IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD AT RANDBURG

CASE NO: **LCC66/2022**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

[redacted] **25 March 2023**

SIGNATURE DATE:

In the matter between

EXXARO COAL (PTY) LIMITED	First Applicant/ First Respondent
EXXARO COAL MPUMALANGA (PTY) LIMITED	Second Applicant/First Respondent

and

VUSIMUZI CHARLES SINDANE	First Respondent/First Appellant
ZANDILE GERTRUDE ZWANE	Second Respondent
CALVIN PHUMLANE SINDANE	Third Respondent
NOTHANDO SINDANE	Fourth Respondent
BADANILE ROSE SINDANE	Fifth Respondent
JOHANNA SINDANE	Sixth Respondent
JULIA SINDANE	Seventh Respondent
KLEINBOOI SINDANE	Eighth Respondent

ELISA NOMADLOZI SINDANE	Ninth Respondent
FELICIA TRYPHINA MASANGO	Tenth Respondent
THE SINDANE FAMILY	Eleventh Respondent
MTHOBISI WESLEY KHUMALO	Twelfth Respondent
THE DIRECTOR-GENERAL DEPARTMENT OF AGRICULTURE RURAL DEVELOPMENT AND LAND REFORM	Thirteenth Respondent
EMAKHAZENI LOCAL MUNICIPALITY	Fourteenth Respondent

JUDGMENT

COWEN J

1. The first to twelfth respondents apply for leave to appeal against the judgment and orders of this Court delivered on 30 November 2023. The orders required that they relocate from their current residence to a nearby development called Phumulani Agri Village by 31 January 2024, failing which they would be evicted.

2. An application for leave to appeal must be delivered within fifteen days after the order was made where reasons are given at that time as in this case.[1] In computing periods of time expressed in days under the Rules of this Court, Saturdays, Sundays and public holidays are excluded as are days which fall within the period 24 December to 2 January 2024. The application for leave to appeal was delivered

[1] Rule 69 of the Rules of the Land Claims Court.

on 1 February 2024, the day after the applicants were to relocate. It was meant to be delivered on or before 22 December 2023. The application was not accompanied by any condonation application. A condonation application was only forthcoming on 9 February 2024 after the Court raised the difficulty. The respondents (the applicants in the main application, Exxaro) oppose the condonation application.

3. In 2008, in *Van Wyk v Unitas Hospital and another (Open Democratic Advice Centre as Amicus Curiae*)[2] the Constitutional Court cautioned litigants to stop what was then perceived as a trend of conduct with litigants routinely failing to observe the rules of Court. The Constitutional Court referred to a growing trend for litigants in that Court to disregard time limits without seeking condonation, noting too that even where litigants did apply for condonation, they at times put up flimsy explanations. The Court firmly cautioned that the undesirable practice 'must be stopped in its tracks'.[3] The Constitutional Court issued a similar reminder in 2014, some six years later, in *Ethekwini Municipality v Ingonyama Trust,*[4] noting that the unacceptable conduct of litigants failing to observe the Rules of Court had continued in spite of its warning in *Unitas Hospital.*

4. These words of caution have equal application to the Land Claims Court which far too often is confronted by litigants conducting litigation without regard to the time-frames imposed by the Rules of Court. Given that this Court is concerned with social legislation aimed at securing land justice, the related historical marginalization of many of its litigants and the rural context in which this Court

[2] 2008(2) SA 472 (CC); 2008(4) BCLR 442; [2007] ZACC 24 (*Unitas Hospital*).
[3] See para 33.
[4] 2014(3) SA 240 (CC) (*Ingonyama Trust*).

generally operates, non-compliance is, at times, justified by good reasons including struggles to access to legal representation. Where warranted, litigants will be duly accommodated.

5. Nevertheless, the consequences of non-compliance with the Rules of Court for the efficient functioning of the Courts, the administration of justice and access to Court are serious and compromising. The Constitution promises 'everyone' 'the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'[5] That access is practically impeded when litigants fail without good cause to observe the time limits for the conduct of litigation that are set out in the Rules of Court. When the leave to appeal process is in issue, as it is here, non-compliance not only delays the appeal process but will often preclude a party who has obtained an order in its favour from enforcing that order until and unless it is confirmed on appeal. In such cases, non-compliance is thus integrally connected not only with the principle of finality, but with the enforceability of court orders and thus ultimately the dignity of the Courts and the rule of law. It is thus important for litigants to exercise their rights to appeal in a manner that respects the legal process.

6. The Constitutional Court set out the test for condonation in *Unitas Hospital* in the following terms:

> '*This court has held that the standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to*

[5] Section 34.

grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry include but are not limited to 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.'

7. On the issue of delay, the Constitutional Court held:

'An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And, what is more, the explanation given must be reasonable.'

8. What is in issue in this case is whether the occupiers should be compelled to relocate from the property or face eviction, in circumstances where they are not employed. That is a clearly important issue for the occupiers, which implicates their constitutional rights. The occupiers' current home has been their home for many years and is of sentimental and cultural significance, and the eviction process can be traumatic and will invariably be difficult.

9. I now turn to the delay, its impact and reasonableness. The delay was some 21 court days after taking into account the *dies non,* weekends and public holidays. While not particularly extensive, this is not a minimal delay not least in context of this case. What happened is that the occupiers effectively delayed until the very date when the eviction order could be executed before applying for leave to appeal. The eviction order was technically not automatically suspended as it would have been had the occupiers delivered their application for leave to appeal timeously. It was thus open to Exxaro to enforce it, but Exxaro understandably sought rather to act cautiously and await the Court's decision. Instead, they requested that the

application be promptly set down for hearing, which it then was. The impact of the delay on Exxaro must, in my view, be accorded due recognition, not least in circumstances where Exxaro has conducted the litigation patiently and in a manner that repeatedly accommodated the occupiers in what turned out to be protracted process. They have done so in circumstances where they have constructed new accommodation at great cost for the occupiers nearby and the occupiers are currently living amidst active mining operations, which is not safe.

10. In explaining the delay, Ms Sindane, who deposed to the founding affidavit, refers to two periods, the period between 1 December and 15 December 2024 (the December period) and the period from 16 January 2024 to 31 January 2024 (the January period). The December period is sought to be explained by stating that it is 'characterised by many holidays and office closures', their attorneys' offices were closed from 14 December 2023 to 15 January 2024 and accordingly 'there was nothing we could have done to pursue the appeal'. The January period is explained on the basis that on 16 January 2024, their attorneys informed them that they would not be able to assist them 'due to lack of capacity'. The occupiers then sought new attorneys initially through the *pro bono* office at the Labour Court. On 17 January 2024, they booked an appointment for 23 January 2024 but were informed on that date that the *pro bono* office does not deal with land matters. On 24 January 2024, they approached Mr Marweshe of Marweshe Attorneys, who informed them that he could only consult with them on 29 January 2024. Mr Marweshe then consulted with the occupiers on that date and prepared the notice of appeal. He filed it on 1 February 2024 without any condonation application.

11. In my view, the explanation for the delay during the December period is unreasonable. The occupiers were legally represented: indeed the hearing of the main application had been postponed on more than one occasion so that legal representation could be secured. But nothing was done during the December period in which the application for leave to appeal ought to have been prepared and delivered. The order was supplied to the parties' representatives on 30 November 2023, two weeks before the attorneys planned to take their leave. There were no public holidays until Friday 15 December 2024 and the application was due on or before 22 December 2024. Even if the attorneys intended to close their offices mid-December it would have been incumbent upon them to inform the occupiers of the applicable time frames and duly to attend to this matter timeously. The explanation for the December period is effectively non-existent and manifests an attitude that the court order and court process could be ignored and need not be respected.

12. In my view, the explanation for the further delay in the January period is in part understandable as it is characterized with efforts to obtain new legal representation which, on the information supplied, was frustrated less by the occupiers and more by their lawyers. In this regard, at least on the face of it, it is not reasonable for a firm of attorneys merely to refuse to assist their clients in the circumstances of this case 'due to capacity constraints'. Moreover, the erstwhile attorneys are still on record and at no stage withdrew. And even if there was a legitimate basis to withdraw, they ought still to have communicated with Exxaro, explained their position and requested an extension on behalf of their clients and once attending thereto, to formally withdraw. But they did nothing, and indeed remain on record.

Furthermore, it is noteworthy that the new attorneys who ultimately assisted the occupiers are not new to the matter, had previously been approached and attended the site inspection before the matter was initially heard. At the very least, correspondence should have been sent immediately upon receipt of the instruction.

13. However, even if I accept that the occupiers should not be prejudiced by the conduct of their attorneys in January, this does not assist them to explain reasonably any of the delay in the December period. And to overlook what happened in that period would be tantamount to condoning disrespect for judicial process.

14. The occupiers have a further difficulty which is the prospects of success on appeal. The application for leave to appeal is scantly framed. As pleaded, the grounds of appeal relate to issue in respect of which my reasons appear from the judgment, and on the issues pleaded, I am unpersuaded that the appeal would have reasonable prospects of success: in my view, the prospects of success are low.

15. There is one issue in respect of which argument was addressed that was not addressed during the hearing. Though not expressly pleaded in the grounds of appeal I assume in favour of the occupiers that it may fairly be canvassed under paragraph 3 of the application for leave to appeal, which takes issue with the Court's finding that the occupier's challenge to the signature of Mr Frans Sindane could not succeed. The submission ultimately amounts to a submission that the Court ought *mero motu* to have referred the issue of whether Mr Frans Sindane signed the settlement agreement to oral evidence. There is no dispute that the occupiers did not request any such referral. Furthermore, the Court canvassed the issue with the occupiers' representatives during the hearing and was informed

that the occupiers are not seeking a referral to oral evidence. In this regard, it was contended on their behalf in the application for leave to appeal that the Court ought nevertheless to have referred the matter to be resolved by way of *viva voce* testimony.

16. I am not persuaded that this point has prospects of success. As appears from the judgment I concluded, in paragraph 38, that although the occupiers sought to dispute the signature, there was no evidence put up seriously to dispute the substantial evidence that Exxaro had produced to substantiate their case – namely that the re-settlement agreement had been signed and concluded. That conclusion was arrived at by applying the trite principles articulated in *Plascon Evans* and *Wightman*,[6] to which the judgment refers at paragraph 27. I am unpersuaded that another Court would conclude differently. In any event, the occupiers' representatives at no stage sought a referral to oral evidence on this or any other issue, and rather confirmed that they did not seek one after enquiry from the Court. Whatever the scope of the Court's powers or discretion in those circumstances, the Court was not obliged to refer the issue to oral evidence and it would have been highly undesirable to insist upon such a referral,[7] not least given the evidence before the Court which was not seriously disputed. Furthermore, Exxaro's case ultimately does not stand or fall on a finding that the agreement was validly concluded and the application for leave to appeal does not address this aspect. For these reasons too, prospects of success are weak. I have also considered

[6] *Plascon-Evans Paints v Van Riebeeck Paints* 1984(3) SA 623 (A) at 634H-635C; *Wightman t/a JW Construction v Headfour (Pty) Ltd and ano* 2008(3) SA 371 (SCA) para 13.
[7] *Joh-Air (Pty) Ltd v Rudman* 1980(2) SA 420 (T) at 428-429; *Santino Publishers CC v Waylite Marketing CC* 2010(2) SA 53 (GSJ) at para 5 citing *Joh-Air* and dealing with the reasons why such a course is undesirable. These remarks have particular resonance when one is dealing with Land Court litigation.

whether there are other compelling reasons why leave might be granted and am not persuaded that there are any.

17. In all of the circumstances, I have concluded that the interests of justice demand that the condonation application be refused. Finality is warranted in this case. This Court only orders costs in special circumstances and I am not persuaded that there are any.

18. I make the following order:

18.1. The first to twelfth respondents' application for condonation for the late filing of their application for leave to appeal is refused.

18.2. There is no order as to costs.

SJ Cowen

Judge, Land Claims Court

Date of hearing: 22 February 2024

Date of judgment: 25 March 2024

Appearances:

Applicants for leave to appeal: Marwashe Attorneys

Respondents in leave to appeal: HR Fourie SC & M Majozi instructed by Twala TRR Attorneys