IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, PRETORIA

CASE NUMBER: 59346/2017

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

12 / 12 / 2019
DATE

SIGNATURE

In the matter between:

VAN SCHALKWYK, CORNISE — APPLICANT

And

MENLYN CORNER BODY CORPORATE — FIRST RESPONDENT

FIRST RAND BANK LTD
t/a FIRST NATIONAL BANK — SECOND RESPONDENT

JUDGMENT

MAVUNDLA, J;

[1] The applicant brought an application in terms of which the flowing orders are sought:

1.1 condonation of the late filing of her notice of intention to amend;

1.2 condonation of her non-compliance with Rule 18(4) and 18(6) of the Uniform Rules of Court.

[2] The dispute between the parties originated in a "slip and trip" incident at Menlyn Corner on 4 November 2013, as a consequence of which the applicant, as plaintiff, allegedly sustained serious injuries including multiple compression fracture through the coccyx area, multiple bone marrow oedema, disc damage at the L5 / S1 level on the spine and a soft tissue back injury, as a result she is claiming alleged damages she suffered.

[3] The applicant had initially instituted damages claim under case number 57229/16 in this Court, against Growth Point Properties, as a result of the injuries she sustained on 4 November 2013, as stated herein above.

[4] On or about 24 May 2017, Growth Point Properties Ltd pleaded that:

4.1 the "property known as Menlyn Corner Building situated at 87 Frikkie De Beer Street constituted a sectional title scheme, the owners whereof were First Rand Bank Ltd and Growth Point Properties Ltd;

4.2 Furthermore, Growth Point pleaded that the aforesaid body corporate delegated its responsibility to manage and maintain the common area to FirstRand Bank Ltd. Furthermore, Growth Point pleaded that the aforesaid body corporate delegated

its responsibility to manage and maintain the common area to FirstRand Bank Limited;

4.3 FirstRand Bank as the body corporate responsible for maintenance of the common area where the slip and trip of the accident occurred, delegated its responsibility for cleaning thereof;

4.4 According to the applicant, on the strength of a forensic investigator's report commissioned by the plaintiff's erstwhile attorneys of record, F J Jordaan Incorporated, the proper defendant was identified as Growth Point Properties, against whom *delictual* proceedings were instituted on 18 July 2016 under case number 59346/2017.

4.5 The defendant raised an exception against the aforesaid particulars of claim on three grounds, thus resulting on 27 March 2019 in Mokose J upholding the defendants' exception, and afforded the respondent the applicant herein a period of fifteen days within which to amend its particulars of claim.

4.6 Under the auspices of the plaintiff's new attorneys of record, the plaintiff filed a notice of intention to amend, together with an application for condonation since the aforesaid notice of intention to amend was some nine days late.

4.7 The application for condonation is founded on the affidavit deposed to by the applicant's attorney of record Mr E H Wiese.

[5] According to Mr Wiese:

5.1 the purpose of this application is to seek:

5.1.1 condonation for the late filing of the plaintiff's notice of intention to amend, consequential to Mokose J upholding defendant's exceptions;

5.1.2 condonation for non-compliance with the provisions of Rule 18(6) relating to pleadings, on the ground that the habitual allegations prescribed therein fall within the peculiar knowledge of the defendants.

5.2 there was controversy concerning the costs of the exception proceedings, since the plaintiff had concluded a contingency agreement with the preceding attorneys, whereas counsel currently apprised of the matter was not willing to proceed on a contingency basis;

5.3 in these circumstances, counsel required clarity as to the payment arrangements for the exception and the subsequent amendment. He undertook to revert to counsel on this issue, but was completely overwhelmed by difficulties surrounding the moving of offices from his premises in Stanza Bopape Street to King's Highway in Lynwood, which they occupied prematurely on 1 April 2019;

5.4 the move presented enormous difficulty and delay getting counsel a full set of instructions, as well as confirmation of his brief and the terms of payment;

5.5 for a period of two weeks from 1 April until 14 April the conditions at his new offices were chaotic;

5.6 he had to attend trials: on 1 April 2019 matter in Rustenburg Magistrate' court for two consecutive days; on 3 April 2019 at Germiston Magistrates' court; on 8 April 2019 in Pretoria Central magistrates' court; on 12 in Magistrates court in Pretoria; on 16 April in Potchefstroom Magistrates' Court and on 17 April 2019 in Pretoria Central Magistrates court;

5.7 he discovered the judgment on 11 April 2019 and the *dies* therein, which had not been brought to his attention by Mrs Lene Coetzee of his offices, due to the work pressure resulting from office relocation;

5.8 he had a long standing arrangement to go on holiday at Umhlanga and Umdloti in Kwa-Zulu over the period of 19 April to 30 April 2019;

5.9 his counsel was engaged in other matters as a result was unable to attend to the reparation of this application much earlier;

5.10 efforts to agree with the respondents' attorney of record to secure an arrangement for the late filing of the application proved fruitless;

5.11 the application was prepared within reasonable time frame, and the delay was not unduly dilatory and the applicant tenders wasted costs occasioned by this application;

5.12 the plaintiff sustained severe injuries and her damages are substantial. No blame can be attributed to her for the delay *in casu*, and the interest of justice favour the grant of the condonation.

AD RULE 18(6)

[6] The amendment of new paragraph 3.3 intends to allege that the plaintiff slipped and fell in an area that was supposed to be cleaned by the second defendant;

{7} the plaintiff was not a party of the agreement concluded between the first and second respondent, the details of which fall squarely within the peculiar knowledge of the defendants. It is therefore not possible for the plaintiff to allege where, when and by whom between the first and second defendants the contract was concluded.

[8] The defendant vehemently opposed both applications for both condonation as referred to herein above. In respect of the application for condonation regarding the failure to comply with Mokose J's order:

8.1 it was submitted on behalf of the respondents' that: (i) the explanation for delay was not satisfactory; (ii) there was no *bona fide* case made out on the papers in relation to the main action; and (iii) it has not been shown that there would be no prejudice on the part of the respondents, were the condonation to be granted; (iv) the previous pleadings were excepted to which exception was upheld, there is no attachment of the envisaged amendments; (v) there was no application to appeal, review and or vary the Mokose J's order, in terms of rule 27 and that there was no good cause shown for the relief sought.

[9] Rule 27 provides as follows:

"(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 rime 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 steps 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-compliance with these rules."

[10] Where an application for condonation is sought, the court must first make a factual finding whether the application has been brought within the prescribed time frames. *In casu* it is common cause that it has been brought outside the ordered time frame of fifteen days. The applicant was nine days out of time. The second consideration is to determine whether the application has been brought within reasonable time. In this regard the court makes a value judgment. The majority judgment of Miller JA in *Wolgroeirs Afslaer (Edms) Bpk v Municipaliteit van Kaapstad*[1] sets out the proper approach to the question of undue delay; first a court must decide whether the proceedings were brought within a reasonable time and, secondly if not, it must decide whether unreasonable delay ought to be condoned, in which event it must

[1] 1978 (1) SA 13 (A) 39-42D.

exercise a discretion taking into account all relevant factors including, but not limited to, prejudice to the respondent.

[11] It is trite that the grant of condonation is a matter of the discretion of the Court. The party seeking condonation bears the *onus*, to advance a satisfactory and reasonable explanation for the delay. In considering whether it should exercise its discretion in favour of the applicant, the Court will have regard to the following: (a) the cause of the delay; (b) the explanation covering the entire period of the delay and reasonableness of the delay; (c) the nature and defect causing the delay;(d) the effect of the delay in the administration of justice; (e) the prejudice to be suffered by any of the other parties. The list is not exhaustive; *vide e Thekwini Municipality v Ingonyama Trust*[2]; *Van Wyk v Unitas Hospital*[3]; and *Gumede v Road Accident Fund*[4]; *Immelman v Loubser en Ander.*[5]

[13] It is equally trite that there is no all-embracing definition as to what a good cause is; *vide Venmop v Cleverlad Projects*[6] where the court held that: "[23] Although "good cause" defies precise or comprehensive definition, in this context it is a well-known expression that has two principal requirements. First is a reasonable explanation for the delay and, secondly, a *bona fide* case on the merits with some prospect of success; *De Wet and Others v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1042; *Chetty v Law Society,*

[2] 2014 (3) SA 240 (CC) at 246 para [24]-[28]at 247.
[3] 2008 (2) SA 472 (CC) at 477E.
[4] 2007 (6) SA 304 CPD) at 307 at para[7].
[5] 1974 (3) SA 816 (AD) at 820E-H.
[6] 2016 (1) SA 78 (GJ) at 91

Transvaal 1985 (2) SA 756 (A) at 765; *Government of the Republic of Zimbabwe v Fick and Others* 2013 (5) SA 325 (CC) at 334 para 25 and 350 paras 85 and 86."

[14] *In casu,* it is common cause that Makose J ordered the applicant (then the respondent) to file the amendment within fifteen days. It is also common cause that the application for condonation was filed nine days out of time. In the matter of *Botha v Rich*[7] the Constitutional Court held that a delay of 74 days was not excessive and granted condonation. In my view, the delay of nine days, cannot be said to be an inordinate delay warranting not to be condoned. I need however also to have regard to the cause of the delay.

[15] In the matter of *Chetty v Law Society, Transvaal*[8] the Appellate Division held that the remissness of an attorney might in certain circumstances not be an excuse. *In casu,* it is clear that the cause of the delay was squarely on the part of the applicant's attorney, and not the applicant. The circumstances caused by the relocation of the attorney's offices coupled by the negligence on the part of a staff member in not timeously drawing the attorney's attention to the judgment of Makose J, cannot be said to be an unreasonable explanation. I also take into account the fact that the injuries suffered by the applicant are of a serious nature. It would be travesty of justice to nonsuit the applicant because of the remissness on the part of the attorney or the latter's staff member. Accordingly, I hold the view that it is in the interest of justice that in the exercise of my discretion, condonation should be given *in casu.* I also take into account the fact that the applicant, through her attorney has tendered wasted costs, which in my view must be borne by the attorney himself.

[16] I do not agree with the contention on the part of the respondents' that the applicant should have either appealed or sought to review the judgment of Makose J. Rule 27 is self-explanatory, and I need not say more in that regard. There is therefore no merit on the respondents' contention that rule 27 was not appropriate *in casu.*

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[7] 2014 (4) SA 12 4 (CC) at 136 para [22].
[8] 1985 (2) SA 756 (A).

[17] I take note of the contention of the respondents that the envisaged amendment is still open to exception, and that the prescription point is not being abandoned. Both these issues are no reason for the court to refuse to grant condonation. These are technical defenses which can be sufficientlyn ventilated in the main trial. Besides, in respect of rule 18(6), the contract complained of, is indeed a matter falling within the peculiar knowledge of the respondents, as contended by the applicant. The respondents can hardly cry prejudice in the circumstances, over what is already within their possession and what they would still have to discover during the run of the trial.

[18] In the result the following order is issued:

1. That the late filing of the intention to amend particulars of claim and the non-compliance with Rule 18(4) and 18(6) of the Uniform Rules of Court are hereby condoned.

2. The applicant's attorney of record is ordered to pay the wasted costs of this application *de bonis propriis*.

N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

DATE OF JUDGMENT: 12 / 12 / 2019

APPLICANT'S ADV : ADV. S W DAVIES
INSTRUCTED BY : WIESE & ATTORNEYS
RESPONDENTS ADV : ADV. SAZI M TISANI
INSTRUCTED BY : DIALE MOGASHOA ATTRONEYS