



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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

DATE

SIGNATURE

CASE NO:

A461/2017

In the matter between:

EUNICE ETANI SIDIMELA

First Appellant

(First Respondent,

court *a quo*)

MUNICIPALITY GRATUITY FUND

Second Appellant

(Second

Respondent, court *a quo*)

THE PENSION FUND ADJUDICATOR

Third Appellant

court *a quo*)

(Third Respondent,

and

SHONISANI IDA MARAGE

Respondent

(Applicant.

Court *a quo*)

JUDGMENT

MBONGWE J: [TLHAPI J and LINGENFELDER AJ CONCURRING]

INTRODUCTION:

[1] This is an appeal against the whole of the judgment handed down by Mavundla J, (the court *a quo*), on 23 June 2017. The purpose of the provisions of section 37 of the Pensions Fund Act 24 of 1956, being to ensure the social security of the dependents of a deceased member of a pension fund, is paramount. The application of these necessarily permeates entitlements, legislative or otherwise, and choices of individuals. So guarded is this purpose that the legislator has seen it fit to forbid the application of the provisions of any other law to the provisions of section 37 to ensure the

exclusive sustenance of the wellbeing of category of persons' section 37 is intended to serve.

[2] The erroneous application of the provisions of the Matrimonial Divorce Act 84 Of 1984 by the court *a quo* to the determinations made in this matter in terms of the Act, not only amounts to judicial overreach (in light of the prohibition) but creates an injustice that this court is enjoined to reverse, through the exercise of its discretionary powers, in the interests of justice. The words interests of justice, in my view, are an expression relied upon by the court to judiciously deviate from its rules / normal procedure, through the exercise of its discretionary powers, to correct and prevent an injustice the judgment and order of the court *a quo* may cause and to ensure the prevalence of justice. It is imperative, therefore, that same be set aside in this appeal.

[3] While the appeal is good for the achievement of that purpose, the shoddy manner in which the appeal process has been handled by the appellants' attorneys has resulted in the lapse of the appeal. The appellants have brought several applications for condonation aimed at the

reinstatement of the lapsed appeal. It will be in the interests of justice that condonation be granted in order to access and set aside the judgment and order of the court *a quo*.

FACTUAL MATRIX

- [4] The deceased, L P Maraga, was employed by the Makhado Municipality and a member of the Municipality Gratuity Fund, the second respondent, from 2001 until his death in 2010. He was still legally married to the respondent in community of property, *albeit* estranged since 2002. He had been cohabiting with the first appellant from 2008 until his death.
- [5] Two children were born of the marriage between the deceased and with the respondent, namely, MP Maraga (16) and P K Maraga (20) at the time this matter was heard in the court *a quo*. The deceased had nominated these children as his only and equal beneficiaries. The value of the benefits which stood to be distributed was the amount of R1 119 004.32
- [6] The deceased had explicitly excluded the respondent from receiving any benefits.

[7] The deceased had other three children who were traced at the instance of the trustees and found to be his deserving beneficiaries.

[8] In its decision, which was subsequently approved by the third appellant, the second appellant distributed the benefits between the first appellant (28%) and the balance to all the children of the deceased proportionately in the discretion of the trustees, taking into account all the factors stipulated in the Act such age and other factors stated in the Act for the trustees to consider.

THE COURT A QUO

[9] Before the court *a quo* was an application launched by the present respondent seeking orders: directing the second respondent (second appellant herein) to 'disinherit the first appellant from receiving any pension benefit held by the second respondent; setting aside the determination made by the trustees of the second appellant and directing the second appellant to pay to the respondent the pension benefits plus interest held by it.

[10] The respondent had contended that she was entitled to 50% of the benefits by virtue of her marriage in community of property to the deceased and also sought the exclusion of the first appellant as a beneficiary of the deceased. In its reasoning and in agreement with the respondent's contention, the court *a quo* states at para [18] and [19] of the judgment;

“ [18] In my view, where the parties are married in community of property, and one of them is a member of a pension fund, the interest such party has in the funds should form part of the joint estate. This ought to be so because whatever the member spouse is contributing towards the monthly pension benefit contribution, 50% thereof is, indirectly, belonging to the non- member spouse”.(sic)

[19] In my view, the fund, when distributing the pension fund, should have distributed 50% thereof to the identified dependants of the member spouse. It should allocate the remaining 50% of the pension benefits to the spouse of the member as her portion of the pension benefit by virtue of the

marriage in community of property.....”(sic)

[11] It is worth mentioning that the benefits had already been distributed at the time the application was launched and judgment of the court *a quo* handed down. The Rules of the Fund provide for an appeal against the decision of the third appellant to be brought within six weeks from the date the decision is made. Section 37 of the Act requires that the trustees identify the dependants and distribute the benefits to them within twelve months from the date of death of the member.

[12] On the basis of its reasoning stated above, the court *a quo* set aside the distribution decision and remitted the matter to the trustees with an order that the trustees reconsider the distribution of the benefits and reallocate the 28% to the present respondent. The order of the court *a quo* gave rise to the present appeal which comes with the leave of that court.

THE LAW

[13] Whether a person is a beneficiary as envisioned in the provisions of the Pensions Fund Act, 1956 depends on

whether the person was factually financially dependent on the deceased member of the fund or the deceased was legally obliged to support him financially. In terms of Section 1 of the Act,

“beneficiary means a nominee of a member or a dependant who is entitled to a benefit, as provided for in the rules of the relevant fund.”

It is imperative that this definition be read in conjunction with the provisions of section 37C. It is important for purposes of the determination of the issues in the present appeal, to have regard to the import of the lengthy provision of the latter section. In interpreting section 37C, the Supreme Court of Appeal stated thus:

“The plain meaning of the subsection is this:

All benefits payable in respect of a deceased member, whether subject to a nominee or not, must be dealt with in terms of one or other of the quoted subparagraphs. In other words, non fall into the estate save in circumstances stated in subparagraphs (b) and (c). In addition, these nominations having been made in

terms of the rules, and the rules requiring the benefits to go to the nominated beneficiaries, the trustee' case inextricably linked to the rules. However, as the phrase 'notwithstanding anything to the contrary.....contained in the rules' makes unmistakably clear, it matters not in the present situation what the rules say - the benefits must be disposed of according to the subsection's statutory scheme." (see *Kaplan and Another NNO v Professional and Executive Retirement Fund and Others* [1999] 3 All SA 1 (A) at page 4) and;

[14] Setting out the purpose of the provisions of section 37C, the court in *Mashazi v African Products Retirement Benefit Fund* 2003 (1) SA 629 (W) stated the following:

"Section 37C of the Act was intended to serve a social function. It was enacted to protect dependency, even over the clear wishes of the deceased. This section specifically restricts freedom of testation in order that no dependants are left without support. Section 37 C (1) specifically excludes the benefits from the assets in the estate of a member. Section 37 C enjoins the trustees of the pension fund to exercise an

equitable discretion, taking into account a number of factors.....”

The court went on to tabulate the qualifications and exceptions to the intended purpose of the Act provided in the subsections of section 37, including the provisions of section 19(5) (a) which are omitted herein as they are of no application to the pertinent facts of the present matter.

[15] It is apparent from the exposition of the law regarding the operation of the provisions of section 37 that the court *a quo* had erred in its findings and reasoning for the orders made and was, with due respect, correct to grant leave to appeal.

PRINCIPLES OF APPEAL

[16] Section 17 of the Superior Courts Act 10 of 2013 sets out the requirements to be met by the applicant for leave to appeal being that:

2.1 the court may grant leave to appeal if 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; 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.

[17] 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).

THE APPELLANTS’ DELAY

[18] In the founding affidavit deposed to by the attorney acting on behalf of the Appellants in support of the application for condonation and taking responsibility for the non-compliance mentioned earlier above, states at para 71.7 that

“I accept, and with contrition state, that the circumstances present in this matter is unacceptable regarding the non-compliance with the Court’s Rules. It was never my intention to wilfully disregard the Rules of Court, the administration of justice or show

disrespect to the Court or the respondent.”

[19] It is common cause that the judgment of the third appellant was made on 23 June 2017 and communicated to all interested parties, including the respondent. The rules provide for the launching of an appeal against the decision within six weeks of it being made. The respondent did not bring an appeal within the period provided resulting in payments of the benefits as determined by the third applicant being effected. The respondent's application in the court *a quo* followed this event.

[20] The reasons for the inordinate delay in launching and prosecuting the appeal are set out in the founding affidavit deposed to by the appellants' attorney in support of the application for condonation. Amongst the reasons proffered for the delay in filling the record of the proceedings was the attorney's lack of knowledge of what documents would constitute the record of the proceedings for the purposes of the appeal. This had resulted in a lengthy exchange of correspondence between the appellants' attorney, their correspondents and the transcribers. Some documents relevant for the record are alleged to have been in the

possession of the appellants' counsel who had gone overseas on honey moon. This, it is alleged, had made it impossible for the appellants' attorney to collate all relevant documents and timeously file the appeal record.

[21] The above explanation on its own points to an ineptitude of the attorney rather than providing a reasonable explanation that warrants the granting of the condonation sought. The appeal arose in 2017. Citing the advent of the *Covid 19* pandemic in 2020 as having contributed in the delay is plainly absurd. It is noted that the attorney has taken responsibility for the delay and has apologised.

CONDONATION

[22] It is trite that whenever a party has not complied with the times provided in the rules, court order or directive for filling a court process, such party is required to seek condonation for non-compliance. It is common cause that the appellants failed to: - to file a notice of appeal timeously as required in Rule 49(2); to file an application for a hearing date of the appeal timeously in terms of Rule 49(6)(a); to file copies of

the record of appeal timeously as required by Rule 49(7)(a) (ii) and to timeously meet the requirement with regard to the security of the respondent's costs of appeal in terms of Rule 49(13). The overall effect of the appellants' non-compliance is that its appeal has lapsed - hence the application for condonation - a step that, if successful, would result in the reinstatement of the appeal. In *CIR v Burger* 1956 (4) SA 446 (A) at 459 the following was stated by the court:

"Whenever an appellant realises that he has not complied with a Rule of Court he should, without delay, apply for condonation."

[23] An application for condonation entails the provision of detailed reasons for the delay. The applicable principle was expressed in *SA Express Ltd v Bagport (Ptyan) Ltd* 2020 (5) SA 404 (SCA) paragraphs [12]-[13] at 408 in the following terms;

"It is trite that condonation is not simply available for the asking: the party applying for condonation seeks an indulgence and must make out a case for the court's discretion to be exercised in its favour."

With regard to a lapsed appeal, the court stated that the factors to be considered 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.”

[24] In order to succeed, a party seeking condonation has to satisfy certain requirements: - there has to be good cause shown for the delay; the length of the period of delay must be fully explained. In *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at C -F, Holmes JA stated 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 facts and, in essence, is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefore, the prospects 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....”

[25] 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 facts. Relevant considerations may include the degree of non-compliance with the rules, the explanation therefor, the prospects 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 prospects of success which are not strong. Conversely, very good prospects of success on

appeal may compensate for an otherwise perhaps inadequate explanation and long delay. See, in general, Erasmus Superior Court Practice at 360-366A.”

[26] It follows from the above principles that a reasonable explanation for the delay coupled with good prospects of success on appeal enhance the chances of the success of the application for condonation. A weak explanation, but good prospects of success and /or the importance of the case will allow for the granting of an application for condonation. It is important to keep in mind that the court is closed with discretionary powers it exercises in the consideration of the reasonableness of explanation, the prospects of success of the matter and other relevant factors that influence its decision. A good explanation without prospects of success on the merits warrants a refusal of condonation.

[27] The absence of prejudice on the other party is also a consideration, 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 22 at 211D -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 facts, and in essence, it is a matter of fairness to both parties. Among the facts usually relevant are the degrees of lateness, the explanation therefor, the prospects 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 prospects 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 the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused.”

[28] In *SA Express Ltd v Bagport (Pty) Ltd* 2020 (5) SA 404 (SCA) par [12] – [13] at 408 the court gave further clarification of

the above principle as follows;

“It is trite that condonation is not simply available for the asking: the party applying for condonation seeks an indulgence and must make out a case for the court’s discretion to be exercised in its favour.”

With regard to a lapsed appeal, the court stated the factors for consideration 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.”

[29] The above requirements ought to be satisfied irrespective of the fact that the respondent, as in the present matter, has not filed any opposition to the granting of the application for condonation. Only at the hearing of this appeal did the respondent raise opposition to appellant’s application for condonation and sought a dismissal thereof with costs. The respondent was clearly opportunistic in this regard in light of the application for condonation being substantive. The

opposition and grounds therefor ought to have been on affidavit and not be by way of arguments from the bar.

**INTERESTS OF JUSTICE AS REASONS TO GRANT
CONDONATION
(RE-INSTATEMENT OF APPEAL)**

[30] An important factor is that the court has wide discretionary powers and may exercise same judicially to address the circumstances if doing so is in pursuit of the interests of justice (See *Grootboom v National Prosecuting Authority & Another* (CCT 08/13) [2013] ZACC 37; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC). The expression interests of justice is, in my view, associated with the court's exercise of its discretionary authority to ensure the prevalence of justice.

[31] In the circumstances of the present matter and as pointed out earlier, the reasons for the inordinate delay proffered by the appellant's attorney point to an ineptitude rather than good cause for the delay. However, the appellants have, by virtue of this court's finding that the court a quo had erred in its findings and order, unassailable prospects of success in

this appeal.

[32] Without this court granting the appellants' application for condonation, there can be no re-instatement of their lapsed appeal. Put differently, a refusal of the reinstatement of the appeal would result in this court depriving itself of the opportunity this appeal presents for the necessary setting aside of the clearly wrong judgment and order of the court *a quo*. It is consequently in the interests of justice that this court grants condonation.

[33] It is noteworthy that the respondent has not filed an answering affidavit opposing the substantive appeal against the judgment and order of the court *a quo*. Equally important is the absence of prejudice or evidence of prejudice that the respondent would suffer should condonation be granted. Even if there was prejudice, it would not constitute a hurdle if it could be resolved by an appropriate costs order.

THE ISSUES AGAINST THE JUDGMENT A QUO

[34] It is common cause that at the heart of the dispute is the decision and order of the court *a quo* setting aside the

distribution of the pension benefits of the deceased by trustees of the second appellant. More specifically and important, it is the premise on which the court *a quo* relied in arriving at the decision challenged in this appeal. The court *a quo* erroneously found that the pension benefits of the deceased, legally distributable in terms of section 37C of the Pensions Fund Act of 1956, form part of the joint estate of the deceased and the respondent by virtue of their marriage in community of property. On the basis of this view, the court *a quo* found that the trustees had erred in not distributing 50% of the benefits to the respondent. This perception informed the decision to set aside the distribution of the benefits amongst the identified dependants of the deceased, including his paramour, the first appellant.

RELEVANT FACTORS IN THIS CASE

[35] Though married to the respondent in community of property until his death in 2010, the respondent had left the deceased in 2002. Since 2008 until his death, the deceased had been cohabiting with the first respondent. There was no evidence before the court *a quo* that despite the separation,

the respondent had been dependent on or was financially supported by the deceased. In my view, had the deceased been living with the respondent, it would have been reasonable to assume that they were inter-dependant or the respondent was financially dependent on the deceased.

[36] The deceased and the respondent had lived apart for 15 years when the order of the court *a quo* was made. The court's emphasis and reliance on the nature and the duration of the marriage as legal justifications for purportedly benefiting the respondent went against the grain and purpose of the provisions of the Act. That the deceased and the respondent had not divorced and the marriage was still extant was of no consequence. The absence of the financial dependency of the respondent on the deceased ought to have weighed heavily against the granting of the order and called for the dismissal of the application in the court *a quo*.

ANALYSIS

[37] It is apparent from the various aspects in respect of which the appellants seek condonation that the degree of non -

compliance was gross and, notably, the explanation given for the inordinate delay is weak, to say the least. However, what is unique is not only the impossibility for the appellants to comply with the order of the court *a quo*, but that the findings of the court *a quo* were premised on a misinterpretation of the provisions of section 37C of the Pensions Fund Act resulting in erroneous orders being made.

[38] In the heads of argument from paras 6.1 to 6.4, counsel for respondent contends that section 7 of the Divorce Act was enacted to ensure the rights of the respondent to 50% of the joint estate in the marriage between the deceased the respondent – a contention the court *a quo* embraced and premised its reasoning on. Counsel for the respondent went further to argue that the provisions of section 37C were not intended to alter the common law. There is simply no merit in this argument. The provisions of section 37C prevail, ‘notwithstanding the provisions of any law’, to serve their intended purpose. In any event, firstly there was no divorce between the deceased and the respondent, secondly, the Act explicitly excludes pension benefits from the estate of the deceased and, thirdly, financial dependence on the

deceased is key in the determination of the beneficiaries of his pension benefits.

[39] By purporting to apply the provisions of the Matrimonial Divorce Act in the sphere of operation of the section 37, the judgment and the order of the court *a quo* stand to interfere with and unwarrantedly disturb the harmonious application of these provisions and purpose they are intended to serve. For this reason, the judgment is plainly wrong and ought to be set aside in this appeal. It is a timeless principle of our law that a court hearing an appeal is not at liberty to interfere with the factual findings of the court below unless its findings were wrong and/or there had been an error of law (see *Dhlumayo & Another v R* 1948 (2) SA 677 (A)).

CONCLUSION

[40] It is trite that costs follow the outcome of the litigation. However, although successful in this appeal and despite the shoddy handling of the appeal by their attorneys, it was important for the appellants that they bring this appeal for the attention of this court.

COSTS

[41] The respondent has not filed a substantive opposition to the relief sought by the appellants, save to justifiably oppose the application for condonation. It will, in my view, accord with justice not to award costs in this appeal.

ORDER

[42] Resulting from the conclusion in this judgment the following order is made:

1. The appeal is upheld.
2. The judgment and order of the court *a quo* is set aside and replaced with the order that; the applicant's application is dismissed.
3. No order as to costs in the appeal.

M P N MBONGWE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA.

Instructed by

Zamisa Shisinga Attorneys

JUDGMENT ELECTRONICALLY TRANSMITTED TO THE PARTIES ON
..... 2023.