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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA
REPUBLIC OF SOUTH AFRICA

CASE NO: 64082/13

CITY OF TSHWANE

APPLICANT

And

GERT THOMAS VAN DER MERWE

RESPONDENT

JUDGEMENT
SEMENYA AJ

[1] This is an application by the respondent in the main application for condonation

for late filing of answering affidavit. The applicant is opposing the application.

The parties shall be referred to as in the main application. The two cardinal relief

sought are for the restoration of electricity on the premises owned by the

respondent and declaration that the respondent is in contempt of court. I deem it

necessary to first deal with the events that led to the main application before I

could deal with the merits of the instant application.

[2] The applicant is a practising attorney whose practice is situated in Pretoria. On

the 8 October 2013 the applicant brought an application against the respondent in this court for restoration of electricity after it was disconnected by the respondent. The disconnection was due to the alleged non-payment of monthly tariffs billed against the applicant by the respondent. The order was granted in terms of which the applicant was ordered to supply/connect electricity on the respondent's premises and was further interdicted from disconnecting the aforesaid services until such a time that the dispute regarding the account has been resolved.

[3] It appears from the founding affidavit in the main application that despite the order, the respondent again disconnected electricity from the applicant's premises. This prompted the applicant into bringing another application in the court in which he sought the following orders;

a) "THAT the respondent be ordered to restore the electricity supply to the applicant's property administered under account number [5.....] with immediate effect.

b) THAT a declarator be issued in terms of whereof the Respondent is found to be in contempt of the court order granted on 8th October 2014 before his Lordship the Honourable Judge Fabricious and that the Respondent be fined with a

penalty in the amount of R50 000.00 payable to the Applicant

- c) THAT the Respondent is ordered to issue a clearance certificate with a zero balance in favour of the Applicant against payment in the amount of R64 401.45 into the trust account of Van der Merwe & Associates supplemented by an undertaking by the aforesaid firm of attorneys in favour of the Respondent that the said amount will be held in trust as security for payment of any amount due to the Respondent under account number [5.....] which amount will be due and payable as and when the Respondent obtains a court order for the said amount or in the event of a written settlement between the parties,
- d) THAT the Respondent pays the cost of this application on a scale as between attorney and own client.”

[4] The application under case no.64082/2013 was placed on an urgent roll on the 6 February 2014 at 14:00. The respondent forwarded, by email, its notice of intent to oppose the application on that very same day. The application was, as a result of this, removed from the roll. It was then expected, as is prescribed by the Rules of Court, of the respondent to approach the court with an application for condonation for late filing of its answering affidavit. It further appears from the

papers filed of record that the parties thereafter communicated with each other by telephone and letters. I shall now proceed to deal with the relevant communication.

[5] On the 10 February 2014 it was agreed that a meeting should be arranged to see if the parties could resolve their issues. Subsequent to that, the applicant sent a letter dated 12 February 2014 to the respondent in which he indicated that the respondent has 15 days to file its opposing affidavit. On the 17 February 2014 the respondent wrote a letter to the applicant in which it undertook to serve its opposing papers within 15 days which it never deed. The respondent instead forwarded a letter dated 19 March 2014 to the applicant in which he requested a copy of the urgent application dated 8 October 2013. On 5 May 2013 the applicant addressed a letter to the respondent informing it that he has enrolled the matter on the unopposed roll for the 2 June 2014. He however, continued to try and resolve the issues with the applicant without yielding any positive results. Several other letters were sent to the respondent in an endeavour to resolve the issues or to remind the respondent to file and serve its application for condonation. The respondent answered to the letters on the 25 June 2014 and undertook to file its application for condonation on the 30 June 2014. Again the

respondent failed to do so. The matter was finally placed on the unopposed roll for the 6

October 2014. However, the respondent filed its answering affidavit on the 2 October 2014. The application was again removed from the roll.

[6] It is against this background that the applicant is opposing the application for condonation. The grounds for the delay in filing the application as furnished by the respondent are that its counsel requested more documents as well as the 8 October 2013 the application, which was collected from the applicant on 10 April 2014. These documents were forwarded to its counsel on the 15 April 2014.

The respondent wrote two letters to its counsel enquiring about the progress that he may have made. Final consultation took place on the 28 May 2014. It was then able to file its answering affidavit on the 2 June 2014 and that was after it was served with a notice of set down.

[7] It was argued on behalf of the respondent that the applicant did not suffer any serious prejudice due to late filing of the opposing affidavit. It was further contended that it did not blatantly and disrespectfully disregard the Rules of Court as alleged by the applicant, nor act in such a way as to cause prejudice to the applicant.

[8] It was submitted on behalf of the respondent that the facts of the application are more in favour of granting condonation than in refusing it .It was argued that the prayers sought in prayer two i.e for restoration of electricity has become moot as same was done before the matter was enrolled. It was further argued that there is no factual or legal basis for prayer three and four and that there are prospects of success in its favour. That the reason why it contents that there are such prospects will appear in the answering affidavit should the present application be granted.

[9] Counsel for the applicant argued that there is no justification for the respondent's delay in filing the answering affidavit and that the respondent simply ignored correspondence he forwarded to it. It was contended that the fact that the respondent chose not to mention the letters in its affidavit is by itself an indication that it is unable to explain its delay in filing the opposing papers. It was further argued that applicant has laid a basis on which the court could find the respondent guilty of civil contempt of court for failure to comply with a court order.

[10] It was held in *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Limited and others* 2013 (2) All SA 251 (SCA) at 256

[11] (Dengetenge) that:

“Factors which usually weigh with the court in considering an application for condonation include the degree of non - compliance, the explanation therefor, the importance of the of the case, a respondent’s interest in finality of the judgement of the court below, the convenience of the court and the avoidance of unnecessary delay in the administration of justice.”

[11] As in Dengetenge, the respondent in this instant matter's delay was in the filing of its answering affidavit as well as application for condonation. It chose to ignore constant nagging, in the form of a number of letters sent to it by the applicant, to file its answering affidavit, application for condonation or to try and resolve the issues amicably. Counsel for the applicant argued, correctly so in my view, that the respondent failed to furnish sufficient reasons upon which an indulgence may be granted in its favour. It failed to explain why it did not file its papers after it undertook to do so on two occasions. It also failed to communicate the challenges it had with regard to obtaining documents required by its counsel to the applicant, neither did it respond to his letters. It is only after the matter was set down for hearing that the respondent deemed it necessary to respond. In the premises I find that the respondent’s delay

in filing the answering affidavit as well as the application for condonation is unreasonable.

[12] The respondent was expected to provide a full, detailed and accurate account of the causes of the delay and to furnish their effect so as to enable the court to understand clearly the reasons thereof and to assess the responsibility. Instead it only provided a scanty explanation without stating the nature and size of the documents counsel asked for, the person or authority in whose custody the documents were, the reasons why they were not readily available and so forth-
Uitenhage Transitional Local Council v South African Revenue Service 2004 (1) SA 292 (SCA) at 6. The explanation furnished that the» respondent is a huge organisation which deals with numerous documents is not, in my view, satisfactory.

[13] In *Commissioner for Inland Revenue v Burger* 1956 (4) SA 446 (A) at G-H application for condonation was refused where the delay was for a period of six weeks. In this instant case the delay was for a period longer than seven months. The court stated in *Burger* (supra) that whenever a litigant realises that he has not complied with the Rules of Court he should, without delay, apply for condonation.

[14] With regard to the issue of prejudice, the respondent has made a bold statement to the effect that the applicant did not suffer any prejudice as a result of the delay. It stated that the mere fact that the applicant refused to accept the answering affidavit on the 2 October is by itself an indication that he has no

interest in the speedy finalization of the matter. I find this reasoning to be faulty in that the application was removed from the roll on two occasions due to the respondent's delay in filing relevant papers. The applicant also took some steps to remind the respondent to take the necessary steps so as to bring the case to finality. On the contrary, it is the conduct of the respondent that shows lack of interest in finality. The argument that the applicant has been prejudiced by this conduct is therefore accepted.

[15] The importance of the case on the respondent is not clear yet. The situation is as it is, as contended by it, because the answering affidavit is not yet filed. That should this application succeed, the respondent will be able to prove, at the hearing of the main application, that the it was entitled to disconnect the electricity. It was further argued that this is the main reason why the applicant is opposing the instant condonation application. The applicant seeks, among others, the court's decision as to whether it is entitled to payment of the amount he claimed due to the respondent's alleged civil contempt of court. It appears from the applicant's founding affidavit filed in support of the main application that the respondent continued to disconnect the electricity in contravention of the court order.

[16] Due to the nature of the issues which are likely to be presented, I find that it would be proper to allow the respondent to file the answering affidavit and to give the parties an opportunity to ventilate the issues in the main application.

[17] In view of the manner in which the respondent handled the matter coupled with the fact that he is the party seeking the indulgence, I find

it proper that it should be ordered pay all reasonable wasted costs of this

application, including the costs of opposition.

I therefore make the following order:

1. The application for condonation of late filing of answering affidavit is granted;
2. The respondent is ordered to pay the costs of this application which shall include reasonable wasted costs as well as opposition costs.

M.V SEMENYA
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA