REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

HCAA 03/2022
REPORTABLE: YES/~~NO~~
OF INTEREST TO OTHER JUDGES: YES/~~NO~~
REVISED
Date: 04 August 2023

In the matter between:

THE MEC FOR DEPARTMENT OF HEALTH LIMPOPO PROVINCE **1ST APPELLANT**

DR MP CHABA AND 67 OTHERS **2ND APPELLANT**

And

MAPIKWA DANIEL SITHOLE **RESPONDENT**

In re:

MAPIKWA DANIEL SITHOLE **PLAINTIFF**

And

MEC FOR HEALTH, LIMPOPO PROVINCE **1ST DEFENDANT**

DR M P CHABA AND 67 OTHERS **2ND DEFENDANT**

MEC FOR HEALTH, LIMPOPO PROVINCE 1ST **DEFENDANT**

DR M P CHABA AND 67 OTHERS **2ND DEFENDANT**

JUDGMENT

MONENE AJ

[1] Notwithstanding whether we believe it to be true or just a recording of some mythical story, we read in the Christian Bible that on being confronted with a situation of a mob baying for the blood of a woman accused of adultery, Jesus Christ defeated the intentions of the stones-possessing murderous crowd with the call that it be the one without sin who casted the first stone.

[2] The English have a saying which carries through a message similar to the one attributed to Christ Jesus supra which calls on people who live in glass houses to refrain from throwing stones.

[3] This appeal brings to question whether an appeal by the appellants whose application for condonation and the lifting of a bar was dismissed by the court *a quo,* per AML Phatudi J, for want of full compliance with the jurisdictional factors of condonation should fail in circumstances where the respondent himself is spotting very unclean hands in that he has not prosecuted his action for more than a year since obtaining the notice of bar.

[4] It really poses a question of whether two wrongs make a right or whether Solomonic wisdom will permit a situation where one wrong party benefits out of the faults of an equally wrong opponent. The matter concerns a series of procedural

missteps from both the appellants and the respondent which confront this court of appeal to determine whether the court of first instance properly employed the interests of justice crucible when dismissing an application for condonation and removal of a bar.

THE FACTUAL MATRIX

[5] The respondent, a clinical manager in the employ of the Health Department in Limpopo, as plaintiff in the main action, issued summons on 15 March 2017 against the appellants suing them for a plethora of damages arising from how he was treated or mistreated in his employment.

[6] The appellants, as Defendants in the main action, filed a notice to defend the action on 12 May 2017.

[7] Subsequent to the filing of the notice to defend the appellants did not file a plea but rather raised an exception on a myriad of grounds.

[8] On 16 November 2018 all the appellants' exceptions were dismissed by Mangena A J.

[9] Aggrieved by the dismissal of their exceptions the appellants launched an application for leave to appeal. This leave to appeal application was struck off the roll by Mangena AJ on 4 April 2019 owing to non-appearance of the appellants as applicants therein.

[10] On 6 June 2019 the respondent served the appellants with a notice of bar in terms of Uniform rule 26.

[11] The appellants countered the notice of bar with an application to set the notice

of bar aside as an irregular step in terms of rule 30 arguing that appeal proceedings were still pending and that therefore the notice of bar was a misstep. It is unclear why the appellants stated that the leave to appeal was pending in the matter.

[12] More than a year later on 17 July 2020 the respondent filed an affidavit opposing the irregular step application pointing out that there was no pending appeal.

[13] The appellants went on to later withdraw their rule 30 application on 28 August 2020.

[14] In the meantime, on 16 July 2020 the respondent issued a default judgement application premising it on the notice of bar dated more than a year ago on 6 June 2019 only for the appellants to issue an application for condonation uplifting or removing the bar in terms of Uniform rule 27.

[15] Both the respondent's default judgement application and the appellants' condonation and upliftment of the bar application were set down on 14 April 2021 before AML Phatudi J. By agreement between the parties only the rule 27 application was proceeded with.

[16] The appellants' condonation and bar removal application was on 7 July 2021 dismissed by Justice AML Phatudi who on 23 November 2021 went on to deny the appellants leave to appeal.

[17] Consequent upon the denial of leave by the court of first instance the appellants successfully petitioned the Supreme Court of Appeal which on 7 March 2022 granted them leave to appeal to the Full Court of this division.

[18] It is against that background that the matter served before us on 4 May 2023.

THE ISSUE

[19] As I understand the parties' arguments and the unfortunately long-winded grounds of appeal and Heads of Argument, the crisp issue for determination is whether the court a quo misdirected itself in its determination of the jurisdictional factors attendant to a rule 27 condonation application.

[20] Anchoring on the heels of that question is, in my view, whether the dismissal of the application on account of non-compliance with the requirements of condonation, in the backdrop of the checkered and prolonged factual background referred to *supra* was in the interests of justice or put differently, was a just and equitable order.

THE COURT A QOU'S FINDINGS, THE LAW AND ITS APPLICATION TO THEFACTS

[20] In dismissing the application for condonation the court a *quo* found at paragraph 28 of its judgement that the appellants had not in their condonation reflected on reasonable prospects on the merits of their case in the main action. That observation cannot be faulted as indeed nowhere in their application did the appellants make any averments about their prospects of success on the merits of the case in the main action.

[21] Indeed a reasonable explanation of a delay and a *bona fide* triable case on the merits are key jurisdictional factors in condonation applications.

[22] When it was pointed out to counsel for the appellants in argument before us that the prospects of success were not articulated in the papers that served before the court a *quo,* counsel was stumped and conceded that indeed that was

the case.

[23] That being the case, at first blush and at a technical level that should be curtains for this appeal as this appeal should ordinarily fail right there because while the checkered history of the matter may be deemed to somewhat explain the delay the prospects of success remained an unknown variable in the condonation application that served before AML Phatudi J.

[24] But would that be in the interests of justice and would such a routine mechanical finding amount to a just and equitable order in the circumstances of the case?

[25] The concept of the interests of justice as the heartbeat of condonation applications, which I notice was cursorily reflected on in the judgement a *quo,* is best captured by the apex court in Grootboom v National Prosecuting Authority 2014(2) SA 68 (CC)("Grootboom") at paragraphs 22 and 51 as follows:

> *"The standard for considering an application for condonation is the interests of justice. However, the concept 'interests of justice' is so elastic that it is not capable of precise definition. It includes the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the identified appeal and the prospects of success. It is crucial to reiterate that both Brummer and Van Wyk emphasize that the ultimate determination of what is in the interests of justice must reflect due regard to all the relevant factors, but is not necessarily limited to those mentioned above. The particular circumstances of each case will determine which of these factors are relevant…*
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> *The interests of justice must be determined with reference to all relevant*

factors. However, some of the factors may justifiably be left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party. As a general proposition the various factors are not individually decisive, but should all be taken into account to arrive at a conclusion as to what is in the interests of justice."

[26] In my view, it will not be in the interests of justice to mechanically dismiss the appeal on the strength merely of the shortcomings referred *to supra* and by so doing effectively grant the respondent a home run to default judgement in circumstances where:

26.1 No prejudice accrues to the respondent if the bar is lifted, and the trial runs its course as he still stands a chance of proving his claim and recouping his pleaded damages.

26.2 The inordinate and at times inexplicable and inexcusable delays in the matter were caused not only by the appellants but by the respondent as well.

26.3 The large amount of no less than R12 million claimed by the respondent in the action will have to come out of a third world health department public purse which is already stretched to the limit resulting in the majority of the people dying from curable diseases and if it is to be paid out it has to be arising from a fair process and not arising from mere technicalities.

[27] At the end of the day the interests of justice are really what justice is interested in and to me justice is interested in disputes, where feasible, being resolved with the benefit of both sides of the story, in payments from the public purse being made on account of proven claims and preferably not over human error induced technicalities, interested in prejudice to litigants being minimized and where possible mitigated by appropriate costs orders and definitely interested in not blaming only one party where there are multiple dirty hands.

[28] Whenever petitions to the Supreme Court of Appeal are granted, as was the case in *casu,* we are left none the wiser as to the reasoning which went into those decisions. I however opine that that court must have been alive to the failure of the appellants to address the prospects of success in their papers which served before AML Phatudi J but still went on to grant leave to appeal. I am no seer nor am I the proverbial fly on the walls of the hallowed chambers in Bloemfontein but were I a betting man I would stake my last penny to suggest that the interests of justice and considerations of a just and equitable order in the circumstances, would have played no small a role in the decision of the Supreme Court of Appeal to grant leave to appeal in this matter.

[29] I find that the conduct of the appellants in launching the rule 30 application on the ruse that appeal proceedings were still pending in circumstances where they were aware or ought to have been aware that the leave to appeal Mangena AJ's dismissal of their exception to have been a major aspect of the delay in this matter. That is exacerbated by their failure for months on end to set their rule 30 application down for determination.

[30] I however cannot excuse the respondent for his own year-long failure to set the rule 30 application down as respondent therein in circumstances where he knew for certain it had no merit as there were no appeal proceedings pending.

[31] In the same breath the conduct of the respondent to serve a notice of bar in 2019 and only seek to action a default judgement on it more than a year later is unreasonable an inexcusable even if there be no rule which states the timeframes within which to bring a default judgement post barring.

[32] In my view it certainly is not available to a litigant who has himself caused inordinate delays in proceedings to cry foul at the delay caused by his opponent and seek to benefit therefrom.

[33] The effect of routinely and mechanically dismissing this appeal will be to either unwittingly clear the way of the equally at fault respondent to default judgement or beset another court seized with the default judgement soon to be issued by the respondent with facts, allegations, and papers similar to those before us in an unnecessary repetitive approach which least serves the proper and expeditious administration of justice. Both effects or consequences are, in my view, inconsistent with guidelines provided by the apex court in Grootboom supra on juggling about in determining where the interests of justice lie, and both gravely offend my sense of what is just.

[34] My sense of justice says that there is no prejudice to the not-so-innocent respondent if the bar is lifted, the matter allowed to run its course to *litis contestatio* and to trial where the merits of the action will be decided fairly with the benefit of evidence from both parties. The respondent is definitely not one qualified to throw stones at the appellants alleging delay nor should he dare cast the first stone.

[35] In the final analysis it would, in my view, really be helpful to all litigants in pursuit of their angle of justice to at times take a pause and consider that whilst they may gleefully point out a speck in their opponent's eye, they may at the same time be unaware of a similar speck or even a bigger log in their own eye. The court, in my

view, occupies a vantage point from the bench from which to clearly see all eyes and all specks and all logs and all clean eyes to can be able to, without a mechanical approach or arbitrariness, dispense justice and equity.

[36] In all the above circumstances the appeal should succeed for it is in the interests of justice that it does.

[37] In the result, the following order is granted:

(a) The appeal against the judgement and orders of Justice AML Phatudi dated 7 July 2021 under case number 1590/2017 is upheld.

(b) Condonation is granted and the barring of the appellants from filing a plea in the main action is lifted.

(c) The appellants are ordered to file their plea within 5 court days of the handing down of this judgement.

(d) The appellants are ordered to pay the costs incurred by the respondent in respect of the rule 30 application.

(e) There is no order as to costs in respect of the application for condonation and the appeal.

M S MONENE
ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

I agree.

SEMENYA APJ
ACTING JUDGE PRESIDENT
LIMPOPO DIVISION, POLOKWANE

I agree.

NAUDE-ODENDAAL J
JUDGE OF THE HIGH COURT
LIMPOPO DIVISION, POLOKWANE

APPEARANCES

Heard on	05 MAY 2023
Judgment delivered on	04 AUGUST 2023
For the Appellants	:Adv.EK TSATSI SC :With her Adv. R TSHIKORORO :Instructed by State Attorney, Polokwane :Email-TNkwana@justice.gov.za
For the Respondents Instructed by	:Adv. M MPSHE SC :Baloyi- Ntsako Attorneys :info@baloyintsakoattorneys.co.za