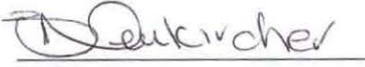


IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)



Case number: 27383/2009

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
<u>2 September 2022</u>	
DATE	SIGNATURE

In the matter between:

P KRUGER

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT – APPLICATION FOR LEAVE TO APPEAL

NEUKIRCHER J

[1] The parties are referred to as they were cited *a quo* to avoid confusion.

- [2] The judgment and the order were handed down on 14 February 2022. The RAF delivered its application for Leave to Appeal (LTA) on 6 June 2022, i.e 22 days late. It was accompanied by an application for condonation.¹ The LTA and the first application were opposed by the plaintiff who filed an answering affidavit on 6 June 2022. The RAF then filed a notice of intention to amend the grounds of its LTA (the amendment) on 18 July 2022, a replying affidavit and an Application for Condonation² for the late replying affidavit, all of which are also opposed by the plaintiff.
- [3] The parties were given an opportunity to file Heads of Argument. They not only filed these, but each also filed Supplementary Heads of Argument. All those documents were considered for purposes of whether to grant or refuse LTA, in addition to the oral argument presented at the hearing. The plaintiff's stance was that he would focus mainly on the grounds of the LTA, but that he still opposed both applications for condonation and the amendment.
- [4] Very briefly, the amendment pertains to ground 6 of the LTA. In that, the RAF complained that the court "*erred in not giving a ruling on nexus and not considering nexus at all.*" Given the content of paragraph 172 of the judgment, this is clearly incorrect. The amendment seeks to substitute that ground with one that the court erred in finding the nexus between

¹ The first application

² The second application

the September 2005 accident and the plaintiff's injuries.

- [5] There can be no prejudice to the plaintiff were the amendment to be granted as much of what is argued here is repeated in the other grounds of the LTA. The amendment is therefore granted.

RULE 42

- [6] Before I deal with the condonation and the grounds of appeal there is an issue pertaining to 2 patent errors in the judgment. I use the word "patent" deliberately as counsel for the RAF described them thus in her argument, but argued that because of them leave to appeal should be granted:

- 7.1 the first is the typographical error which resulted in an award in paragraph 1 of the judgment³ of R10 561 611 instead of R10 561 677. The arithmetic was explained in paragraph 184 of the judgment but unfortunately a typographical error crept into the actual order granted;
- 7.2 the second is the costs award in paragraph 4⁴ of the order which included the reserved costs of 29 April 2019 instead of excluding them. It is very clear from paragraph 210 of the judgment that the intention was to exclude the reserved costs of 29 April 2019 from the costs of suit awarded to plaintiff.

- [7] These errors may clearly be corrected in terms of Rule 42 and neither

³ Under paragraph 223

⁴ Also under paragraph 223

constitutes a ground of appeal. It will be corrected in the order I hand down.

- [8] As to the condonation: the first application sets out the reasons why the LTA was late. Inter alia the RAF states:

“18 This Courts having made such orders it was necessary for the Applicant to consider the judgment which straddles about 94 Pages. This Courts can imagine, the RAF as a juristic entity function through natural persons and some work from home and meeting to discuss this judgment and take legal advice thereafter took some time more than I anticipated.

19. Considering the hierarchy and the bureaucratic and red tapes of public service, all those considerations delayed the making of a decision and the taking of instructions by the legal teams involved.

20. In pursuit of holding a meeting to discuss this matter, the judgment has to be circulated and various persons had to study and schedule meetings thereafter to debate and assess the next step to take and this occurs in conjunction to obtaining legal advice on the judgment and understanding what it really means for the RAF.

21. If one considers what is stated above, i.e., internal workings of the RAF the decision to appeal was taken outside of the 14 – day period required for the institution of leave to appeal proceedings. I attach herewith annexure indicating instructions to counsel to

start with the papers as annexure FA1.

22. *As a result of the delay in decision-making in relation to the leave to appeal proceedings the institution of condonation proceedings became necessary to properly place the leave to appeal before this Courts and to provide this Court with sufficient basis to enable you to exercise the discretion to condone the late filing of the leave to appeal.*
23. *It is common cause that the Applicant is required at the level of law to ensure that the administration of its financial affairs is in order, and this must be viewed in contrast to achieving its object, which is to fairly compensate the thousands of victims of road accidents.*
24. *In doing so the Applicant decision sought to be taken, which inarguably has financial implications, it sensibly needed to do so properly and after consultation with everyone obliged to take such a decision. After I compiled the request for Approval to Appeal the Judgment on the 15 March 2022, the judgment was referred to legal for approval. Approval was granted on the 30 March 2022.*
25. *...*
26. *...*
27. *The decision to appeal the judgement of her Ladyship Justice Neukircher was subsequently taken on 30 March 2022. Having taken such a decision counsel was immediately instructed to prepare leave to appeal papers and the relevant condonation for*

the purposes of ensuring that the appeal is properly prosecuted.

28. ...

29. *In a nutshell the reason for the delay lies squarely in the bureaucratic nature of administration of RAF and because of the bureaucratic nature of administration within the RAF the decision to subsequently appeal the judgement was taken late.” (sic)*

[9] What is completely absent from this explanation, is the particularity as to dates, decisions or persons who took these decisions or what occurred between 14 February 2022 until ± 15 March 2022.

[10] The second application explains that the replying affidavit was filed late in circumstances where the answering affidavit to the condonation application was served on 6 June 2022 and the replying affidavit only on 21 July 2022. The RAF's attorney says:

“5 ... *having other matters assigned to me on the said date, there was an oversight on my part in that in that I unintentionally neglected to read the answering affidavit and to forward same to my counsel to attend to. I was actively attending to other matters assigned to me for trials and applications between then and the time I eventually attended to this matter, which is no excuse in the circumstances. I consequently forgot about the respondent's answering affidavit.*

6. *I was reminded of this affidavit when my counsel had phoned me on 13 July 2022 asking for the Respondent's answering affidavit.*

My counsel Ms Moses only became aware of the respondent's answering affidavit when upon reading the respondent's heads of argument for the application for leave to appeal and the condonation for the late filing of the application to appeal."

CONDONATION

[11] In **Melane v Santam Insurance Co Ltd**⁵ the Court in dealing with the issue of whether or not sufficient cause had been shown for condonation for non-compliance with the Court rules of a petition that was late by "several weeks" stated the following:

"In deciding whether sufficient cause has been shown, the basic principle is that the Court has discretion, to be exercised judicially upon consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation thereof, the prospect of success, and the importance of the case. Ordinarily these factors are interrelated, they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects may

⁵ 1962 (4) SA 531 (A) at 532 C – F

tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked..."

[12] In **Pitje v Shimbambo and Others**⁶, the LTA was filed 7 days late and the applicant raised important constitutional issues being the right to property, the right to have access to adequate housing and not to be evicted from his home without an order of court made after all relevant circumstances were considered. The Constitutional Court found that condonation should be granted in those circumstances.

[13] And in **Turnbull-Jackson v Hibiscus Coast Municipality**⁷, where the record and written submissions were each filed \pm 2 weeks late, the court found that the explanation for the delay was satisfactory and condoned the late filing of the record but set out the factors to be considered as follows:

"[22] The applicant's counsel takes the blame for the late lodgment of written submissions. She told the court that she forgot to diarise the due date and was only reminded — after the fact — when the applicant asked for a copy. The municipality opposed this application asserting that it had suffered prejudice. It pointed out that it had to file its argument without the benefit of seeing the applicant's. The upshot was that the municipality's argument did not address that of the applicant. In particular, the municipality was in the dark as to the exact nature of the constitutional issue the applicant was relying on.

⁶ 2016 (4) BCLR 460 (CC)

⁷ 2014 (6) SA 592 (CC)

[23] *In this court the test for determining whether condonation should be granted or refused is the interests of justice. Factors that the court weighs in that enquiry include: the length of the delay; the explanation for, or cause of, the delay; the prospects of success for the party seeking condonation; the importance of the issues that the matter raises; the prejudice to the other party or parties; and the effect of the delay on the administration of justice. It should be noted that, although the existence of prospects of success in favour of the party seeking condonation is not decisive, it is a weighty factor in favour of granting condonation.*

[24] *This court has in the past cautioned against non-compliance with its rules and directions. The words of Bosielo AJ bear repetition:*

'I need to remind practitioners and litigants that the rules and court's directions serve a necessary purpose. Their primary aim is to ensure that the business of our courts is run effectively and efficiently. Invariably this will lead to the orderly management of our courts' rolls, which in turn will bring about the expeditious disposal of cases in the most cost-effective manner. This is particularly important given the ever increasing costs of litigation, which if left unchecked will make access to justice too expensive.'

[25] *The explanation given by the applicant's counsel is unsatisfactory. Where non-compliance with the rules or directions is as a result of the fault of a litigant's legal representative, certain considerations come into the equation. Before I deal with them, let me emphasise that an application for condonation is not a mere formality. This is true whether it is the litigant, the legal representative or both who are at fault. The test remains the same: is it in the interests of justice to grant condonation?*

[26] *Courts are reluctant to penalise litigants for the tardiness of their legal representatives. I do not read this court's pronouncement in Ferris to say that this long-standing principle no longer avails. It is more a*

question of what the facts of a given case dictate. Courts have made it clear though that in a fitting case the fault of a legal representative will be imputed to the litigant. In the oft-cited decision in Saloojee the Appellate Division said:

'There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. . . . The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship'

[14] The RAF has used what it terms the “bureaucratic nature” of the administration within the RAF and those inefficiencies as an excuse to motivate its condonation application. But this is simply an excuse that has been used constantly in our courts to excuse the RAF’s conduct. But it appears that whilst the RAF’s “bureaucratic administration” is blamed, what in fact took place was that a) Mr Pretorius took more than a month to compile a request to appeal the judgment – no explanation is given for why it took from 14 February 2022 until 15 March 2022 to do this; and b) the RAF then took 11 court days to approve the filing of the LTA and thus it is quite clear that, in fact, had the request to file the LTA been sent at the outset, it may not even have been necessary to apply for condonation.

[15] The excuse regarding the replying affidavit is no better – that was filed 6.5 weeks after the answering affidavit was received. Here the attorney

“forgot” to send the answering affidavit to counsel and 5 weeks later had to be reminded to do so on 13 July 2022.

[16] In my view, the words of Steyn J in **Saloojee and Another NNO v Minister of Community Development**⁸, as quoted in paragraph 13⁹ *supra*, bear particular relevance.

[17] Furthermore, the RAF has failed to provide sufficient or satisfactory explanation for its delay.

[18] Even were I persuaded otherwise (after perusing all the papers filed and after hearing counsel), I am of the view that there are no prospects of success on appeal:

19.1 as stated in the judgment, the issue here is a crisp one and that is whether a nexus was proven between the 2005 collision and the plaintiff's injuries and sequelae;

19.2 the fact that several experts testified did not make the matter a complex one;

19.3 there is no issue of public importance – the fact that the claim is a large one does not transpose the matter into one;

19.4 whilst I accept that the matter is of importance to the RAF the claim amount on its own does not elevate it to one that means leave should be granted;

19.5 all the other grounds for leave have been addressed in the main judgment and I am unpersuaded that another court would come

⁸ 1965 (2) SA 135(A)

⁹ Paragraph 26 of the Turnbull-Jackson judgment

to a different conclusion.

[19] On a last aspect, it is important to note that this matter has taken 13 years to finalise and the words of Boiselo AJ (as he then was) in **Grootboom v National Prosecuting Authority and Another**¹⁰ resonate.

[20] All these issues being considered I am of the view that, there being no true reasonable explanation for the delay and the lack of prospects of success, leave to appeal should be refused.

The Order

[21] The order made is the following:

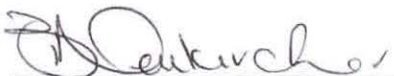
21.1 The application for leave to appeal, the application for condonation of the late filing of the replying affidavit are all dismissed with costs, such costs to include (a) the costs occasioned by the employment of two counsel where so employed and (b) the costs of the preparation of heads of argument as directed by the court and (c) the costs of perusal and consideration of the application for condonation for late filing of the replying affidavit, the replying affidavit and the defendant's notice of intention to amend its application for leave to appeal on the opposed party and party High Court scale;

¹⁰ 2014 (2) SA 68 (CC) at paragraph 32 in Turnbull-Jackson at paragraph 24 (see paragraph 14 supra)

21.2 In terms of Rule 42 (1)(b):

21.2.1 paragraph 1 of the order of 14 February 2022 is amended so that the amount of R10 561 611 shall read R10 561 677;

21.2.2 the costs order in paragraph 4 of the order of 14 February 2022 is amended so that the costs the defendant is ordered to pay shall exclude the reserved costs of 29 April 2019.


B NEUKIRCHER
JUDGE OF THE HIGH COURT

Delivered: This judgment was prepared and authored by the Judges whose names are reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 2 September 2022.

Appearances:

For the Plaintiff	: Adv de Waal SC Adv van Wyk
Instructed by	: Van der Hoff Inc
For the Defendant	: Ms Moses
Instructed by	: State Attorney, Pretoria
Heard on	: 22 July 2022