REPUBLIC OF SOUTH AFRICA

HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 42443/2008

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED. ✓

23.2.2016
DATE

SIGNATURE

23/2/2016

In the matter between:

JAMES GEORGE AUSTIN Applicant

And

UMANAND RAMPURSAD SENTOO 1st Respondent

DEREK ARROW 2nd Respondent

JUDGMENT

MSIMEKI J:

[1] Applicant, in this application, seeks an order extending the period for and condoning the late filing of a declaration. Applicant further seeks an order for costs against any respondent who opposes this application.

BRIEF FACTS

[2] Applicant, in the main application, sought to obtain payment of R3 million Rand by way of motion proceedings from respondents. Applicant contends that the two respondents' liability arises from suretyships concluded by directors and shareholders of TAS Investments (Pty) Ltd. The two respondents and applicant on 14 May 2010, before Makgoka J, agreed that the main application be referred to trial. The notice of motion would stand as a simple summons while the answering affidavit would stand as a notice of intention to defend. A declaration was to be filed within 20 days from the date of the order of 14 May 2010 whereafter the rules dealing with pleadings and the conduct of trials would apply. Applicant failed to file the declaration in the matter as ordered by the court. Such failure resulted in the bringing of this application which is opposed by second respondent.

[3] Second respondent, in his opposing affidavit, has raised a point in limine contending that, if upheld, the point in limine would render the current application premature. The point in limine raised is that first respondent was finally sequestrated on 21 July 2014 and that the sequestration order has the effect of staying all civil proceedings instituted by or against the insolvent pending the appointment of a trustee (See Section 20 (1) (b) of the Insolvency Act No 24 of 1936 and Vrystaat Vloere (Pty) Ltd V Van Rooyen 1969 (2) SA 437 (0))

[4] Advocate S J Van Rensburg (Mr Van Rensburg), for second respondent, submitted that applicant's failure to properly cite the trustees appointed on behalf of first respondent rendered the application fatally defective. Advocate K Fitzroy (Ms Fitzroy) for applicant, submitted that even if first respondent was indeed sequestrated that would not affect second respondent who was not sequestrated. Mr van Rensburg, in his heads of argument,t stated that a copy of the sequestration order was attached to their heads. This is in fact not so. First respondent, despite service of the notice of motion with founding affidavit and annexures on Miss K Reddy, secretary, is not opposing the application. It was submitted on behalf of applicant that second respondent had failed to prove that first respondent had in fact been sequestrated.

[5] Mr Van Rensburg submitted that should first respondent indeed have been sequestrated, proceeding in his absence or that of his trustee would effectively deprive his estate of an opportunity to oppose the relief sought and thereby deprive his creditors of an opportunity to oppose the application. This is correct if first respondent has been sequestrated. However, it does not, in my view, affect second respondent who is opposing the application. The point in limine, in my view, has nothing to do with second respondent. Mr Van Rensburg, in any case, represents second respondent and not fist respondent. The point in limine, in so far as it relates to second respondent, should fail. Nothing has been produced to prove that first respondent has indeed been sequestrated.

[6] **LEGAL POSITION APPLICABLE TO AN APPLICATION FOR CONDONATION**

The application is brought in terms of rule 27 of the uniform Rules of Court. The rule provides:

"27 extension of time and removal of bar and condonation

(1) 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.

(2) .....

(3) The court may, on good cause shown condone any non-complience with these rules." (my emphasis)

[7] To succeed with the application, Rule 27 (1) requires applicant to show good cause. The court has a wide discretion which it has to exercise having regard to the merits as a whole. (See Du Plooy V Anwes Motors (Edms) Bpk 1983 (4) SA 212 (0) at 217B and Erasmus: Superior Court Practice D-322 where the aspect of "on good cause shown" is discussed)

[8] Second respondent contends that:

1. The sequestration of first respondent has the effect of staying all actions against first respondent until a final trustee is appointed in terms of Section 20 (1) (b) of Act 34 of 1936. I discussed this above.
2. Applicant failed to give a proper explanation for not complying with the order. This, according to second respondent, amounts to contempt of court.
3. There was an extensive delay of more than four years before the application was brought.
4. Applicant failed to set out the merits of the matter.
5. Applicant failed to explain what the costs for filing the declaration would have been.

[9] I have already shown that the point in limine, in so far as second respondent would like it to apply to him, should be dismissed.

[10] The 20 day period within which applicant was supposed to have filed his declaration lapsed on 11 June 2010. The notice of motion in this application is dated 25 June 2014 which is almost four years after the lapsing of the 20 day period. Applicant, as a result, has to show good cause why the 20 day period ordered by the court was not complied with. There has to be a good reason for condonation to be granted for the late filing of the declaration. The court, in the exercise of its discretion, may extend the time within which to file the declaration should such "good cause" be shown (See Smith N. O

v Brummer N.o 1954 (3) SA 352(0) at 358A and Du Plooy v Anwes Motors (Edms) Bpk (Supra) at 216H-217A)

[11] The court has to establish if:

1. Applicant has given a reasonable explanation for the delay
2. The application is bone fide
3. Applicant has not demonstrated a reckless or intentional disregard of the court Rules
4. Applicant's action is not ill-founded.

[12] In Van Wyk v Unitas Hospital and Another (Open Democratic advice Center as Amicus Curiae) 2008 (2) SA 427 (CC) at [22] the court said:

"[22] An applicant for condonation must give 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."

(See also Laerskool General Hendrik Schoeman v Bastian Financial Services (Pty) Ltd 2012 (2) SA 637 (CC) at [15]

In Grootboom v National Prosecuting Authority and Another 2014 (2) SA 68 (CC) at [23] the court said:

"[23] It is now trite that condonation cannot be had for the mere taking. 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."

[13] Coming back to the current application it is noteworthy that applicant in paragraph 6.4 of his founding affidavit states:

"6.4 I was unable to provide my attorney with the sufficient funds in order to proceed with this application that has been referred for trial. After the aforesaid actions have been finalized I am now able to fund this action and have the available time and resources to properly proceed with my claim in the amount of R3 million."

The actions referred to in this paragraph relate to case number 2008/22987 where applicant states that he had been sued by Nedbank Limited which claimed an amount of R46 million from him and case number 2010/12641 where Absa Bank Limited claimed R1.7 million from him.

[14] According to applicant, the Nedbank case was finalized in May 2013 while the Absa bank case was finalized during November 2013.

[15] It is common cause that applicant concluded an agreement with TAS Investments (Pty) Ltd (TAS Investments) in terms of which TAS investments bought applicant's shares in various companies for R8.000.000.00. Applicant, up to the time of the main application, received R5.250.000.00 from TAS Investments. TAS Investments was liquidated before the balance in the amount of R3 million was paid to applicant.

Applicant, on the basis of the suretyships alleged by him, brought the main application, against the two respondents for the payment of the balance.

[16] Second respondent contends that the reason proffered by applicant for his failure to comply with the court order of 14 May 2010 cannot be true and correct. Second respondent bases his contention on the fact that applicant had received R5.250.000.00 referred to in paragraph 15 above. What is more, second respondent contends, applicant paid only 1.010.000.00 in respect of the Nedbank and Absa bank cases. This, according to second respondent, left applicant with an amount of R3.990.000.00 which should have been used to fund the current action.

[17] Applicant, in paragraph 14.2 of his replying affidavit, admits receiving R5.000.000.00 which was to be utilized as his "pension for old age and was kept available to cover my legal costs, to potentially pay the legal costs of Nedbank and Absa Bank and to pay Nedbank and Absa Bank's claims against me". A settlement was reached at the trial and applicant ended up paying R1.010.000.00 as shown above. Applicant, in paragraph 14.4 of his replying affidavit, explains that his last instalment with Absa Bank was paid in June 2014. Nothing more is said about this installment. No satisfactory explanation is advanced regarding why applicant, at the time, could not use the R3990.000.00 to fund the current action.

[18] Applicant fails to explain when the R3.990.00 was invested in the pension fund. The court is not told as to how much was retained to pay Nedbank and Absa Bank. Ms

Fitzroy, for applicant, however conceded that the two cases were settled before the money was invested in the pension fund.

[19] The above demonstrates that it cannot be correct that applicant did not have money to fund the current action as he contends. No reasonable explanation, also, has been furnished for the delay in filing the declaration. As Mr Van Rensburg correctly submitted, this could have been done without any difficulty. Applicant again failed to explain how much would have been needed for work done in respect of the declaration. This could not have exhausted the R3.990.000.00 that applicant remained with after paying R1.010.00 to Nedbank and Absa Bank. The fact that one does not have money to proceed with a matter was not seen as reasonable explanation in Ferrera v Ntsingila 1990 (4) SA 271 (A). What is worse in applicants matter is that he had more than enough money which could have enabled him to have the declaration prepared and filed and to proceed with the matter. The inordinate delay in filing the declaration has not been adequately explained by applicant. The merits of the matter, in my view, have also not been properly set out especially if regard is had to the alleged suretyships. In an application for condonation the explanation of the delay must be full and frank and demonstrate that the case of the applicant bears some prospect of success. The application, in my view, is deficient in both respects

[20] Ms Fitzroy, for applicant, submitted that second respondent had a remedy in Rule 26 where a notice of bar could have been delivered and followed, in the event of continued inaction by the applicant, by an application of absolution. The case of Woolf v

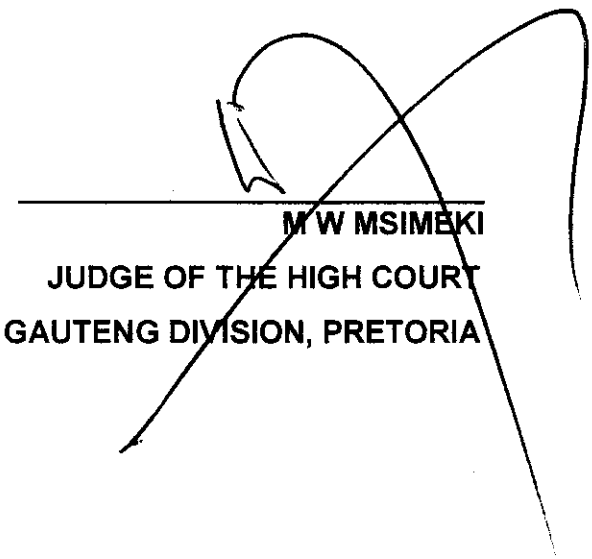
Zenex Oil (Pty) Ltd 1999(1) SA 652 (W) at 654F-G which they rely on is, in my view, distinguishable from the current case. There an application was brought by applicant seeking the dismissal of the action instituted against applicant by respondent who had failed to deliver a declaration. A point in limine relating to Rule 26 was taken by applicant and such was upheld by the court. Here the application is different. Second respondent was not obliged to invoke the application of Rule 26. The duty rested on applicant to explain the inordinate delay in filing the declaration as ordered by the court. This, applicant failed to do. It can hardly be said that applicant was bona fide. He failed to take the court into his comfidence. Applicant may not have intentionally disregarded the court rules but he was nevertheless reckless. The delay is inordinate and this renders it unnecessary to decide whether or not the action is ill founded. The application, in my view, should fail

COSTS

[21] Second respondent seeks costs on a scale as between attorney and client. I find nothing to justify the granting of such an order. Second respondent, however, having successfully opposed the application is entitled to his costs.

[22] I, in the result, make the following order:

Condonation is therefore refused and the application is dismissed with costs.



M W MSIMEKI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of hearing: 27.7 2015

Judgment delivered: 23.2.2016

Appearances:

For the applicant: Adv K Fitzroy

Instructed by Jordaan and Smit Inc
For the respondent: Adv S T Van Rensburg

Instructed by: Scharbort Inc