

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: ✓
Date: 5th June 2023 Signature: <i>PP.</i>	

APPEAL CASE NO: A3097/2022

COURT A QUO CASE NO: 1595/2021

DATE: 5TH JUNE 2023

In the matter between:

GLO-SEE CHEMICALS CC

Appellant

and

HULLEY, RUSSEL

Respondent

Neutral Citation: *Glo-See Chemicals v Hulley* (A5046/2022) [2023] ZAGPJHC
621 (5 June 2023)

Coram: Adams J et Turner AJ

Heard: 26 January 2023

Delivered: 5 June 2023 – This judgment was handed down electronically by circulation to the parties' representatives via email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 10:30 on 5 June 2023.

Summary: Appeal – reconsideration of *ex parte* attachment –
Appeal – condonation – relevance of transcript of argument delaying appeal.

ORDER

On appeal from: The Magistrates Court for the district of Ekurhuleni South East, Benoni (Additional Magistrate Nana sitting as Court of first instance):

- (1) The appellant's application for condonation is dismissed.
 - (2) The appellant's appeal is dismissed.
 - (3) The appellant is required to comply with the order of the Learned Magistrate dated 25 August 2021 and to return the two containers to the respondent and to restore them to the same condition they were in prior to removal by the Sheriff, at the cost of the appellant.
 - (4) The appellant shall pay the respondent's costs in the application for condonation and his costs in the appeal.
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JUDGMENT

Turner AJ (Adams J concurring):

[1] The appellant appeals against a decision of Additional Magistrate Nana sitting at the Ekurhuleni South Magistrate's Court, Benoni, in which the Learned Magistrate discharged the *rule nisi* that had been obtained by the appellant (as applicant) on an *ex parte* basis against the respondent.

[2] During 2017, the respondent resided on a property belonging to the appellant. While he was staying there, he and the appellant agreed that the respondent would work for the appellant and that payment for that work would be in a form of two shipping containers. On the affidavits exchanged, there is a dispute between the parties as to what work the respondent was obliged to do in

exchange for the shipping containers and consequently, whether the work was done.

[3] The respondent left the appellant's premises in November 2017 and took the two shipping containers with him to his own property. From October 2018 to January 2021, the respondent was in Zambia. It appears that there was no dispute between the parties over the containers between November 2017 and October 2018 and, although not stated expressly, it appears that the containers remained on the respondent's property in South Africa while he was away.

[4] After the respondent returned to South Africa, Mr Menezes of the appellant sent the respondent a long *WhatsApp* message on 7 April 2021, recording what appear to be several contentious matters between them. I quote the full message as it is relevant to the procedure that was followed by the appellant after it was sent.

'Hi Russel,

Sorry to be an inconvenience. I had some time to think and felt that I have been treated unfairly. We had made a deal that you would help me build three container homes (myself, Zayne and Clarice) in exchange for 2 containers. You stayed here a year to complete it but upon your choice you uplifted the containers and went to your plot without completing the container homes. I have asked you to please come help me complete the homes to honour our agreement, but instead you used this opportunity to break our verbal contract by bringing up Jan's wheelchair lift to this equation, which had nothing to do with our original deal. And you also did work for my parents and handed it over to Kyle to complete on your behalf when you went to Zambia, but Kyle abandoned the job because of issues between himself and Jaylene sleeping over in Leo's flat and my mom walking in on them and chasing Jaylene out, resulting in Kyle abandoning the job. The job was not completed. A loan of R2000 was given to Kyle by my parents at the time, therefore my parents didn't pay for the rest of job because it was not completed. You should go speak to my parents regarding the incompleteness of the job and the non-payment. I don't see how I am suddenly responsible for their projects and payments and it is quite sad that I had to choose between option 1 and 2. I didn't know our friendship was worth money. I plead and demand for the return of my containers due to your failure to complete your obligation. I would like to give you an opportunity to come clean and give me what belongs to me.

Thank you.'

[5] When the appellant did not receive an answer to this *WhatsApp* message, he launched an application in the Magistrate's Court, on an *ex parte* basis. The relief claimed in the Notice of Motion was the following:

- (a) That an Order be granted authorising and directing the Sheriff of the Magistrate's Court to search, attach, seize and hand over to the appellant certain 2 (two) containers belonging to the applicant, being: -
 Make: Shipping container
 Colour: Green
 Serial/identification No: MOTU0306000 and
 Make: Shipping container
 Colour: Green
 Serial/identification No: MOTU0328761
 at present in the possession of the Respondent or wherever it may be found.
- (b) That the Respondent be called upon to show cause to this Honourable Court on this the 23 day of June 2021 at 09:00 or so soon thereafter as the matter may be heard as to why this Order shall not be made final;
 alternatively
- (c) Payment in the sum of R98,382.50 ... in respect of the two containers.
- (d) That prayer (a) above shall act as interim order with immediate effect.'

[6] An order was granted in these terms *ex parte* on 13 May 2021.

[7] The respondent first received notice of this Order on 25 or 26 May 2021 when the Sheriff executed the order. In his answering affidavit, the respondent records that the Sheriff entered his property, removed assets from the containers, damaged the fixtures and fittings connected to the containers and removed the containers. The damage complained of included damage to fittings supplying water and electricity to the containers, which had been cut away from the containers with a grinder.

[8] On 4 June 2021, the respondent delivered an affidavit opposing and responding to the urgent *ex parte* application and anticipating the return date. By the time that the answering affidavit was delivered, the containers had been removed from the respondent's premises by the Sheriff and had been placed in the custody of the appellant.

[9] In the answering affidavit, the respondent set out various points *in limine* and also addressed the merits of the applicant's case. In doing so, he set out a strong challenge to the applicant's conduct in bringing the application on an urgent and *ex parte* basis, setting out facts and arguments why there was no justification for the appellant having done so. He also set out facts which he

contends ought to have been brought to the attention of the Court in the founding papers if the applicant had acted *bona fide* in bringing the application on an *ex parte* basis.

[10] In dealing with the merits of the dispute, the respondent recorded what he contended was the true agreement between the parties. He denied that there was an agreement that he would convert three containers into residential units. Rather, he alleged that he undertook to convert one silver aluminium shipping container into a residential unit, that he did this work and was paid with one green shipping container. He says that after he had completed the silver container, he agreed to perform further general construction and engineering services for the appellant and that, in return for rendering those services, he was compensated with the transfer of the second container.

[11] Having set out the contractual basis on which he had received the containers as payment for his services, the respondent asserted that the appellant had transferred ownership of the containers to him and that from 2017, he was the lawful owner of the containers. He emphasised that, by the time the application was brought, he had been in possession of the containers for more than three years, during which time his ownership was not disputed by the applicant.

[12] The matter was heard by the Court *a quo* on 23 June 2021 and judgment was delivered on 25 August 2021. In that judgment, the Court found *inter alia* that the appellant had not justified the *ex parte* basis of the application and, in particular, had not established that the giving of notice to the respondent would have defeated the purpose of the application. The Court also held that the degree of urgency with which the applicant had proceeded was not justified. Where the appellant had waited more than three years to lodge a claim and where, even if the containers were sold, the appellant would be content to receive payment of damages in lieu of the containers, there was no justification for the appellant having brought the application urgently and without notice.

[13] The Court *a quo* also found that there was a dispute of fact over the rights to the two containers, that the respondent had shown good cause to support an

argument that he was in fact the owner of the containers, including the fact that he had been in undisturbed possession of those containers for more than three years.

[14] In the circumstances, the Court discharged the *ex parte* order that had been made on 13 May 2021 and ordered that the two containers be returned to the respondent and be restored in the same condition in which they were found, at the cost of the applicant. The Court did not make a final decision on any of the merits of the application, finding merely that the interim order that had been granted on an *ex parte* basis should be discharged.

Appeal and Condonation

[15] The appellant delivered a notice of appeal on 30 August 2021, within a week after the judgment *a quo* was handed down. However, the record was only lodged and an appeal date applied for in July 2022, almost 11 months later.

[16] It is common cause that the 60-day period allowed for prosecuting the appeal expired on 30 November 2021. Consequently, the appellant required condonation to resuscitate the appeal.

[17] An application for condonation was delivered on 15 July 2022 when the appellant delivered its application for a hearing date. The respondent opposed the application.

[18] To succeed in obtaining condonation, the appellant must establish 'good cause' to excuse and condone the non-compliance. There is no exhaustive definition of what constitutes 'good cause', but the key factors informing the exercising of a court's discretion in evaluating an application for condonation include:

18.1 The appellant must furnish an explanation of its default which is sufficiently full to enable the Court to understand how the delay came about and to assess the applicant's conduct and motives, having regard to those facts. A full and reasonable explanation, which covers the entire period of the delay, must be given. The application must be *bona fide* and not made with the intention of delay.

- 18.2 The appellant for condonation must also satisfy the court that it has *bona fide* prospects of success in pursuing the matter. In an appeal such as the current one, the papers before the Court should reveal *prima facie* that the appellant has prospects of success.
- 18.3 In any matter, additional factors may be considered, such as prejudice to the parties that cannot be compensated by costs.
- 18.4 In all respects, the court must undertake a broad assessment of whether it is in the interests of justice to grant condonation and the importance of the matter is a relevant factor in determining the interests of justice.

(*Ferris v FirstRand Bank Ltd*¹, *Van Wyk v Unitas Hospital*²).

[19] In the condonation application, the appellant explains that the primary reason for the delay was that the transcript of the proceedings before the Magistrate was not available in time. The appellant requested the audio recording from the stenographers on 7 September 2021 and followed up multiple times between September 2021 and March 2022. On 30 March 2022, the transcribing company requested payment of a deposit to commence with transcription of the record, indicating that the audio recording had been found. The appellant made payment of that deposit on 5 April 2022 and paid the final amount on 13 April 2022. The transcript was received on 19 April 2022.

[20] As we discuss below, no justification has been given for the appellant waiting for the transcript of proceedings. However, even if the transcript were relevant, I would expect a reasonable appellant to have prepared all other parts of the record while waiting for the transcript. However, it was only on 25 April 2022 that the appellant enlisted the services of Legal Documents Services (LDS) to assist with the preparation of the appeal record. It received a draft version of the record from LDS on 16 May 2022.

[21] In trying to explain the delay from April to July 2022, the appellant relies on letters it wrote to the respondent requesting the respondent to comment on

¹ *Ferris v FirstRand Bank Ltd* 2014 (3) SA 39 (CC);

² *Van Wyk v Unitas Hospital* 2008 (2) SA 472 (CC) at 477 E-G;

the index to the record and consent to condonation being granted. It wrote those letters on 12, 18 and 23 May 2022. In response, the respondent record that he would not confirm whether he would oppose an application for condonation until the condonation application had been delivered. This clearly put the appellant on notice that it should deliver the appeal record and prosecute the appeal.

[22] On 4 July 2022, when he had heard nothing from the appellant, the respondent wrote, accusing the appellant of intentionally delaying the resolution of the appeal and he demanded that the appellant take all necessary steps within ten days, failing which the respondent will apply to strike out the appeal. The appellant then delivered its application for condonation and its application for an appeal date on 15 July 2022.

[23] It appears that the sole reason relied upon by the appellant for the delay between April 2022 (when it received the transcript) and 15 July 2022 is an allegation that the respondent did not comment on the index to the draft appeal record. It suggests that the respondent's failure to comment on the index justifies its delay in prosecuting the appeal.

[24] In my view, the explanation is unsatisfactory. First, the appellant has not explained why the transcript was necessary in the first place. The proceedings before the Learned Magistrate were motion proceedings. Consequently, all of the relevant evidence was recorded in affidavits and the oral hearing of the matter involved only counsel's submissions. In some cases, it may be necessary for the transcript of argument to be provided to the Appeal Court; for example, if there is a dispute over whether a concession was made in argument. However, the appellant's condonation application does not identify any particular aspect in the transcript which was required for purposes of prosecuting the appeal. All that is stated is that 'the transcript in the proceedings is particularly germane to the issues raised in the appeal and therefore essential for the record. This includes the admissibility of certain evidence'. Such a vague and unspecified statement provides no factual basis to motivate for the inclusion of the transcribed argument.

[25] Second, the overwhelming impression created by the delay after April 2022 is that the appellant was intent on retaining possession of the containers and delaying the prosecution of the appeal.

[26] In my view, the delay between receiving the transcript in mid-April 2022 and prosecuting the appeal on 15 July 2022 is unexplained and consequently, the appellant has not crossed the necessary threshold to succeed in its application for condonation.

[27] Further, insofar as the merits of the appeal are concerned, it does not appear to me that the appellant had any prospect of success on appeal either. First, even though the respondent did not take the point, it appears doubtful whether the Magistrate's decision was appealable at all. Second, in light of the long delay between November 2017 and April 2021 and the various disputes that were anticipated in the long *WhatsApp* message quoted above, there does not appear to be any justification for the applicant to have approached the Court on an *ex parte* basis.

[28] An *ex parte* application is an extraordinary procedure, particularly when it is used to affect the rights of another party, as it employs the machinery of Court to affect the rights of that party without affording that party the right to be heard before his rights are affected – undermining a fundamental principle of natural justice. The limited circumstances in which an *ex parte* application may be employed are usefully summarised as follows in *Erasmus, Superior Court Practice* RS20 D1-59 to 61:

'An *ex parte* application is used: (i) when the appellant is the only person who is interested in the relief which is being claimed; (ii) where the relief sought is a preliminary step in the proceedings, eg applications to sue by edictal citation, for substituted service, to attach or confound or confirm jurisdiction; (iii) where the nature of the relief sought is such that the giving of notice may defeat the purpose of the application, eg an Anton Piller type order; (iv) where immediate relief, even though it may be temporary in nature, is essential because harm is imminent. In such cases the appellant will often seek a rule nisi, the application then being in the nature of an *ex parte* application in terms of the sub-rule; (v) where certain kinds of applications are customarily brought *ex parte*

Good faith is a *sine qua non* in *ex parte* applications. It extends also to legal representatives.

If any material facts are not disclosed, whether they be wilfully suppressed or negligently omitted, the court may on that ground alone dismiss an *ex parte* application.'

(See the cases referred to in *Erasmus*).

[29] In the current matter, the appellant did not bring itself within any of the above categories or meet the requirements for an *ex parte* order: (i) This was not a matter where the appellant was the only person interested in the relief claimed, the respondent's interests were directly and negatively affected; (ii) The relief sought was not a preliminary step in the proceedings, it meted out substantial impact on the respondent by depriving him of the containers and breaking off the fixtures and fittings; (iii) There was no evidence to support a conclusion that the giving of notice to the defendant and permitting him to defend the application would defeat the purpose of the application. The containers had remained in place at his premises for more than three years and there was no indication that he would spirit them away when the application was served. (iv) There was no evidence to support a conclusion that harm was imminent and therefore immediate relief was essential. Not only was there no evidence that the containers would be removed but the damages claimed in the alternative shows that there was nothing essential or unique in securing those particular containers. (v) An invasive attachment and removal of assets is not the kind of application that is customarily brought *ex parte*. The order ought not to have been sought or granted *ex parte*.

[30] On a review of the answering and replying affidavits, it is abundantly clear that the respondent had been given possession of the containers and had removed them from the appellant's premises in November 2017 with the consent of the appellant. It is also clear that before he launched the application the applicant knew the respondent disputed his version of events or, at least, he ought to have anticipated that the respondent disputed his version. In the circumstances, the necessary inference to be drawn is that the appellant intentionally abused the *ex parte* process to secure an unjustified and unlawful advantage, using it to take possession of the containers without having to address and overcome the defences that it expected the respondent would raise.

[31] The appellant has argued that the matter is one of significant importance to it as a small business, and therefore it is in the interests of justice to grant condonation. However, the available evidence does not support this submission. The appellant did not act to recover the containers for three years after they were removed in November 2017, this shows that they were not an important part of its business. In addition, the appellant has instituted action proceedings in which the fate of the containers will be decided and so a result in its favour in the current matter is not decisive of the parties' rights.

Conclusion

[32] In the circumstances, the appellant has not met the threshold for condonation to be granted. Not only has the appellant failed to provide a satisfactory explanation for the extended delay but it has also failed to show prospects of success on appeal. It is not in the interests of justice for condonation to be granted.

[33] For all of these reasons, the appellant's application for condonation of its failure to timeously prosecute its appeal should fail and the order of the court *a quo* should be confirmed. It follows that the appeal should be dismissed.

[34] As for the costs of the appeal, it is so that the general rule is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so. See: *Myers v Abramson*³. There are no grounds in this case to depart from the ordinary rule that costs should follow the result. I therefore intend granting costs against the appellant in favour of the respondent.

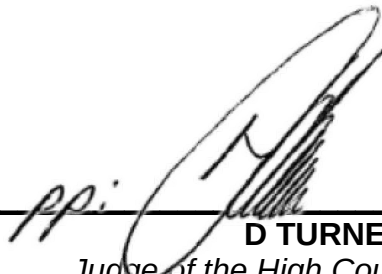
Order

[35] In the result, the following order is made: -

- (1) The appellant's application for condonation is dismissed.
- (2) The appellant's appeal is dismissed.

³ *Myers v Abramson*, 1951(3) SA 438 (C) at 455

- (3) The appellant is required to comply with the order of the Learned Magistrate dated 25 August 2021 and to return the two containers to the respondent and to restore them to the same condition they were in prior to removal by the Sheriff, at the cost of the appellant.
- (4) The appellant shall pay the respondent's costs in the application for condonation and his costs in the appeal.



D TURNER
Judge of the High Court
Gauteng Division, Johannesburg

HEARD ON:	26 th January 2023
JUDGMENT DATE:	5 th June 2023 – judgment handed down electronically
FOR THE APPELLANT:	Adv J C Viljoen
INSTRUCTED BY:	J J R Botha Attorneys, Edleen, Kempton Park
FOR THE RESPONDENT:	Adv Fundile Sangoni
INSTRUCTED BY:	Malherbe Rigg & Ranwell Inc, Boksburg