

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED</u>
DATE: 28/07/2021. SIGNATURE: <i>C. G. M.</i>	

CASE No HCA04/2020

In the matter between:

MOPANI DISTRICT MUNICIPALITY

APPELLANT

And

TIVA NSHALATI REBECCA & OTHER

RESPONDENT

JUDGMENT

LEDWABA AJ

Introduction

- [1] The appellant is aggrieved by the summary judgment granted by the Giyani Magistrate's Court on the 27th July 2018. It has noted an appeal against the whole judgment and order made by the court of first instance.

[2] In its notice of appeal, the grounds of appeal are to the effect that the court of first instance erred in finding that:

- 2.1 there was a volunteer borehole operator agreement between the parties;
- 2.2 the respondent's claim falls under the claims referred to in the Rule 14 of the Rules Regulating the Conduct of Proceedings of the Magistrates' Court of South Africa (the Magistrate's Court Rules);
- 2.3 the respondent is entitled to summary judgment without evidence in support of the allegation that services were rendered by the respondent to the appellant;
- 2.4 the appellant has not disclosed a bona fide defence to the respondent's claim and
- 2.6 there was an agreement between the parties despite the respondent's failure to produce proof of payments allegedly made to respondent.

[3] On the 27th July 2018 and in the presence of the parties' legal representatives, the court a quo delivered an *ex tempore* and written judgment. In terms of Rule 51(1) of the Magistrate's Court Rules, the appellant served the request for the reasons for judgment on the 14th August 2018. Whilst the reasons for judgment are dated the 31st August 2018, the notice of appeal is dated and was served on the 29th November 2018. The appellant filed condonation application for the late filing of the appeal more than a year later on the 30th March 2020.

[4] Rule 51(3) of the Magistrates Court Rules requires an appellant to note

an appeal within twenty days after the date of a judgment or after the receipt of the reasons for judgment. The appellant is applying for the condonation of the late filing of the notice of appeal and the record of appeal.

Condonation

- [5] In an application for condonation, an applicant is required to show sufficient cause for the court to exercise its discretion in favour of granting the condonation application.¹ In deciding whether sufficient cause has been shown, the basic principle is that the court has a discretion, to be exercised judicially upon consideration of all the facts, including the degree of lateness in complying with the prescribed time frame, the explanation for the delay as well as prospects of success on the merits.²
- [6] Without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused.³
- [7] The application for condonation is not a mere formality but must be accompanied by acceptable explanation for the delay.⁴ In ***Uitenhage Transitional Local Council v South African Revenue Service 2004(1) SA 292(SCA) at (6)*** it was said :

“ One would have hoped that the many admonitions concerning what is required of an applicant in a condonation application would be trite knowledge among practitioners who are entrusted with the preparation

¹ Grootboom v National Prosecuting Authority & Others ZACC 37-par 23(Grootboom)

² Melani v Santam Insurance Co Ltd 1962(4) SA 532(A),

³ NUM v Council for Mineral Technology(1999) 3 BLLR 209(LAC) at page 211 paragraph G-H

⁴ Goortboom – par 22 Darries v Sherriff, Magistrates Court, Wynberg and Another 1998(3) SA 34(SCA) at 401-41D

of appeals to this Court: condonation is not to be had merely for asking : a full detailed and accurate account of the causes of delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility: it must be obvious that if the non-compliance is time-related then the date, duration and the extent of any obstacle on which reliance is placed must be spelled out .”

See also **Standard Bank of SA Ltd ; Court v Bester NO and Others 1995(3) SA 123(A)**.

- [8] A condonation applicant seeking condonation for non-compliance with the set out time is required to give complete account for each period of delay. The entire period of the delay must be fully explained.⁵
- [9] The standard for considering condonation application is the interest of justice.⁶ Whether it is in the interest of justice to grant condonation depends on the facts and the circumstances of each case.⁷
- [10] The granting of condonation application is within the discretion of the court.⁸
- [11] In *casu*, the appellant’s reason for the late filing of the appeal is that the requested reasons for judgment did not reach its attorney’s office. It says the delay “*was occasioned by inadvertent errors on the part of the judicial system in the court a quo.*” It says it lodged the appeal without the reasons

⁵ Grootboom – par 22 NUMSA & Another v Hillside Aluminium (2005) 6 BLLR 601(LC); Nehawu obo Netshivubgulu par 8, Makhubela v S (2017) ZACC 36; 2017(S) SACR 665(CC); 2017(12) BCLR 1510- par 21
⁶ Grootboom – par 22, Ferris v First Rand Bank Ltd (2013) ZACC 46, 2014(3) BCLR 321(CC), 2014(3) SA 39(CC) par 12, Bertie Van Zyl (Pty) Ltd and Another v Minister of Safety and Security & Others (2009) ZACC 11 2010(2)SA 181(CC);2009(10) BCLR 978(CC)-par 14, Van Wyk v Unitas Hospital & Another (Open Democratic Advice Centre As Amicus Curiae)(ZACC 24; 2008(2) SA 472(CC); 2008(4)BCLR 442(CC) –par 20 ; Glenister v The President of the Republic & Others 2011(3) SA 34(CC) par 41

⁷ Van Wyk- par 20

⁸ Grootboom v National Prosecuting Authority & Others ZACC 37;2014(2)SA 68(CC);2014(1) pars 20 .and 35

for judgement. Dealing with prospects of success, the appellant says this is reflected on the grounds set out in the notice of appeal.

[12] The respondent is opposing the condonation application. It submits that having regard to the provisions of Rule 51(9) of the Magistrate's Court Rules read with Rule 49(6) of the Uniform Rules, the appeal has lapsed by the operation of law. It says that the appeal was lodged with the aim of frustrating the execution warrant served on the appellant on the 31st October 2021, about a month before the appeal was lodged. The respondent also raises various points *in limine*. In view of the conclusion arrived at in this judgement, there is no need to consider these points *in limine*.

[13] In terms of rule 49(6) of the Uniform Rules, an appeal is required to be prosecuted within sixty days after its lodgement.

[14]. The reason provided by the appellant for the delay in lodging the appeal does not meet the requirement of sufficient or acceptable explanation. The appellant says it was not provided with the reasons for judgment. Having requested the reasons for judgment on the 14th August 2018 and despite the fact that same are required to be provided within fifteen days of the receipt of the request, the appellant only made progress enquires through its correspondents on the 1st November 2018, about three months after the request for reasons for judgment. The reasons for judgment is dated the 31st August 2018, less than fifteen court days from the date of the request. They were received by the respondent on the 17th September 2017. At the time the appellant enquired about the progress of providing the reasons for judgement, the respondent had already attached the appellant's property in execution of the judgement a month before on the 31st October 2018. The appellant only jumped into action in the face of the execution warrant. The appellant gives no account of the period from the date of the request for reasons for judgment, being the 14th August 2018 until the appeal was noted three

months later on the 29th November 2018.

- [15] The condonation application served on the 9th March 2020 is silent about the prosecution of the appeal. The application was issued more than three months after the respondent had re-issued the warrant of execution in November 2019. An appeal is prosecuted by filing the record of the proceedings and applying for the hearing date with the registrar. In terms of Rule 49(6)(a) of the Uniform Rules, within sixty days after the noting of appeal, an appellant is obliged to make a written application to the registrar for a date for the hearing of such appeal, failing which a respondent may do so. If an application for the date of the hearing is not made by either party, the appeal is deemed to have lapsed. Rule 49(6) (b) provides that the court to which an appeal is made may on good cause shown reinstate a lapsed appeal. There is no application to reinstate this appeal in the present case. The submission on behalf of the applicant from the bench, which does not appear from the papers, that the appeal could not be prosecuted before it was condoned does not assist the applicant's case.
- [16] The respondent rightly says the appellant has not complied with the requirements of Uniform Rule 49(6) and (7) and submits that the deeming provision has kicked in. Even if the late lodging of the appeal can be condoned, in view of the failure of the appellant to prosecute it within sixty days of its lodgement and in the absence of the application to reinstate it, the appeal has lapsed.
- [17] Given the above, it is not in the interest of justice to grant condonation.
- [18] Having found that the condonation application does not succeed, there is no need to consider the merits of the summary judgment application.

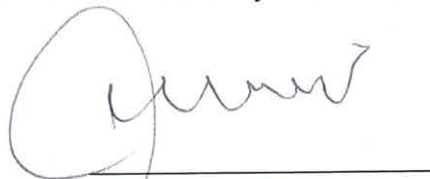
Costs

[19] Following the dismissal of the summary judgement on the 27th July 2018 and after a period of more than two months, the respondent attached the appellant's properties on the 31st October 2018. On the 7th November 2018, the appellant's legal representative directed the letter to the respondent's attorney requesting an undertaking to be received by the 9th November 2018 that pending the receipt of the reasons for judgement and the noting of an appeal, the attached properties would not be removed. In response and apart from not giving the requested undertaking, the respondent's attorneys advised that they received the reasons for judgement from the provided pigeon hole on the 17th September 2018. The appellant's attorneys lodged the appeal on the 29th November 2018.

[20] When the appellant failed to set the appeal down for the whole of 2019 and 2020, the respondent set it down for the 12th March 2021. Despite the fact that the appeal was not set down by the appellant and in the face of the respondent's protestation, the appellant removed the matter from the roll of the 12th March 2021. This resulted in the respondent applying for preferential hearing date. The appellant's conduct deserves punitive costs order.

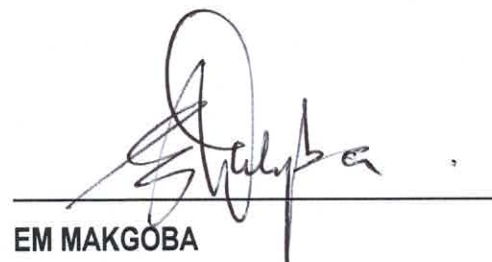
Order

[21] The appeal is dismissed with costs on attorney and client scale.



LGP LEDWABA
ACTING JUDGE OF THE HIGH COURT
LIMPOPO DIVISION : POLOKWANE

I agreee



EM MAKGOBA
JUDGE PRESIDENT OF THE HIGH COURT
LIMPOPO DIVISION : POLOKWANE

APPEARANCES

For the appellant: Adv G G Mashimbye

Instructing attorney: Magabe Inc

For the Respondent: Adv MS Sikhwari

Instructed by: Mthombeni Attorneys

C/O DS Sello Attorneys

Heard on: 23rd July 2021

Judgement delivered on: 28th July 2021