REPUBLIC OF SOUTH AFRICA

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

CASE NUMBER: 42542/2018

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: NO

2.OF INTEREST TO OTHER JUDGES: NO

3.REVISED NO

19 October 2021

Judge Dippenaar

In the matter between:

KENNETH DAVID BRAUDE N.O FIRST APPLICANT

JULIAN RICHARD POLANTISKY N.O SECOND APPLICANT

MORIA BRUYNS N.O THIRD APPLICANT

And

JAMES BLACKWOOD MURRAY RESPONDENT

In re:

JAMES BLACKWOOD MURRAY	PLAINTIFF
and	
KENNETH DAVID BRAUDE N.O	FIRST DEFENDANT
JULIAN RICHARD POLANTISKY N.O	SECOND DEFENDANT
MORIA BRUYNS N.O	THIRD DEFENDANT

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 19th of October 2021.

DIPPENAAR J:

[1] There are three opposed interlocutory applications which fall to be determined on an opposed basis. The genesis of the applications lies in a delictual claim instituted by the respondent, a European resident, against the trustees of the deceased estate of his erstwhile attorney, Mr Zartz during November 2018. During July 2015, the respondent had instructed Mr Zartz to institute proceedings against one of his debtors based on a written acknowledgement of debt for 52 200 pounds and had paid a deposit of R13 041. At that time, the respondent's claim would prescribe about 10 months later. The proposed action was not instituted before it prescribed. Subsequently, on 16 September 2016, Mr Zartz passed away.

[2] The first application seeks the dismissal the respondent's claim under r 35(7) for non-compliance with an order made on 2 November 2020 directing the respondent to respond to the applicants' notice in terms of r 35(3),(6) and (12) ("the discovery notice") within 10 days of service of the order ("the compelling order"). Those notices were served on the respondent on 19 February 2020 and the compelling application was launched during October 2020. The order was served on the respondent on 9 November 2020 and his response was due by 23 November 2020. On 25 November 2020, the applicants launched an application to dismiss the respondent's claim in terms of r35(7). Despite delivering a notice of intention to oppose, the respondent delivered no answering affidavit in the dismissal application.

[3] The second application is one under r 30(2) to set aside the respondent's defective responses to the discovery notice on 24 and 25 February 2021, launched during March 2021. The responses were contained in an affidavit deposed to by the respondent's attorney of record, Ms Kinstler, accompanied by unsigned and un-commissioned affidavits of the respondent and Ms Joselowitz. The respondent further provided a response to applicants' r 35 (12) notice, providing certain documentation and advising that the other document (item 60) of the discovery affidavit did not exist. That response was in the incorrect format. The applicants objected to the response and delivered a notice under r 30A to set aside the deficient responses on the basis that the replies were delivered after the launching of the application to dismiss the respondent's claim. Subsequently, the applicants launched an application for the setting aside of the respondent's responses on 13 March 2021 in which it was contended that the respondent was precluded from delivering his replies to the discovery notices absent having obtained condonation for his non-compliance with the compelling order and in circumstances where he did not deliver an answering affidavit in the r 35(7) application. The respondent opposed the application and delivered his answering papers on14 April 2021.

[4] The third application is a condonation application launched by the respondent on 14 April 2021 for the late delivery of his replies to the discovery notices outside the 10 day period directed in the compelling order of 2 November 2021. That application is also

opposed. The respondent did not deliver a replying affidavit. The respondent's opposition to the r30(2) application hinged on the condonation application being successful.

[5] After the delivery of the papers in the three interlocutory applications, the respondent on 17 August 2021 delivered a signed affidavit deposed to by the respondent responding to the discovery notices. That affidavit complies with r 63 and is dated 6 May 2021. No explanation was tendered why it was only served on the applicants more than three months later. In addition, a signed and commissioned affidavit by Ms Joselowitz dated 11 October 2021, was provided by the respondent shortly before the hearing of the application. The signed affidavits resolved defects complained of by the applicants in the initial defective February 2021 responses. The applicants' complaint at the time was that the affidavits of the respondent and Ms Joselowvitz were not signed. They further contended that it was not appropriate for the respondent's attorney of record to depose to a discovery affidavit. This was conceded by the respondent.

[6] No affidavit was delivered by the respondent explaining the delays in the provision of the signed affidavits of the respondent and Ms Joselowitz. The applicants argued that as no condonation was sought for the late delivery of the proper replies, and the condonation was limited to the defective February 2021 replies and as no reasons were provided explaining the delay, no good cause was made out for the granting of condonation.

[7] It was common cause between the parties that the respondent did not timeously comply with the compelling order granted on 2 November 2020. It was also not disputed that the replies delivered on 24 February were defective and the supporting affidavits of the respondent and Ms Joselowitz were served unsigned.

[8] The applicants contended that the main application was to dismiss the respondent's claim. Logic dictates and the parties were in agreement that the condonation application should be determined first, as it has an impact on the remaining applications.

[9] It is trite that an applicant for condonation must show good cause. To do so a full and reasonable explanation must be given for the entire period of the delay. It must also be illustrated that there are good prospects of success[1].

[10] The applicants contended that the explanation was not bona fide and did not provide a full explanation for the entire period of the delay. Their case was that there was a flagrant and continuous disregard by the respondent and his attorney for the rules of court which should not be condoned. The respondent on the other hand contended that the explanation tendered was reasonable.

[11] The fundamental principle is that condonation will be granted if it is in the interests of justice to do so and that all relevant factors must be considered. All relevant factors must not be considered in isolation but must all be taken into consideration to determine what is in the interests of justice[2]. A court must exercise a discretion judicially based on a consideration of all the facts in what is in essence a matter of fairness to both sides. Among the factors to consider are normally the degree of lateness, the explanation for the delay, the prospects of success, the importance of the case and the applicants' interests in the finality of the case.[3]

[12] It is clear that the delays have been substantial and have not in all respects been fully explained for the entire period of the delay. The respondent's attorney of record has frankly disclosed that she was responsible for certain of the delays, due to circumstances which arose in the context of the COVID 19 pandemic. The respondent's role in the extensive delays which occurred is not explained. I agree with the applicants that the explanations tendered mainly pertained to the attorney's personal circumstances rather than to any professional exigencies. Whilst I agree with the applicants that sufficient measures had been put in place in our courts to ensure that matters could proceed, a

[1] Aurecon South Africa (Pty) Ltd v Cape Town City 2016(2) SA 199 (SCA) para [17]; Grootboom v National Prosecuting Authority and Another 2014 (2) SA 68 (CC) para [50]
[2] Brummer v Gorfil Brothers Investments (Pty) Ltd 2000 (2) SA 837 (CC) para [3]; United Plant Hire (Pty) Ltd v Hills 1961 (1) SA 717 (A) at 720E-G
[3] Melane v Santam Insurance 1962 (4) SA 531 (A) at 532C-F

measure of lattitude must be afforded to the reality of the detrimental effects many people experienced during the pandemic. I agree that the explanations tendered by the respondent's attorney were in broad and somewhat generic terms and did not give a comprehensive explanation for the entire period. Even accepting that the explanations are deficient it must still be considered whether such conduct can and should be attributed to the respondent. The respondent's role in the delays has not been explained. As such, it cannot simply be assumed that the delays are all attributable to the respondent's attorney of record or vice versa that the respondent was the author of his own misfortune.

[13] There were also certain delays on the part of the applicant, which were not explained, such as the delay in launching the compelling application only in October 2020 whereas the replies to the discovery notice were already due in March 2020. The applicants complained that the respondent's conduct was frustrating the administration of justice by delaying the finalisation of the matter. Their contention that the matter could have been enrolled for hearing already if the respondent had not failed to comply with the rules is however speculative and not based on any cogent factual evidence, nor does it take account of their own delays in relation to the matter.

[14] The delays and absence of a full explanation militate against the respondent but I do not agree with the applicants that the delays and insufficient explanations are fatal to the condonation application. On the other side of the scale, there are various factors which militate in favour of the respondent.

[15] First, it cannot be concluded that the respondent's claim has no prospects of success or that his claim is vexatious. The respondent's claim is based on the negligent conduct of his erstwhile attorney Mr Zartz, who allowed his claim against a debtor to prescribe. On the respondent's version, he furnished Mr Zartz with a mandate and paid him a deposit. It is undisputed that no proceedings were instituted against the respondent's debtor and that the claim prescribed before Mr Zartz's death. On the applicants' version the respondents claim has limited prospects of success as there was no mandate and respondent is unable to prove the mandate on the available evidence.

The applicants further contended that the respondent suffered no loss as the debtor was a man of straw and any judgment against him would be hollow. Lastly, they contended that the debtor was untraceable and thus that the summons could not be served before the claim prescribed. It is not possible nor appropriate at this juncture to determine with any precision whether respondent's claim would ultimately be successful. For present purposes I accept that the respondent's claim does have good prospects of success if he is able to prove the facts averred in the application papers and his pleadings.

[16] Second, an important consideration is prejudice to the respective parties, which must be weighed up. On the one hand, the consequences of the dismissal of the respondent's claim if condonation is not granted is severe and self-evidently prejudicial to him. The applicants' argument that the respondent would not be left without a remedy as he could institute a delictual claim against his present attorney of record consequent upon her negligent dealing with the matter, is speculative as such conclusion cannot be drawn from the papers. Moreover, such claim would not equate to an absence of prejudice. It can also not be concluded from the papers that the respondent is the author of his own misfortune.

[17] The applicants on the other hand, also contended for prejudice which cannot be cured by an appropriate costs order as Mr Zartz' estate cannot be finalized until the present proceedings are finalized and no final liquidation and distribution account can be prepared. It was argued that there has been a four-year delay as a result of these proceedings, resulting in an increase in the administration costs of the estate and creditors and heirs being prejudiced by the delay. The estate is insolvent and favourable settlements have been concluded with SARS and creditors. According to the applicants, it is conceivable due to the delay that creditors may resile from the settlement agreements reached. No facts were however presented that any of the creditors have taken any steps to do so and the conclusion reached is speculative. It was further argued that any further delays in the proceedings are untenable and it was conceivable that the matter could have been enrolled but for the delays caused by the respondent. The applicants did however not state whether any interim liquidation and distribution accounts have been

prepared. The contention that the matter would already have been enrolled for hearing is speculative, illustrated by the use of the word “conceivable”. The matter can be placed under case management to expedite the finalization thereof. The applicants are thus not without remedy to expedite the matter to trial.

[18] In balancing the prejudice to the respective parties, I conclude that the prejudice to the respondent were his claim to be dismissed, outweighs the prejudice to the applicants as a result of the delay. I have sympathy for the position of the applicants and am mindful of the caution expressed by Schreiner JA in Maluleka[4], that parties and their legal representatives should not be encouraged to become slack in their observations of the rules.

[19] However, I must also consider the position of the respondent and the constitutional principles pertaining to access to justice. Prima facie, he has already been let down by his attorney in diligently performing his duties. He is again faced with a situation where his legal representatives have not complied with the rules and his claim is at risk.

[20] The applicants have chosen to oppose the proceedings and have not admitted the respondent’s claim against the estate of Mr Zartz. As such the respondent has no option but to prove his claim in trial proceedings. In balancing the prejudice to be suffered by the respective parties, dismissal of respondents claim and refusal of condonation would be fatal to that claim.

[21] Considering the nature and extent of the respondent’s non-compliance, the respondent attempted to comply and reply to the discovery notice, albeit that the responses were defective and late. The respondent did not simply ignore the notices. This a factor in the respondent’s favour.

[4] Fn ……supra at 278F

[22] Considering all the relevant factors, I conclude that it would be in the interests of justice to grant condonation to the respondent for the late delivery of his replies to the discovery notices. In reaching this conclusion, the prejudice to the respondent if condonation is not granted, is weighty.

[23] As the respondent sought an indulgence, it is appropriate that he pays the costs of the application. It cannot be concluded that the opposition of the application by the applicants was unreasonable.

[24] I turn to the setting aside application. The basis of the applicants' complaint was that the respondent had delivered its replies to the r 35(3), (6) and (12) notices after an application had already been launched to dismiss this claim under r35(7) and consequently that the delivery of the replies constituted an irregular step. In their application, the applicants contended that the plaintiff was precluded from delivering his replies as he had not obtained condonation for his failure to comply with the compelling order of 2 November 2020. They contended that the response to the r35(12) notice was in the incorrect format.

[25] The respondent opposed the application on the basis that a condonation application was simultaneously delivered with the answering affidavit to condone the late delivery of the replies and that the applicants adopted an overly technical approach in relation to the incorrect format of the r35(12) reply. He further contended for prejudice were the replies set aside as it would result in dismissal of his claim.

[26] In argument, the applicants further contended that the replies were in any event deficient as the affidavits were deposed to by the respondent's attorney of record and not by the respondent personally. The replies were accompanied by unsigned supporting affidavits of the respondent and a Ms Joselowitz.

[27] R30 (1) provides for the setting aside of an irregular procedural step. Under r30(3):

> *"If at the hearing of the application the court is of the opinion that the proceeding or step is irregular or improper, it may set it aside in whole or in part, either as against all the parties or as against some of them, and grant leave to amend or make any such order as to it seems meet.*

[28] I do not agree that the respondent was precluded from delivering his replies after a dismissal application under r35(7) was launched. There is no time bar and it was open to the respondent to seek, as he did, condonation for his non compliance[5].

[29] In order to succeed, the applicants must establish prejudice[6]. By the time the application was heard, properly signed and commissioned affidavits by the respondent and Ms Joselowitz had been provided, albeit that the respondent's affidavit was only produced during August 2021 and that of Ms Joselowitz shortly before the hearing. A court further has a discretion to grant an appropriate order.

[30] Whilst the applicants had been entitled to launch the application to set aside the replies as the affidavit was not deposed to by the respondent personally, but rather by his instructing attorney[7], by the time the application was heard, the defects had been rectified. The only complaint raised by the applicants pertained to the affidavits. No complaints were raised regarding the contents of the affidavits and it was not contended that they were defective in any way. Thus irrespective of the condonation application and my conclusion that condonation should be granted, I am not persuaded that the applicants have illustrated that they have suffered any prejudice or that the applicants are entitled to the relief sought.

[31] Considering the late stage at which the deficiencies in the replies were rectified, it would however be appropriate to mulct the respondent with the costs of the application.

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[5] Ikamva Architects CC v MEC for the Department of Public Works and Another (CA337/2013){2014] ZAECGHC 70 (27 August 2014) paras [29]-[31]
[6] Trans-African Insurance Co Ltd v Maluleke 1956 (2) SA 273 (A) at 278F-G; Life Healthcare Group (Pty) Ltd v Mdladla and Another [2014] JOL 31463 (GSJ) para [7]
[7] Rellams (Pty) Ltd v James Brown and Hammer Ltd 1983 (1) SA 556 (N)

[32] Turning to the application for dismissal of the respondent's claim under r 35(7), I have already concluded that condonation should be granted for the non con-compliance with the compelling order. That application is intertwined with the dismissal application.

[33] Rule 35(7) provides:

> *"Ïf any party fails to give discovery as aforesaid, or having been served with a notice under subrule (6), omits to give at 278Ftimnotice of a time for inspection as required by that subrule, the party desiring discovery or inspection may apply to a court, which may order compliance with this rule and, failing such compliance, may dismiss the claim or strike out the defence"*.

[34] A court is thus granted a discretion, which is to be exercised judicially considering all the facts. Having concluded that condonation should be granted to the respondent for his failure to comply with the order compelling delivery of replies to the discovery notices, the basis underpinning the dismissal application falls away. The applicants are thus not entitled to the relief sought. It would however be appropriate to direct the respondent to pay the costs of the application as the applicants were justified in pursuing the procedural remedies available to them considering the dilatory conduct of the respondent for the reasons already advanced.

[35] The applicants sought the costs of two counsel in relation to all three of the applications. Considering the nature of the applications and the issues which arose, I am not however persuaded that such an order is warranted.

[36] From the papers the delays seem to be attributable to the respondent's attorney. During the hearing when I engaged with the respondent's counsel on the issue of costs, the respondent's attorney tendered to pay the costs as a sign of accountability. As I was not furnished with any facts indicating whether the respondent contributed to the delay or not, I am not persuaded to grant an order against the respondent's attorney. This is an issue which she and the respondent must discuss and resolve.

[37] The applicants' frustration at the pace of the litigation is understandable. In my view, the matter must be placed under case management in order to prevent any further delays in the litigation. An order will be granted authorizing the parties to approach the Deputy Judge President for the allocation of a case management judge.

[38] I grant the following order:

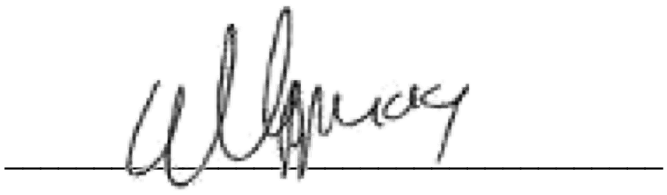
[1] The respondent is granted condonation for the late delivery of his replies to the applicants' notices in terms of rule 35(3) and(6) and rule 35(12);

[2] The respondent is directed to pay the costs of his condonation application;

[3] The respondent is directed to pay the costs of the applicants' application in terms of rule 30(2);

[4] The respondent is directed to pay the costs of the applicants' application in terms of rule 35(7) for dismissal of the respondent's claim;

[5] The action proceedings are referred to case management and the parties are authorized and directed to approach the Deputy Judge President forthwith for the allocation of a case management judge.



EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

DATE OF HEARING	: 12 October 2021
DATE OF JUDGMENT	: 19 October 2021
APPLICANTS' COUNSEL	: Adv. R. Shepstone : Adv. N. Jongani
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RESPONDENT'S COUNSEL	: Adv. D Mokale
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