



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: 677/2020P

In the matter between:

VIKIZITHA R. MLOTSHWA

FIRST APPLICANT

SILUNGILE B. DUMISA

SECOND APPLICANT

AHMED SHAIK EMAM

THIRD APPLICANT

and

VERONICA ZANELE KAMAGWAZA MSIBI

FIRST RESPONDENT

JEREMIAH B. MAVUNDLA

SECOND RESPONDENT

BHEKITHEMBA ABEL DLAMINI

THIRD RESPONDENT

CHRISTOPHER H. SIBISI

FOURTH RESPONDENT

OBED T. NGCAMU

FIFTH RESPONDENT

KELLY BALOYI

SIXTH RESPONDENT

CONAN MDLETSHE

SEVENTH RESPONDENT

SKHUMBUZO ZULU

EIGHT RESPONDENT

NHLANHLA KHAWULA

NINTH RESPONDENT

THE NATIONAL FREEDOM PARTY

TENTH RESPONDENT

ORDER

1. Condonation for the late lodging of the application for leave to appeal is granted.
The 8th respondent Skhumbuzo Zulu is ordered to pay 50% of the costs of the application.

2. Leave to appeal the judgment of Van Zyl J delivered on 19 November 2021 is granted to appeal to the Supreme Court of Appeal. The costs of the application for leave to appeal to be costs on appeal.
3. Costs to include costs of two counsel where so employed.

JUDGMENT

Deemed to be delivered on: 17 November 2023

Mngadi, J

[1] This is an application for leave to appeal the judgment of Van Zyl J delivered on 19 November 2021. I am seized with the matter since my brother Van Zyl J has retired.

[2] Van Zyl J in his judgment set aside as void and invalid a conference and its resolutions held on 12 -13 December 2019.

[3] In the main application before Van Zyl J the applicants were Vikizitha R. Mlothwa, Silungile B. Dumisa and Ahmed M. Shaik Emam. The respondents were Veronica Zanele KaMagwaza Msibi, Jeremiah B. Mavundla, Bhekithemba Abel Dlamini, Christopher H Sibisi, Obed T. Ngcamu, Kelly Baloyi, Conan Mdletshe, Skhumbuzo Zulu, Nhlanhla Khawula and the National Freedom Party (NFP) respectively.

[4] The application for leave to appeal was launched on 7 December 2022 together with an application for the late lodging of the application for leave to appeal. The parties for ease of reference this ruling to retain their reference in the matter before Van Zyl J.

[5] The application for leave to appeal stated that the respondents sought leave to appeal. The condonation application was accompanied by an affidavit deposed to by Skhumbuzo Zulu (8th respondent). On 24 March 2023 the applicants filed grounds for opposing the application for condonation and the grounds for opposing the application for leave to appeal.

[6] On 26 April 2023 the applicants issued a Rule 7(1) notice disputing authority of the attorneys to act on behalf of the first to tenth respondent in the application for leave to appeal. On 25 October 2023, Sikhumbuzo Zulu filed an affidavit stating that he was applying for leave to appeal as he was the 8th respondent in the main application, and he remained an active member of the NFP. He stated that Mlotshwa and Dumisa have left the NFP, and he is interested only in the welfare and the functioning of the NFP.

[7] On 30 October 2023 Silungile Dumisa filed an answering affidavit stating that she is the second applicant in the main matter, she is a data capturer of the NFP. She stated that the 8th respondent deliberately attempted to mislead the court by not disclosing in front that he was the only person seeking leave to appeal. Dumisa went on to state that all the other respondents are not seeking to appeal Van Zyl J's judgment but in fact they accepted and supported the judgment of Van Zyl J's judgment, except those who had left NFP.

[8] In the original application for leave to appeal the grounds of appeal were stated to be namely; that the learned Judge erred in not finding that the material disputes of facts existed; misdirected himself in not interpreting the constitution of the National Freedom Party in its entirety rather referring only to sections that dealt with the elective process, had he done so, he would have ensured that all domestic remedies in terms of the grievance procedure of the National Freedom Party ought to have been followed by the applicants which would have resulted in the dismissal of the application.

[9] Zulu on 20 October 2023 filed supplementary grounds for the leave to appeal. These grounds are extensive, and they challenge the judgment of Van Zyl J on multiple fronts. But in my view for purposes of this ruling in the application for leave to appeal it is not necessary to deal with all of them.

[10] The applicants before Van Zyl J sought an declaring the meeting held at Ulundi on 12/13 December 2019 as the Elective National Conference of the National Party and the decisions taken in that meeting unlawful. The main or fundamental reason given by the applicants was that the said conference was not called by the INEC in that the INEC had taken no valid decision to call the said conference. The other grounds stated by the applicants which received attention from Van Zyl J challenged processes leading to and at the conference. In my view these grounds were irrelevant before Van Zyl J because the relief sought did not seek to set aside a particular decision of the conference.

[11] Van Zyl J stated that the NFP has a history of internal factionalism and dispute which resulted in a litany of litigation. The situation resulted in an impasse. The two factions to resolve the impasse entered on 7 September 2018 into a Settlement Agreement which was made an order of court. It set up an Interim National Executive Committee (INEC) wherein both factions were equally represented. INEC became solely responsible for the routine administration of both the political and administration functions of the NFP. To this end it was tasked with the appointment of the National Administrator, National Organiser, National Treasurer and other key personnel instrumental in the proper functioning of the party, but in compliance with its constitution. The INEC would remain in place until the General National Conference and/or Elective National Conference is held which would result in the formation of the National Executive Committee (NEC which would automatically take over from the INEC.

[12] Van Zyl J delved into the matter and came out with a decision in favour of the applicants. It is not necessary to deal with all the details which to me appear to have resulted in confusing the issue rather than clarifying it. The learned Judge appear to have overlooked the fact it was common cause that INEC was the body seized with the calling of the Elective National Conference and in charge of the affairs of the party. Further, it was common cause that the December conference was called. Lastly, all those who were serving in the INEC at the time confirmed that the conference was called by INEC. The applicants did not challenge INEC in the manner it called the conference but claimed that INEC did not call the conference.

[13] Zulu has managed to persuade me that another court might hold differently from Van Zyl J on the question of whether the December conference was called by the INEC or not and on whether the deviations from the NFP constitution, if any, had the effect to nullifying the conference and in its resolutions.

[14] Dumisa and Emam contends that condonation for the late lodging of the application for leave to appeal, despite the view of the court on merits of the application for leave to appeal should be refused. Mr Padayachee for Zulu conceded that Zulu's grounds for the delay in lodging the leave to appeal are thin but excusable.

[15] Zulu in the initial application for condonation stated:

I am a major male, office bearer, of the 10th Applicant and in the capacity of acting chairman in the Durban Metropolitan Region. We, 9 applicants desire to appeal against the judgment of Honourable Van Zyl J handed down on 19 November 2021. We are aware that this application for leave to appeal ought to have been filed within 14 days of the judgment. We are aware that we were late on filing our application for leave to appeal. However, we respectfully submit that we have reasonable grounds for this honourable court to condone our late filing of the application. The reasons for the late filing of the application are as follows: (a) We were involved in preparation for the Local Government Election which took place in November 2021 and as a consequence thereof did not have time to meet to consider the judgment of Van Zyl J; (b) Our Honourable President who is the casting vote in the Interim National Executive Committee passed away on 6 September 2021 effectively rendering the committee ineffective; (c) All funds that we had at our disposal were expended for the Local Government Elections; (d) As a cumulative consequence of the above and the perilous state of affairs of the party, the party was ineffectively dysfunctional.

[16] Further, Zulu states as follows that the divisive factionalism did not help the *status quo*. However, they as a collective in the absence of the erstwhile President accepted that they have a moral and social responsibility and an obligation to their constituents and community in reviving the activities of the party. To this end they pledged to apply their personal funds but others failed in honouring the pledges. Eventually they were in a position to consult with their attorneys and counsel briefed for advice. He asked for

condonation and apologised for the delay and stated that the other side if condonation is granted shall suffer no prejudice.,

[17] The applicants responded stating, *inter alia*, that Zulu had not attached confirmatory affidavit, he has not set out the degree of the lateness and the reasons thereof, the INEC has been running the affairs of the party. In September 2023 it successfully held a provincial elective conference in Newcastle and it is now busy preparing to hold in December 2023 an Elective National Conference. The continuing litigation is creating a distraction and unnecessary uncertainty within the party.

[18] Zulu without leave of court, but with no objection from the other side on 26 October 2023 filed another affidavit in support of the application for condonation, stating that he arrived at only supplementing the averment contained in the primary affidavit seeking condonation. He stated that although in his reasons for submitting the application for leave to appeal were weak they should and ought to be considered against the extremely good prospects of success. Zulu then stated that he intended on appeal if granted leave to lead evidence to show that Van Zyl J's judgment benefits only Emam since both Mlotshwa and Dumisa have left the NFP.

[19] Dumisa in the answering affidavit filed on 30 October 2023 stated as follows. After the judgment of Van Zyl J was handed down on 19 November 2021 INEC continued as the managing executive committee of the NFP in accordance with the 2018 order of the

court which authorized its creation and purpose. The INEC is made up of two factions within the NFP. Each faction is represented by four (4) members. The other member of INEC was the late NFP President. All the respondents in the main application including the 8th respondent accepted and acquiesced in the judgment of Van Zyl J. In particular the 8th respondent accepted that INEC was the only managing executive committee of the NFP. Furthermore, it was accepted that the alleged new elected office bearers following the 2019 Ulundi meeting were null and void. On 23 November 2021, 8th respondent in his capacity as the secretary of faction A of INEC wrote to INEC to advise it that two (2) members of faction A were withdrawn and were replaced by two (2) other NFP members. The third applicant happened to be one of the faction A members who the 8th respondent attempted to replace with another member. He attached copies of the relevant communication to this fact. On 30 November 2021 the both respondents repeated the aforesaid statement that faction A of INEC had changed two (2) of their representatives. On 10 December 2021 INEC received a letter from 8th respondent claiming that INEC did not have the constitutional powers to arrange a general National Conference and calling for the reconstruction of INEC. Dumisa then refers to the roles of the two respondents in the main application in the affairs of INEC demonstrating that they accepted Van Zyl J's judgment.

[20] The above-mentioned alleged facts by Dumisa on which the claim of acquiescence is founded must be contracted with the content of the grounds for opposition of condonation for late filing of leave to appeal by applicant dated 24 March 2023 which reads as following:

'Ad par 6

The content of this paragraph is noted hence the applicant and those in his faction refuse to accept the authority of INEC and have been rebellious and in contempt of the court order declaring their elective conference null and void and a contempt of court application had to be brought against them and to date they still refer to themselves as the NEC members, thus meeting confusion to the public and the members of NFP.

5.

.... The applicant and his faction have created a parallel structure causing disorder and undermining the authority of INEC and causing instability in the party..... applicant and his faction have opened an unlawful bank account on behalf of the party and illegally collected monies from the members of the NFP and the NFP ward Councillors without the approval of INEC and the NFP ward Counsellors of eDumbe Municipality and Ethekewini Municipality were the victims to the aforesaid scam and fraud of the applicant and his faction.

[21] The applicant in the main application in addition claim *Brutum fulmen* in that even if Zulu is granted leave to appeal, and the appeal succeeds, it will serve no purpose because none of the persons elected in the 2019 conference are in position to commence the positions they were elected to. It is argued that since all the 2019 Ulundi elected

leaders have accepted that they were not validly elected, INEC would inevitably have to remain in charge of the party. until new leaders are validly elected at the forth coming Durban Elective National Conference, therefore, it is argued the appeal is *brutus fulmen*.

[22] Mr Padayachee for Zulu argued that members of political parties are entitled to look at the court to resolve their disputes in accordance with the law. The subsequent events don't justify refusing a party an appeal hearing to a party who put his faith to the law to adjudicate the dispute. I agree with Mr Padayachee that there is a delay involved in resolving disputes through litigation but that is a fact of life which must not undermine the role of the courts in resolving the disputes. In fact, knowledge that eventually the court shall give a fair and considered judgment promotes respect for the law. The judgement when given might pose some challenges with the issue of retrospectivity and practical implementation but that is a fact of life.

[23] I am not persuaded on the facts that peremption has been established. Once judgment has been delivered it bounds the parties and it has to be complied with until set aside on appeal. Van Zyl J's judgment created a factual situation and a reality the parties had to contend within. Those who resisted complying with the judgment were pursued through contempt of court proceedings. There is no voluntary acquiescence or unequivocal abandonment of the right to challenge the judgment of Van Zyl J has been demonstrated or proved by those alleging it. In addition, I am of the view that since *brutum fulmen* and peremption were not issues before Van Zyl J it is not for me to make a

definitive decision on the issues. See *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration & Others* 2017 (1) SA 549 (CC) ; *Dabner v South African Railways & Harbours* 1920 AD 583

[24] Rule 49 (1) Provides that the application for leave to appeal must be made within fifteen (15) days of the judgment sought to be appealed. Failure to lodge the application for leave to appeal within the prescribed period, may on good cause be condoned.

[25] Mr Padayachee conceded that the reasons furnished by Zulu for the failure to lodge the application for leave to appeal on time is thin. He however, argued that the NFP was consumed by challenges and dysfunctionality. It was lethargic. It is general knowledge that the NFP as a party faced numerous challenges as evident from the litany of litigation involving its members and factions.

[26] It is common cause that Van Zyl's judgment impacted the party, its factions and its members. Zulu needed to know what measures would be taken either by a faction or individuals not happy with the judgment. The dysfunctional position of the party did not make its possible for a decision to be taken within a period of fifteen (15) days.

[27] Zulu needed to reflect before making a decision to expend his own funds for a course not his individual benefit. The INEC was established in 2018. It scheduled and

held an elective conference in Dec 2019. In November 2021 Van Zyl J set aside the conference and its resolutions. Up to date INEC has not held an elective national conference resulting in a structure not in accordance with the constitution of the party running the affairs of the party for a period of about five (5) years.

[28] The delay by Zulu in lodging the application for leave to appeal is not related to a failure of INEC to hold an elective conference. INEC has not blamed Zulu for the delay to hold an elective conference. If there was general lethargy in the party run by INEC or which the applicants were part of they cannot be held to shout louder when Zulu delayed in lodging the application for leave to appeal

[29] In *Uitenhage Transitional Council v SA Revenue Service* 2004 (1) SA 292 (SCA) at 297 the court 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..... 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. The party seeking indulgence must be bona fide in that he must genuinely seek to contest not engaged in a strategy to serve another agenda. The paucity of the reasons given for the delay justifies an inference of substantial laxity on the part of Zulu. In *Gordon v Robinson* 1957(2) SA 549 (SR) at 552 C-D the court held that lack of diligence or negligence on the part of applicant or applicants’ attorneys even if gross, is not necessary a bar of relief.

[30] The court in deciding whether to grant condonation is guided by what is in the interest of justice. A judicial discretion upon consideration of all the facts, including, degree of non-compliance, prejudice, if any, to the other party caused by the delay, importance of the case, fairness to the parties. See *Melane v Sanlam Insurance v Co Ltd* 1962(4) SA 531 (A) at 532 B -D; *Torwood Properties (Pty) Ltd v South African Reserve Bank* 1996 (1) SA 215 (W) at 228; *Fortman v SAR & H* (2) 1947 (3) SA 505 (N) AT 509.

[31] In my view, good cause has been shown to grant condonation for the late lodging of the application for leave to appeal. It has been shown too that another court may decide the matter differently from Van Zyl J. I am of the view that the matter is relatively complex for leave to appeal to be granted to the Supreme Court of Appeal. Zulu in seeking condonation for the late lodging of the application for leave to appeal is seeking an indulgence. The delay is substantial, and it is poorly explained. These are some of the factors that have a bearing on the question of costs and they constitute exceptional circumstances justifying a deviation from the standard rule that costs follow the results.

[32] It is ordered as follows:

4. Condonation for the late lodging of the application for leave to appeal is granted.
The 8th respondent Skhumbuzo Zulu is ordered to pay 50% of the costs of the application.
5. Leave to appeal the judgment of Van Zyl J delivered on 19 November 2021 is granted to appeal to the Supreme Court of Appeal. The costs of the application for leave to appeal to be costs on appeal.
6. Costs to include costs of two counsel where so employed.



Mngadi, J

APPEARANCES

Case Number : 677/2020P

For the Applicants
(In the application for leave to appeal) : R. Padayachee SC

Instructed by : Bharath and Associates

PIETERMARITZBURG

For the respondents
(In the application for leave to appeal) : De Wet SC with Du Plessis

Instructed by : SLK Attorneys
PIETERMARITZBURG

Matter argued on : 31 October 2023

Date Judgement delivered : 17 November 2023