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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION: CAPE TOWN)

Case number 23230/2023

In the matter between

ECONOMIC FREEDOM FIGHTERS	First Applicant
JULIUS SELLO MALEMA, MP	Second Applicant
NYIKO FLOYD SHIVAMBU, MP	Third Applicant
MBUYISENI QUINTIN NDLOZI, MP	Fourth Applicant
MARSHALL MZINGISI DLAMINI, MP	Fifth Applicant
VUYANI PAMBO, MP	Sixth Applicant
SINAWO TAMBO, MP	Seventh Applicant

And

THE CHAIRPERSON OF THE POWERS AND PRIVILEGES COMMITTEE N.O.	First Respondent
THE SPEAKER OF THE NATIONAL ASSEMBLY	Second Respondent
THE SECRETARY TO PARLIAMENT	Third Respondent
THE INITIATOR N.O.	Fourth Respondent
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Fifth Respondent
THE CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	Sixth Respondent

Coram	Erasmus, Cloete et Thulare JJ
Date of Hearing	29 January 2024
Date of Judgment	30 January 2024

JUDGMENT

ERASMUS, J (CLOETE J concurring and THULARE J dissenting)

INTRODUCTION

[1] The issue before us, is to determine whether to condone the non-compliance with a court order that led to the unfortunate delay in finalizing an important matter of national importance.

[2] I had the benefit of considering the judgment of Thulare J herein, the conclusion which I respectfully disagree with. I am of the view that the application should be struck from the roll for the reasons stated below.

[3] The Constitutional Court recently reminded us:

> "It is indeed the lofty and lonely work of the Judiciary, impervious to public commentary and political rhetoric, to uphold, protect and apply the Constitution and the law at any and all costs. The corollary duty borne by all members of South African society – lawyers, laypeople and politicians alike – is to respect and abide by the law, and court orders issued in terms of it, because unlike other arms of State, courts rely solely on the trust and confidence of the people to carry out their constitutionally-mandated function." [1]

[4] I am of the view that the court must ensure that all litigants have equal access to the courts in order to have their disputes adjudicated. For this reason, there are rules, directives, and often court orders that regulate the process. The functioning of the courts to effectively and efficiently deliver on its constitutional mandate therefore depends on a proper application and compliance with, inter alia, court orders. An undermining of these mechanisms lead to disorder and unnecessary delays and disruptions as is evident in this case. I pause to note that Thulare J had to postpone a criminal matter where witnesses were subpoenaed and

[1] Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including *Organs of State v Zuma and Others* [2021] ZACC 18 at para [1]

the accused is in custody, to attend to this matter. The timeline will indicate the enormous amount of judicial resources employed.

[5] The Constitutional Court in *Pheko* stated:

> "[t]he rule of law, a foundational value of the Constitution, requires that the dignity and authority of the courts be upheld. This is crucial as the capacity of the courts to carry out their functions depends upon it. As the Constitution commands, orders and decisions issued by a court bind all persons to whom and organs of State to which they apply, and no person or organ of State may interfere, in any manner, with the functioning of the courts. It follows from this that disobedience towards court orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced. Courts have the power to ensure that their decisions or orders are complied with by all and sundry, including organs of State. In doing so, courts are not only giving effect to the rights of the successful litigant but also and more importantly, by acting as guardians of the Constitution, asserting their authority in the public interest." [2]

BACKGROUND

[6] The second to seventh applicants are all members of the first applicant. They represent the first applicant as elected representatives in the National Assembly, Parliament of the Republic of South Africa. As members of Parliament they are subjected to the internal rules of the National Assembly. The National Assembly and the National Council of Provinces have sub-committees with designated functions. The National Assembly has a sub-committee named the Powers and Privileges Committee, of which the first respondent is the chairperson.

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[2] *Pheko v Ekurhuleni City* [2015] ZACC 10; 2015 (5) SA 600 (CC); 2015 (6) BCLR 711 (CC) (Pheko II), see also *Witham v Holloway* [1995] HCA 3 at para 15, where the Australian High Court held that— "there is not a true dichotomy between proceedings in the public interest and proceedings in the interest of the individual. Even when proceedings are taken by the individual to secure the benefit of an order or undertaking that has not been complied with, there is also a public interest aspect in the sense that the proceedings also vindicate the court's authority. Moreover, the public interest in the administration of justice requires compliance with all orders and undertakings, whether or not compliance also serves individual or private interests."

[7] Annually, normally early in February of each year, the Head of State (the President of the Republic of South Africa) address a joint sitting of the two Houses of Parliament at what is named the State of the Nation Address ["SONA"]. The sitting is presided over by the Speaker of the National Assembly [the second respondent] and the chairperson of the National Council of Provinces [the sixth respondent]. The State of the Nation Address for 2023 was held on 9 February 2023. It was attended by members of Parliament, the executive and representatives of the Judiciary that included the Chief Justice and the Heads of Court for the different divisions. Local and foreign dignitaries are often invited and the event is live streamed on television and other electronic media. Customarily, in the week that follows the address, political parties in Parliament through the elected representatives, have an opportunity to address questions to the Head of State.

[8] Certain events happened at SONA 2023 that led to the referral of the second to seventh applicants to the Powers and Privileges Committee. This committee had the task to consider the matter relating to contempt of Parliament. A process was followed which led to a guilty finding of the members concerned, which finding and the sanctions recommended were confirmed by the National Assembly on 5 December 2023. The decision of the National Assembly is recorded as follows:

> "An order to apologize in person in the house to the President, the Speaker and the people of South Africa as determined by the house as set out in section 12 [5] [c] of the Privileges Act; and suspension of the members without remuneration for a period of 30 days, whether or not the house or any of its committees is scheduled to meet during that period starting from 1 to 29 February 2024 a [SIC] set out in section 12 [5] [g] of the Privileges Act."

The second, third, sixth and seventh applicants were present at this sitting.

[9] On 20 December 2023 (some 15 days later) this application was launched wherein the following relief was sought:

> "1. Dispensing with the Rules relating to service and dealing with this matter as one of urgency in accordance with the provisions of Rule 6(12) of the Uniform Rules of Court.
>
> 2. Declaring the National Assembly Rule 214 and the Schedule: Procedure to be followed in the investigation and determination of allegations of misconduct and

contempt of Parliament (9th edition- 2009) (**"the impugned Rules"**) relating to the Powers and Privileges Committee unlawful and unconstitutional to the extent that:

2.1. they fail to ensure that Parliament's process for disciplining members of Parliament (**"MPs"**) is conducted by an independent and impartial decisionmaker.

2.2. they fail to provide sufficient guidelines for the exercise of discretion insofar as sanctions are concerned;

2.3. they provide the Powers and Privileges Committee with unfettered discretion without providing sufficient guidelines on the right to cross-examine witnesses, the discovery of documents and information; and the standard of proof; and

2.4. they fail to provide a time-bar for the institution of charges against an MP.

3. Declaring the impugned Rules relating to the Powers and Privileges Committee unlawful and unconstitutional to the extent that they fail to conform to the requirements of section 12(3)(a) of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act No 4 of 2004 (**"the Act"**) as well as sections 1(c) and 57(1) of the Constitution of the Republic of South Africa, 1996.

4. Declaring section 12(5) of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act No 4 of 2004 in that it fails to provide sufficient guidelines for the imposition of sanctions on a Member of Parliament.

5. Declaring the following decisions and actions (**"the impugned decisions and actions"**) of the Powers and Privileges Committee unconstitutional, unlawful and invalid:

5.1. The proceedings in terms of which the second to sixth applicants were charged and found guilty of contempt of Parliament held from 20 November 2023 to 22 November 2023;

5.2. The report of the Powers and Privileges Committee dated 1 December 2023 conveying its guilty finding and recommending a penalty of an apology to the President, the Speaker, and the people of South Africa, as well as suspension of the applicants for a month without remuneration.

5.3. The decision of the National Assembly dated 5 December 2023 to adopt the report of the Powers and Privileges Committee and to impose the recommended penalties.

6. Reviewing and setting aside the impugned decisions and actions referred to in paragraph 5 above.

7. In the event that prayer 2, 3 and 4 is granted, directing the respondents, as appropriate, to cause the necessary amendments to the Act, Rules and the Schedule within twelve months of the granting of this order.

8. In the alternative to the prayers set out in paragraphs 2, 3, 4, 5, 6 and 7, an interim interdict is granted suspending the operation of the sanction and penalty against the Second to Seventh Applicants until the finalisation of this application.

9. Costs, including the costs of two counsel, one being senior, in the event of opposition to be awarded against any respondent opposing the relief set out herein, such costs to be paid on a joint and several basis.

10. Further and/or alternative relief."

[10] The papers were served on the state attorney on Thursday, 21 December 2023. In accordance with the applicants' unilaterally imposed timeline, the respondents were called upon to indicate their intention to oppose the relief sought, in writing, by no later than 29 December 2023. I pause to note that from Friday, 22 December until Wednesday, 27 December 2023, it was one long weekend with public holidays scattered between that led into another long weekend that included 1 and 2 January 2024.

[11] Further, In the event that the respondents opposed the application, the applicants required them to file their answering affidavits, together with any relevant documents, by no later than 8 January 2024. The date for the hearing was set for 18 January 2024. It is apparent from these timelines that the times given for responses and setdown was truncated to an extreme extent compared to the timelines set in the Uniform Rules of Court.

[12] Needless to say the respondents, but for the fourth and fifth respondents who abide the decision, had difficulty in meeting these deadlines. A voluminous reply was delivered on 11 January 2024, three days later than the date unilaterally set by the applicants. No application for condonation was filed as the respondents were of the view that no condonation was needed. The applicants wanted to reply to the documents filed by the respondents and therefore sought a postponement of the matter set down for 18 January 2024. The parties agreed to an order that was taken on 17 January 2024 before Cloete J, who coincidentally happened to be the senior urgent recess judge that day. The order reads as follows,

"1. The matter is postponed for hearing on the urgent roll on **29 JANUARY 2024,** and the parties' legal representatives are given leave to approach the Acting Judge President for a special allocation.
2. The Applicants shall deliver their Replying Affidavit by **19 JANUARY 2024.**
3. The Applicants shall deliver their Heads of Argument by **22 JANUARY 2024.**
4. The Opposing Respondents shall deliver their Heads of Argument by **25 JANUARY 2024.**"

[13] It is instructive to note that specific timelines were agreed to and confirmed in an order of court.

[14] The applicants had difficulty complying with filing their replying affidavit by Friday, 19 January 2024 due to the unforeseen personal circumstances of one of their team. Correspondence between the parties was exchange in this regard. I pause to note that no negative inference is drawn from the first delay in non-compliance of the court order.

[15] The run up to the date for hearing caused a flurry of activity, particularly with constituting a bench. On 23 January 2024 in the afternoon it was decided by the Acting Judge President that the bench be constituted as it is now. I became the presiding judge and immediately took steps in an attempt to manage the matter so that it was ripe for hearing on 29 January 2024. I caused a notification to be sent to the attorneys calling on a judicial case management meeting for the morning of 25 January 2024. At the meeting it became apparent that the replying affidavit was not filed. I was informed that an unsigned version was provided to the respondents' attorneys and that a copy will be filed on that day. I raised the issue of condonation pertinently in respect of the non-compliance with a court order as well. My discomfort was that the parties were aware from 23 January 2024 of the constitution of the bench and the need to prepare timeously for hearing. I was assured that the heads of argument will also be filed by Friday, 26 January 2024 in respect of both parties. I indicated to the applicants' attorney that that seemed to be an impossibility which was confirmed by the respondents' attorney. I further arranged that a facility be created on the Microsoft Teams platform to facilitate the uploading of documents, during non-court hours, to assist the bench and the parties to prepare for the hearing.

[16] The replying affidavit was filed on 25 January 2024. It became apparent that the affidavit was commissioned on 24 January 2024 and that an unsigned version was sent to the respondents the day before. The application for condonation was only received by the respondents' attorney late in the afternoon of Friday, 26 January

2024. The applicants' heads of argument were uploaded, until now still not filed, shortly before midnight on Friday, 26 January 2024. No application for condonation for this non-compliance with the previously agreed court order and Practice Directives in this division has been filed to date. This caused the matter not to be ripe for hearing on 29 January 2024 as was seen by myself on the 25th and the parties alerted to the possibility. I indicated to the parties on the 25th, with the foreseen possibility, that they should seek an agreement for interim relief, if at all possible, as it was apparent that the matter could not be heard on Monday 29 January 2024 given the time constraints and the volume on which the bench had to prepare. The parties could not agree on some form of interim relief and the applicants' heads of argument filed on Friday, the 26th still dealt with all the issues, including the main relief still persisted with at that point. Accordingly, both the respondents and the court were still required by the applicants at that stage to prepare for the entire case.

[17] Although the respondents do not oppose the application for condonation for the late filing of the replying affidavit, they argue strongly that the court should strike the matter due to the conduct of the applicants. The applicants in turn argue, primarily, that by striking the matter we would infringe on their right of access to the courts. Further, that there is no proper application for striking before us and it should therefore not be entertained at all. I do not agree that in exercising my discretion insofar as it relates to condonation for the non-compliance of a court order, that the applicants' argument can hold.

[18] The applicants are *dominus litis.* They chose to approach court on an urgent basis, which they were entitled to do. It would have been clear from the outset, given the time of year and the particular circumstances that the respondents are mostly of an institutional nature, Parliament had already risen for the year. The court was in recess on the date that they unilaterally chose, meaning there were only two judges on duty. Managing the hearing of a matter like this, launched during the court recess and set down to be heard during court recess becomes an almost impossible task. The judiciary has an obligation to perform their duties and functions for all the parties

involved in litigation to have a fair hearing. This includes proper preparation and reading of all the necessary papers.

[19] An applicant who applies for the date for a matter that they foresee will be opposed, as in the instant matter, must ensure that the timelines they set are not only reasonable in the particular circumstances but that it can be accommodated on the court roll and that the matter will be ripe for hearing on the date so chosen or agreed. The agreed order of this court dated 17 January 2024 included the possibility of approaching the Acting Judge President for special allocation, which eventually happened in this matter.

[20] The applicants in this matter had the obligation to ensure that the matter was ripe for hearing. No reasons were given for the midnight filing of the heads of argument on the Friday preceding the Monday hearing which clearly left no time for the respondents to file their heads of argument. Not only were the applicants forewarned of the effect of late filing of heads of argument but also the requirement to apply for condonation for the non-compliance with a court order.

[21] I can put it no better than Gilbert AJ in *Chonqin Gingxing Industries SA (Pty) Limited v Ye and Others* [3]:

> "[25] Having so applied for the opposed date, the applicant represented that the matter was ripe for hearing. As discussed above, the whole purpose of the procedures is to ensure that as far as practically possible a matter is ripe for hearing before becoming deserving of allocation on the busy opposed motion court roll.
>
> [26] Having made that representation, the applicant must, insofar as practically feasible, ensure that the application remains ripe for hearing. Should the application become no longer ripe for hearing, then the application should be removed from the roll. Understandably there may be instances where recalcitrant respondents may conduct themselves, with varying degrees of ingenuity, in an attempt to render an allocated matter no longer ripe for hearing and so seek to avoid a hearing. The court will be alive to these attempts, but where the applicant itself take steps that render its

[3] [2021] ZAGPJHC2; 2021 (3) SA 189 (GJ) at paras 25-27.

> own matter no longer ready for hearing, it can hardly complain that its opposed application is struck from the roll.
>
> [27] This is such an instance"

[22] The respondents were clearly prejudiced by the conduct of the applicants but more importantly, the court is prejudiced despite our best efforts and literally having to disadvantage other litigants in an attempt to accommodate the matter. All litigants before the courts have equal rights of access and, by accommodating this matter, other litigants had to be prejudiced. Courts must ensure that the integrity and efficient use of the judicial resources is protected. As pointed out above by allowing litigants to ignore court orders that they've agreed to without a proper explanation, will bring the administration of justice into disrepute.

[23] I am mindful of the importance of this matter and that the applicants might not get the relief they wish before the next State of the Nation Address and/or the Budget Speech, but this is of their own making. The court was willing and ready to not only accommodate the parties but to go the extra mile in sacrificing the weekend to read in excess of a thousand pages and prepare for the hearing. I observed that the applicants lamented the fact that they had eight days to prepare on less papers for the hearing before the committee.

[24] I can see no reason why the non-compliance with the agreed court order and the effect thereof should be condoned with no reasons proffered. The result can only be ascribed as self-made by the applicants.

[25] Insofar as it relates to costs. There is no reason why the costs should not follow that result. Consequently, I am of the view that the applicants pay the wasted costs. Both employed more than one counsel as it was necessary.

[26] Consequently, the following order is made:

1. **The application for condonation for the late filing of the applicants' replying affidavit is granted.**
2. **Save as aforesaid, the application is struck from the roll.**
3. **The applicants shall pay the first, second, third and sixth respondents' costs of the application, jointly and severally, the one paying the others to be absolved, such costs to include the cost of two counsel where so employed.**

_____

N C Erasmus
Judge of the High Court

I agree

_____

J I Cloete
Judge of the High Court

IT IS SO ORDERED

THULARE, J [DISSENTING]

[27] I have read the judgment of Erasmus J wherein he set out the background facts to the matter. He has dealt with the facts and I will only deal therewith to the extent necessary to set out the reasons why I am unable to agree with his order. Life happened, especially during both Parliament and Court recess periods of the 2023-2024 year-end and beginning, the festive period and most importantly during the generally long leave periods of business and active social life. That is the milieu in which I understood the exchange of pleadings, and the difficulties of the lawyers getting the role players for the parties readily available to depose to the necessary affidavits. Emerging from the dust of that arena, in his opening address, Adv Ngcukaitobi, Senior Counsel leading the applicants' team, advised the court that

what was sought, on the morning of 29 January 2024 before court, was a two-pronged approach. The first was what would be the first prize for the applicants, which was the hearing of the alternative prayer, to wit, an interim interdict suspending the operation of the sanction and penalty against the second to seventh applicants until finalization of the application. The second, an alternative to the first prize, was the postponement of the matter to a date on, before or soon after 1 February 2024, to enable the parties and the court to be ready on all fronts to hear the application.

[28] Before the first prize and its alternative was heard, the Senior Counsel asked to be permitted to first deal with the application for condonation for non-compliance with the court order dated 17 January 2024 in respect of the late filing of the applicant's replying affidavit which, in terms of that order, had to be delivered on or before 19th January 2024. Life happening, the personal circumstances of the Advocate assigned to finalise the replying affidavit on behalf of the applicants, which were beyond his control, led to the applicants only serving their unsigned replying affidavit on 23 January 2024. The deponent to the applicant's replying affidavit, Mr Julius Sello Malema MP, was in Ghana on 23 January 2024. The applicants' representatives only received his signed copy at 16h15, upon his return on 24 January 2024 and immediately served it on the respondents' representatives. As it was after court hours, the applicants' correspondence attorneys were only able to file the signed affidavit at court on 25 January 2024. The unsigned replying affidavit was served two days late and filed five days late. It was the applicants' case that they would be greatly prejudiced should the court not condone the late filing of their replying affidavit. The MP's stood to be suspended and removed from Parliament and the information contained in the replying affidavit was crucial. The submission was that neither the attorneys nor the applicants themselves were overtly dilatory or mala fide, and that the non-compliance with the agreed deadline which was made an order of court was unintentional and for the most part unavoidable.

[29] The respondents did not oppose the condonation for the late filing of the applicants' answering affidavit. They abided by any order so granted, subject to two points. The first was that some factors were be taken into consideration. The second

was that regardless of whether condonation was granted, the broader issue remained and that was the matter was not ripe for hearing on Monday 29 January 2024 and that the respondents and the court were prejudiced by the non-compliance, and that the matter should be struck from the roll. Already by 23 January 2024, when the unsigned answering affidavit was served, Parliament would have been left only with two days from the date of receiving it, to file their heads of arguments. Against the background that the applicants had not had their heads of argument ready by then, and given the nature of the issues herein, it was unfair to both the respondents and the court. Already by 23 January 2024, the respondents alerted the applicants to these challenges, noting that the record was then 845 pages without the applicants' replying affidavit and heads of arguments. On that same date, 23 January 2024, Parliament proposed to both the applicants' legal representatives and the Acting Judge President that the matter be urgently case managed determining the new date for the hearing of the matter. As at the morning of Thursday 25 January 2024, two court days before the hearing on Monday 29 January 2024, the court had not yet received the applicant's replying affidavit, the applicants' heads of argument and the respondents' head of arguments. The applicants only served the condonation application on Friday 26 February 2024 at 16H00, after an electronic attempt failed at 11h40. The respondent had to prepare and deliver its affidavit over the weekend, in anticipation of the hearing on Monday. The condonation application did not provide a time by which the respondents were to file their answering affidavit and only dealt with the lateness of the replying affidavit and not the heads of argument. The heads of argument served at 23h22 on Friday 26 January 2024 were 66 pages and dealt with the entire case and did not explain why they were filed five court days late and just before midnight of the Friday before a Monday hearing.

[30] The respondents submitted that the late filing of the replying affidavit, the heads of argument and the condonation application prejudiced Parliament in that it was given inadequate time to consider the replying affidavit and the heads of arguments, to draft the respondents' heads of argument and to respond to the condonation application and to prepare for hearing given this matter's complexity and potential serious consequences for the business of Parliament. It was the

respondents' case that the court was prejudiced in the same way and that moreover the court did not have Parliament's heads of argument at all as the applicants' filed their heads of argument so late that Parliament did not have time to file its heads and that even if Parliament had been able to file heads of argument the court would only have received them on the day of the hearing. If the matter was heard, whether interim relief of final relief, on 29 January 2024, it will not be a fair hearing as Parliament and the court would have been denied adequate time to be ready. The respondents' case was that the applicants' late filing of their replying affidavit and heads of argument had materially prejudiced both the respondents and the court. The respondents argued that the matter be struck off the roll. The matter was not ready to proceed on the merits.

[31] In *Member of the Executive Council for Health and Social Development of the Gauteng Provincial Government v Motubatse and Another* (182/2021) [2023] ZASCA 162 (30 November 2023) at para 11 and 12 it was said:

> "[11] With regard to the explanations for the delays on behalf of the MEC, there is no doubt that they are far from satisfactory. They are excessive, and the explanations therefor are woefully inadequate. The ignorance of the rules and procedures of this Court for failing to timeously file the record and the heads of argument, is no excuse. Counsel for the MEC was hard-pressed to concede that the non-compliance with the rules of Court were excessive, and the explanations for non-compliance were inadequate. This is indicative of a disturbing pattern regard being had to the instances in the high which led to her defence being struck out. Ordinarily, on these facts, that would be the end of the matter.
>
> "It is trite that good prospects on the merits may compensate for poor explanation for the delay."

In *United Plant Hire (Pty) Ltd v Hills and Others* 1976 (1) SA 717 (A) at 720E-G it was said:

> "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; and that in essence it is a question of fairness to both sides. In this enquiry, relevant considerations may include the degree of non-compliance with the Rules, the explanation therefore, the prospects of success on appeal, the importance of the

case, the respondent's interest in the finality of his judgment, the convenience of the Court, and the avoidance of unnecessary delay in the administration of justice. The list is not exhaustive.

These factors are not individually decisive but are interrelated and must be weighed one against the other, thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong."

In *Darries v Sheriff of the Magistrate's Court Wynberg and Another* 1998 (3) SA 34 at 40G-41D it was said:

"The number of petitions for condonation of failure to comply with the rules of this Court, particularly in recent times, is a matter for grave concern. The reported decisions show that the circumstances which have led to the need for applications for condonation of breaches of the rules have varied widely. But the factors which weigh with the Court are factors which have been consistently applied and frequently restated. See Federated Employers Fire and General Insurance Co Ltd and Another v McKenzie 1969 (3) SA 360 (A) at 362 F-H; United Plant Hire (Pty) Ltd v Hills and Others 1976 (1) SA 717 (A) at 720 E-G. I will content myself with referring, for present purposes, only to factors which the circumstances of this case suggest should be repeated. Condonation of the non-observance of the Rules of this Court is not a mere formality (see Meintjies v H D Combrinck (Edms) Bpk 1961 (1) SA 262 (A) 263H-264B; Saloojee and Another NN.O. v Minister of Community Development 1965 (2) SA 135 (A) 138 E-F.

In all cases some acceptable explanation, not only of, for example, the delay in noting an appeal, but also, where this is the case, any delay in seeking condonation, must be given. An appellant should whenever he realises that he has not complied with a rule of court apply for condonation as soon as possible. See Commisioner for Inland Revenue v Burger 1956 (4) SA 446 (A) at 449 F-H; Meintjies's case, supra, at 264 B; Saloojee's case, supra, at 138 H. Nor should it simply be assumed that where non-compliance was due entirely to the neglect of the appellant's attorney that condonation will be granted. See Saloojee's case, supra, at 141 B-G. In applications of this sort the appellants' 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. See Meintjies's

> case, supra, at 265 C-E; Rennie v Kamby Farms (Pty) Ltd 1989 (2) SA 124 (A) at 131 E-F; Moraliswani v Mamili 1989 (4) SA 1 (A) at 10 E. But 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. See Ferreira v Ntshingila 1990 (4) SA 271 (A) at 281 J - 282 A; Moraliswani v Mamili, supra, at 10 F; Rennie v Kamby Farms (Pty) Ltd (supra, at 131 H; Blumenthal and Another v Thomson NO and Another [1993] ZASCA 190; 1994 (2) SA 118 (A) at 1211 - 11 122 B."

In *Valor IT v Premier, North West Province and Others* (322/19) [2020] ZASCA 62; [2020] 3 All SA 397 (SCA); 2021 (1) SA 42 (SCA) (9 June 2020) it was said:

> "[38] One of the factors that must be considered whenever condonation is sought is the applicant's prospects of success on the merits. It must be borne in mind that the grant or refusal of condonation is not a mechanical process but one that involves the balancing of often competing factors. So, for instance, very weak prospects of success may not off-set a full, complete and satisfactory explanation for a delay; while strong prospects of success may excuse an inadequate explanation for the delay (to a point)."

[32] The applicants raised novel and complex constitutional issues and the relief, if granted in the terms sought in the interim relief which is the main prize for the applicants for now, would have serious consequences for Parliament. Both parties therefore needed to deal with the issues raised comprehensively, and the court needed to consider and formulate an appropriate response. Parliament did not agree to interim relief as according to them that would almost certainly defeat the purpose of the sanction that Parliament had imposed on the applicants. The applicants insist on their right according to them peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions even where the sole business of the day was the State of the Nation address by the President of the Republic of South Africa, in circumstances where the opposing respondents amongst others allege that the applicants deliberately created and took part in a serious disturbance, disorder and disruption in the joint sitting of Parliament, and acted in a manner which was

seriously detrimental to the dignity, decorum and orderly procedure of Parliament. The applicants allege that the real intention was to prevent the Economic Freedom Fighters (EFF) from expressing its views against the President.

[33] In paragraphs 214 to 215 of the application the applicants said the following:

> "URGENCY AND INTERIM RELIEF
> [214] We have requested that this matter be heard as one of semi-urgency and that it be placed on the roll for January 2024.
> [215] The semi-urgency is a result of our suspension which is set to commence on 1 February 2024. If the application cannot be heard before 1 February 2024, the EFF shall ask for an interim order for the suspension of the coming into operation of the sanction, until the matter can be heard."

In para 324 to 325, the respondents' answer hereto is:

> "Ad paras 214-5
> 324. Parliament does not object to an urgent determination of this application, on 18 January 2024, or on another date determined by the court.
> 325. I deny that the Applicants are entitled to come to court for final relief, and then seek interim relief in the alternative. They must choose a horse and ride it."

[34] The parties are agreed that the matter deserved the urgent attention of this court. It is against this background that I understood the lapses in the punctuality of both parties to adhere to time frames, in their respective earnest quest to have this matter dealt with preferably before the State of the Nation address 2024, scheduled for 8 February 2024. There were delays, but I am not persuaded that the explanation for the delay in the filing of the replying affidavit is woefully inadequate such that it should lead to the refusal of the condonation application. The degree of non-compliance with the time for the filing of the replying affidavit was not excessive. There is no doubt that this case is important for our constitutional democracy and the sanctity of its institutions, especially Parliament and its committees. The avoidance of unnecessary delay in the hearing of this important matter of public interest is a factor that needed to be considered. Where the delay is slight and the explanation good, the scales of justice tilted in favour of the applicant.

[35] I appreciate that the notice of motion placed the entirety of the application before the court. At the commencement of the hearing, the approach adopted as I understood the applicants' Senior Counsel, was to narrow down the relief sought for 29 January 2024. The applicants, as *dominus litis,* had not yet addressed the court on its relief which it indicated it sought for 29 January 2024. The applicants only dealt with their application for condonation for the filing of their replying affidavit. My understanding was that it was after the decision on whether the affidavit was admitted or not, that they would have commenced their submissions on their narrowed relief for 29 January 2024. It would have been apposite to consider whether the application was ripe for hearing when the applicants dealt with their submission on their first prize or its alternative of a postponement to a truncated date. In my view, the call for the striking of the application from the roll by the respondents was simply premature.

[36] In fairness to both sides, upon consideration of all these factors, in exercising my judicial discretion, I would make the following order:

1. **Condonation for the late filing of the applicants' replying affidavit is granted.**
2. **The parties are called upon to address the court on the question of costs, as well as the further conduct of the matter.**

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D M Thulare
Judge of the High Court

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