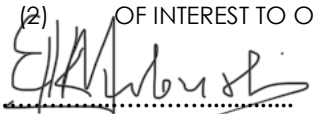




**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case Number: 94792/2019

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
	
E.M. KUBUSHI	
DATE: 24 FEBRUARY 2023	

In the matter between: -

FRANS STANDER N.O.

APPLICANT

and

THE MASTER OF THE HIGH COURT, PRETORIA

FIRST RESPONDENT

THE REGISTRAR OF DEEDS, PRETORIA

SECOND RESPONDENT

THE SOUTH AFRICAN REVENUE SERVICE

THIRD RESPONDENT

JUDGMENT

KUBUSHI J

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on 24 FEBRUARY 2023.

INTRODUCTION

[1] The relief sought in the application involves the narrow question of costs. The crux is whether the First Respondent, the Master of the High Court Gauteng Division, Pretoria (“the Master”), should, in the circumstances of this matter, be mulcted with costs.

[2] Only the Applicant, Frans Anthonie Stander N.O., who is cited herein in his official capacity as the duly appointed executor of the Estate Late Ferreira with Estate Number: 15492/2017 (“the Estate”), and the Master, are taking part in these proceedings. No relief is sought against the Second and Third Respondents, and are merely cited in these proceedings, in so far as they may have an interest in the matter.

[3] At the commencement of the hearing of this application, it was brought to the attention of the Master’s counsel that there were no heads of argument filed on behalf of the Master. On explanation by counsel, it became apparent that there had been a miscommunication between counsel and his instructing attorney in respect of the filing of the heads of argument, as well as, the date of the hearing of the matter. Counsel for the Applicant had no issue with the matter proceeding without the Master having filed the heads of argument, as such, the matter proceeded with only the Applicant’s heads of argument having been filed.

FACTUAL BACKGROUND

[4] Mr Len Ferreira (“the Deceased”), who passed away on 16 October 2017, has in his Last Will and Testament (“the Will”), appointed the Applicant to be the Executor of his Estate in the event of his death. The Master issued letters of executorship to the Applicant, duly appointing him as the executor of the Estate. The beneficiaries of the Deceased’s estate are his four children who are dependent upon the Estate in respect of maintenance.

[5] A *curator ad litem* was also appointed for two of the beneficiaries whose mother had passed on even before the death of the Deceased. The Deceased has, in the Will, bequeathed his estate to the four beneficiaries, to be held in trust until they each turned 25 years old. At all times relevant to these proceedings, none of the beneficiaries had reached the age of 25. The value of the Deceased’s Estate is estimated at

approximately R62 million consisting of various movable and immovable properties and monies held in a number of bank accounts.

[6] It is alleged that in November 2018, almost a year after the appointment of the Applicant as Executor, the Master was informed by the *curator ad litem* and the aunt and uncles of the beneficiaries of the Estate that the Applicant was disposing of property to the detriment of the beneficiaries. On the basis of that information, on 17 July 2019, the Master wrote to the Applicant requesting that the Applicant lodge on or before 23 August 2019, a true and full account of the Liquidation and Distribution account of the Estate, as well as, proof that there was an existing banking account in respect of the Estate.

[7] According to the Master, in terms of the Act,¹ the Liquidation and Distribution account has to be lodged within six months, and at the time of writing a request to the Applicant, the six months had already expired. The Applicant had also, not applied for an extension of time for the lodgement of the account.

[8] On 30 August 2019, the Applicant applied for the extension of time within which to lodge the Liquidation and Distribution account. According to the Master, this application did not come to her attention. Another letter was written by the Applicant to the Master on 7 October 2019, which letter did not come to the notice of the Master as well. Having not received any response from the Applicant, and being under the impression that the Applicant ignored the letter of the Master of 7 July 2019, the office of the Master issued a J88 letter informing the Applicant of the Master's intention to remove him as Executor of the Estate. The letter also afforded the Applicant a period of 30 days within which to approach Court for an order restraining the Master from so removing him.

[9] With his removal imminent, the Applicant launched an urgent application which was heard on 27 December 2019. The urgent application was struck from the roll for lack of urgency and no order as to costs was made. The application was re-enrolled for hearing on 11 March 2021, when the relief sought by the Applicant was granted as prayed for, except for the prayer for costs which was postponed *sine die*.

¹ The Administration of Estates Act No. 66 of 1965.

[10] The Master had, since service upon her of the application, not filed her answering affidavit. As a result, the postponement of the prayer for costs necessitated the filing of an answering affidavit by the Master. Even though it does not appear in the Order of the Court granted on 11 March 2021, it seems to be common cause between the parties that at that hearing, the Master was granted leave to file her answering affidavit within ten (10) days. The Master was unable to file the answering affidavit within the stipulated period of ten (10) days, and *per* agreement between the parties, the Applicant allowed the Master to file on 9 April 2021. The Master was unable to meet this deadline, as well, and requested a further indulgence from the Applicant to file the answering affidavit on 12 April 2021, which request was declined by the Applicant. The answering affidavit was, in any event, filed on 12 April 2021, which necessitated the application for condonation.

CONDONATION

[11] The Master has applied for the condonation of the late filing of the answering affidavit which, the Applicant is opposing. The issue that this Court has to decide at this stage of the proceedings, is whether the Master should be granted condonation for the late filing of the answering affidavit.

[12] Rule 27(1) of the Uniform Rules of Court (“Rule 27(1)”) provides that in the absence of agreement between the parties, the Court may upon application on notice and on good cause shown, make an order extending or abridging any time prescribed by these rules or by an order of Court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet.

[13] The test for condonation is trite and well established. It is a well-known principle of our law that, for the Court to grant the condonation applied for, it must be satisfied that the applicant has established or shown good cause. In order to determine whether good cause is shown, the following factors together with any other relevant factors are taken into account: the degree of lateness, the reasons for the lateness, the prospects of success, any prejudice that the respondent may suffer, and the respondent’s interest in finality.²

² *Melane v Santam Insurance Company Limited* 1962 (4) SA 531 (A) at 552.

[14] The crux in this condonation application, is the degree of lateness. The Master's counsel contends that the Master was late by one day only, whereas counsel for the Applicant submits that the Master was late from the time she failed to file the answering affidavit upon service on her, of the main application, which is far more than only one day.

[15] For the reasons that follow hereunder, this Court is in agreement with the argument raised by counsel for the Master that the Master was late by one day only. In this Court's view, this is a classic case covering all the facets of Rule 27(1).

[16] It is common cause that in terms of the notice of motion served on her, the Master was supposed to have filed an answering affidavit by 17h00 on or before 24 December 2019, but, the answering affidavit was not filed, and the matter, was subsequently, struck off the roll for lack of urgency. It is, also, not in dispute that when the matter appeared in the opposed motion Court on 11 March 2021, the Master had still not filed her answering affidavit, and had to be granted leave to file the answering affidavit within ten (10) days, when the prayer for costs was postponed.

[17] It is this Court's view that, in granting the Master leave to file the answering affidavit, the Court had in terms of Rule 27(1), exercised its inherent powers of the High Court to regulate its own processes,³ and extended the time within which the Master should file her answering affidavit. When the Master failed to file the answering affidavit within the time of ten (10) days fixed by the Court, she asked for a further extension from the Applicant. And, by agreement between the parties the time for filing was, further, extended to 9 April 2021. Rule 27(1) allows the extension of prescribed time periods by agreement between the parties. The result is that, by filing her answering affidavit on 12 April 2021, as she did, the Master was late by only one day - 9 April 2021 was on a Friday and 12 April 2021 on a Monday.

[18] It is a trite principle of our law that, in condonation applications, the Court has a discretion which must be exercised judicially on a consideration of the facts of each case. In the exercise of this Court's discretion, it is its view that the degree of lateness, that is, one day, is slight and warrants condonation. Thus, the condonation in this matter ought to be granted.

³ See Erasmus: Superior Court Practice Volume 2 pD1-321.

MERITS

[19] The issue of costs emanates from the Master's refusal to pay the Applicant's costs of the main application even though she conceded all the other prayers sought in the notice of motion. There appears, also, to be a dispute as to the scale at which the costs ought to be awarded, that is, whether it should be on a scale between party and party or attorney and client, in the event it is found that the Applicant is entitled to such costs.

Arguments

[20] The Master is opposing the request for a cost order against her on the basis that she was executing her duties of ensuring an orderly winding up of the Estate and protecting the interests of the minor children who are the beneficiaries in terms of the Will. She contends that if she had not intervened, she would have failed in her duties as the Master, most importantly, she would have failed the beneficiaries and in all probability have been brought to Court by the *Curator ad litem*, who was still threatening to do so.

[21] Furthermore, the Master argues that this Court should not follow the general principle governing costs, that the successful party should have his or her costs, instead it must exercise its discretion and award costs against the Estate or the Applicant in his personal capacity. The basis of this request, according to the Master, rests against the background that, had the Applicant lodged the Liquidation and Distribution account within the prescribed period, alternatively, requested an extension timeously, the Master would not have had to invoke the provisions of section 54 of the Act. The contention is that the Applicant's conduct in the administration of this Estate was dilatory, and he should, therefore, be held accountable by being mulcted with costs. In oral argument in Court the Master's counsel, on a question from the bench, submitted that the Master was opposing the payment of cost and that at best each party should be ordered to pay own costs.

[22] The Master submits that she inadvertently missed the Applicant's application for extension of time within which to file the Liquidation and Distribution account, and acted only on the information that was before her at the time. And, immediately she became aware that the Applicant had launched the account she did not pursue the opposition of the main application and conceded to the relief sought by the Applicant.

Moreover, there was no *mala fide* intent on her part, her intention, which was *bona fide*, was at all material times to do her work and protect the Estate of the minor children who are beneficiaries in the Estate, so it is submitted.

[24] The Applicant, on the other hand, submits that if the Master had complied with her functions and properly performed her duties, there would not have been any need for the Applicant to launch an urgent application in order to protect his appointment as the Executor of the Estate. Furthermore, it is argued that the Master was kept informed by correspondence of the difficulties that the Applicant encountered in the administration of the Estate and the failure by the Master's office to provide him with the consents and certificates, which he required to administer the Estate.

[25] In oral argument before this Court, counsel for the Applicant, referred to two letters (Annexures C and M) which formed part of the record, to rebut any allegations of wrongdoing by the Applicant. The said letters show that the Master was always kept well apprised of the issues and the winding up process of the Estate. For instance, the contention is that, on 28 August 2019 and 7 October 2019, by means of two detailed letters, the Master was given updates. The papers if properly considered demonstrate that the Applicant has only ever been absolutely exemplary in the manner in which he wound up the Estate, so it is argued.

[26] A further argument is that at the hearing of the urgent application, the Master made a tender for party and party costs, and should, therefore, be held to such tender. The contention is that the Applicant can do no worse than receive a cost order ordering the Master to pay the cost of the application on a party and party scale. The sole purpose of the Master's opposition of the cost order is an attempt to avoid a cost order on the attorney and client scale, so it is argued.

Discussion

[27] The grounds raised by the respective parties as to whether a cost order should be awarded against the Master, seeks to impute wrongdoing on each other.

Whether the Applicant is entitled to the costs

[28] In this Court's view, it is disingenuous of the Master to raise the argument that she should not be ordered to pay the costs of the application or that an order be granted that each party pay own costs. The evidence on record shows, clearly so, that

the matter was postponed on 11 March 2021 solely for the purpose of arguing the narrow issue of the scale of the costs to be awarded the Applicant, that is, whether the costs should be granted on an attorney and client scale or not.

[29] The uncontested evidence of the Applicant is that on conceding the relief sought by the Applicant the Master tendered the costs of the application. It was only when the Applicant sought a cost order on an attorney and client scale that the Master opposed the prayer for costs, hence the matter was postponed solely for argument on that narrow issue of the scale at which the costs should be awarded. This Court is thus satisfied that the Master has already tendered to pay the Applicant's costs and should be held to that tender.

[30] Besides, a flexible approach to costs has over the years been developed by our Courts which proceeds from two basic principles. The first principle is that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer. The second is that ordinarily costs follow the result and a successful party is, therefore, entitled to his or her costs.⁴ In this case the Applicant is the successful party and is, therefore, entitled to costs. The question is whether in the circumstances of this matter the Applicant should be granted a punitive cost order.

At what scale should the costs be awarded?

[31] When considering whether to grant a punitive cost order, the Constitutional Court in *Tjiroze v Appeal Board of the Financial Services Board*,⁵ expressed itself as follows:

"[22] . . . There is no reason not to award costs against the applicant. The question is: is the punitive scale prayed for warranted?

[23] In *Public Protector v South African Reserve Bank*,⁶ Mogoeng CJ noted that

"[c]osts on an attorney and client scale are to be awarded where there is fraudulent, dishonest, vexatious conduct and conduct that amounts to an abuse of court process".

Although that was in the minority judgment, I do not read the majority judgment to differ on this. In the majority judgment Khampepe J and Theron J further noted that

⁴ Ferreira v Levin NO and Others 1996 (2) SA 621 (CC) at 624B—C par 3.

⁵ [2020] ZACC 18 para 22 and 23.

⁶ 2019 (9) BCLR 1113 (CC) at para 8.

"a punitive costs order is justified where the conduct concerned is 'extraordinary' and worthy of a court's rebuke".⁷

Both judgments referred to *Plastic Converters Association of SA*,⁸ in which the Labour Appeal Court stated:

"The scale of attorney and client is an extraordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible manner. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium."

[32] Furthermore, it has been held that the Court's reluctance to award attorney and client costs against a party is based on the right of every person to bring complaints or alleged wrongs before the Court to get a decision, and a litigant should not be penalised if misguided in bringing a hopeless case before the Court. If, however, the Court is satisfied that there is an absence of *bona fides* in bringing or defending an action it will not hesitate to award attorney and client costs.

[33] Based on the aforementioned authorities, this Court is of the view that an award of costs on an attorney and client scale is not warranted in the circumstances of these proceedings. It is evident from the evidence of the Master that sets out the circumstances that prevailed at the time she sent the J88 letter to the Applicant, that there were no *mala fide* intentions on her part.

CONCLUSION

[34] This Court concludes, therefore, that a cost order should be awarded against the Master on a party and party scale. These costs must include the costs occasioned by the postponement on 11 March 2021.

ORDER

[35] Consequently, the following order is made:

1. The application for condonation is granted.
2. The First Respondent is ordered to pay the costs of the application on a party and party scale.

⁷ Id at para 226.

⁸ [2016] ZALAC 39; (2016) 37 ILJ 2815 (LAC) at para 46.



E.M KUBUSHI

**JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

APPEARANCES:

APPLICANT'S COUNSEL:

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APPLICANT'S ATTORNEYS:

MANLEY INC ATTORNEYS

FIRST RESPONDENT'S COUNSEL:

ADV MASHABELA

FIRST RESPONDENT'S ATTORNEYS:

STATE ATTORNEY