HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 2091/2021

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO.
(3) REVISED.
DATE: 16 MAY 2021

SIGNATURE

In the matter between:

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	Applicant
and	
PHELADI SUZAN RAPHELA	First Respondent
PSR SOLUTIONS (PTY) LTD	Second Respondent
THEMBEKA KOEKI MDLULWA	Third Respondent

J U D G M E N T

(In Leave to Appeal and the Condonation Application)

This matter has been heard by way of a virtual hearing and otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

[1] Introduction

For ease of reference, the parties shall be referred to as in the main application. On 29 March 2021 this court, by way of a written judgment, confirmed a preservation order in terms of section 163 of the Tax Administration Act 28 of 2011 (the TAA) against the initial third respondent, Mrs Mdlulwa. She was the funder of the first respondent's company (PSR) who sold personal protective equipment (face masks) to the South African Police Service at 125% the cost price. PSR, who is the second respondent, has an estimated tax debt of some R 14,5 million (before interest and penalties) and the funds received from it by Mrs Mdlulwa, being a "repayment" of the funding in an amount of R33,154 million including a profit of some R 13 million (over 7 days) are, in terms of the preservation order, preserved for the recovery of this tax debt. On 7 March 2022 the third respondent delivered an application for condonation for the late delivery of her application for leave to appeal. This judgment is in respect of the application for condonation and the application for leave to appeal.

[2] The relevant appliciples to condonation applications:

2.1 Courts may, on good cause shown, condone any non-compliance with its rules. See: Joubert, LAWSA, Vol 14 at 11 and the cases cited at footnote 1, read with Rule 27(3).

2.2 In considering applications for condonation, courts have a discretion, to be exercised judicially on a consideration of the facts of each case.

2.3 Among the factors that the court has regard to are: the degree of non-compliance, the explanation for the delay, the prospects of success, the importance of the case, the nature of the relief, the other party's interest in

finality, the convenience of the court, the avoidance of unnecessary delay in the administration of justice and the degree of negligence of the persons responsible for the non-compliance.

2.4 Generally, a court is reluctant to penalize a litigant for its lawyer's conduct, but there are limits beyond which a litigant cannot escape the result of his or her lawyer's lack of diligence. See *Salojee v Minister of Community Development* 1965 (2) SA 135 (A). Where a litigant relies on the ineptitude or negligence of his or her lawyer, he or she should show that it is not to be imputed to him or her.

[3] <u>The basis upon which condonation is sought</u>

The third respondent, being an attorney herself, set out in paragraphs 19 – 25 of her founding affidavit to her application for condonation, what she termed "good cause" and "sufficient merits" to condone the late delivery of her application for leave to appeal. In order to curtail the length of this judgment, I shall deal with the evaluation of her allegations simultaneously with the listing thereof:

3.1 In paragraph 19 of her affidavit, the third respondent stated that, upon receipt of the final preservation order, she had a "*very lengthy discussion*" with her attorney during which she instructed him to appeal the judgment. The third respondent stated that, at the time, the attorney "*was certainly placed in a position to at least prepare a draft notice of application for leave to appeal for my further input*".

3.2 The application for leave to appeal had to be filed by 21 April 2021. After she had consulted with her attorney on 30 March 2021, the third respondent stated that, as she "understands" it, her attorney consulted with an advocate

"*to settle and finalise the anticipated appeal documentation*" on 13 April 2021.

3.3 The next paragraph in the third respondent's affidavit is significant, particularly in respect of what it does not say and in respect of its vagueness. It reads as follows: "*20. I personally followed up with my attorney from time to time to ascertain when he anticipated having the draft appeal document ready for me to peruse and finalise. He continuously reassured me that he was attending to the matter and that I would be in possession of a draft document in due course*". The third respondent, as an attorney would have known that all this needed to have taken place before 21 April 2021. She did not ensure that it did. She does not even refer to any enquiries as to the draft that counsel was supported to prepare. Her paragraph is vague as to dates and it appears that this is purposely so.

3.4 Another curious feature of the third respondent's explanation is that her attorney apparently uploaded an unsigned notice of application for leave to appeal on 28 June 2021. This was two months out of time but was in any event never signed. The practice directive requiring invitation of the registrar of the appeals section was also not followed. I, as the presiding judge, was blissfully unaware of the intention to apply for leave to appeal and remained so until the condonation application was filed some nine months later.

3.5 The third respondent stated that she was also unaware of this unsigned notice being uploaded. She says in her affidavit, in dealing with this: "*I advise that as a result of me currently living in Barcelona, Spain, I was unable to sign the documentation before a Commissioner of Oaths*". There was at that stage no such documentation to be signed.

3.6 Another unexplained curiosity of the third respondent's version, is her allegation that she had terminated her previous attorney's mandate already on 20 May 2021. She does not say why. She does allege that she had appointed another attorney, Witz Inc "*immediately upon the said termination*". She does not explain what instructions she gave to this new attorney or what the attorney did. All the while, according to the third respondent, she must still have been awaiting a draft application for leave to appeal. She alleges that this new attorney informed her that "*he had seen the appeal that has been uploaded*". This must chronologically have been more than a month after his own appointment and, inexplicably, by his predecessor whose mandate had been terminated. It was also done by way of a document unseen by the third respondent, yet she was content to rely on this.

3.7 The mandate of Witz Inc was also terminated, on 17 January 2022. The third respondent does not explain why except that she was concerned about the delay of a date of hearing. The third respondents' current attorneys "*came on record*" on 24 January 2022. The third respondent stated that it was only then that her "non-compliant" Notice of Application for Leave to Appeal "*was brought to her attention*" and when she was advised to launch a condonation application. She now relies on Rule 27(3) and claims that good cause had been shown.

3.8 This is not the customary matter where a lay client can feign innocence and claim to be excused for her attorney's negligence – the third respondent is herself an officer of this court. Where she had initially had counsel intructed to prepare a draft notice for her perusal, which had thereafter to be served and filed on 21 April 2021, then for her to be content that an unseen, unsigned notice delivered by an unmandated attorney be merely

"uploaded" and never served, a fact which she found out at an unspecified date in 2021, smacks not only of gross negligence, but of disdain for this court's procedure.

3.9 I find that the third respondent has not crossed the first hurdles necessary for applications for condonation. She has given an unsatisfactory and completely blameworthy explanation for her delay and default.

3.10 The prospects of success of the third respondent's application for leave to appeal is a relevant factor. See, inter alia *Mbutuma v Xhosa Development Corporation Ltd* 1978 (1) SA 681 (A) and *Uitenhage Transitional Local Council v SA Revenue Service* 2004 (1) SA 292 (SCA) at paragraph [11].

3.11 The third respondent does not even deal with this aspect in her affidavit in support of her application for condonation, but merely annexes a copy of the non-compliant notice referred to above.

3.12 Adv Struwig, who appeared for the third respondent, valiantly raised the following grounds in this regard:

3.12.1 He reiterated the argument dealt with in the judgment, namely the third respondent's complaint that SARS had not made full disclosure in the ex parte application for the provisional preservation order granted by Basson J and, had it done so, the order would never have been granted. Two issues were concentrated on in this regard: the first was that the third respondent was labelled "the mastermind" of the scheme to supply cheap equipment to the SAPS at exorbitant prices and secondly the allegation that she had dissipated funds overseas, without mentioning that she had the necessary authority to do so. As

pointed out in the judgment, whether the third respondent had been the mastermind or not is legally irrelevant. The order is for preservation of assets in respect of the principal taxpayer's liability, it is not an attachment or attempted recovery from the third respondent as a co-perpetrator as elsewhere catered for in the TAA. Similarly, the authority to transfer funds out of the country is equally legally irrelevant. The fact remains that when funds are expatriated with or without authority, it compromises SARS' recovery of tax. These points therefore create no prospects of success on appeal and I remain of the view that the initial preservation order had correctly been granted.

3.12.2 The second point was that the preservation order was too wide and already authorises the curator to sell the third respondent's assets. Not only was this objection to the order not raised during the hearing of the main application, but SARS has confirmed that the only sale of assets which could take place, could be after the taxpayer's tax liability has been assessed and has remained unpaid and only then, as part of a recovery process in terms of the TAA. It would also be limited to the funds received form PSR, and not in respect of the third respondent's own assets. This appears to be a correct statement of the law and no appeal is necessary in this regard.

3.12.3 The issue of alleged disproportionality of the amount sought to be preserved was raised, but not in the fashion as discussed by Sutherland J (as he then was) in *CSARS v Hamilton Holdings (Pty) Ltd and Others* (referred to in paragraph 6.7 of the judgment) by having regard to the possible extent of the taxpayer's tax liability.

The argument was that, of the R33 million received by the third respondent, R19 million was a "repayment" of the funds advanced by her and that the preservation order should have been limited to her profit portion. The recipient of funds in circumstances such as these is not entitled to apply unilateral set-off. The fact is that, prior to any "repayment", R 33 million of funds were in hands of the taxpayer and those funds had been paid over (or dissipated) to the third respondent. It is those funds that are preserved for purposes of recovery of the taxpayer's tax liability. If the full amount is so recovered, the third respondent must look to the taxpayer for repayment of the funds advanced. Similarly, as with the previous points, this issue raises no real prospects of success on appeal.

3.12.4 A last point was that the order also went too wide in not only preserving the R 33 million but "all" of the third respondent's assets. She (rightly) claims she is not liable for the taxpayer's tax debts but that is not what the import of the order is. Its import is to preserve assets of the third respondent up to the amount which has been disbursed to her by the taxpayer, i.e the R33 Million, as already pointed out in paragraph 3.12.2 above.

3.13 Where a "good defence" or substantial prospects of success can "compensate" for a poor explanation for default (such as in *Lazarus and Another v Nedcor Bank Ltd, Lazarus and Another v Absa Bank Ltd* 1999 (2) SA 782 (WLD)), this is clearly not the case here. There are insufficient prospects of success on appeal and therefore insufficient prospects of success in the application for leave to appeal that condonation should be granted.

[4] Order

The application for condonation is refused with costs.

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 6 May 2022

Judgment delivered: 16 May 2022

APPEARANCES:

For the Applicant:	Adv. K D Magano
Attorney for Applicant:	Ledwaba Maswai Attorney, Pretoria
For the 3rd Respondent:	Adv. H Struwig
Attorney for 3rd Respondent:	Faber Goërtz Ellis Austen Inc., Bryanston c/o Phillip Venter Attorney, Pretoria