

**IN THE HIGH COURT OF SOUTH AFRICA,  
GAUTENG DIVISION, JOHANNESBURG**

**CASE NO: 2018/18147**

REPORTABLE: YES / NO  
OF INTEREST TO OTHER JUDGES: YES/NO  
REVISED.  
19/02/21

In the matter between:

**CITY OF JOHANNESBURG  
METROPOLITAN MUNICIPALITY**

Applicant

and

**OLYMPIA TRADE CENTRE (PTY) LIMITED**

Respondent

**JUDGMENT**

**SOUTHWOOD, AJ:**

**A. INTRODUCTION**

1. Two applications served before me, namely, an application for leave to appeal and an application for condonation for the late filing of the application for leave to appeal.

2. The main application which formed the subject matter of the judgment against which leave to appeal is sought, was directed at obtaining the following relief:

2.1. a declarator that the respondents, their actions and/or activities are unlawful for erecting, and/or allowing and/or causing to be allowed, to be erected, a certain advertising sign on erven [...], known as stand number 66, corner Kliprivier Road and Van der Hoven Street, Glenanda, Johannesburg, Gauteng (**'the property'**), for contravening and/or failing to comply with section 3 of the Outdoor Advertising By-laws of the applicant (**'the By-laws'**), in that the said sign was erected by the respondents, or their appointed agents without the applicant's requisite prior written approval;

2.2. a declarator that the applicant's prior approval was required prior to the said erection and that failing such approval, the erection was, on that basis, in contravention of the By-laws and therefore unlawful;

2.3. that the respondents be ordered to remove the said sign and restore the property to the state which the property was in prior to erecting the said sign, thereby ceasing the unlawfulness complained of; and

2.4. ancillary relief.

3. This relief was persisted in against both respondents even though the applicant had served a notice of withdrawal of application against the second respondent on 5 November 2018, which notice was delivered on 5 November 2018.

4. On 15 April 2020, judgment was handed down by emailing the judgment to the parties' legal representatives. In the judgment, the following orders were made:

4.1. The relief sought in prayers 1.1 and 1.2 of the notice of motion is refused.

4.2. No order is made in relation to the relief sought in prayer 1.3 of the notice of motion.

4.3. The applicant is ordered to pay the first respondent's costs of the application.

## **B. THE APPLICATION FOR CONDONATION**

5. Condonation is not granted merely because it is sought. The court should exercise its discretion judicially and upon sufficient and satisfactory grounds being shown. An applicant for condonation must give a full explanation for the delay which must not only cover the entire period of the delay but must also be reasonable. A number of other factors may be considered. These include the prospects of success, the importance of the case, the absence of prejudice to the parties, the respondent's interest in the finality of its judgment and the convenience of the court.<sup>1</sup>

6. The application for leave to appeal was served on the respondent on 9 July 2020 and, allegedly, filed on 14 July 2020. On 8 September 2020, the applicant's attorney uploaded the application for leave to appeal onto CaseLines. The application for condonation was served on the respondent on 28 July 2020. The application for condonation was also uploaded onto CaseLines on 8 September 2020. I was invited to the CaseLines case only on 15 January 2021. The uploading of the main application onto CaseLines was only completed on 29 January 2021.

7. On 15 March 2020, a national state of disaster was declared, and a country-wide lockdown imposed in terms of the Disaster Management Act 57 of 2002.

8. In terms of Rule 49(1)(b) of the Uniform Rules of Court, the application for leave to appeal had to be made within 15 days after the date of the order i.e. by 6 May 2020.

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<sup>1</sup> *Off-Beat Holiday Club v Sanbonani Holiday Spa Shareblock Ltd* 2016 (6) SA 181 (SCA) at [26]

9. The application for leave to appeal is forty-nine days late, a not negligible amount of time.

10. The condonation application is supported only by an affidavit deposed to by the applicant's instructing attorney. The application was not opposed and so the facts alleged are not in dispute.

11. The explanation for the delay commences with the applicant's attorney indicating that because of lockdown, he was unable to attend at the firm's offices from the time that the lockdown commenced until 6 May 2020. He alleges, further, that during that time, he did not have remote access to his work email. It was only on his return to the firm's offices, on 6 May 2020, that he became aware of the judgment.

12. The applicant's attorney then states that he sent the judgment to the applicant but does not indicate on what date he sent it. He alleges, further, that on 10 May 2020, he managed to speak to the person instructing him at the applicant who requested that counsel be instructed to furnish an opinion. He doesn't indicate what steps, if any, were taken to bring the judgment to the applicant's attention and to obtain instructions between 6 and 10 May 2020.

13. Despite the fact that the deadline for making the application for leave to appeal had passed, the applicant's attorney only instructed counsel on 11 May 2020. The opinion was received by the applicant's attorney on 15 May 2020. Between 15 May 2020 and 10 June 2020, when a further opinion was received from counsel, no explanation is provided as to what transpired (other than there being an instruction to obtain a second opinion) and what steps were being taken to progress this matter.

14. The second opinion was forwarded to the applicant, but it is unclear when this was done. The applicant's attorney then states that, on 15 June 2020, he was informed by the person instructing him that he is having difficulty obtaining instructions on whether to proceed or not. There is no confirmatory affidavit from anyone at the applicant who explains what difficulties were being experienced by the

applicant between 15 and 30 June 2020 (or prior thereto), when the applicant instructed its attorney to proceed with the appeal.

15. Whilst I accept the applicant's attorney's evidence as to what he was told, I do not accept the reasons for his not obtaining an instruction earlier as this constitutes inadmissible hearsay.

16. The applicant's attorney then states that he received the application for leave to appeal from counsel on 4 July 2020 and *'thereafter effected the necessary amendments and ensured that same was served and filed.'*

17. However, what the applicant's attorney then alleges is that on 7 July 2020, he attempted to serve a hard copy of the application on the respondent. He was unable to do so and, on 8 July 2020, the parties agreed that the application could be served via email. Despite that agreement having been concluded on 8 July 2020, the application for leave to appeal was only served on 9 July 2020 and only filed on 14 July 2020.

18. There is no explanation why the application for condonation only follows some three weeks later.

19. In dealing with my difficulties regarding the gaps in time in the explanation for the delay, counsel submitted that the respondent did not oppose this application. Although not irrelevant, it is not an overriding consideration.<sup>2</sup>

20. Taking all the facts into consideration and the fact that the explanation does not cover the entire period of the delay, I find that the applicant has not furnished a sufficient explanation for the delay to assess whether the delay was reasonable.

21. A further significant factor is the applicant's prospects of success in the application for leave to appeal.

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**2 *Saloojee and Another NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 138E**

22. Section 17(1) of the Superior Courts Act 10 Of 2013 read with Rule 49(1) regulate applications for leave to appeal.

23. The application for leave to appeal is against the whole judgment of the court.

24. Given the withdrawal of the application against the second respondent, there can be no difficulty with the absence of any order against the second respondent.

25. The second issue which arises is whether order 2, which makes no order in relation to prayer 1.3 of the notice of motion, is appealable.

26. The test for appealability of an order of court is whether it is in the interests of justice for an appeal against the order to be heard.<sup>3</sup>

27. One of the factors to be taken into consideration is whether the order is final. Order 2 does not have final effect and is susceptible of alteration by the court of first instance; it is not definitive of the rights of the parties; and it does not have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.<sup>4</sup>

28. A further factor is whether irreparable harm will result if leave to appeal is not granted against the order and an interdict as contemplated by prayer 1.3 of the notice of motion is granted in due course? There is no indication that the applicant will suffer irreparable harm if leave to appeal is not granted. There is, furthermore, no basis on which I can find that irreparable harm to the public will ensue if leave to appeal order 2 is not granted.

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**3 See the helpful overview of how the test has developed given by Sutherland AJA in *United Democratic Movement and another v Lebashe Investment Group (Pty) Ltd and others* (1032/2019) [2021] ZASCA 4 (13 January 2021) at [7]-[9]**

**4 See *Zweni v Minister of Law and Order of the Republic of South Africa* 1993 (1) SA 523 (A) at 532H-533A**

29. In the premises, the interests of justice do not require that an appeal be entertained. Order 2 is not appealable.

30. As such, the application for leave to appeal in relation to order 2 has no prospect of success.

31. I turn now to the declaratory relief.

32. It must be stated at the outset that the applicant has failed to set out the grounds of appeal in a clear and coherent fashion. It was difficult to ascertain what the grounds were, and to which orders they were applicable. My attempts to obtain clarification during the hearing met with little success.

33. The grounds of appeal which I have managed to identify appear to be directed, in the main, at order 2 and I do not discuss them further.

34. The first prayer for a declarator is directed at the respondents erecting a sign or causing or permitting a sign to be erected. In this matter, the respondent alleged that it had purchased the property with the advertising sign already having been erected on it, this being the reason for the purchase. This was not disputed by the applicant. The respondent could not have erected nor allowed or permitted anyone else to erect the advertising sign.

35. In the application for leave to appeal, the applicant contends that this finding is wrong (despite the applicant's failure to take issue with the respondent's allegations) because, '*The owner of the property [i.e. the respondent] and the sole director of the respondent when making a fresh application for approval despite the fact that the advertisement sign had been erected already confirms that he has given permission to the respondent to erect the sign, having owned the property since September 2014*'. The meaning of this contention is unclear. The alleged confirmation is the deponent's opinion which is irrelevant and makes no sense in the context of the undisputed facts.

36. Accordingly, given the undisputed facts, I have no difficulty in finding that another court cannot come to a different conclusion that the respondents had not erected nor caused or permitted the sign to be erected.

37. For this reason, the applicant's reliance on the unreported judgment of *Friedshelf*<sup>5</sup> does not avail it. *Friedshelf* cannot be applicable in relation to factual findings. Furthermore, *Friedshelf* is distinguishable *inter alia* because in that matter it was clear that the respondent, as the owner of the property, whilst not having erected the sign, had allowed or permitted the entity which had erected the sign to do so.

38. For all these reasons, the application for leave to appeal in relation to the dismissal of the first prayer has no prospects of success.

39. Insofar as the prayer for the second declarator is concerned, this is directed at confirming that prior approval was required for the said erection i.e., the erection of the sign at the relevant property. Given that, as is clear from the judgment, the date of the erection of the advertising sign was not established (and, in all likelihood, cannot be established), I could not make a finding as to whether any bylaws were applicable and, thus, whether prior approval was required for the said erection of the sign.

40. None of the grounds of appeal were directed at these factual findings.

41. For the reasons above, it is unlikely that another court will come to a different conclusion. Accordingly, the application for leave to appeal in relation to the refusal to grant the second declarator has no prospects of success.

42. There is no importance to be attached to this dispute. The applicant's failure to obtain relief in this matter is based on the factual findings of the Court rather than on any legal determinations.

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**5** *City of Johannesburg v Friedshelf 1120 (Pty) Ltd* (2016/44430) [2017] ZAGPJHC 1 [3 January 2017]



43. Only the question of prejudice favours the applicant. The respondent failed to dispute that it would not suffer any prejudice if condonation was granted.

44. Taking all the above factors into consideration, I find that the applicant has failed to establish sufficient and satisfactory grounds for the granting of condonation for the late filing of the application for leave to appeal.

### **The Order**

45. Accordingly, the following order is made:

1. The application for condonation is dismissed with costs.

**F SOUTHWOOD  
ACTING JUDGE OF THE HIGH COURT  
GAUTENG DIVISION, JOHANNESBURG**

This judgment was handed down electronically by circulation to the parties' representatives by email. It has been uploaded onto CaseLines. The date of delivery of the judgment is deemed to be 19 February 2021.

Date of Hearing: 4 February 2021

Date of Judgment: 19 February 2021

### **Appearances**

For the applicant: DZ Kela

Instructed by: Tshiqi Zebediela Inc

For the respondent: SJ Martin

Instructed by: Dogulin Shapiro Demartinis Inc