IN THE SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NO 01/25930

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

In the matter between

SADERS ATTORNEYS **APPLICANT**

and

DOROTHEA JOHANNA SUSANNA MOOLMAN **FIRST RESPONDENT**

HELENA CATHARINA MOOLMAN **SECOND RESPONDENT**

In re

MICHAEL HENRY SELLAR **APPLICANT**

and

DOROTHEA JOHANNA SUSANNA MOOLMAN **FIRST RESPONDENT**

HELENA CATHARINA MOOLMAN **SECOND RESPONDENT**

J U D G M E N T

VAN OOSTEN J

[1] This is an application for the variation of a court order. The applicant is Saders Attorneys who were the attorneys of record on behalf of Michael Henry Sellar, the applicant in an opposed application bought by way of

urgency in this Court, against the present respondents, as respondents (the urgent application). The urgent application was heard by Hussain J, who on 22 October 2003, dismissed the application and ordered Saders Attorneys to pay the respondents' costs of the application *de bonis propriis* on an attorney and client scale (the costs order).

[2] On 17 November 2003 Saders Attorneys delivered a notice of application for leave to appeal against the costs order. The notice was delivered three days late. The application for leave to appeal was heard by Hussain J almost a year later on 18 October 2004. In argument before the learned judge counsel for the respondents contended that the application for leave to appeal was out of time and that the respondents were not prepared to grant condonation. The application for leave to appeal was dismissed with costs on an attorney and client scale for the reasons stated by the judge as follows

> *The respondents are not willing to condone this and bearing in mind the long history of this matter I am loath to exercise my discretion in favour of the applicant and condone this in the absence of a substantive application for condonation. It is not in dispute that the Notice of Appeal is five days (sic) out of time, nor is it in dispute that there is no application before me for condonation for the lateness of the filing. What is more is that it is not in dispute that the applicant's attorneys, or at least counsel was warned that this was the case and that the point will be taken notwithstanding that there was no application for condonation that was filed. That being the case my hands are tied and for that reason the application must be dismissed.*

[3] On 17 November 2004 Saders Attorneys launched the present application in which the following relief is sought:

> *1. An order varying His Lordship's (Hussain J's) order of the 18th of October 2004 by deleting same and substituting the following order:*
>
> > *"The application for leave to appeal is postponed, each party to pay their own costs".*
>
> *2. An order declaring that the Respondents condoned the Applicant's late filing of its notice of application for leave to appeal against His Lordship's judgment and order of the 22nd of October 2003.*
>
> *3. Alternatively to 2, condoning Applicant's late filing of its notice of application for leave to appeal and ordering that Applicant's notice dated 17th November 2003 stand as its notice of application for leave to appeal.*
>
> *4. That leave be granted to the Applicant to appeal to the Supreme Court of Appeal, alternatively the Full Bench of the Transvaal Provincial Division, against the order of His Lordship delivered on the 22nd of*

> *October 2003 when His Lordship ordered the Applicant to pay Respondents' costs on the attorney and client scale de bonis propriis on the basis as outlined in Applicant's notice of application for leave to appeal dated 17th of November 2003.*
> *5. That the Respondents be ordered to pay the costs of this application in the event of their opposing same but in the event of their not so doing that the costs hereof be costs in the cause of the appeal.*

[4] Although the respondents are opposing the application, no answering affidavit has been filed. The matter therefore has to be decided on the founding papers alone.

[5] A convenient starting point is to consider whether condonation for the late filing of the notice of application for leave to appeal had in fact been granted by the respondents (prayer 2 of the notice of motion). In principle the applicant's entitlement to a variation of the order dismissing the application for leave to appeal on the basis of a mistake common to the parties to the effect that condonation had in fact been granted, is uncontested. Counsel for the applicant readily and in my view correctly conceded that no case has been made out for express condonation having been granted by the respondents. Counsel however submitted that condonation was granted by the respondents either by implication or tacitly. In support hereof reliance in essence was placed on two letters in the chain of correspondence that preceded the hearing of the application for leave to appeal. In the first letter dated 19 November 2003 Saders Attorneys having referred to the fact that the application for leave to appeal was filed late, and furnishing the reasons therefore, requested the respondents' then attorney to "please inform us whether you will consent to the late filing of the application or whether you require us to bring a formal application in this regard". In his response hereto respondents' attorney "confirmed" that he would "take instructions from our client with regards to the late service and filing of the application for leave to appeal and revert back to you in due course". Further correspondence between the attorneys followed but the aspect of condonation was not raised again. Nor was it dealt with by the respondents' attorneys successors. The applicant now contends that the absence of an indication by the respondents' attorney whether a formal application for condonation was required and the

following correspondence in which no reference was made to condonation, created the “firm impression” that no formal application for condonation was required and that condonation therefore was granted.

[6] The applicant’s reliance on implied or tacit condonation in my view is misplaced. It is for the party seeking an indulgence such as condonation to ensure that it is properly obtained and recorded. Such party cannot merely rely on the inaction of its opponent to respond to a request for an indulgence as constituting implied or tacit condonation. But on the facts of the present matter it goes further: any doubt that may exist in this regard was removed when the aspect of condonation was telephonically discussed between counsel approximately one and a half month prior to the hearing of the application for leave to appeal. It is common cause between the parties that counsel for the respondents in the conversation had informed counsel for the applicant that the application for leave to appeal was out of time and that the point on the lateness would be taken at the hearing. Counsel for the applicant confirmed as much at the hearing of the application for leave to appeal before Hussain J. This I hardly need to say lays the contention that condonation was granted finally to rest except for one last string to the applicant’s bow which is this: Attorney M Sader it is contended was at fault for having failed to advise their counsel prior to the hearing that condonation had been granted. The contention flies in the face of the concession I have earlier referred to that no express condonation had been granted by the respondents at any time.

[7] For these reasons I find that the applicant has not shown that the order of 18 October 2004 resulted from a mistake common to the parties. The application for the variation of the order must accordingly fail.

[8] The remainder of the relief sought by the applicant need not detain me long and can briefly be disposed of. It is clearly misconceived: this court is not sitting as a court of appeal. It may well be argued that Hussain J for the reasons given by the judge should have removed the application for leave to appeal from the roll and that it was not proper for those reasons to dismiss the application for leave to appeal. Accepting that to be so, the applicant’s remedy

undoubtedly should have applied for leave to appeal against the order on the basis that it was wrongly granted, which it has failed to do. The relief sought in prayers 3 and 4 of the Notice of Motion therefore also falls to be dismissed.

[9] In the result the application is dismissed with costs.

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FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

COUNSEL FOR THE APPLICANT	***ADV M BASSLIAN***
APPLICANT'S ATTORNEYS	***SADERS ATTORNEYS***
COUNSEL FOR THE RESPONDENTS	***ADV (Ms) S VAN ZYL***
RESPONDENTS' ATTORNEYS	***DE KLERK VERMAAK & VENNOTE***
DATE OF HEARING	***28 JULY 2009***
DATE OF JUDGMENT	***31 JULY 2009***