



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

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: NO

Date: Signature:  15 JULY 2022

CASE NO: 04956/2020

In the matter between:

LEON JJ VAN RENSBURG ATTORNEYS

Applicant

and

MATLOTLO TRANDING (PTY) LTD

First Respondent

THE LEADERS CHRISTIAN ACADEMY

Second Respondent

MRS S RODRIGUES

Third Respondent

MRS NYIKA

Fourth Respondent

EKURHULENI METROPOLITAN MUNICIPALITY

Fifth Respondent

MRS SAMKE NGCOBO

Sixth Respondent

Coram: MACHABA AJ

Heard on: 18 MAY 2022

Delivered: 15 JULY 2022

Delivered: This judgment was handed down electronically by circulation to the party and or her representatives via email and caseline and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 15 July 2022.

ORDER

- (1) The application for condonation for the late filing of the Applicant's application for leave to appeal is refused; and
 - (2) The Applicant's application for leave to appeal is refused with costs.
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JUDGMENT

MACHABA AJ

*"[1] It is indeed the lofty and lonely work of the Judiciary, impervious to public commentary and political rhetoric, to uphold, protect and apply the Constitution and the law at any and all costs."*¹

¹ Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others [2021] ZACC 18.

CONDONATION

1. In this matter, the Applicant seeks leave to appeal the judgment and order of this Court handed down on about 20 December 2021 ("the Judgment").
2. The Applicant advanced numerous reasons in support of the said application and same was opposed by the First Respondent.
3. At the hearing of the matter, the Applicant moved an application for condonation for the late filing of the application for leave to appeal.
4. In an affidavit supporting the above application for condonation, the Applicant submitted that the Judgment was received by its office on 15 January 2022 "*by email or noted on Caseline*". It submitted that its offices were closed between 15 December 2022 and 15 January 2022.
5. The Applicant submitted that the reason the Judgment was only received on the said date was because "*nobody has access to any emails or has authority to act on any emails during the closure of the office.*"
6. The deponent to the above affidavit, makes a startling averment that although he is "*not sure*", but he believes "*that there was a period of dies non during December and January where parties were not required to act due to most law firms closing during festive season.*"
7. The deponent further states that "*all staff were required to take compulsory leave even the secretary working on this matter was on leave hence they knew of this matter when they all returned from the festive holidays.*"
8. The Applicant submitted that there is no prejudice to be suffered by it filing its application as late as did. It stated that it is, instead, the one that is prejudiced because the Court's interpretation of rule 41(1)(c) is completely wrong.
9. It emerged for the first time in the hearing of the application for leave to appeal, and in its application for leave to appeal that the agreement in relation to the costs of the main application extended not only to the Fifth and Sixth

Respondents. In fact, as the Applicant's counsel argued, the other respondents, namely, the Second to Fourth Respondents also reached an agreement with the Applicant in respect of costs "*hence this Court ought not to have interfered with the arrangements made with these other respondents.*"

10. The Applicant states that all respondents offered to pay their part of the costs in full when matter became settled with them. This, as I find, is news to this Court.
11. In the main application for costs, the Applicant appeared to be wholeheartedly after the First Respondent and seeking the latter pay the rest of the costs it incurred and those occasioned by the withdrawal of the opposition by the First Respondent. It contended that the Court should not interfere with the cost order/agreement that it and the Fifth and Sixth Respondents agreed to. This view, is shared by the First Respondent both in its heads in this application and in the main application.
12. Based on the above understanding of the matter, this Court found against the Applicant and exercised its discretion in a manner it deemed meet.
13. On the merits of the application for condonation, the First Respondent argued that the Judgment was handed down on 20 December 2021 and the application for leave to appeal was filed on 24 January 2022, despite the Applicant being aware that such an application must be filed 15 days from the Judgment being handed down.
14. According to the First Respondent the Applicant is out of time and the *dies* for filing its application for leave to appeal has lapsed.
15. In my analysis of the application for condonation, it appears evident that the Applicant completely misread the rules of this Court with regard to *dies non*, and has largely advanced its internal dynamics, in its office, as reasons for the late application for leave to appeal.

16. It further does not look like the Applicant willingly launched the late condonation application. Indeed, even the application for condonation was filed late in the day.
17. The Applicant's memory *in re* condonation application, despite it being late in the filing of the application for leave to appeal, was probably jogged up by the First Respondent's undated heads of argument which contended that the Applicant had not been granted condonation or an extension of time for its delays in filing the current application for leave to appeal.
18. It was only then and on 16 May 2022, two days before the hearing of the application for leave to appeal, that the Applicant filed its application for condonation.
19. It seems that all along and based on its erroneous understanding of the *dies non*, the Applicant believed that it did not need to ask for this Court's indulgence. This was wrong and fatal to its application.
20. Rule 19 of the Uniform Rules of Court provides as follows:

19 Notice of Intention to Defend

(1) Subject to the provisions of section 27 of the Act, the defendant in every civil action shall be allowed ten days after service of summons on him within which to deliver a notice of intention to defend, either personally or through his attorney: Provided that the days between 16 December and 15 January, both inclusive, shall not be counted in the time allowed within which to deliver a notice of intention to defend.

[Subrule (1) substituted by GN R2021 of 5 November 1971, by GN R2164 of 2 October 1987 and by GN R2642 of 27 November 1987.]

21. Mavundla J, pointed that “[I]n the works of Erasmus, Superior Court Practice, the learned authors point out that the definition of the words ‘civil summons’ in s.1 of the Supreme Court Act 59 of 1959 “contemplates two classes of persons who may be affected thereby, viz a person against whom relief is sought (i.e

*the actual defendant or the respondent to an application) and a person who is interested in resisting the grant of relief (i.e creditors or other person who may be called upon to 'show cause' why a certain relief should not be granted)."*²

22. From the plain reading of the above rule, it is apparent that Rule 19(1) of the Uniform Rules of Court provides for *dies non* only in respect of a notice of intention to defend. During this period, from 16 December to 15 January, the usual period of ten (10) business days for filing a notice to defend after receipt of a summons is suspended.
23. There is nothing that permits the Applicant to assume, as it has done, that even an application for leave to appeal is affected by *dies non*. Counsel for the Applicant also did not refer this Court to any authority in support of the Applicant's conduct.
24. In ***Melane v Santam Insurance Co. Ltd 1962 (4) SA 531 (A)***, the Appellate Division of the Supreme Court considered the meaning of "on good cause shown" or "on sufficient cause shown" and outlined the factors which need to be taken into account in this regard. These factors are: "the degree of lateness, the explanation for the delay, the prospects of success and the importance of the case". The Court held, then, that the factors are interrelated and should be considered holistically when making a decision on whether or not condonation should be granted.
25. Although provision is made for condonation applications, there is no uniform stance by the courts on whether to provide leeway in granting condonation applications for non-compliance during the December and January period.
26. I suppose, as is usually the case with our law, that each case must be determined on its own unique facts and merits.

² Du Plessis and Another v Mjwara and Another (14848/05) [2007] ZAGPHC 134 (31 July 2007), para [16].

27. For example, in the matter of **South African Airways (Soc) Ltd v Commission for Conciliation, Mediation and Arbitration and Others (JR271/15) [2018] ZALCJHB 6 (19 January 2018)**, the Labour Court dealt with the late filing of a review application. The reason provided for the late filing was that the staff members who were handling the matter over the December/January period had been on leave. The judge in the matter accepted that some leeway must be allowed during the festive season, "*in that the court has rightfully acknowledged the fact that the absence of a Labour Court rule stipulating dies non during the ordinary annual shutdown period over December and January should be taken into account when delays over this period are being considered*".
28. Furthermore, the judge in matter of **Lentsane and others v Human Sciences Research Council (2002) ILJ 1433 (LC)** stated that, in his view, the omission of such an institution in the Rules of this Court was "lamentable". He further stated that "*It is not necessary for one to approve of the near complete collapse of national enterprise during the traditional year-end holiday period, but is seems manifestly obvious and sensible that any legal practitioner who institutes an action in the first week of December must appreciate that there will be considerable hardship, done unnecessarily, if individuals who are required to respond have, at the last moment, to rearrange their family and other commitments*". [Underlining mine]
29. The *dies non* periods prescribed in Rules 6(5)(a), 19, and 26 of the Uniform Rules of Court only apply to affidavits and pleadings. No *dies non* period is provided for applications for leave to appeal under the then Rule 49 or section 17 of the Superior Court Act, 2013.
30. It is this Court's finding that the Applicant ought to have known this trite legal position, especially given the professions it purports to ply its business in.
31. This Court has discretion in granting condonation upon exercising same judiciously and a judicious exercise of its discretion does not mean that it is bound to agree with any of the parties.

32. Even if I could have exercised my discretion to admit the late filing of the answering affidavit, such discretion must be premised on facts placed before me, explaining the failure to have the answering application for leave to appeal filed in time. The fact that there would be no prejudice, on the part of the applicants, were I to allow the answering affidavit to stand, that fact cannot stand alone, especially when, for example, it is marshalled over the bar, without any formal application for condonation.
33. In *casu*, there is an affidavit to explain the source of the delay. The facts placed before this Court in support thereof i.e. that in the Applicant's belief, *dies non* applied indiscriminately to any process from December to January (including to applications for leave to appeal), smacks of ignorance of the law (and the rules of Court). This, from a firm of attorneys which conducts the business of law. This I find unacceptable.
34. From the reading of the rule itself, it is only the commencement of actions (including notice of motion – according to the Judgment of Mavundla J) and the filing of Notice of an Intention to defend (by necessary logic from Mavundla J's judgment) that the reckoning of the days falling within the *dies non* period is not to be counted. Not in respect of applications for leave to appeal or any other process.³

APPLICANT'S INTERNAL OFFICE DYNAMICS AS CAUSE FOR DELAYS

35. The other grounds relied upon by the Applicant for this condonation application have to do with its internal/office arrangements. The Applicant and its office resolved to take a very risky business practice of 'switching all the lights off' when judgments such as the one under attack presently could be handed down

³ Du Plessis and Another v Mjwara and Another (14848/05) [2007] ZAGPHC 134 (31 July 2007)

at any time. As I have pointed out, not every process is covered by *dies non*. Even emails were shut off.

36. This Court does not wish to advise attorneys on how to run and manage their offices, however, failure of the Applicant and its officials to benefit from the use of the modern-day technological advancements appears to have done the Applicant under.
37. In light of the above facts and legal principles, this Court is not prepared to accede to the application for condonation.
38. Accordingly, this application is to be dismissed on this basis alone.

THE TEST FOR LEAVE TO APPEAL

39. Even if this Court were to entertain this application for leave to appeal, the Applicant has failed to satisfy the three cumulative requirements for leave to appeal in terms of section 17(1) of the Superior Courts Act:

“(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that –

(a) (i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

(b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and

(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.”

40. As stated herein above, leave to appeal may only be given where the Judge or Judges concerned are of the opinion that the appeal would have reasonable prospect of success or where there is some compelling reason(s) why the appeal should be heard, including conflicting judgments on the matter under consideration.
41. The grounds for leave to appeal are succinctly stated in the notice of application for leave to appeal and I do not intend to restate them in this judgment. Furthermore, I would like to extend my gratitude and appreciation to both counsel for the submissions made in their concise heads of argument filed in this application for leave to appeal.
42. I am satisfied that I have covered and considered all the issues raised in the application for leave to appeal in the Judgment and exercised my discretion judiciously. I am therefore of the view that there are no reasonable prospects of success in this appeal. Put, differently, I am of the view that there is no prospect that another Court may come to a different conclusion in this case. Therefore, the application for leave to appeal the Judgment falls to be dismissed.
43. Accordingly, it is ordered that:
1. The application for condonation for the late filing of the Applicant's application for leave to appeal is refused; and
 2. The Applicant's application for leave to appeal is refused with costs.

By Order,



T J MACHABA

Acting Judge

Gauteng Local Division

APPEARANCES

COUNSEL FOR APPLICANT: Adv LM du Plessis

INSTRUCTED BY: Leon JJ Van Rensburg

COUNSEL FOR 1ST RESPONDENT: Adv Wesley Vittee

INSTRUCTED BY: Mayet Vittee Inc