsel for SARS submits that the applicant has not suffered any prejudice at all as a result of the late filing of the answering affidavit on 30 January 2018. It is further submitted that the applicant will not suffer any prejudice if condonation is granted and the answering affidavit is allowed. This would allow the main application to be adjudicated upon properly and there will be finality on the disputes between the parties.

[30] It is further submitted that in the avoidance of further delays and in the interest of the administration of justice, the applicant should have allowed this application for condonation to be adjudicated simultaneously with the main application.

[31] Counsel for the applicant argues that Mr Mashabela's version is that on 22 January 2018, he was in possession of a signed answering affidavit, together with all the necessary annexures but gives no explanation as to why he did not arrange with the applicant's attorneys to serve the affidavit by email. Counsel submits that this application for condonation should be adjudicated on the backdrop of *Grootboom supra*¹⁴ wherein Bosielo AJ stated as follows:

"[23] 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."

¹³ Bundle page 55, annexure "N3"

¹⁴ 2014 (2) SA 68 (CC) at paras [23] and [30]

[30] There is another important dimension to be considered. The respondents are not ordinary litigants. They constitute an essential part of government. In fact, together with the office of the state attorney, the respondents sit at the heart of the administration of justice. As organs of state, the Constitution obliges them to 'assist and protect the Courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the Courts'.

[32] I totally agree with the sentiments expressed by Bosielo J and agree that SARS and the State Attorney were indifferent to the consequences of their failure to attend to this case diligently and timeously.

[33] The principles of seeking condonation are analogous to those of seeking a postponement. A party who applies for a postponement seeks an indulgence from the court and must therefore show good cause for the interference with the other party's procedural right to proceed and the general interest of justice in having matters finalised¹⁵.

[34] In *Feldman v Feldman*¹⁶ the Court stated that:

"... the Court Rules are not there to hamper a Court in dispensing justice, but to assist a Court in doing so. Where it becomes necessary to deviate from those Rules in order to dispense justice and to see that justice is done, it is absolutely necessary for a Court, if good cause is shown, to grant the indulgence. That is the very action which the appellant in this case resorted to and he is at present criticised for his honest approach".

[35] In my opinion, SARS has fully explained the reasons for its delay in filing the answering affidavit, showing that it was not due to delaying tactics. Given the merits of the case as summarized above, and in the interest of justice, SARS should be given the opportunity to present its case. This will allow the applicant to file a

¹⁵ *Persadh and another v General Motors SA (Pty) Ltd* 2006 (1) SA 455 (SE) at para [13]

¹⁶ 1986 (1) SA 449 (T) at page 455 A-B

replying affidavit and to explain the pertinent issues raised by SARS in its answering affidavit. I am therefore satisfied that SARS had demonstrated that *prima facie* there are sufficient reasons to entitle it to the Court's indulgence.

Costs

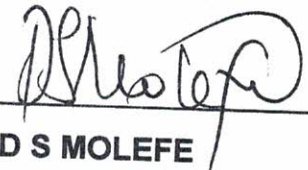
[36] Counsel for SARS argues that there is no plausible reason why the applicant is opposing the condonation application, save for the grounds that the answering affidavit was filed late. It is therefore submitted that in light of the opposition of this application, the costs of this application should follow the cause on a party and party scale. I do not agree with this argument.

[37] Rules of court are meant to be observed by the parties at all material times. No one party should be allowed by his own indolence, to treat the rules of court with disdain. In *casu*, SARS disregarded and ignored the compliance with the court order. There is no justifiable reason why SARS should be allowed to disregard the rules and order of this court with no consequences. The usual rule is that the party seeking indulgence must pay the wasted costs. I have taken into consideration the circumstances of this case, weighed the various issues and the conduct of the parties and I am of the view that it is just and fair that SARS should pay the costs for the application.

[38] I accordingly make the following order:

1. The applicants (SARS) is granted condonation in terms of Rule 27(2) for the late filing of its answering affidavit in the main application;
2. The date for the filing of the answering affidavit is hereby extended to include the date on which the answering affidavit was filed 30 January 2018.

3. *The applicant to pay costs of this application.*


D S MOLEFE
JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel on behalf of Applicant	:	Adv. M Chabedi and Adv. R Tsele
Instructed by Attorneys	:	Prinsloo, Wolmarans, Greyling
Counsel on behalf of Respondent	:	Adv. R Ellis
Instructed by	:	The State Attorney, Pretoria
Date of Hearing	:	28 January 2019
Date of Judgment	:	6 March 2019