IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1)	REPORTABLE:
(2)	OF INTEREST TO OTHER JUDGES:
(3)	REVISED.

DATE _____ SIGNATURE _____

CASE NO: 29177/2020

In the matter between:

MACBERTH ATTORNEYS INCORPORATED APPLICANT

And

SOUTH AFRICAN FORESTRY COMPANY SOC, LTD FIRST RESPONDENT

(Registration Number: 1992/005427/30)

KOMATILAND FORESTS SOC, LTD SECOND RESPONDENT

(Registration number: 2000/023152/30)

TSEPO MONAHENG THIRD RESPONDENT

SIYABONGA MPONTSHANA FORTH RESPONDENT

JUDGMENT

MBONGWE J:

INTRODUCTION

[1] This is an opposed application for leave to appeal against the judgment of this court 02 March 2022 and in which the applicant's application for the review of the first and second respondents, alternatively, the third and fourth respondents, to terminate the mandate they had given to the applicant was dismissed with costs. The first and second respondents are State owned entities under the same management comprising of the third and fourth respondents. Leave to appeal is sought in terms of Section 17 of the Superior Courts Act 10 of 2013.

ABRIDGED FACTS

[2] The applicant was appointed as part of a panel of legal practitioners rendering legal services to the first and second respondents as and when called upon to do so. No guarantees were given by the respondents for the supply of work to the applicant. Owing to differences emanating from certain conduct of the applicant, which included dishonesty and acting without a mandate, the contracts it had with the first and second respondents were terminated. The applicant brought an application for the review of the decisions to terminate his mandate at a time when the period for which it had been contracted had lapsed. In dismissing the application, it was pointed out that the review would serve no purpose.

[3] However, this court went further to consider the merits of the matter and concluded that, on the facts, the applicant was in no way prejudiced as it had been paid for all services rendered and, in particular, that the termination was well grounded. There had been no irregularity or an unlawful exercise of statutory authority in the termination of the contracts. It is that decision that gave birth to this application for leave to appeal.

APPLICATION FOR CONDONATION

[4] The judgment in the review application was handed down on 02 March 2022. On the same date the judgment was emailed to the parties' attorneys and to counsel for the applicant. In terms of the rules, the applicant should have brought its application for leave to appeal within 15 days from the date judgment was handed down. The applicant served the applications for leave to appeal and for condonation of the late filling of the application for leave to appeal in June 2022 – three months out of time. The reason proffered by the applicant for the delay is that it only became aware of the judgment on 27 May 2022. The applicant's application for condonation is opposed by the respondents.

REQUIREMENTS FOR GRANTING CONDONATION

[5] For the application for condonation to succeed, the applicant must explain the delay fully, that is, the applicant must account for each day the delay persisted and demonstrate good cause for the delay. In respect of a delayed application for leave to appeal, the court also considers the prospect of success of the appeal itself. The absence of prejudice to the other party is also amongst the factors the court considers. These principles were laid down in the matters referred to hereunder.

[6] An application for condonation must set out justifiable reasons for non-compliance with the time frame set out in the rules for filling of a court process or with an order of the court or directive. In *Melane v Santam Insurace Co Ltd* 1962 (4) SA 531 (A) at C-F, Holmes JA state the applicable principle thus:

> *"In deciding whether sufficient cause has been shown, the basic principle is that the court has a discretion to be exercised judicially upon a consideration of all the fact and, in essence, is a matter of fairness to both sides. Among the fact usually relevant are the degree of lateness, the explanation thereof, the prospect of success, and the importance of the case. Ordinarily these facts are interrelated; they are not individually*

decisive, for that would be a piecemeal approach incompatible with a true discretion…"

[7] In *Foster v Stewart Scott Inc.* (1997) n18 ILJ 367 (LAC) at para 369, Froneman J stated the principle in the following terms:

> *"It is well settled that in considering applications for condonation the court has a discretion, to be exercised judicially upon a consideration of all the fact. Relevant considerations may include the degree of non-compliance with rules, the explanation thereof, the prospect of success on appeal, the importance of the case, 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, but the list is not exhaustive. These factors are not individually decisive but are interrelated and must be weighed one against the other. A slight delay and a good explanation for the delay may help to compensate for prospect of success which are not strong. Conversely, very good prospect of success on appeal may compensate for an otherwise perhaps inadequate explanation and long delay. See, in general, Erasmus Superior Court Practice at 360-399A."*

[8] The court is clothed with wide discretionary powers which it exercises judicially in the valuation of the relevant factors in the particular matter. The interests of justice underpin the court's exercise of its discretionary powers. A good explanation without prospect of success on the appeal warrants a refusal of condonation.

[9] The court may grant condonation despite a poor explanation of the delay where doing so will be in the interests of justice. A typical example is a situation where an appellant seeks a plainly erroneous judgment and order to be set aside, but has a weak or unsatisfactory explanation of the delay in bringing the application for leave to appeal. The interests of justice will necessitate the granting of the condonation in order for the court to set aside the impugned judgment and orders

(see *E.E. Sidimela and others v S. I. Marage,* unreported case A461/2017 [GHC]: Decided: 08 March 2023).

[10] The absence of prejudice on the other party is also a factor to be considered, particularly where the prejudice may not be cured by an order of costs. In *National Union of Mine Workers v Council for Mineral Technology* [1998] ZALAC at 211 D- 212 at para 10, the court stated the legal position thus:

> *"The approach is that the court has a discretion, to be exercised judicially upon a consideration of all the fact, and in essence, it is a matter of fairness to both parties. Among the facts usually relevant are the degrees of lateness, the explanation therefore, the prospect of success and the importance of the case. These facts are interrelated; they are not individually decisive. What is needed is an objective conspectus of all the facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospect of success may tend to compensate for a long delay. There is a further principle which is applied and that is that without a reasonable and acceptable explanation for delay, the prospects of success are immaterial, and without prospect of success, no matter how good the explanation for the delay, an application for condonation should be refused."*

[11] The applicant has not accounted for all the period of the delay. It is unthinkable that the applicant did not open its inbox from 2 March 2022 (when the judgment was emailed to 27 May 2022 when it alleges to have come to know about the judgment. In their answering affidavit the respondents have attached ANNEXURE ''CAA2'', being proof that the email to which the judgment was attached was sent to the attorneys of the parties, including the applicant's counsel on 2 March 2022. In terms of the provisions of section 23 of the Electronic Communications and Transmissions Act 25 of 2002 (ECTA), an emailed item is deemed to have entered the inbox of the addressee once the

proof of its sending is established. That establishes that control of the emailed material had fallen outside the control of the sender. Section 23 reads as follows:

> ***"23 Time and place of communications, dispatch and receipt***
>
> *A data message -*
>
> *(a) used in the conclusion or performance of an agreement must be regarded as having been sent by the originator when it enters an information system outside the control or, if the originator and addressee are in the same information system, when it is capable of being retrieved by the addressee;*
>
> *(b) must be regarded as having been received by the addressee when the complete data message enters an information system designated or used for that purpose by the addressee and is capable of being retrieved and processed by the addressee.*
>
> ***26 Acknowledgement of receipt of data message***
>
> *(1) An acknowledgement of receipt of a data message is not necessary to give legal effect to that message.*
>
> *(2) An acknowledgement of receipt may be given by -*
>
> *(a) any communication by the addressee, whether automated or not; or*
>
> *(b) any conduct of the addressee, sufficient to indicate to the originator that the data message has been received."*

[12] In light of the above deeming provisions and proof that the email attaching the judgment was sent to the applicant and its counsel, it was for the applicant to rebut these deeming provisions. I find that the applicant's failure to know about the judgment having been handed down 2 March 2022 was of his own making. The late filling of the application for leave to appeal has not been fully explained. Condonation must be refused in this circumstance.

REQUIREMENTS FOR GRANTING LEAVE TO APPEAL

[13] The criteria for granting leave to appeal are contained in the provisions of sections 17(1) and 16(2)(a)(i) of the Superior Courts Act 10 of 2013, ('the Act'). In terms of section 17(1) the court may only grant leave to appeal where it is convinced that:

(a) the appeal would have a reasonable prospect of success; or

(b) there is some other compelling reason why the appeal should be heard, including the existence of conflicting decision on the matter under consideration; or

(c) the decision on appeal will still have practical effect (section 16(2)(a)(i), and

(d) where the decision appealed against does not dispose of all the issues in the case, and the appeal would lead to a just and prompt resolution of all the issues between the parties.

[14] In *Zuma v Democratic Alliance* [2021] ZASCA 39 (13 April 2021) the court held that the success of an application for leave to appeal depends on the prospect of the eventual success of the appeal itself. In *The Mont Chevaux Trust v Tina Goosen and Others* 2014 JDR 2325 LCC the court held that section 17(1)(a)(i) requires that there be a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against before leave to appeal is granted.

> *"An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be sound, rational basis to conclude that there is a reasonable prospect of success on appeal.'' (See: MEC for Health, Eastern Cape v Mkhitha and Another [2016] ZASCA 176 (25 November 2016).*

[15] A court is not enjoined to entertain a matter if the order sought will have no practical effect. The period of the applicant's contract had lapsed when the application for the review of the decision to terminate the contracts was launched. Consequently, even if the order was granted in favour of the applicant, such order would have been of no consequence (*see JT Publishing (Pty) Ltd v Minister of Safety and Security* 1997 (3) 514 (CC) para 16 – 18 and section 16 of the Superior Courts Act.

CONCLUSION

[16] In light of the dismissal of the application for condonation in particular, the appeal ought to be dismissed. Further, the finding in para 15, above, clearly means that this court is precluded from granting condonation where the order sought on appeal will have no practical effect in terms of section 16 of Act 10 of 2013. The applicant's applications consequently stand to be dismissed.

COSTS

[17] The respondents have succeeded in these proceedings and are, therefore, entitled to an order for costs in their favour.

ORDER

[18) Resulting from the findings in this judgment the following order is made:

1. The applicant's applications are dismissed.

2. The applicant is ordered to pay the costs on the opposed scale.

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MPN MBONGWE

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA.

APPEARANCES

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THIS JUDGMENT WAS ELECTRONICALLY TRANSMITTED TO THE PARTIES ON.....**MARCH 2023**