


OFFICE OF THE CHIEF JUSTICE
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION: PRETORIA

8/3/2016

CASE NO: A620/2015

<u>DELETE WHICH IS NOT APPLICABLE</u>	
(1)	REPORTABLE: YES/NO <input checked="" type="radio"/> NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO <input checked="" type="radio"/> NO
(3)	REVISED <input checked="" type="checkbox"/>
8/3/2016	
Date	Signature

In the matter between:

LIPIDSANA DLO PRODUCTS (PTY) LTD

APPLICANT

And

MONALI KAMFFER

RESPONDENT

JUDGMENT

VUKEYA AJ

Introduction

- [1] This is an application for condonation wherein the applicant requests the court to grant condonation for the late prosecution of an appeal and to reinstate the appeal;
- [2] The applicant has requested the court to allow him to apply for a court date for the hearing of the appeal and to submit the necessary record to the Registrar within thirty (30) days of the granting of the order in order for him to take

steps to attend to the rectification or reconstruction of the record;

Background

[3] In his application the applicant alleges that it was not in willful default as the following factors contributed to the delay:

1. After the judgment of the Regional Court Pretoria, on 30 January 2015 which went in the favour of the respondent, the applicant noted an appeal on 19 February 2015.
2. On 24 February 2015 a transcribed record of the proceedings as well as a quotation for such transcription was requested from iAfrica.
3. On the same day the compact disc (CD) containing the record of proceedings was requested from the clerk of the court to have it sent for transcription;
4. Numerous letters were sent to the Regional court and to iAfrica between 26 February 2015 and August 2015 regarding the transfer of the CD and the ultimate transcription of the record, without success.
5. On 11 August 2015 the record was finally transcribed and sent to the applicant.
6. On 25 August 2015 the applicant came to learn that the transcript was incomplete as it showed that the whole of the evidence in chief of the respondent's witness was missing.
7. iAfrica was informed of the defect and they confirmed their certificate to the effect that there were no recordings on 30 July.
8. The evidence of that witness is missing in the transcript and reconstruction of the record is thus required.

- [4] The respondent opposed the application for condonation for various reasons. First he contends that the applicant has not shown good cause for the application and that the application is not bona fide, as it has failed to deliver its notice of appeal and to give security for the Respondent's costs. He further states that the applicant does not give a satisfactory account for the delay. He contends further that the explanation provided is vague and does not explain with sufficient particularity why the applicant is in default.
- [5] According to the respondent the applicant is deliberately delaying the process in order to evade the execution of the court's order, and that its appeal does not have good prospects of success as its defence is bad in law.
- [6] The respondent has referred the court to the following case law amongst others:
1. *P E Bosman transport works committee and others v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A)
 2. *Commissioner for Inland Revenue v Burger* 1956 (4) SA 446 (A)
 3. *Ferreira v Ntshingila* 1990 (4) SA 271 (A)
- [6] In a nutshell the principle that can be extracted from all this cases is that the court should be reluctant to grant condonation where there has been a flagrant breach of its rules in more than one respect and where there is no explanation for some of the delays. Furthermore, that where there has been non-compliance, an application for condonation is required to be made as soon as the party concerned realizes that the rules have not been complied with.

- [7] Regarding Security for Costs the applicant explained that the Magistrate's court, Pretoria was approached in order to make the payment but the Court through the Court Manager refused to take the money saying the process is outdated. An amount of R150 000, 00 was therefore put into a trust account and this amount covers the judgment of the court a quo.

Applicable Law

- [8] Rule 27 (3) of the Uniform Rules of Court provides that:

A court may, on good cause shown, condone any non-compliance with the rules.

- [9] The Rule requires that good cause be shown before condonation can be granted but the court cannot ignore the lateness of the application; the reasons for the lateness; any prejudice to the other party; and the prospects of success the applicant has on prosecuting the appeal.

- [10] The exercise of discretion by the court is involved when deciding whether to grant or to refuse condonation and the above requirements for determining whether condonation should be granted were set out in *Melane v Santam Insurance Co Ltd* 1962 (4) SA531 (A) where the court indicated how the discretion should be exercised.

The degree of lateness

- [11] Judgment was granted in favor of the respondent on 30 January 2015 and the *dies* required in terms of the rules expired 60 days thereafter. A period of at

least four (4) months expired before the applicant could apply for condonation.

The applicant explains that it would not have taken his application anywhere if it had brought it without a transcribed record of the proceeding and it had to wait until it was available. This explanation is reasonable as it is evident from the documents filed that immediately after receiving the transcripts; the applicant brought its application for condonation together with its notice of appeal.

Reasons for the lateness

- [12] The applicant has sufficiently displayed its frustrations with trying to obtain the transcribed record in order to prosecute the appeal. To date it has been unable to obtain a complete record from the Magistrate's court or from iAfrica. These reasons are satisfactory as they are also supported by documentary proof of the applicant's endeavors to obtain a complete record from February 2015 to date.

Any prejudice to the other party

- [13] It is in fact so that the respondent obtained judgment for R150 000, 00 plus costs in January 2015 against the applicant. It can also be accepted that he would have by now executed the judgment, had it not been for the delayed prosecution of the appeal. The interests of the respondent are not to be considered in isolation but they are to be weighed against the rights of the applicant especially where there is provided, a satisfactory explanation regarding the delay.

[14] This is in line with Section 34 of Act 108 of 1996 which gives everyone the right to have any dispute that can be resolved by application of law decided in a fair public hearing before a court or where appropriate, in another independent and impartial tribunal or forum.

[15] The applicant has taken steps to deposit the judgment amount in the Trust account. The potential prejudice of the respondent not obtaining a refund through execution of the judgment is removed.

Prospects of success of the applicant in the appeal

[16] The dispute between the parties arises from a contract executed on 18/05/2011 wherein the respondent bought in to a product scheme operated by the applicant, where the respondent became the principal agent for a buying value of R150 000, 00. In terms of the said contract, in the event the applicant does not deliver or meet its obligations in terms of delivery of the product by a certain specified date; and if no such delivery has been made, then the respondent would be entitled to a refund within 48 hours. The respondent alleges that the applicant failed to meet his obligations and therefore he is entitled to a refund.

[17] The applicant alleged that though the contract had lapsed, there was an extension by agreement between the parties alternatively that the parties entered into a verbal agreement with each other whereby the respondent accepted such an agreement and the applicant actually performed in terms of the verbal agreement.

[18] This defence has already been tried and tested and was found to have no merit by the court a quo, hence the judgment in favor of the respondent. The test herein is whether there are reasonable prospects of success if the appeal is prosecuted.

[19] I therefore find that there are reasonable prospects that the appeal might be successfully prosecuted.

Finding

[20] The applicant did not deliberately delay the filing of the appeal as is evident from the documents filed in support of the application; it has given a satisfactory account of the delay and its attempts to accelerate the process; it made attempts to pay into the Magistrate's Court Account security for costs for the appeal and did not succeed; it then paid the judgment amount into a trust account in order to comply with the rules regarding payment of security.

[21] I am of the view that the applicant has shown good cause why his application for condonation should be granted; his application is bona fide and it has not been brought for purposes of delay.

Order

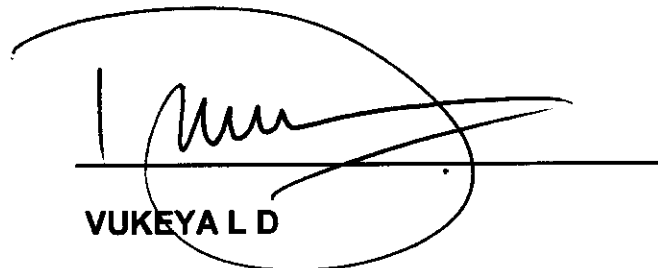
[22] I therefore propose that the following order is made:

22.1. The application for condonation is granted;

22.2. Reconstruction of the record is ordered;

22.3. The Presiding Officer, iAfrica and all interested parties are hereby directed to assist in the reconstruction of the record within ninety (90) days from the date of this order and within a further sixty (60) days thereafter the appeal must be placed on the roll of this division with the record fully paginated and heads of argument filed;

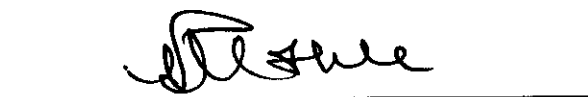
22.4. Costs are reserved.



VUKEYA L D

**ACTING JUDGE OF THE HIGH COURT OF
SOUTH AFRICA GAUTENG DIVISION PRETORIA**

I agree



**MOTHE S P
JUDGE OF THE HIGH COURT OF
SOUTH AFRICA GAUTENG DIVISION PRETORIA**

HEARD ON: 04 FEBRUARY 2016

DELIVERED ON:

COUNSEL FOR APPELLANT: ADV A J SWANEPOEL

ATTORNEYS FOR APPELLANT: VOGEL INC.

COUNSEL FOR RESPONDENT: ADV K FITZROY

ATTORNEYS FOR RESPONDENT: MUTHRAY AND ASSOCIATES INC.