



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case no: A163/2022

REPORTABLE: YES/NO

OF INTEREST TO OTHER JUDGES: YES/NO

CIRCULATE TO MAGISTRATES: YES/NO

In the matter between:

**THE BODY CORPORATE OF
BOSCHENVAAL RIVERFRONT LODGES**

Appellant

And

MINEPOWER LIQUOR (PTY) LTD

Respondent

CORAM: MHLAMBI J *et* CRONJé, AJ

HEARD ON: 24 APRIL 2023 AND 5 JUNE 2023

DELIVERED ON: 14 JUNE 2023

JUDGMENT BY: P R CRONJé, AJ

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 11H00 on 14 June 2023.

I INTRODUCTION

- [1] The Appellant is a Body Corporate established in terms of Section 2(1) of the Sectional Title Schemes Management Act, 8 of 2011, as amended. It issued summons in the Magistrate's Court for Sasolburg wherein it sought payment of R184 716.16 for administrative expenses and insurance premiums.
- [2] On 31 August 2018, prior to institution of the action, the Appellant referred a dispute in respect of the insurance premiums to the Community Schemes Ombud Services (CSOS).¹
- [3] The parties requested the court *a quo* to determine the dispute on a summary of facts.² After action was instituted, a letter was received from CSOS dated 25 February 2020, stating:

*"Removal from the adjudication hearing roll. The Community Schemes Ombud Service is in receipt of an application for dispute resolution. The matter was set down for an adjudication hearing on 16th January 2019 at 11:00."*³

- [4] Subsequently, CSOS sent an e-mail stating:

"Dear Mr Seonelo

We refer to the abovementioned matter which was set down with CSOS on 16 January 2020 as well as the associate correspondence.

*The parties, i.e. board of trustees and respondents reached an agreement at the AGM from the minutes. The meeting approved the proposal to change the management rules of the body corporate with regard to insurance and in so doing, accommodated all parties."*⁴

¹ Record, p. 39 - 42

² Volume 1, p. 74 – 92; On the face of the record, the parties were in fact not in agreement on the facts and determination of the dispute on stated facts (case) would probably not have been proper.

³ Volume 2, p. 101

⁴ Volume 2, p. 111, line 19 – p. 112, line 2. Whether such an arrangement can be effected is debateable.

[5] The Appellant states that the intention was to have a possible amendment to the Rules effected to the extent that individual owners could insure their properties themselves. The Respondent on the other hand states that a settlement was reached and the matter became settled.

[6] On 12 May 2022, the Court *a quo* concluded:

“For reasons already conveyed to the parties, the Court finds that the plaintiff is not entitled to claim insurance premiums from the defendant, as the dispute in respect thereof has been resolved and settled as on plaintiff’s own version as early as January 2020, the 14th.

Furthermore, summons in respect thereof was issued on the 14th June 2019 at a time and stage when this matter was still pending before CSOS.

The balance of the claim is standing over for trial to a date that can be agreed to between the parties.”⁵

III APPEALS - THE UNIFORM RULES OF COURT

[7] Rule 50(1) of the Uniform Rules of Court provides:

“An appeal to the Court against the decision of a Magistrate in a civil matter shall be prosecuted within sixty (60) days after the noting of such appeal, and unless so prosecuted it shall be deemed to have lapsed.”

[8] Rule 50(4) provides that:

“The Appellant shall, within forty (40) days of noting the appeal, apply to the Registrar in writing and with notice to all other parties for the assignment of a date for the hearing of the appeal and shall at the same time make available to the Registrar in writing his full residential and postal addresses and addresses of his attorney if he is represented.”

⁵ Volume 2, p. 123, line 11 - 20

IV EXPLANATION FOR THE DELAY AND PROSPECTS FOR SUCCESS

[9] It is common cause that the appeal lapsed. The test on condonation is trite. In *Grootboom v National Prosecuting Authority and Another*⁶ it was held:

22. ... I agree with him that, based on *Brummer*⁷ and *Van Wyk*⁸, 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 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.

23. It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default."

⁶ (CCT 08/13) [2013] ZACC 37; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC); [2014] 1 BLLR 1 (CC); (2014) 35 ILJ 121 (CC) (21 October 2013); *Mulaudzi v Old Mutual Life Insurance Company (South Africa) Limited and Others, National Director of Public Prosecutions and Another v Mulaudzi* (98/2016, 210/2015) [2017] ZASCA 88; [2017] 3 All SA 520 (SCA); 2017 (6) SA 90 (SCA) (6 June 2017); *Nair v Telkom SOC Ltd and Others* (JR59/2020) [2021] ZALCJHB 449 (7 December 2021)

⁷ *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* [2000] ZACC 3; 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC) at para 3

⁸ *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)* [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) at para 20.

[10] The Appellant filed a request for reasons of the judgement in terms of Rule 51(1) of the Magistrate's Court Rules on 17 May 2022. The Magistrate had to reply by no later than 7 June 2022. The Appellant eventually received the reasons on 11 August 2022. A Notice of Appeal was served on 27 July 2022. Thereafter engagement took place with Gauteng Transcribers to have the record of proceedings transcribed.⁹

[11] The Notice of Motion in respect of the condonation application was only filed in this Court on 15 November 2022 and served on the Respondent on 10 January 2023.

[12] In its condonation application, with reference to its prospects for success, the Appellant states:

"4.1 It is submitted that the Applicant has good prospects for success in the appeal.

*4.2 It is submitted that it is in the interest of justice that condonation be granted."*¹⁰

[13] The Respondent was out of time with filing its answering affidavit. It also seeks condonation for late filing of its answering affidavit. The Appellant abides by this Court's decision whether condonation should be granted to the Respondent. I am satisfied that the Respondent made a case for condonation.

[14] In the Respondent's answering affidavit it states that:

"In this application for condonation the reasonable prospects for success on the merits have not been dealt with by the Applicant in its founding affidavit. The Applicant has further failed to properly explain the delay in prosecuting the appeal, since the condonation application was only served on the Respondent on 10 January 2023, with no set down of the appeal in the High Court having been served on the Respondent, and large periods of delay being unexplained by the Applicant."

⁹ Pleadings, p. 6, para 11 – p. 11, para 40

¹⁰ Pleadings, p. 11, para 41 and 42; This was not expanded on in the replying affidavit. See para 11.1.1 of the replying affidavit

- [15] The Respondent refers to *Mulaudzi v Old Mutual Life Assurance Co (South Africa) Ltd and others*¹¹ where it was held:

“[26] What calls for an explanation is not only the delay in the timeous prosecution of the appeal, but also the delay in seeking condonation. An appellant should, whenever he realises that he has not complied with a rule of this court, apply for condonation without delay. 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. Factors which usually weigh with this court in considering an application for condonation 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.”

- [16] On this basis, the Respondent prays that the appeal be dismissed with costs.

V CONCLUSION

- [17] It is common cause that there is no full explanation for the whole period in which the Appellant is late. It is also apparent from the condonation application that the Appellant did not elaborate on the prospects for success. On the conspectus of all the facts, this Court has insufficient material to grant condonation.

VI COSTS

- [18] The Respondent should pay its own costs in respect of its condonation application. There is no reason why costs should not otherwise follow the result.

¹¹ 2017 (6) SA 90 (SCA) at 101 E – G para [26]; See also: *United Plant Hire (Pty) Ltd v Hills and Others* [1976] 2 All SA 253 (A)

[19] I make the following order.

ORDER

1. Condonation is granted to the Respondent for the late filing of its answering affidavit.
2. There is no order as to costs in respect of the Respondent's condonation application.
3. The Appellant's application for condonation for reinstatement of the appeal and late prosecution of the appeal is dismissed with costs.
4. It is declared that the appeal lapsed.

P R CRONJÉ, AJ

I agree:

MHLAMBI J

On behalf of the Applicant:

Adv A Jacobs

Instructed by:

Du Bruyn Attorneys

Webbers Attorneys

BLOEMFONTEIN

On behalf of the First Respondent:

Adv. G V Meijers

Instructed by:

JC Uys Attorneys

McIntyre van der Post Attorneys

BLOEMFONTEIN