(Inlexso Innovative Legal Services) / mvd

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 15996/2019

DATE: 2020.01.28

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.
(3) REVISED.

DATE 6/2/2020 SIGNATURE

In the matter between

7.2.20 Debi

DUDUZILE CYNTHIA MYENI AND 3 OTHERS Applicants

and

THE ORGANISATION UNDOING TAX ABUSE NPC AND 4 OTHERS Defendants

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J U D G M E N T

TOLMAY, J: On 23 January 2020, that is 4 days before the trial was supposed to commence first defendant's attorneys filed an application for leave to appeal relating to the judgment on the special plea that was handed down on 12 December

2019.

Rule 49 (1) (b) of the Uniform Rules of Court requires that an application for leave to appeal, and I quote –"Shall be filed within 15 days of the date that the judgment is granted". The rule also provides that the period of 15 days may be extended on good cause shown.

In this instance the application should have been filed by 9 January 2020. To establish whether good cause exists to allow for an extension a condonation application should set out the facts upon which the application is based. Only once condonation is granted should a court proceed to determine the application for leave to appeal.

The courts has refrained from defining what would constitute good cause and it is trite that the Court has a wide discretion which should however be exercised judicially and upon consideration of all the relevant facts.[1]

In **Van Wyk v Unitas Hospital (Open Democratic Advice Centre) as *an Amicus Curiae***[2] the CC held that an applicant for condonation must give a full explanation for the delay and such explanation should also be reasonable.

In this instance there was no condonation application to begin with. Mr Buthelezi argued that no application for condonation was filed as he was of the view that the *dies non* applied. An assumption that was clearly incorrect and which a

[1] Erasmus Superior Court Practice Service 6/2018 D1-70
[2] 2008 (2) SA 472 CC at 477 a-d.

perusal of the rules would have revealed.[3]

Mr Buthelezi also stated that due to the recess period the attorneys, as he put it, and I quote him, "dropped the ball". It is quite obvious that this lackadaisical approach by the attorneys is totally unacceptable, especially in the light of prior delays that occurred in this matter, most of which could be attributed to first defendant's failure to comply with the rules and to prepare for trial.

Furthermore the application for leave to appeal was filed a mere two court days before the trial was supposed to commence.

The plaintiffs' attorneys were not informed about the intended application for leave to appeal. Even more concerning is that attempts to arrange a further pre-trial by plaintiffs' representative were first ignored and finally spurned on 22 January 2020. This can be gleaned from the correspondence that was filed. A pre-trial could have assisted in arrangements to accommodate the hearing for the application for leave to appeal, without resulting in further delays. An inference of an element of obstructiveness on the part of the first defendant's attorney is not unreasonable under these circumstances.

It is trite that unless and until condonation is sought and granted for the late filing of the application for leave to appeal,

[3] Rule 6(5) (aa) 19 and 26 of the Uniform Rules of Court

there is no application before the Court.[4]

As a result the right to seek leave to appeal lapsed and could only be reinstated through a properly motivated condonation application showing good cause.

Presently the only explanation from the bar for the belated filing of the application is the failure of the legal representative to consider the rules and prepare for trial during the recess. This cannot conceivably be regarded as good cause or a reasonable explanation for the failure to file the application for leave to appeal timeously or a proper condonation application. This explanation from the bar fails to constitute good cause for an extension as envisaged in the rules.

Although there is at this stage no proper condonation application before court and consequently no proper application for leave to appeal to consider. I did consider the grounds set out in the application for leave to appeal solely on the basis to establish whether this court should grant condonation despite all the aforesaid shortcomings, and in the interest of justice and to ensure a judicial exercise of the court's discretion.

First defendant raises only two grounds of appeal. First she claims that this court erred in its interpretation of section

[4] Modder East Squatters and another v Modderklip Boerdery (Pty) Limited; President of the Republic of South Africa and others v Modderklip Boerdery (Pty) Limited 2004 (3) ALL SA 169 (SCA) paragraph 46 and Panayoti v Shoprite Checkers (Pty) Limited 2016 (3) SA 110 JG at paragraph 8 and 13 to 14

162 of the Company's Act 71 of 2008. Secondly she claims that this court further erred in deciding the special plea after disposing of the other interlocutory application.

The first ground proceeds from the premise that this court interpreted section 162 of the Company's Act of 2008 to mean that the plaintiff has *locus standi* to bring the application in terms of section 162. At no point in the judgment did this court hold that section 162 of the Company's Act gives first plaintiff standing. Instead this court held that first plaintiff has standing under section 157(1) (e) of the Company's Act which provides extended standing for parties who act in the public interest.

First defendant's second ground of appeal is that this court ought to have heard and decided a special plea before deciding her other interlocutory application for amendments and joinder of other parties.

First defendant's argument hinges on three premises. Firstly, that the amendment and joinder applications were only opposed by the first plaintiff. Secondly, by deciding these interlocutory applications in first plaintiff's favour, this court somehow predetermined first plaintiff's standing, as a finding that OUTA lacked standing would somehow have invalidated this court's decision on the interlocutory applications. Thirdly, this invalidates this court's dismissal of the special plea.

The interlocutory applications were opposed by both

plaintiffs at all times. This is reflected in the notices of objection to the first defendant's proposed amendments, the answering affidavit filed on behalf of both plaintiffs in the interlocutory proceedings, as well as the heads of argument in the interlocutory applications which were filed in the name of both plaintiffs. There is nothing in this court's judgment on first plaintiff's standing which in any way suggests that this court's findings were influenced, let alone predetermined by the Court's previous dismissal of the first defendant's interlocutory application.

As a consequence the fact that the interlocutory applications were decided first can have no bearing on this court's dismissal of the special plea and its decision to grant first plaintiff leave to participate in these proceedings in the public interest.

Another important aspect on the merits is that it is common cause that the second plaintiff has the required standing to proceed. As such second plaintiff will in any event be able to proceed and therefore there will be no substantial benefit to the first defendant if the appeal is allowed and won by her,[5] and the point is actually academic.

The courts have also ruled in the past that public interests may be considered.[6] Not only is first plaintiff funded by the public, but the broader public has a huge

[5] Hassim v Ismail 1947 (4) SA 637; Erasmus *supra* D 676
[6] Erasmus *supra* 676 and the authorities referred to in footnote 16

interest in this matter as it concerns a state owned enterprise.

The avoidance of unnecessary delay in the administration of justice and the convenience of the Court are also considerations that can and should be taken into account.[7]

This matter has already been delayed. The trial date was allocated in 2018 and the trial should have commenced during October 2019. Justice delayed is indeed justice denied. Although the application was only 9 days out of time, the impact of this delay is substantial in the light of the facts of this particular case.

This brings me to the aspect of prejudice which is yet another aspect to be taken into account. The party who seeks an indulgence must show that the other party will not be adversely affected to any substantial degree.[8] Accordingly the first defendant carried the *onus* to prove this aspect.

The plaintiffs argued that they have already been severely prejudiced by the delays, most of which were caused by the first defendant's failures. They argued that they waited until the time to launch a leave of appeal had expired before arranging for witnesses, some of them from abroad to avail themselves. If further delays occur they might be unable to proceed with litigation. This must also be seen in the light of first defendant's claim that she is financially distraught. It is

7Erasmus page 676 and the authorities referred to in footnote 2 and 3
8Erasmus *supra* 675 and authorities referred to in footnote 7 thereof

also by now common knowledge that Mr Buthelezi as a result of this, is presently appearing *pro bono* for her. There exists, accordingly, a very real possibility that first defendant would be in no position to honour any cost order against her, this will undoubtedly prejudice the plaintiffs further. Apart from vague suggestions that there is no reason not to delay the matter further, no substance was given to enforce or support that argument.

In the light of all these facts and in the absence of a proper condonation application there is no live application for leave to appeal before me and therefore the application should accordingly be dismissed with costs.

Plaintiffs urged me to order that costs be immediately taxable and payable, due to the manner in which the application was brought. I am of the view that the facts set out above warrant such an order. They also suggested costs *de bonis propriis*. In the light of Mr Buthelezi's position as *pro bono* counsel, I am not going to exercise my discretion to punish the legal representatives at this point in time with such a costs order.

The following order is made:

1. The application is dismissed.
2. The first defendant is ordered to pay the costs of the application. These costs to include the costs of two counsel.

3. The costs are immediately taxable and payable within 30 days of taxation.

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TOLMAY, J

JUDGE OF THE HIGH COURT

DATE: 6/2/2020

(Inlexso Innovative Legal Services) / mvd

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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In the matter between

7.2.20

DUDUZILE CYNTHIA MYENI

AND THREE OTHERS Appellants

and

THE ORGANISATION UNDOING TAX ABUSE

NPC AND 4 OTHERS Respondents

J U D G M E N T

TOLMAY, J: On 27 January 2020, the day that this trial was supposed to commence first defendant filed a second application for leave to appeal. This time against the

judgment handed down on 2 December 2019 relating to her proposed amendment of the pleadings and a joinder application.

The application was however, limited to the Court's dismissal of her application to amend her pleadings and the Court's conclusion that she waved her attorney and client privilege, when she alleged that her previous attorney did not execute his duties properly when drafting the pleadings.

This application was filed out of time as it should have been filed by 24 December 2019. Although the period may not be that long, in the context of this case and the facts referred to in that judgment the delay has serious consequences for the reasons referred to in that judgment.

A belated application for condonation was filed at 14:00 on 28 January 2020. A perusal of the application reveals that the reasons for the delay were that

(a) First defendant's attorneys' offices were closed from 13 December 2019 to 6 January 2020 and [redacted] under the impression that the *dies non* applied.

(b) It was never first defendant's intention to delay proceedings.

(c) She spent most of the time travelling out of KwaZulu Natal. This must be seen against the background that she complained during last year's appearance that she could not travel because of a lack of financial

resources to attend this court. Her counsel suggested in argument however, that her circumstances might have changed.

(d) The plaintiff will not be prejudiced if condonation is granted.

(e) A failure to grant condonation will prejudice her.

The Court dealt in the judgment delivered yesterday with the requirements of rule 49 (1) (b) and the principles applicable regarding what would constitute good cause for an extension and the parties are referred to that judgment and the authorities quoted therein.

The Court also dealt with the question of prejudice. First defendant did not base her allegations that plaintiffs will not suffer any prejudice on any facts, nor did she state on what basis she would be prejudiced if the condonation is not granted. The affidavit filed by first defendant was vague and in my view did not set out any facts to support her general allegations. Her explanation for the delay is insufficient, unreasonable and may be indicative of a total disregard for the rules of the Court, the Court proceedings and the importance of the matter pending before Court. Both first defendant and her legal representative had an obligation to prepare for trial and to file all the applications that they wanted to bring timeously. They should have prioritised the preparation for the trial irrespective of the festive period.

Recess and first defendant's travels should not have been the first priority. They disregarded the importance of this trial with impunity and the Court proceedings at their own peril.

First defendant does not seem to grasp the importance of this case and litigants and the court's obligation to ensure that administration of justice is executed expeditiously.

The merits of the application were considered solely in order to consider the merits of the condonation application. Firstly, the refusal to amend the pleadings was not final. Paragraph 54[1] of the judgment delivered reads as follows: "*In any event if evidence is lead or provided by the applicant during the trial that clearly contradicts admissions made by her in her plea, nothing will prevent her legal representative to approach the Court at that point for an amendment based on the evidence and the Court may then reconsider an application for amendment. It must be noted that at this point no evidence in support of the withdrawal of the admissions were provided.*"

In **Zweni v The Minister of Law and Order**[2] the appellate division held that a judgment or order will be appealable only if it has three characteristics.

1. It must be final in effect and not susceptible to alteration by the Court of first instance.
2. It must be definitive of the rights of the parties in the

[1] D C MYENI vs OUTA, CASE NO 15996/2019, PARA 54, DELIVERED 2 December 2019
[2] 1993 (1) SA 523 (A) at 532 i to 533 b and 536 a-c

sense that it grants definitive and distinct relief; and

3. It must have the effect of disposing of at least the substantial portion of the relief claimed in the proceedings.

The aforesaid test is not "*exhaustive*" or "*cast in stone*".[3]

The CC held in **Philani-Ma-Africa v Malula**[4] the SCA added that the interests of justice are paramount in determining whether orders were appealable in the light of the unique facts of the case.

The CC held in **Mathole v Linda and another**[5] that generally it is not in the interests of justice for the interlocutory relief to be subject to appeal as this would defeat the very purpose of that relief. Even where an order may be of final effect it is generally not in the interest of justice to allow piecemeal appeals.

The SCA in **Health Professionals Council of South Africa and Another v Emergency Medical Supplies and Training CC t/a EMS**[6] stated as follows: *"piecemeal appellate disposal of the issues in litigation was not only expensive, but that generally all issues in a matter should be disposed of by the same court at the same time. Thus even if, technically, an order is final in effect, it may be inappropriate to allow an appeal against it when the entire dispute between the parties*

[3] Loch v Net Travel (Pty) Limited t/a American Express Travel Service1996 (3) SA 1 (A) at 10 f to 11 c 1996 (3) SA 1 (A) at 10 f to 11 C
[4] 2010 SA 573 (SCA) at paragraph 20, see also *Itac v Scaw South Africa (Pty) Ltd* 2012 (4) SA 618 (CC) at paragraph 15
[5] 2016 (2) SA 461 (CC) p 461 at at paragraph 25
[6] 2010 (6) SA 469 (SCA) at paragraph 16

has yet to be resolved by the court of first instance."[7]

These principles are reflected in section 17 (1) (c) of the Superior Court's Act which requires that where a decision does not dispose of all the issues in the case, leave to appeal should only be granted where this would lead to a *"just and prompt resolution of the real issues between the parties"* as required under section 17 (1) (c) of the Superior Court's Act.

Furthermore section 18 (2) of the Superior Court Act states as follows: "*subject to sub-section (3) unless the Court under the exceptional circumstances orders otherwise the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application for leave to appeal.*"

Consequently, in my view, the refusal to amend is not a final order and as a result it is in any event not appealable.

Regarding the imputed waiver of attorney and client privilege the Court dealt extensively with this aspect in the judgment and the Court followed the principles already set out by the SCA in **S v Twanda and Others.**[8]

Despite her belated attempt to persuade the Court that she did not allege incompetence by her erstwhile attorneys

[7] See page 8 paragraph 17
[8] [2007] ZASCA 34008(1) SACR 613 (SCA) at par 18 -20, see also B v Boesman 1990(2) SACR 389(E) 394 [G] – [H]

she did indeed do so as a result a conclusion of imputed waiver was justified and there is no reasonable possibility that another court would come to a different conclusion.[9] After this judgment the SCA in **Contango SA and Others v The Central Energy Fund SOC Ltd and Others**[10] stated that once the quality of legal advices is put in issue the privilege attached to that advice is waived. As a result the SCA has already determined this issue.

In the light of all the circumstances the application for condonation has no merit and should be dismissed.

Due to the way in which this application was brought, the vague allegations contained in the affidavit and further delay caused by the fact that this application was not filed timeously and the further delay that was caused as a result, a punitive costs order is warranted.

I make the following order:

1. The application for condonation of the late filing of the application for leave to appeal is dismissed.
2. The first defendant is ordered to pay the costs of this application on an attorney and client scale, which costs will include the costs of two counsel.
3. The costs order is immediately taxable and payable within 30 days of taxation thereof.

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[9] D C MYENI & THREE OTHERS v THE ORGANISATION UNDOING TAX ABUSE NPC AND 4 OTHERS, case no 15996/2019,para 30 – 34, delivered on 2 December 2019

[10] (533/2019) [2019] ZASCA 191 (13 December 2019)

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TOLMAY J

JUDGE OF THE HIGH COURT

DATE: 1/2/2020.

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