REPUBLIC OF SOUTH AFRICA

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

CASE NO: 29079/2017

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED: ~~YES~~/NO

Date: …11 June 2021…

In the matter between:

ISIBAYA HOUSE BODY CORPORATE SS273/2007 First Applicant

ISIBAYA HOUSE BODY CORPORATE SS67/2008 Second Applicant

and

CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY Respondent

JUDGMENT

TURNER AJ:

[1] This is an interlocutory application in which the applicants apply for condonation for the late filing of their replying affidavit. The founding papers in this matter were delivered during August 2017, during September 2017 the respondent served a notice in terms of Rule 35(12) and, after some correspondence in relation to the discovery request, the respondent delivered its answering affidavit during January 2018. In the ordinary course, the replying affidavit would have been due in February 2018. The replying affidavit was finally delivered in October 2020, some 2 years 8 months after it would ordinarily have been filed in terms of the Rules.

[2] On 5 November 2020, the respondent delivered a notice in terms of Rule 30A objecting to the applicants delivering the replying affidavit late and without condonation.

[3] The applicants delivered their application for condonation on 19 November 2020. The notice of motion is supported by a founding affidavit and a confirmatory affidavit by the applicants' attorneys. In the founding affidavit, the attorneys attempt to explain the delay (which explanation is dealt with more fully below), they also record the nature of the disputes which have arisen and why the replying affidavit needs to be before the court in order for the main application to be properly ventilated. The attorneys ask this Court to exercise its discretion to grant condonation. In addition, the notice of motion asks that the respondent be ordered to pay the costs of the application "only in the event of opposition".

[4] The respondent's answering affidavit to the Condonation Application was delivered in January 2021 and was deposed to by the respondent's attorney, supported by a confirmatory affidavit by Mr Ngwana of the respondent. In the answering affidavit, the respondent's attorney sets out a number of grounds opposing condonation: he challenges the reasonableness of the delay in filing the replying affidavit; he points out

what he alleges to be contradictions between the applicants' initial intention to deliver a supplementary founding affidavit and its ultimate decision not to do so; and he directs a number of allegations against the applicants and its attorneys accusing them of bringing the original application "on false evidence", recanting prior evidence and of a lack of *bona fides*. Notably, as discussed below, his affidavit does not identify the actual evidence in the replying affidavit that is alleged to be new or contradictory to the founding affidavit. Nor does it identify the significance (or prejudice to the respondent) of this change or the extent to which any further response from the respondent would be required to deal with that matter.

[5] Before dealing with the merits of the application, I wish to note significant displeasure at having to review a CaseLines record which exceeds 1000 pages in an interlocutory application for condonation and to put up with unnecessary mud-slinging between attorneys. In this regard, I lay the blame on both sets of attorneys, whose personal attacks have made the reading of the papers a wholly unpleasant and laborious task.

[6] To borrow from Van Reenen J in *Die Dros (Pty) Ltd and Another v Telefon Beverages CC and others* 2003 (4) SA 207 (C) at 28, with my emphasis:

> "It is trite law that the affidavits in motion proceedings serve to define not only the issues between the parties, but also to place the essential evidence before the Court (see *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (W) at 323G) for the benefit of not only the Court but also the parties. The affidavits in motion proceedings must contain factual averments that are sufficient to support the cause of action on which the relief that is being sought is based. Facts may be either primary or secondary. Primary facts are those capable of being used for the drawing of inferences as to the existence or non-existence of other facts. Such further facts, in relation to primary facts, are called secondary facts. (See *Willcox and Others v*

> *Commissioner for Inland Revenue* 1960 (4) SA 599 (A) at 602A; *Reynolds NO v Mecklenberg (Pty) Ltd* 1996 (1) SA 75 (W) at 78I.) Secondary facts, in the absence of the primary facts on which they are based, are nothing more than a deponent's own conclusions (see *Radebe and Others v Eastern Transvaal Development Board* 1988 (2) SA 785 (A) at 793C - E) and accordingly do not constitute evidential material capable of supporting a cause of action."

[7] The above *dicta* apply to interlocutory matters as much as they do to ordinary motion matters. The test to be applied by the Court in an application for condonation involves the evaluation of facts as to what happened, when it happened and why those facts impacted on the applicant's ability to meet its obligations. If either party seeks to have the Court draw inferences, in order to making a finding of abuse, wilfulness, misconduct, *mala fides* or the like, it needs to clearly record the facts from which the inferences are to be drawn. In the absence of the primary facts being clearly recorded, no such assertions should be made and no such inferences can be drawn. Additionally, particularly in the context of an interlocutory application, it is singularly unhelpful to have to wade through affidavits where so many allegations comprise personal attacks by one attorney on the other.

[8] Uniform Rule 27(1) provides

> "In the absence of agreement between the parties, the court may upon application on notice and on good cause shown, make an order extending or abridging any time prescribed by these rules or by an order of court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet.

[9] No exhaustive definition of what constitutes "good cause" is prescribed to avoid fettering the Court's overall discretion, but the key factors informing the exercise of the discretion are the following :

9.1 The first is that the applicant must furnish an explanation of his default sufficiently full to enable the court to understand how the delay came about and to assess applicant's conduct and motives, having regard to those facts. A full and reasonable explanation, which covers the entire period of delay, must be given. If there has been a long delay, the court should require the party in default to satisfy the court that the relief sought should be granted, especially in a case where the applicant is the *dominus litis*. The court will refuse to grant the application where there has been a reckless or intentional disregard of the rules of court, or the court is convinced that the applicant does not seriously intend to proceed. The application must be *bona fide* and not made with the intention of delay.

9.2 The second factor is that the applicant for condonation should satisfy the court on oath that he has a *bona fide* defence or claim. In the current matter, involving the delivery of a replying affidavit, this factor would require that the replying affidavit be relevant and contains material required for the Court to make a proper determination when it hears the main application.

9.3 The third factor is that the grant of the indulgence should not prejudice the other party in a way that cannot be compensated for by a suitable order as to postponement and costs. It is not sufficient for the applicant to merely show that condonation will not result in prejudice to the other party, where the applicant has not shown good cause. Where this principle has been applied to

refuse condonation (such as *Standard General Insurance Co Ltd v Eversafe (Pty) Ltd* 2000 (3) SA 87 (W) at 93G – 95 F) it is often where the new aspect is introduced at the eleventh hour or at the commencement of proceedings.

9.4 The additional consideration, applied in *Ferris v FirstRand Bank Ltd* 2014 (3) SA 39 (CC), involves the broad assessment of whether it is in the interests of justice to grant condonation.

Explanation of the delay

[10] It is common cause that the answering affidavit was delivered in January 2018 and, as such, the replying affidavit would have been due in February 2018. It is also common cause that the replying affidavit was delivered in October 2020, some 2 years 8 months after the due date. This is an inordinate delay. The applicant has attempted to explain the delay but there are a number of gaps which have not been explained. I have summarised the timeline below:

10.1 In early 2018 the applicant requested extensions to deliver the reply first until 16 February 2018 and then until 23 February 2018 and then again until May 2018. The respondent granted all these requested indulgences, but the replying affidavit was not delivered. The details of these extensions are not set out in the founding affidavit and scant explanation is given for the not meeting these self-imposed deadlines other than for the attorneys to record that they were busy with other matters and new personnel were employed by the applicants.

10.2 No details are given for the seven-month period May 2018 until 18 January 2019. The applicant alleges that after Mr Beech, the deponent to the replying affidavit, was appointed in early 2018 and it received Mr Mantlana's reply that

"I will wait for you" delivered on 3 May 2018, it assumed and believed it could accept "that the applicants could file when they were ready to file". In my view, this is an unsatisfactory approach. First, it is clear from the applicants email to which Mr Mantlana was responding, that he was responding to the applicants' attorneys' statement that "I have already started drafting our reply and only need to supplement the information as soon as we receive same". Second, the attorneys had an independent duty to the Court to attend to the finalise of the reply. It seems nothing was done between May 2018 and January 2019 and no explanation for this period has been provided.

10.3 The explanation for the period January 2019 to September 2019 appears to be that the applicant was attempting to engage the respondent to meet "with the hope that a settlement might eventuate". It is not suggested that settlement was proposed by the respondent, nor is it suggested that the respondent had consented to a further delay in the filing of papers. Eventually, pursuant to these discussions, an inspection in loco was arranged and was attended by the attorneys on 20 September 2019. The inspection was directed at resolving the apparent dispute on the papers regarding the number of units in the building.

10.4 Following the inspection in loco, the applicants delivered an amendment to its notice of motion, but did not deliver a supplementary founding affidavit as they had initially suggested they would. This amendment did not attract opposition from the respondent.

10.5 The applicants assert that, during the period 30 January 2020 to 23 March 2020, "the applicants attorneys continuously followed up with the City's attorneys with regard to whether the City would be amending its answering

affidavit, as a result of the amended notice of motion". The respondent's attorney reverted on 23 March 2020 to say that the respondent would not be amending. It is unusual for the applicants to have expected the respondent to amend its answering affidavit or even to supplement its answering affidavit, particularly where the applicant had not supplemented the founding papers.

10.6 The period from 23 March 2020 until 21 July 2020 is explained with reference to the Covid-19 lockdown and a month delay in having counsel settle the final replying affidavit. No detail is given as to why the affidavit could not be finished earlier and why it could not have been sent to counsel earlier.

10.7 The period from July 2020 until October 2020 is explained on the basis that the trustees of the applicants had changed between the time the application was launched and the time that the replying affidavit was ready to be delivered. The applicants allege that the meeting of the trustees could only take place on 14 August 2020, that the trustees requested additional documents before approving the filing of the document and only provided their approval for the filing of the affidavit on or about 2 October 2020. The replying affidavit was then signed before a Commissioner and delivered in mid-October 2020.

[11] In argument, applicant's counsel acknowledged that there is a seven-month period between May 2018 and January 2019 which is not explained by the applicant. He argued however that after this delay, the applicant engaged with the respondent, the respondent attended an inspection *in loco* which was designed to resolve the factual question over the number of residential units and the existence of business units in the building and the respondent did not insist on the reply being delivered in advance of such inspection. He went on to note that it was after this inspection in loco was held

that the amended notice of motion was delivered, and the respondent did not object to the amended notice of motion. The amended notice of motion reflected the relief consequent upon the facts which had been confirmed since the delivery of the founding affidavit – namely that there were business units located within the building and, consequently, on the applicant's case, a mixed-use tariff ought to be applied.

[12] From the available facts, I am satisfied that the applicants were not in wilful default and they do not appear to have delayed delivery of the replying affidavit to intentionally delay the proceedings or for any other ulterior motive. However, there is an extraordinary dilatoriness in the manner in which the applicants' attorneys dealt with the matter and large periods of delay which are not adequately explained by the attorneys.

[13] To my mind, the length of the delay and the failure to have provided a satisfactory explanation for a large portion of the delay is a significant factor against granting condonation. However, it is not determinative. It must be weighed with the other factors.

Other factors

[14] It is clear that there have been significant delays in the finalisation of the underlying disputes (which apparently arose in 2008/9) and that these delays have not been mitigated by either the applicant or the respondent's representatives. There are no facts recorded which indicate *prima facie* that the additional delay has added material additional prejudice to the respondent's defence of the matter and the respondent did not take steps to set the matter down while the reply was outstanding.

[15] The respondent asserts the following grounds of prejudice which I deal with briefly:

15.1 That the applicants' decision to file a reply was aimed at preventing the respondent from being able to answer the allegations in the reply. Linked to this is the allegation that the applicants should not be entitled to cure a defective founding affidavit in reply.

15.2 The difficulty I have in dealing with this aspect of the respondent's case is the respondent's failure to identify in its answering affidavit to the Condonation application, what it contends to be the "new matter" in the reply. As a result, it does not set out what response would be needed thereto and what additional matter would have to be sourced to respond thereto. Both the answering affidavit and the heads of argument assert that new matter has been included and accuse the applicants of attempting to "deprive the respondent of a right to reply" but none of the primary facts are included.

15.3 The applicants have set out in the replying affidavit what they contend to be the difference between the factual assertion in the founding affidavit and the replying affidavit (in the main application). The applicants point out that the substance of the difference lies in the fact that previously they recorded that there were 118 residential units in the buildings but now, in response to the details of the buildings set out in the answering affidavit, they confirm there is a mix between residential (113) and commercial (5) units in the building. This has the result that a different tariff would need to be applied in calculating their claim. The applicants point out that the respondent had dealt with the facts of that issue in the answering affidavit and, further, an inspection in loco had been held at which these issues could be resolved. In the circumstances, the

applicants contend that there is no significance in the correction of the factual position set out in the reply.

[16] During argument, the respondent's counsel confirmed that the facts which to which the Respondent objected were the correction of the number of residential and commercial units in the building. While he complained that the relief in the notice of motion had also changed, he confirmed that the only different "fact" was the number of units.

[17] In the respondent's answering affidavit, the respondent's attorney accuses the applicants of not being bona fide by delivering a reply containing "new and contradictory evidence". In my view, the reply would only lack bona fides if the facts set out in the reply were false. The purpose of affidavits (as noted above) is to ensure that the correct facts are placed before the Court. Nowhere in the respondent's affidavit answering the condonation application does the respondent's attorney suggest that the new fact – that the building contains 113 residential units and 5 commercial units, rather than 118 residential units – is incorrect. The respondent's attorney attended the inspection in loco in September 2019 and, if that statement is wrong, I would have expected him to say so.

[18] In argument, I asked the respondent's counsel what the content of any additional affidavit would need to record in order to deal with the "new matter" allegedly raised in the replying affidavit. Counsel indicated that he did not have instructions on this issue as the matter had not been canvassed. A critical aspect of this interchange lies in the fact that allegations of prejudice and *mala fides* can only be made where facts are available to support those allegations. In the answering affidavit, the respondent's attorney had made such allegations without setting out the facts which support those allegations.

[19] Shortly after the replying affidavit was delivered, the respondent's attorney spoke on the telephone with the applicant's attorney and recorded that he was offended by the content of the replying affidavit and that the respondent would object to the late filing, without condonation having been applied for. In the current application, the applicants argue that the reason why condonation has been opposed is because the respondent's attorney took personal offence at the content of the replying affidavit. The respondent asserts that the accusatory stance adopted by the applicants in the replying affidavit towards the respondent and its attorney, should persuade me that the applicants are not *bona fide*, and this should disentitle them to condonation.

[20] I note that the respondent has made an application to strike out various offensive portions of the applicants' replying affidavit in the main application. From the bar, the applicants' counsel recorded that the applicants did not oppose such strike out application. If that is the case, those issues can be resolved without much ado. It is not necessary for me to deal with that application or with who should bear the costs of that application. It is however relevant to recognize that Counsel's concession affirms that the respondent's attorney was probably justified in taking offence at the content of the replying affidavit.

[21] In this application, I am not asked to strike out any matters from the replying affidavit, to decide the main application nor am I asked to consider whether the respondent should be given an opportunity to deliver a fourth set of affidavits. As such, it is neither necessary nor appropriate for me to descend into these matters. On the face of the facts set out in the condonation application (as opposed to the arguments and assertions), it appears that the applicants were entitled to deliver a reply, that the majority of the material set out in the reply is does address the answering affidavit and

that the difference in the factual position set out in the replying affidavit (when compared with the founding affidavit) is not significant.

[22] The general principle is that all the necessary allegations upon which the applicant relies must appear in his founding affidavit, and he will not generally be allowed to supplement the affidavit by adducing supporting facts in a replying affidavit. This is, however, not an absolute rule and the court has discretion to allow new matter in a replying affidavit, giving the respondent the opportunity to deal with it in a second set of answering affidavits. If a fourth (rejoinder) affidavit is required (to deal with specific factual averments in the reply), I am confident that the respondent will not be precluded from delivering such an affidavit.

[23] A significant factor in dealing with the current application for condonation is the "interests of justice". The hearing of the application had not been set down when the replying affidavit was delivered and so its introduction did not interfere with or have the effect of interrupting or postponing a hearing. If condonation were refused, it would have an unnecessarily punitive effect on the applicants in circumstances where the introduction of the reply does not disrupt the finalisation of the matter. In other, circumstances, the late delivery of a reply may invite a punitive sanction even at the risk of deciding the matter on the wrong facts. In the current circumstances, having regard to the interests of the owners and occupants of the residential units involved and the interests of the City itself, I find the interests of justice to be best served by having the application determined on the correct facts. It is also in the interests of justice for the court hearing the application to have the applicants reply before it when it hears the application. The reply cannot make the applicant's case for relief but having it will

assist the Court in understanding the applicant's position on the facts and contentions set out by the respondent in the answering affidavit.

Conclusion

[24] I am mindful of the test for "good cause" and the need for an applicant for condonation to give a full explanation for the delay for which condonation is sought. In the current matter, the explanation given to explain the delay suggests that the applicant's attorneys were dilatory in the manner in which they dealt with the matter. However, it is in the interests of justice for the relevant evidence and clarifications to be placed before the court for a proper ventilation of the matter.

[25] In the circumstances, notwithstanding that part of the delay is unexplained, I find it is in the interests of justice to condone the late filing of the replying affidavit. I also find that the respondent's opposition to the application (though unnecessarily aggressive and personal at times) was not unreasonable. The extensive delays and the offensive manner in which the applicant approached the replying affidavit provided the respondent with grounds reasonably to object and so the respondent is entitled to the costs of the application.

[26] In the circumstances, I make the following order:

26.1 Condonation is granted to the applicants for their failure to comply with the time periods stipulated in Uniform Rule 6(5)(e) for the filing of their replying affidavit.

26.2 The applicants are to pay the respondent's costs of the application on the scale as between party and party.

DA Turner AJ

Date of hearing: 07 June 2021
Date of judgment: 11 June 2021

Appearances:
On behalf of the applicants : T Paige- Green
Instructed by: Schindlers Attorneys

On behalf of the respondent : C van der Merwe
Instructed by: Dali Mantlana Attorneys