

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case no: **11338/2022P**

In the matter between:

YAKAZA PROPERTIES SA (PTY) LTD
(Registration Number: 2018/035635/07)

APPLICANT

and

BTT INVESTMENT (PTY) LTD
(Registration Number: 2017/489941/07)

RESPONDENT

Coram: Mossop J
Heard: 25 January 2024
Delivered: 30 January 2024

ORDER

The following order is granted:

1. The respondent is granted condonation for the late delivery of its condonation application.
2. The respondent is granted condonation for the late delivery of the answering affidavit deposed to by Mr Muhammad Saleem Khan on 14 February 2023 in the liquidation proceedings instituted by the applicant against the respondent.
3. In terms of the provisions of Uniform rule 6(5)(e), the respondent is granted leave to deliver the answering affidavit deposed to by Mr Ali Mustafa Khan on 31

March 2023 in the liquidation proceedings instituted by the applicant against the respondent.

4. The respondent is granted condonation for the late delivery of the answering affidavit deposited to by Mr Ali Mustafa Khan on 31 March 2023.

5. The applicant is granted leave to deliver a further affidavit, if so advised, in order to deal only with any differences that may exist when the answering affidavit deposited to by Mr Muhammad Saleem Khan and the answering affidavit deposited to by Mr Ali Mustafa Khan are compared with one another.

6. The respondent shall pay the applicant's costs of opposition.

JUDGMENT

MOSSOP J:

[1] The parties to this application have a litigious history with each other. Briefly stated, it comprises the following:

(a) In August 2020, the applicant sought the eviction of the respondent from certain commercial business premises. The eviction application was opposed by the respondent, was argued on the opposed roll of this court on 20 May 2021 and judgment was granted in the applicant's favour on 6 August 2021;

(b) An application for leave to appeal was pursued by the respondent, was opposed by the applicant and was dismissed on 22 October 2021;

(c) A petition to the Supreme Court of Appeal was also unsuccessful and was rejected by that court on 2 June 2022; and

(d) On 25 August 2022, the applicant brought an application to liquidate the respondent, alleging that it is an unpaid creditor of the respondent. It is alleged that the respondent owes it R765 000, being unpaid rental due by the respondent arising out of the respondent's occupation of the commercial business premises mentioned above. I shall refer to the liquidation application as 'the main application'.

[2] What is before me is an application in which the respondent seeks the following relief:

- '1. Respondent is granted condonation for the late delivery of its answering affidavit.
2. Respondent is granted condonation for the late delivery of this condonation application.
3. Respondent is granted leave to substitute, for the answering affidavit that was delivered on 15 February 2023, the affidavit a copy of which is annexed hereto marked X.
4. There is no order as to costs, provided that if Applicant opposes this application, it will be requested that it be ordered to pay the costs of the application.'

I shall refer to this application as 'the condonation application'.

[3] Notwithstanding that it is the applicant in the condonation application, I shall continue to refer to the respondent as 'the respondent' because that is how it has described itself in its notice of motion and in its founding affidavit in the condonation application and it will accordingly avoid confusion.

[4] From the wording of paragraph 3 of the notice of motion, it may be discerned that the condonation application involves two answering affidavits. Why this is so will be considered in more detail shortly, but it may be helpful to first briefly give a thumbnail sketch of what has occurred. An answering affidavit was deposed to on

behalf of the respondent on 14 February 2023 (the first answering affidavit) and was served on the applicant the next day. A second answering affidavit was deposed to on 4 April 2023. It is not immediately apparent from the papers whether it has been served, but a copy of the second answering affidavit is attached to the founding affidavit in the condonation application. Save for the names of the respective deponents to the two answering affidavits, for each affidavit was deposed to by a different person, the documents are identical in their content. The first answering affidavit was delivered out of time. It follows that the second answering affidavit is also out of time for it was attested to after the first answering affidavit was delivered. The respondent now seeks condonation for the late delivery of the second answering affidavit and at the same time seeks to substitute the second answering affidavit for the first answering affidavit.

[5] The answering affidavits are documents that have been filed in the main application. They constitute an answer to the applicant's attempts to liquidate the respondent. While the applicant has insisted on the respondent bringing the condonation application, significantly, it has already delivered its reply to the first answering affidavit in the main application.

[6] The condonation application has been necessitated by what the deponent to the respondent's founding affidavit, Mr Carlos Miranda (Mr Miranda), an attorney of this court, describes as a 'comedy of errors'. The ordinary meaning of that phrase is an event or series of events made ridiculous by the number of errors that have been made throughout.¹ The applicant does not see the events in the same light and does not recognise that any errors have been made. If I have understood its case correctly, it asserts that the respondent has acted purposefully and with design to delay the main application and that no errors have therefore occurred.

[7] The test to be applied when considering a condonation application is not a thing of mystery and is well known. The Supreme Court of Appeal has noted that:

¹ Merriam-Webster Online Dictionary.

‘ . . . condonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the court to understand clearly the reasons and to assess the responsibility.’²

The court went on to state that:

‘ . . . if the non-compliance is time-related, then the date, duration and extent of any obstacle on which reliance is placed must be spelled out.’³

[8] In *Van Wyk v Unitas Hospital and another*,⁴ the Constitutional Court stated that:

‘An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And, what is more, the explanation given must be reasonable.’

[9] A court considering a condonation application has a discretion that it must exercise judicially. In assessing the merits of such an application, the court makes a value judgment largely founded on the facts of the matter.⁵ Ultimately, the consideration uppermost in the court’s mind will be the interests of justice.⁶ That will require a consideration, inter alia, of the nature of the relief sought, ‘the degree of non-compliance, the explanation therefor, the importance of the case’, a respondent’s interest in the finality of the matter, ‘the convenience of the Court and the avoidance of unnecessary delay in the administration of justice’.⁷

[10] In support of its application, Mr Miranda states that by agreement with the applicant’s attorneys, the respondent was required to deliver its answering affidavit in

² *Uitenhage Transitional Local Council v South African Revenue Service* 2004 (1) SA 292 (SCA); [2003] 4 All SA 37 (SCA) para 6.

³ *Ibid* para 6.

⁴ *Van Wyk v Unitas Hospital and another (Open Democratic Advice Centre as amicus curiae)* [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) para 22.

⁵ *Grootboom v National Prosecuting Authority and another* [2013] ZACC 37; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC) para 35.

⁶ *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* [2000] ZACC 3; 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC) para 3.

⁷ *Federated Employers Fire & General Insurance Co Ltd and another v McKenzie* 1969 (3) SA 360 (A) at 362F-G.

the main application by 22 November 2022, its notice of intention to defend the main application having been delivered by it on 1 November 2022 (which notice also appears to have been delivered out of time). The respondent had previously been represented by another firm of attorneys in the litigation relating to the eviction of the respondent, mentioned at the commencement of this judgment, and Mr Miranda's firm took the matter over from those attorneys in late October 2022.

[11] Mr Miranda states in the respondent's founding affidavit that he consulted with the respondent's director, a Mr Ali Mustafa Khan (Mr Ali),⁸ regarding the main application and that counsel was then briefed to prepare an answering affidavit. Counsel was also instructed to draw particulars of claim in which the respondent intended to claim a refund of certain monies from the applicant. When counsel was briefed is never revealed by Mr Miranda. Counsel advised Mr Miranda that he needed to consult with Mr Ali in order to draw the answering affidavit. This posed a difficulty as Mr Ali had left for Pakistan, his country of origin, on 6 November 2022 and was initially scheduled to only return to South Africa on 22 February 2023. However, whilst in Pakistan, Mr Ali deferred his return to this country until 24 March 2023. Mr Miranda states that he was not initially aware that this was to occur, but later came to know of this.

[12] Counsel who had been briefed prepared the particulars of claim and forwarded them to Mr Miranda. The answering affidavit was not prepared, presumably because counsel had not had the opportunity to consult with Mr Ali. I digress momentarily at this point to mention the case made out by the respondent in the particulars of claim. They reveal that the respondent is the first plaintiff in that action, that Mr Ali is the second plaintiff and that the applicant is the defendant. They go on to state that the first plaintiff and the defendant concluded an agreement in terms of which the defendant would reserve certain business premises for a period of three days for the first plaintiff and that the second plaintiff would pay to the defendant a refundable reservation fee of R600 000 to secure that reservation (the reservation fee). For some reason, the second plaintiff only paid the defendant the

⁸ Mr Khan is referred to as 'Mr Ali' because there is another person involved in these events by the name of Mr Muhammad Saleem Khan, and it would be unhelpful, and confusing, to refer to both gentlemen as 'Mr Khan'. Both will therefore be referred to by their forename. No disrespect is intended by such reference.

amount of R500 000, but, nonetheless, an agreement of lease was concluded in respect of the reserved business premises. The refund due arising out of that agreement would be paid either to the first plaintiff or to the second plaintiff. As that refund had not been paid, the plaintiffs demanded it from the defendant. An exception was subsequently taken to the particulars of claim by the applicant but I am informed that it was dismissed by Olsen J after hearing argument. No plea has as yet been delivered by the applicant to the particulars of claim.

[13] Reverting to Mr Miranda's narration of the facts of the condonation application, the deadline for the delivery of the answering affidavit in the main application, 22 November 2022, neared, was reached, was then passed and it was not delivered. Mr Miranda states that he expected the draft answering affidavit from counsel because he had received the particulars of claim from him. But the answering affidavit did not come.

[14] What did come was a letter from the applicant's attorneys, dated 28 November 2022, recording the non-delivery of the answering affidavit by the agreed date and putting Mr Miranda on terms to deliver it by close of business of the next day, 29 November 2022. Mr Miranda responded the same day by email stating that:

'Unfortunately there has been some logistical issues and we will try and file our client's affidavit by tomorrow but if not by the end of the week.'

The answering affidavit was not delivered the next day, nor by the end of the week.

[15] It is not clear to me how this assurance could have been given by Mr Miranda. He knew that counsel required to consult with Mr Ali before he drew the answering affidavit but he also knew that Mr Ali was not in the country at the time that he responded to the applicant's attorneys. How this difficulty was to be overcome and therefore permit the delivery of the answering affidavit as promised by Mr Miranda is not readily apparent.

[16] Mr Miranda continues and states that the respondent admitted that it owed the applicant at least the amount of R265 000 and that this was to be tendered to the

applicant in the belief that the payment of that amount would bring a halt to the main application. But while this amount was admitted by the respondent, Mr Ali had not placed Mr Miranda in the financial position to make the tender before he left for Pakistan.

[17] Because the respondent did not deliver its answering affidavit by the agreed date and then not as promised by Mr Miranda in his email of 28 November 2022, on 12 December 2022, the applicant's attorneys wrote to Mr Miranda and informed him that the matter would now be set down on the unopposed motion roll on 22 February 2023. The December shut down was then reached and the matter was not given the attention that it undoubtedly required from Mr Miranda's offices. It was, in fact, not given any attention at all for a substantial period.

[18] On 25 January 2023, counsel forwarded a draft answering affidavit to Mr Miranda for Mr Ali to sign but it could not be signed because Mr Ali was still out of the country. It is not explained how counsel managed to produce this work given his previous insistence that he needed to consult with Mr Ali prior to drafting that document. Mr Ali was still in Pakistan and, according to Mr Miranda, he could not make arrangements to sign and commission the answering affidavit at the South African High Commission in that country. Mr Miranda states that Mr Ali indicated to him that it would be easier for another Mr Khan, being Mr Muhammed Saleem Khan (Mr Saleem), to sign the answering affidavit. This idea was scotched by Mr Miranda as Mr Saleem was at that stage not a director of the respondent and could not positively depose to any of the facts in that affidavit.

[19] Mr Miranda then received the payment of R265 000 from the respondent and tendered it to the applicant on 30 January 2023 in the certain, but mistaken, belief that such a tender would be accepted by the applicant, thereby putting an end to the main application. To his apparent surprise, the tender was not accepted and the main application proceeded. I was advised by both counsel for the applicant, Ms van Jaarsveld, and counsel for the respondent, Mr Temlett, that the amount of R265 000 has now been paid to, and accepted by, the applicant. The balance of the alleged indebtedness of the respondent to the applicant is thus the amount of R500 000,

which is the amount claimed by the respondent from the applicant in its particulars of claim.

[20] Meanwhile, Mr Ali, while still in Pakistan, resigned as a director of the respondent and Mr Saleem became a director on 9 February 2023. Mr Miranda then sent the draft answering affidavit prepared by counsel, and intended for Mr Ali's signature, to Mr Saleem in Microsoft Word format. Why this was done is not explained in the papers. Mr Saleem unilaterally then amended the draft answering affidavit by deleting Mr Ali's name and inserting his name in the place thereof and then signed it and had it commissioned on 14 February 2023. Mr Saleem made no other changes to the answering affidavit. The answering affidavit was then served on the applicant's attorneys the next day by a member of Mr Miranda's staff, apparently in his absence.

[21] As the applicant had indicated would occur, the main application was enrolled on the unopposed motion roll on 22 February 2023 when, coincidentally, it came before myself. I granted the following order:

- '1. The matter be and is hereby adjourned to 13 April 2023.
2. The Respondent is to deliver its condonation application within 10 days of this order.
3. The Respondent to pay the costs of this adjournment.'

[22] Ultimately, that order was not complied with and the condonation application was not delivered within the time period ordered.

[23] Mr Miranda states that he thereafter met with counsel on 3 March 2023 for the purpose of preparing the required condonation application. At this consultation, it emerged that counsel had not realised that Mr Saleem, and not Mr Ali, had deposed to the first answering affidavit that had already been delivered to the applicant. Counsel was of the view that this occasioned a difficulty for the respondent as the first answering affidavit had been drafted with the intention that Mr Ali would sign it.

Mr Miranda then had an epiphany and realised that condonation for the late filing of the first answering affidavit signed by Mr Saleem would not cut the mustard: a second answering affidavit deposed to by Mr Ali would have to be prepared and condonation for its late filing would have to be sought. That is what this condonation application is designed to achieve.

[24] Mr Miranda states that Mr Ali returned to South Africa on 24 March 2023 and met with him on 31 March 2023, when he signed the second answering affidavit. Mr Miranda then met with counsel on 5 April 2023 to prepare the present condonation application. It was subsequently launched on 11 April 2023.

[25] All of this constitutes the respondent's 'comedy of errors'. The applicant opposes condonation being granted and opposes the second answering affidavit being substituted for the first answering affidavit.

[26] As a general proposition, it would be fair to state that the applicant holds the view that the respondent has engaged in a deliberate strategy of delay and that evidence of this foot dragging is manifested by the delay in the delivery of both the first and second answering affidavits in the main application. This point of view would appear to be largely coloured by the respondent's conduct in the eviction application mentioned previously.

[27] While the applicant may be anxious to finally resolve all the issues between itself and the respondent, there does not appear to me to be any evidence of the strategy complained of by the applicant. The steps taken by the respondent that may have prevented a swift and final resolution of the eviction matter were all steps that the law countenances and makes available to parties aggrieved by a decision of the high court. The respondent cannot be criticised for taking advantage of that which the law permits. The fact that the respondent did not succeed in its attempts to appeal does not mean it was not entitled to attempt such appeal.

[28] Indeed, it appears to me that the applicant has contributed somewhat to the delay in finalising the matter. While it is within its rights to require the respondent to formally apply for condonation, sight must not be lost of the fact that the first

answering affidavit was delivered on 15 February 2023 and had already been replied to by the applicant on 1 March 2023. The papers were then at that stage complete. Rather than set the matter down for argument on the opposed roll, the applicant took the principled stand that condonation should be sought by the respondent. It must have realised that this would delay the final adjudication of the main application. Moreover, the condonation application was set down separately from the consideration of the main application. Had they been set down together, they could have been determined together and some of the delay that has eventuated could have been averted. The longest delay in the matter is the delay occasioned by the wait for a date on the opposed roll.

[29] The applicant commences its opposition to the condonation application by taking two points in limine in its answering affidavit. The first point taken is that while the respondent may seek condonation for not delivering its second answering affidavit in the main application within the time prescribed by the Uniform Rules of Court, condonation cannot be sought for the failure to comply with my order of 22 February 2023, wherein I directed that the condonation application had to be brought within ten days of that date. The applicant submits that the court cannot condone non-compliance with an order, only non-compliance with a rule. The second point in limine is that the respondent may seek leave to deliver a further affidavit but the Uniform Rules make no provision for the substitution of one affidavit for another.

[30] The first point is entirely without merit and was correctly abandoned by Ms van Jaarsveld, who appeared for the applicant. I need not say anything further on this issue.

[31] As regards the second point in limine, it seems to me that there is some merit in it. The Uniform Rules of Court do not deal with the issue and I have found only two matters⁹ where the issue of substitution of affidavits was in issue. In *Ndlebe v Budget Insurance Limited*,¹⁰ there was an application to file a supplementary affidavit and an application to file a substituted affidavit. The court also had to deal with two

⁹ During argument, I indicated to Ms van Jaarsveld that I had found only one judgment: I have subsequently found another.

¹⁰ *Ndlebe v Budget Insurance Limited* [2019] ZAGPJHC 320.

applications in terms of rule 30. The court did not rule on the substitution application as it was held that substitution was not necessary where a supplementary affidavit was filed, with the court stating that:

‘It is my firm view that the interest of justice would not be served by discarding the supplementary affidavit and/or the substitution of the answering affidavit as sought by the applicant in both applications.’¹¹

[32] In *Umsobomvu Coal Proprietary Limited v Transasia Mineral SA Proprietary Limited*,¹² an application to substitute an affidavit was brought based on an allegation that the answering affidavit was:

‘... deposed to and delivered fraudulently in this application as well as prior applications on behalf of the respondent by a Ms Roytblat.’¹³

However, it appears that the application was not persisted in and no judgment on it was therefore delivered.

[33] There is no suggestion of a fraud having been committed in this matter. It is simply a question of who had direct knowledge of the information contained in the answering affidavit and who was entitled to depose to the affidavit. The first affidavit is entirely regular in its form and in its commissioning and has properly been delivered and received and replied to. It purports to record what the deponent thereto states as being the truth. I am not persuaded that in those circumstances I am entitled to allow its withdrawal. On the other hand, the respondent is entitled to deliver what it regards as a properly commissioned answering affidavit deposed to by the person that it claims has true and direct knowledge of the facts. However, before resolving what should occur, I consider whether condonation should be granted for the late delivery of the answering affidavits.

¹¹ Ibid para 14.

¹² *Umsobomvu Coal Proprietary Limited v Transasia Mineral SA Proprietary Limited* [2022] ZAGPPHC 893.

¹³ Ibid para 6.

[34] The explanation narrated by Mr Miranda is reasonably comprehensive and permits the court to understand, if not approve of, what has happened in the matter. It covers the full period of the delay and describes the difficulties that he experienced in the absence of Mr Ali from this country. That absence was unfortunate and could not have happened at a worse time when viewed in the context of the main application. But it happened. The applicant has not been seriously prejudiced thereby and has been content to await the date on the opposed roll to argue about condonation.

[35] It appears to me that the respondent has prospects of resisting the main application. It states that it is entitled to the refund of the reservation fee. Whether this is a view shared by the applicant is, unfortunately, not known at this stage as it has not pleaded to the respondent's particulars of claim. If the reservation fee refund is due to the respondent, then the balance of the amount claimed by the applicant from it would be extinguished by the operation of set-off¹⁴ and the liquidation application would founder. If the refund is due to Mr Ali, the R500 000 is tendered by him to the applicant, again extinguishing the respondent's debt to the applicant. It is difficult to understand why the applicant persists with the main application when payment of the indebtedness owed to it has been offered or tendered.

[36] The relief sought by the applicant in the main application is the compulsory termination of the legal persona of the respondent. It is therefore a matter of some consequence to the respondent. The degree of non-compliance has not been slight but, as mentioned, the respondent appears to have prospects of resisting the winding-up order sought by the applicant. The applicant has known since 15 February 2023 what the defence of the respondent is to the winding-up application. If condonation is given to permit the correct answering affidavit, which is identical in content to the first answering affidavit, to be delivered, the applicant will not be taken by surprise nor will it be prejudiced.

[37] It seems to me that the interests of justice require me to condone the late delivery of both the first and the second answering affidavits. I am, however, not

¹⁴ *Standard Bank of South Africa Ltd v Echo Petroleum CC* 2012 (5) SA 283 (SCA) para 33.

prepared to allow the withdrawal of the first answering affidavit and to permit the second answering affidavit to be substituted for it. I am, however, prepared to invoke the provisions of Uniform rule 6(5)(e) which provides that a further affidavit may be delivered by a party with the leave of the court. That rule reads as follows:

‘Within 10 days of the service upon the respondent of the affidavit and documents referred to in sub-paragraph (ii) of paragraph (d) of subrule (5) the applicant may deliver a replying affidavit. The court may in its discretion permit the filing of further affidavits.’

When the main application is eventually argued, there will thus be two answering affidavits, identical in content but deposed to by two different persons. The parties will have to decide how they address this issue. To the extent that it is advised to do so, the applicant is given leave to deliver a further affidavit that deals only with any differences that may exist when the two answering affidavits are compared with one another.

[38] On the question of costs, the respondent in bringing this application is seeking an indulgence from the court. In *Premier, Western Cape v Lakay*,¹⁵ the Supreme Court of Appeal observed that:

‘Ordinarily, in applications for condonation for non-observance of court procedure, a litigant is obliged to seek the indulgence of the court whatever the attitude of the other side and for that reason will have to pay the latter's costs if it does oppose, unless the opposition was unreasonable.’

[39] Given the facts of the matter and the length of the delay in the delivery of the answering affidavits, the applicant was entitled to oppose the relief claimed by the respondent in the condonation application. It would be just in the circumstances therefore to direct that the respondent shall pay the applicant's costs

[40] I accordingly grant the following order:

¹⁵ *Premier, Western Cape v Lakay* [2011] ZASCA 224; 2012 (2) SA 1 (SCA) para 25.

1. The respondent is granted condonation for the late delivery of its condonation application.
2. The respondent is granted condonation for the late delivery of the answering affidavit deposed to by Mr Muhammad Saleem Khan on 14 February 2023 in the liquidation proceedings instituted by the applicant against the respondent.
3. In terms of the provisions of Uniform rule 6(5)(e), the respondent is granted leave to deliver the answering affidavit deposed to by Mr Ali Mustafa Khan on 31 March 2023 in the liquidation proceedings instituted by the applicant against the respondent.
4. The respondent is granted condonation for the late delivery of the answering affidavit deposed to by Mr Ali Mustafa Khan on 31 March 2023.
5. The applicant is granted leave to deliver a further affidavit, if so advised, in order to deal only with any differences that may exist when the answering affidavit deposed to by Mr Muhammad Saleem Khan and the answering affidavit deposed to by Mr Ali Mustafa Khan are compared with one another.
6. The respondent shall pay the applicant's costs of opposition.

MOSSOP J

APPEARANCES

Counsel for the applicant	:	Ms M E van Jaarsveld
Instructed by:	:	Schabort Potgieter Attorneys Incorporated 189 Soutpansberg Road Riviera Pretoria

Care of:
Hay and Scott Attorneys
Top Floor, 3 Highgate Drive
Redlands Estate, 1 George MacFarlane

Lane

Pietermaritzburg

Counsel for the respondent : Mr J W Temlett
Instructed by : Carlos Miranda Attorneys
273 Prince Alfred Street
Pietermaritzburg

Date of argument : 25 January 2024

Date of judgment : 30 January 2024