THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CIRCUIT LOCAL DIVISION, THEMBALETHU)

CASE NUMBER: 71 / 2022

In the matter between:

COUNTERPOINT TRADING CC	Applicant
and	
IW VAN DER VYVER INCORPORATED ATTORNEYS	First Respondent
IZAK WILHELM VAN DER VYVER	Second Respondent

Coram: Wille, J

Order granted: 30 August 2023

Condonation filed: 7 March 2024

Reasons: 12 March 2024

Heard: 20 June 2024

Delivered: 10 July 2024

JUDGMENT - [LEAVE TO APPEAL]

WILLE, J:

INTRODUCTION

[1] This is an application for leave to appeal against (as I understood it) my order refusing to hold the respondents in contempt of a court order which was not timeously served on the respondents by the applicant. I handed down an order about eleven months ago. I made myself available to hear this application for leave to appeal. Still, due to the failure of the applicant to comply with this court's directions, the hearing of this application took some time. Thus, more than eleven months have passed since the dismissal of the application. I dismissed the initial application with costs.[1]

[2] Because of the excessive delays at the applicant's instance, I directed the applicant to launch a formal application for condonation, explaining why it was progressing this matter at such a sluggish pace and not following the relevant court directives. A plethora of reasons were advanced for these numerous delays. None of these reasons were of any merit. This notwithstanding, and to bring some finality to this outstanding matter, I granted the relief contended for in the application for condonation.[2]

CONTEXT

[3] Initially, the applicant sought contempt of court relief and condonation for filing a replying affidavit. This replying affidavit was delivered nearly seven months late. I also granted the condonation relief concerning this replying affidavit. In hindsight, it seems glaringly apparent that the applicant bears little or no regard for the court rules, considering how it elected to litigate. The applicant should have explained why the final interdict order it had obtained was not timeously served on the respondents. It was only served and brought to the respondents' attention a month after it was obtained. Indeed, this was one of the core issues that affected my determination during the initial hearing.[3]

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[1] My order was handed down on the 30th of August 2023.
[2] The applicant only launched its application for condonation on the 7th of March 2024.
[3] The final order was granted on the 16th of September 2020 and only eventually served on 16 October 2020.

[4] The core complaint regarding my findings, as set out in my reasons for my order (as far as the applicant was concerned), was my determination that the second respondent should not be imprisoned for thirty days for contempt of court (with such period of imprisonment to be suspended for sixty days pending the finalization of specific processes), failing which the second respondent should be committed to prison.[4]

[5] The first respondent is an incorporated firm of attorneys, and the second respondent is the sole director of this incorporated entity. The applicant launched an interdict for interim relief concerning allegedly stolen monies, which were then paid to the first respondent to be held in trust for these alleged thieves' to purchase immovable property. The interdict was to prevent these stolen funds from being paid to third parties.[5]

[6] An interim order with a return date was granted. A copy of the interim order was delivered to the respondents, who were aware of it and fully complied with it. A final order was granted after that, but the applicant did not serve this final order on the respondents after the granting thereof. No explanation is given for this. It was, however, eventually served on the respondents about one month later.[6]

[7] This failure was not the fault of the respondents, and the applicant was entirely to blame for this inordinate delay. During the interim period (and even after that), the respondents communicated with the applicant's then-attorneys of record and opined that because they had received no correspondence after a significant time, the interim order had lapsed and was no longer of any force or effect.[7]

[8] In the interim, the respondents also brought to the attention of the applicant's erstwhile attorneys of record (and their clients) that the purchasers (the alleged thieves) were going to be held liable for breach of contract and that, as a consequence, the estate agent's commission and the respondents' wasted conveyancing costs were now due and payable. Also, written communication and discussions took place concerning these due and payable amounts. A dispute of fact existed concerning the exact

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[4] I found no contempt because the court order was not served to the respondents timeously.
[5] This was granted without notice at the beginning of September 2020.
[6] The applicant's attorneys could have easily emailed the final order to the respondents.
[7] The final order was granted on the 16th of September 2020 and served on 16 October 2020.

discussions that took place between the respondents and the applicant's erstwhile attorneys of record.[8]

[9] This notwithstanding, a clear intention was communicated to the applicant's erstwhile attorneys that specified amounts would be deducted at source from the monies held in trust by the respondents. Further, the respondents' *written communications* recorded that two more payments, one for damages claimed by the seller and one for further legal costs related to the purchaser's breach, also fell to be deducted from the monies held in trust as contractually agreed in terms of the written sale agreement.[9]

[10] No protest was received in response to these communications by the applicant's then-attorney of record. It was the respondents' case that they always acted according to their mandate. Their case was that they were obliged to complete their mandate. The final interdict order was not served on them despite the passage of a month. Thus, they were obliged to complete their mandate as the duly appointed transferring attorneys for the transaction. Further, the remainder of the monies that the respondents held in trust (in terms of their conveyancing mandate) was eventually paid over to the applicant's erstwhile attorneys by the respondents upon completion of their mandate.[10]

CONSIDERATION

[11] I found that, on the facts, the second respondent's actions were not based on any intent to violate the dignity, reputation, or authority of any judicial body. This was so primarily because the second respondent was unaware that the final order had been granted, and he merely continued to act following the terms and conditions of his mandate as a conveyancing attorney. The second respondent's facts on this issue were good. The applicant's facts on this issue were not good. Most significantly, I found that the second respondent did not act *unlawfully* or in a *mala fide* fashion.[11]

[12] I say this because there was nothing to gainsay from the second respondent's genuine belief that the interim order had lapsed. In any event, even disregarding a court order in such circumstances may not be enough for a contempt of court order since there may be a genuine, *albeit* mistaken, belief in having been entitled to act in

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[8] This disputed issue could not be resolved on the papers.
[9] The respondents' position was communicated in writing.
[10] The amount of R129 636,90 was paid over by the respondents on 23 March 2021.
[11] Frankel Max Pollak Vinderine Inc v Menell Jack Hyman Rosenberg & Co Inc 1996 (3) SA 355 (A) 367 H-I.

the way that has been claimed to constitute contempt. Thus, good faith (in law) could avoid any possible suggested infringement.[12]

[13] What was crucial and a lacuna in the applicant's case was that the final order was not brought to the respondents' attention timeously. The respondents were unaware that the interim order against them, which they admitted knowledge of, was made final. Self-evidently, the respondents had not acted maliciously or carelessly to deliberately disobey or violate any judicial body's dignity, reputation, or authority. This is because they still needed information concerning the final order having been granted.[13]

[14] In a final throw of the dice, the applicant charters (in a now belated amended notice of application for leave to appeal) that the court erred in finding that the respondents had no reason to believe that the interim order had not been extended or confirmed. Herein lies the rub, as the applicant's case is predicated on what the applicant expected the respondents to have believed in these circumstances. Thus, on the applicant's version, the only form of intention that could come into play is what the applicant expected the respondents to have believed in these circumstances.[14]

[15] The opposing affidavit to the condonation application fortifies a vital consideration. The second respondent declares under oath that he sent correspondence to the applicant's erstwhile attorney after the grant of the interim order and before the service of the final order and never got any response to his communications. It is *improbable* that the second respondent would have sent these communications if he harboured an intention to disobey any court order.[15]

[16] Applications for leave to appeal are now more strictly regulated. Leave to appeal may only be given (among other things) where the judge or judges concerned believe the appeal *would* have a reasonable prospect of success. No doubt, a more stringent and demanding test now applies.[16]

[17] Finally, the applicant argued that all its other remedies in civil law against the respondents have now become prescribed due to the effluxion of time. This may be so,

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[12] Noel Lancaster Sands (Edms) Bpk v Theron 1974 (3) SA 688 (T) at 691 C.
[13] The applicant needs to give a reasonable explanation for this inordinate delay.
[14] The respondents subjectively foresaw the possibility of the conduct being contemptuous.
[15] This needs to be answered by the applicant and engaged with. It is left untouched.
[16] Ramakatsa and Others v African National Congress [724/2019] [2012] ZASCA 31(31 March 2021) para [10].

but this does not mean that this court must rescue the applicant and formulate an order akin to incarceration to promote the collection of an alleged civil debt. This mechanism for imprisonment for a *debt* has now been abolished by legislation.[17]

COSTS AND ORDER

[18] The respondents did not oppose the application for leave to appeal and filed a notice stating that they abided by the court's decision. However, they did file an affidavit opposing the application for condonation. Thus, the respondents must have incurred some costs in this connection and also must have incurred some costs when considering their options in connection with the application for leave to appeal. In my view, the respondents should be able to recover these costs and the disbursements they incurred even though they did not participate in the leave to appeal hearing application.[18]

[19] For all these reasons, I make the following order:

1. The application for condonation is granted.

2. The application for leave to appeal is refused.

3. The applicant shall be liable for the respondents' costs on the party and party scale (as taxed or agreed), following scale B (if applicable).

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E.D. WILLE
(Cape Town)

[17] The Abolition of Civil Imprisonment Act, 2 of 1977.
[18] The quantum of these costs is for the taxing master to determine.