



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: **NO**
- (2) OF INTEREST TO OTHER JUDGES: **NO**
- (3) REVISED: **NO**
- (4) Date: 01 August 2023 Signature: _____

CASE NO

35050/2021

In the matter between:

AGGRIVED BENEFICIARIES OF HWASHI-DIFAGATE

COMMUNITY TRUST (IT 1253/07)

Applicant

And

HWASHI-DIFAGATE COMMUNITY TRUST (IT 1253/07)

1st Respondent

THABISH AMEL MAKUA	2 nd Respondent
PHINEAS MATLOSE MAKUWA	3 rd Respondent
DAVID MALENG MAGANE	4 th Respondent
MAKWELEBETE MOSES MAKWANA	5 th Respondent
BHEKI ERIC MORABA	6 th Respondent
MASTER OF THE NORTH GAUTENG HIGH COURT	7 th Respondent
THE MINISTER OF RURAL DEVELOPMENT AND LAND REFORM	8 th Respondent
REGIONAL LAND CLAIMS COMMISSIONER, LIMPOPO PROVINCE	9 th Respondent

JUDGMENT

NYATHI J

A. INTRODUCTION AND CONTEXT

- [1] This is an opposed interlocutory application for condonation for the late filing of its answering affidavit by the respondent in the main application. The current applicant is the respondent in the main application.
- [2] The respondent raised a point *in limine* regarding a defective power of attorney. They submitted that the power of attorney was defective due to it being signed by 1 trustee instead of the three trustees.
- [3] Advocate Baloyi made submissions that the alleged defect in the power of attorney has since been rectified by attaching a resolution. He referred to the matter of *Nampak Products Ltd t/ is Nampak Flexible Packaging v SweetCor (Pty) Ltd¹* as authority for application of the common law rules of ratification to rectify any defects in the Rule 7, concerning the power of attorney.

B. THE LAW ON CONDONATION

- [4] It is generally accepted that condonation is not to be had merely for the asking. The party asking for condonation must provide a full, detailed, and accurate account of the reasons for the delay to enable the court to understand and assess such delay. If the non-compliance is time-related, the date, duration and extent of the problem that occasioned such delay, should be set out. It is trite that where non-compliance of the rules has been flagrant and gross, a court

¹ Nampak v SweetCor (Pty) Ltd 1981 (4) SA 919 (T)

should be reluctant to grant condonation whatever the prospects of success might be.²

[5] In *Uitenhage Transitional Local Council v South African Revenue Service*³ Heher JA stated:

“Condonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the non-compliance is time-related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out.”

[6] In *Grootboom v National Prosecuting Authority*⁴ Bosielo AJ as he then was, said the following:

“I have read the judgment by my colleague Zondo J. I agree with him that, based on Brummerand and Van Wyk, the standard for considering an application for condonation is the interests of justice. However, the concept “interests of justice” is so elastic that it is not capable of precise definition. As the two cases demonstrate, it includes: the nature of the relief sought; the extent and cause of the delay; the effect of the delay on

² *Darries v Sheriff, Magistrate's Court, Wynberg* 1998 (3) SA 34 (SCA) at 41D.)

³ *Uitenhage Transitional Local Council v SA Revenue Service* 2004 (1) SA- 292 (SCA) at 297

⁴ 2014 (2) SA 68 (CC) at para [22]

the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal and the prospects of success. It is crucial to reiterate that both Brummer and Van Wyk emphasise that the ultimate determination of what is in the interests of justice must reflect due regard to all the relevant factors but it is not necessarily limited to those mentioned above. The particular circumstances of each case will determine which of these factors are relevant.”

C. CASE FOR THE APPLICANT

The extent of the delay

- [7] In *casu* the answering affidavit was filed more than a year out of time. Mr. Benjamin Moreko, the attorney for the applicant filed an affidavit in support of the condonation application.

Reason for the delay

- [8] Mr. Moreko states that the matter was assigned to Ms Alice Oliphant, a candidate attorney at Raphela Attorneys Inc. Ms Oliphant left the employment of Raphela Attorneys at the end of June 2022.
- [9] During August 2022 the applicant in the main application filed and notice of set down on the unopposed roll and emailed same to Raphela Attorneys Inc.

[10] The current applicant noticed that the matter had become dormant and assigned the deponent as the new attorney to attend to it. It transpired that Ms. Oliphant had left the office of Raphela attorneys abruptly without a proper handover. From a perusal of the file, it became clear that nothing was done after filing the notice to oppose on the 5 August 2021. Ms Oliphant could not be reached for the purpose of obtaining a confirmatory affidavit to the facts set out in this founding affidavit.

[11] On 29 August 2022, the deponent arranged for a consultation with clients and briefed counsel. On 30 August 2022 consultations happened and the draft answering affidavit was forwarded to the applicant for comment. The applicant at all times intended to defend the main application.

Prejudice

[12] The deponent submits that the respondents are not prejudiced by the delay. The application was served on the respondents on 2 August 2021. The respondents did nothing to advance their case when the applicant failed to file their answering affidavit except for serving a Rule 41A (mediation) notice. The matter was only set down for hearing on 6 September 2022, a year after the application was filed.

[13] On 6 September 2022 the matter was removed from the unopposed roll with an order that the applicant file an application for condonation, that the respondents

file a replying affidavit to the main application and further that the applicant file a supplementary affidavit to the main application as requested during argument by counsel of the applicant.

The prospects of success.

[14] Mr. Moreko submits that the applicants have prospects of success in the main application. The respondents accuse the Trustees of being conflicted, misusing the Trust funds and of failure to account to the beneficiaries without providing any evidence at all.

[15] All the allegations are unfounded, the Trustees have since the inception of Trust accounted to the beneficiaries. The Annual General Meeting (AGMs) have been held every single year as required by the Trust Deed (clause 7). Beneficiaries are informed in time of the AGM by announcement in the local radio station, advertising in the local newspapers and transport is arranged wherein beneficiaries without means of transport are bussed to the meetings. Furthermore, minutes and all documents pertaining to the activities of the Trust are held in the office and beneficiaries are encouraged to visit the office and view any of the documents.

[16] The only instance where an AGM was not held was in the year 2020 and 2021 due to Covid19 restrictions. The last AGM was held on the 28 August 2022.

Copies of the meeting are attached to the founding affidavit and are marked "HDC3".

Importance of the case

[17] This case is important for the trust, it should be ventilated in court in the presence of both parties concerned for the following reasons:

- 17.1 The respondents accuse the Trustees of mismanagement of the Trust, in particular the Trust funds with no evidence being put forward to support the accusations while the applicant has attached bank statements to prove the contrary.
- 17.2 The respondents accuse the Trustees of conflict of interest, and it is alleged that Trustees are directors of the entities that the Trust is a shareholder of. No evidence has been put forward by the respondent to support this accusation. The applicant in its answering affidavit has attached proof that the Trustees are not directors of such entities as it is alleged.
- 17.3 The respondents allege that the Trustees make decisions without consulting the beneficiaries. Clause 10 of the Trust Deed makes it clear that the Trustees have certain powers, and such powers may be exercised without consulting the beneficiaries as long as they are in the interest and for the benefit of the beneficiaries.
- 17.4 The respondents seek relief that the beneficiaries of their choice be appointed by the Master as Trustees without following the process of election of Trustees as prescribed in the Trust Deed. In essence, the respondents seek to take over the Trust.

17.5 The respondents seek an order in terms of section 13 of the Trust Property Control Act 57 of 1988 for the variation of the Trust provisions. As applicant in the main application, the respondents have not set out a case in their founding affidavit for such an order.

17.6 The respondents further seek an order to the effect that once the orders have been granted that the parties refrain from issuing legal process against each other until such time that the verification process and the election have been completed. This order is incompetent in law and unconstitutional. The respondents seek to have their own members set out in annexure "MP1" attached to the founding affidavit appointed as Trustees without having been elected as set out in the Trust Deed.

[18] The trust is a Community Trust and has more than 100 beneficiaries. The respondents do not represent all the beneficiaries. As it appears from the purported resolution attached to the respondents' founding affidavit, only 12 beneficiaries are involved in these proceedings. As set out in the answering affidavit in the main application (paragraph 4), the deponent to the founding affidavit Lucas Phaurus Mashigo has since passed away.

[19] The deponent is further advised that the list of beneficiaries attached to the applicants' founding affidavit in the main application is correct and was prepared by the 9th Respondent (main application).

[20] It is in the interest of justice that the main application be brought to finality and the court should have consideration of the answering affidavit forming the basis of this application.

D. CASE FOR THE RESPONDENT

[21] At the commencement of his submissions, Mr. Mabilo focused on the applicants' reasons for the delay. He referred to the matter of *Nair v Telkom SOC Ltd.*⁵ Where the court held 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.”

[22] Mr. Mabilo further submitted that the applicant ought to have detailed attempts it made to trace Ms. Oliphant to obtain a confirmatory affidavit from her at the very least.

⁵ *Nair v Telkom SOC Ltd* [2021] ZALCJHB 449

[23] The rest of the submissions on behalf of the respondents are in the papers, I will not burden this judgment with same.

E. DISCUSSION

[24] There are numerous authorities, where the prospects of success were held to be irrelevant in the absence of an acceptable explanation for the delay. The prospects of success would have to be overwhelming to assist the applicants in circumstances where their explanation is found to be so inadequate as to constitute a complete lack of an explanation. The delay of more than a year has not been satisfactorily explained away by the deponent. There appears to be a convenient scapegoating around the mythical Ms. Oliphant who vanished into the proverbial thin air.

[25] In this case, the hopeless mishandling of this matter lies squarely at the hands of the attorneys Raphela Inc. Whether Ms. Oliphant is the cause of the shambles or not, the responsibility should ultimately rest at the leadership of the law firm.

[26] In *Superb Meat Supplies CC v Maritz*⁶ Nicholson AJA stated:

“In this court and the Supreme Court of Appeal there have been frequently repeated judicial warnings that there is a limit beyond which a litigant cannot escape the results of his attorney’s lack of diligence of the

⁶ *Superb Meat Supplies CC v Maritz* (2004) ILJ 96 (LAC) at 100H.

insufficiency of the explanation tendered. It has never been the law that invariably a litigant will be excused if the blame lies with the attorney. To hold otherwise might have a disastrous effect upon the observance of the rules of this court and set a dangerous precedent. It would invite and encourage laxity on the part of practitioners.”

[27] There are therefore limits beyond which a party cannot rely on their legal representative’s lack of diligence or negligence when they are themselves innocent insofar as an explanation is provided for any delay or non-compliance with time periods.⁷

[28] In the result, the following order is made:

- (a) The application for condonation for the late filing of the answering affidavit is dismissed.
- (b) The applicant (respondent in the main application) to pay the costs for this application.

J.S. NYATHI

Judge of the High Court

Gauteng Division, Pretoria

⁷ Nair v Telkom SOC Ltd [2021] ZALCJHB 449.

Date of hearing: 7 February 2023

Date of Judgment: 01 August 2023

Appearances

On behalf of the Applicant: Adv. F. Baloyi

Instructed by: Raphela Attorneys Inc.

E-mail: benjamin@raphelainc.co.za

On behalf of the Respondent: Adv. Mabilo

Instructed by: Gilbert Motedi Attorneys Inc.

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Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email and uploaded on the CaseLines electronic platform. The date for hand-down is deemed to be 01 August 2023.