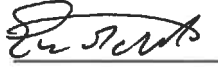




**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 2315/2017

(1) REPORTABLE: Yes NO	
(2) OF INTEREST TO OTHERS JUDGES: Yes NO	
(3) REVISED	
03 May 2019	
DATE	SIGNATURE

In the matter between:

VALENCIA HOLDINGS 13 (PTY) LTD

First Applicant

SHAUN MICHAEL GREEN

Second Applicant

MARK DOUGLAS SMITH

Third Applicant

RONALD JAMES HOY

Fourth Applicant

DEREK NORMAN STANBRIDGE

Fifth Applicant

ALEXANDER ELIAS RODITIS

Sixth Applicant

and

MICHELLE ARMITAGE N.O

Respondent

Summary: Condonation application. Principles governing condonation restated.

Implications of failure to deal with prospects of success.

JUDGMENT

MOLAHLEHI, JIntroduction

- [1] This is an application in terms of which the applicants (the Defendants in the main claim) seek an order for condonation for the late filing of the consequential amendment to their plea. The application is consequent their failure to comply with the 15 days provided for in rule 28 (8) of the Rules of the High Court (the Rules). The Applicants are 11 days late in filing their consequential amendment.
- [2] The Respondent (the Plaintiff in the main claim) opposed the application on the grounds that; (a) the Applicants have failed to make out a proper case for condonation and (b) that the amendment sought are not *bona fide* in that - the true nature of their application is to "seek to withdraw admission of facts and replace them with denials which are either to their knowledge false, or which are unable to claim to be correct."
- [3] The Respondent instituted the action proceedings against the Applicants in her capacity as the executrix of her deceased's husband estate. The dispute in brief as set out in the particulars of claim relates to the purchase of shares of the deceased in the First Applicant. The Respondent further seeks an order to have the First to the Sixth Applicants declared delinquent directors.
- [4] The First Applicant, Valencia is a company incorporated in terms of the company laws of South Africa and the Second to the Fifth Applicants are a shareholder in the First Applicant.

Background facts

- [5] The Respondent's claim in the particulars of claim is based on the averments that during the first half of 2012 the deceased and the Second to Fifth Respondents entered into an oral agreement in terms of which, each one of them would contribute towards an insurance policy which would become payable upon death to their survivors. The payment would be made in the proportion of the percentage of the shares held by each of the survivors to fund the acquisition by those, other than the deceased, of the purchase of the deceased's shares in the First Respondent.
- [6] The agreement further provided that the Second to the Fifth Respondents would upon receipt of the proceeds of the policy pay to the executor of the estate of the deceased the amount received by the survivor in consideration of the shares of the deceased and a portion to the shareholding of all the survivors.
- [7] The insurer issued the policies during May 2012 and after that the parties to the agreement paid the premiums to the policies.
- [8] After the passing away of the deceased, the insurer paid each of the Second to the Fifth Respondent the total amount of R6 768 900,00, as the proceeds of the policy.
- [9] The alternative claim is that the business of the First Respondent is being conducted in a manner that is oppressive and or unfairly prejudicial to or that unfairly disregards the interest of the Respondent.
- [10] The Applicants in their plea, incorporating the consequential changes, maintain the shareholders borrowed money from the First Respondent as and when they required funds. The loans were made to each of the shareholders

when requested and advance payment made as a loan from the First Respondent to be paid either to the shareholder or to a third party on behalf of the shareholder.

- [11] It appears that it is for the above reasons that the Applicants contend that the party with the right to claim is, in fact, the First Respondent.
- [12] The Applicants further conceded that no interest-free loans were granted to the Respondent.
- [13] The Applicants' application to amend their plea is consequent to the amendment effected by the Respondent to her particulars of claim effected on 22 January 2019.
- [14] The Respondent has before 22 January 2019, effected several amendments to her particulars of claim. The Applicants did not object to the notice of intention to amend the particulars of claim. In this respect, upon receipt of the notice of intention to amend the particulars of claim, the Applicants' attorneys addressed an email to the Respondent's attorneys dated 23 January 2019 that their clients were not opposed to the amendment. It was further indicated in the same email that the Applicants intend effecting a consequential amendment to their plea as soon as they received the amended papers.
- [15] In terms of the Rules the 15 days for the Applicants to have made their consequential amendment to the plea was the 18th February 2019. As indicated earlier in this judgment the Applicants are 11 days out of time in terms of filing their consequential amendment.

The reasons for the delay

- [16] The reasons for the delay, according to the Applicants, were due to the need to do a review of the shareholders' agreement, the memorandum and the articles of association. The delay in this respect was occasioned by having to arrange for a consultation with shareholders, in particular, that one of the shareholders is based in New Zealand.
- [17] The availability of the Applicants' Counsel who was busy with two matters in the Supreme Court of Appeal during the week of the 18 February 2019 contributed to the delay.

The legal principles governing condonation

- [18] It is trite that in condoning non-compliance with rules of the court, as is the case in the present matter, the court has a discretion to exercise. In an application for condonation, the applicant seeks the indulgence of the court.
- [19] In *Grootboom v National Prosecuting Authority*,¹ Boshielo J, as he then was, said:

“[23] It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default.”

- [20] I had the occasion to summarise the approach to adopt in dealing with an application for condonation in the Labour Court judgment in *Portapa t/a*

¹ 2014 (1) BCLR 65 (CC) at paragraph [23].

Supabets v Moodley N.O and Others,² a copy of that judgment was handed during argument by Counsel for the Applicants together with that of *Grootboom* in support of the contention that the Applicants were entitled to condonation for the late filing for their consequential amendment to their plea.

[21] I intend quoting extensively from that judgment as in addition to relying on several judgments dealing with this issue it also relied on the Constitutional Court decision in *Grootboom*. In that case, I summarised the applicable principles applicable to condonation from paragraphs [10] to [18] as follows:

“[10] The test to apply in considering whether condonation should be granted or refused is the interest of justice as stated in *Grootboom v National Prosecuting Authority*. [1] The interest of justice is determined by having regard to the following factors: (a) the degree of lateness or the extent of non-compliance with the prescribed time frame, (b) the explanation for the lateness or the failure to comply with time frames, (c) prospects of success or *bona fide* defence in the main case; (d) the importance of the case, (e) the respondent’s interest in the finality of the judgment, (f) the convenience of the court; and (g) avoidance of unnecessary delay in the administration of justice.

[11] In *Grootboom*, Zondo, J held that:

“51 ...some of the factors may justifiably be left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted.

²(JR 1027/13) [2016] ZALCJHB 103 (15 March 2016).

However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party. As a general proposition the various factors are not individually decisive but should all be taken into account to arrive at a conclusion as to what is in the interests of justice.”

[12] In dealing with the approach to adopt when dealing with prospects of success and the explanation tendered for the delay, Zondo, J had the following to say:

“[52] ... where the delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospective of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party.”

[13] In *Rustenburg GearBox Center v Geldmaak Motors*, it was held that it is not good enough for the applicant to make bald averment that there are prospects of success in his or her case. (My emphasis)

[14] Similar to the present matter, in *eThekweni Municipality v Ingonyama Trust* ³, where the explanation furnished did not cover the entire period and part of the delay was unexplained, the Constitutional Court held that:

“As stated earlier, two factors assume importance in determining whether condonation should be granted in this case. They are the explanation

³ (CCT 80/12) [2013] ZACC 7; 2013 (5) BCLR 497 (CC); 2014 (3) SA 240 (CC),

furnished for the delay and prospects of success. In a proper case these factors may tip the scale against the granting of condonation. In a case where the delay is not a short one, the explanation given must not only be satisfactory but must also cover the entire period of the delay. Thus in *Van Wyk v Unitas Hospital and Another* (Open Democratic Advice Centre as Amicus Curiae), this Court said in this regard:

'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. The explanation given by the applicant falls far short of these requirements. Her explanation for the inordinate delay is superficial and unconvincing.'

[15] In the *e-Thekwini Municipality* case, the Constitutional Court held that an explanation for a period of delay that was unexplained was necessary and, therefore, concluded that the appellant has failed to establish that its non-compliance with the relevant Rule was pardonable.

[16] It has repeatedly been stated in various court cases that condonation is not a mere formality and is, therefore, not a mere asking. A proper full explanation of the period of the delay needs to be provided by the applicant.

[17] In *NUM v Council for Technology*, Myburgh, JP stated:

"There is a further principle which is applied and that is, without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused." (My emphasis).

- [18] In *SA Post Office Ltd v Commission for Conciliation, Mediation and Arbitration and Others*, where Waglay, DJP, as he then was, said the following:

“Where it is evident that the party seeking condonation has no prospects of succeeding in its principal claim or opposition, no purpose is served in granting condonation and the court must in such circumstances refuse to grant condonation irrespective of the degree of delay or the explanation provided. Where the prospects of success are reasonably good or ever fair then, depending on the delay and the explanation, consideration must be given to the prejudice that the parties may suffer before the discretion can be exercised on whether to grant the indulgence sought. The factor of prejudice plays a role only when the delay is substantial.” (My emphasis).

Consideration

- [22] In my view, the period of delay in this matter is not insignificant. It required some full and detailed explanation.
- [23] The explanation proffered by the Applicants is unsatisfactory in that it lacks the necessary details to assist the court in determining the condonation application.
- [24] As stated above the reasons for the delay, was due to the need to do a review of the shareholders' agreement, the memorandum and the articles of association. The delay was occasioned by having to arrange for a consultation with shareholders. It was also stated that the delay was more importantly occasioned by one of the shareholders who is based in New Zealand.
- [25] The Applicants do not state in their founding affidavit how many of the shareholders needed to be consulted. It is not apparent from the Applicants'

papers whether all of them were consulted. The date when Counsel consulted with the shareholders is also not stated in the Applicants' papers. Also, more importantly, is that the Applicants have not attached any supporting affidavit of any of the shareholder, confirming that they were consulted and when did that happen.

[26] In the founding affidavit the Applicants deal with the issue of prejudice against the Respondent, but do not deal with the issue of prospects of success. This is worse than what happened in *Rustenburg Gearbox Centre v Geldmaak Motors CC t/a M E J Motors*⁴ where the full bench in dealing with the issue of prospects of success had the following to say:

“In para 14 at p 419, the appellant simply submits that it has good prospects of success on appeal. . . That is not sufficient. What is required is that the deponent should set forth briefly and succinctly the essential information that may enable the Court to assess the appellant's prospects of success. A bald submission unsupported by any factual averments is not good enough to discern what the prospects of success are in this matter. (My emphasis)

[27] In *Grootboom*, the Court in dealing with the same issue said:

“59 It must be remembered that this Court has rightly held that the presence of prospects of success is an important consideration in deciding whether to grant or refuse condonation.” (Footnotes omitted).

[28] And in *Turnbull-Jackson v Hibiscus Court Municipality and Others*⁵ the Constitutional Court said:

⁴ 2003 (5) SA 468 (T).


⁵ (CCT 104/13) [2014] ZACC 24; 2014 (6) SA 592 (CC); 2014 (11) BCLR 1310. (CC) (11 September 2014).

[23] It should be noted that although the existence of prospects of success in favour of the party seeking condonation is not decisive, it is a weighty factor in favour of granting condonation.⁶

[29] In light of the above, I agree with the Respondent that the Applicants have failed to make out a case for condonation.

Order

[30] Accordingly, the Applicants' application for condonation for the late filing of the consequential amendment to their plea is dismissed with costs.



E MOLAHLEHI

JUDGE OF THE HIGH COURT;

JOHANNESBURG.

Representation:

For the Applicants: Adv P Cirone

Instructed by: Bowman Gilfillan Inc.

For the Respondent: Adv P Strathern SC

Instructed by: Brian Kahn Inc.

⁶ See also *Mbatha v University of Zululand* (45/13) [2013] ZACC 43; 2014 (2) BCLR 123 (CC); (2014) 35 ILJ 349 (CC); [2014] 4 BLLR 307 (CC) (5 December 2013)

Heard on: 02 April 2019

Delivered on: 03 May 2019