IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

APPEAL CASE No.: **A90/2021**
COURT a *quo* Case No.: **2122/2019**
REPORTABLE: YES/NO
OF INTEREST TO OTHER JUDGES: YES/NO
CIRCULATE TO MAGISTRATES: YES/NO

In the appeal between:

PHILLIP TSHEPISO MOTSIMA	First Appellant
THANDIWE PATIENCE MOTSIMA	Second Appellant
And	
LIPHAPANG ALBERT KOPA	First Respondent
NTHABISENG MOSOEU-KOPA	Second Respondent
THE TRUSTEES OF THE TIME BEING FOR THE C & D INVESTMENT TRUST	Third Respondent
THE REGISTRAR OF DEEDS, FREE STATE PROVINCE	Fourth Respondent
THE TRUSTEES OF THE VAN DER MERWE FAMILY TRUST	Fifth Respondent

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CORAM: MUSI, JP *et* MBHELE, DJP *et* VAN RHYN, J

HEARD ON: 12 JUNE 2023

DELIVERED ON: 30 JUNE 2023

JUDGMENT BY: VAN RHYN, J

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[1] The appellants, Mr P T Motsima and his wife, Mrs T P Motsima, were granted leave to appeal on 15 July 2021 to the Full Bench of this court against the whole of the judgment and order delivered by Molitsoane J on 8 February 2021. The appellants noted the appeal on 12 August 2021.

[2] Due to a delay in prosecuting the appeal, the appellants have filed a substantive application for condonation for the late prosecution and reinstatement of the appeal which had lapsed. The application for condonation and reinstatement of the appeal is opposed by the first and second respondents (the "Kopas"), third respondent (the "C & D Trust") and fifth respondents (the "Van der Merwe Trust"). The Registrar of Deeds, being the fourth respondent, did not take part in the proceedings.

[3] The appellants purchased the property situated at Woodland Hills Wildlife Estate, known as […] W[…] Road (the "property"), during 2017. The dispute between the parties arose in respect of an agreement concluded between the appellants and the C & D Trust and two separate transfers of the appellants' property. The property was transferred from the appellants to the C& D Trust during 2017 and from the C & D Trust to the Kopas on 1 October 2018.

[4] The appellants sought to impugn the transfer to the C & D Trust as well as the transfer of the property from the C & D Trust to the Kopas on the grounds that the agreement between the appellants and the C & D Trust, which led to the first transfer, constitutes and unlawful *pactum commissorium* and also amounts to *parate executie.* The argument is further that the transaction/agreement entered into by the Kopas and the C & D Trust, which led to the second transfer, is indivisible from a verbal agreement concluded between the appellants and the Kopas and the agreement between the appellants and the C & D Trust. Such transaction/agreement constitutes an unlawful *pactum commissorium* and amounts to parate executie, alternatively the agreement was tainted by fraud.

[5] At the hearing of the appeal, we heard arguments whether to grant condonation for the late prosecution of the appeal and to allow the re-instatement of the appeal as well as arguments on the merits. The chronology of events giving rise to the application for condonation and re-instatement are as follows:

5.1 on 8 February 2021, the trial court found in favour of the respondents (defendants in the court *a quo*) and dismissed the relief prayed for by the appellants;

5.2 on 7 May 2021 the property was transferred from the Kopas to the Van der Merwe Trust. The appellants timeously applied for leave to appeal against the judgment and leave to appeal was granted to the appellants on 15 July 2021;

5.3 there is a dispute between the parties whether the appellants, on filing the record of appeal on 8 November 2021, requested a date for the hearing of the appeal;

5.4 on 8 July 2022 the respondents' attorney sent a letter to the appellants to enquire whether they will be proceeding with the appeal. The appellants failed to respond to the letter;

5.5 on 15 July 2022 the Registrar of this court, in a letter addressed to the parties, stated that the file has been inactive since the lodging of the record on the 8th of November 2021 together with an application for the assignment of a date for hearing, but that the appeal was never prosecuted. The Registrar directed that if any of the parties to the matter intends to proceed with the appeal, the Registrar must be notified in writing within five days of date of the letter, failing which the file will be removed from the system of active files and archived;

5.6 on 26 July 2022 the appellants' attorney, in a letter sent to the respondents' attorney, indicated that they await instructions from their clients regarding the prosecution of the appeal;

5.7 on 18 August 2022 the appellants, in terms of the provisions of Rule 49, applied for a date for the hearing of the appeal;

5.8 on 14 November 2022 the respondents informed the appellants that they have failed to prosecute the appeal as per the Rules and failed to apply for dates within the prescribed time period, notwithstanding the letter addressed to them by the Registrar dated 15 July 2022;

5.9 on 7 December 2022 the appellants indicated that they would be approaching the court with a condonation application in terms of the provisions of Rule 49(6)(b);

5.10 on 9 December 2022 the respondents replied and confirmed that the appeal had lapsed;

5.11 ultimately, on 11 May 2023 the appellants filed their application for condonation for failure to prosecute the appeal within the times prescribed by the Rules, that the appeal be reinstated in terms of Rule 49(5)(b) and that the first, second and fifth respondents be ordered to pay the cost of the application in the event of opposition. The application for condonation was to be heard together with the appeal on 12 June 2023; and

5.12 the respondents filed their answering affidavit to the application for condonation on 26 May 2023, where after the replying affidavit was filed on 2 June 2023.

[6] The appellants noted the appeal, filed the record of appeal and, according to them, also applied for dates for the hearing of the appeal within the times prescribed by the Rules. During or about July 2021 the appellants became aware of the fact that the fifth respondent had placed an advertisement for the sale of the property on a website known as “Property 24”. The appellants were advised by their legal representatives that, should the property be sold to a *bona fide* third party, they will not be able to recover the property from such third party even if they were eventually successful on appeal.

[7] The appeal would be rendered moot in the event of the property being transferred from the current owner, the Van der Merwe Trust to a *bona fide* third party.

[8] In an endeavour to stop the sale and transfer of the property by the Van der Merwe Trust, the appellants issued an application on 16 July 2021 to interdict the sale and transfer of the property pending the finalisation of this appeal. On 7 October 2021 De Kock AJ dismissed the application. Being at risk that the appeal would become moot, the appellants applied for leave to appeal against the judgment of De KocK AJ. The application for leave to appeal was issued on 7 December 2021 and was heard by Opperman J on 6 May 2022. On 30 June 2022 Opperman J refused leave to appeal.

[9] The appellants therefore contend that the delay in prosecuting the appeal was not as a result of their disregard of the Rules, but faced with the situation of being compelled to attempt to protect their interest in the property through litigation, they failed to timeously prosecute the appeal by *inter alia* applying for dates for the hearing of the appeal.

[10] Mr Reinders, for the respondents, argued that an applicant, in an application for condonation, must give a full explanation for the delay which must not only cover the entire period of the delay, but must also be reasonable. In this regard he relied on what was said in **Van Wyk v Unitas Hospital (Open Democratic Advice Centre as *Amicus Curiae*)**[1] that, to grant condonation after an inordinate delay and in the absence of a reasonable explanation, would undermine the principle of finality in litigation and is not in the interest of justice.

[11] The principles relating to applications for condonation are trite. Suffice to state that an applicant for condonation is required, *inter alia,* to address the following: the degree of non-compliance with the rules; the explanation therefor; the importance of the case; a respondent's interest in the finality of the judgment of the court *a quo*; the convenience of the court and the avoidance of unnecessary delay in the administration of justice.[2] The interests of justice predominate in such applications.

[12] Although it seems that the appellants' legal representatives had realised during December 2022 that a condonation application had to be brought in respect of the lateness of the prosecuting of the appeal, that application was only finalised during May 2023. The main reason advanced by the appellants for the late prosecution of the appeal is that an intentional and premeditated decision was taken to resort to legal steps to prevent the transfer of the property to the Van der Merwe Trust and to prosecute such appeal subsequent to the interdict not succeeding, rather than prosecuting the appeal at hand.

[13] Notwithstanding the correspondence to enquire as to the prosecution of the appeal by the respondents' attorneys on 8 July 2022 and the letter by the Registrar dated 15 July 2022, the appellants only applied for a date for the hearing of the appeal on 18 August 2022. As a result of the appellants' decision to rather pursue the application for leave to appeal against the order dismissing the interdict to transfer the property to the Van der Merwe Trust, their appeal lapsed. The period

[1] 2008 (2) SA 472 (CC) at 477 E.
[2] Federated Employers Fire and General Insurance Co Ltd and Another v McKenzie 1969(3) SA 360 (A) at 362F-G; Uitenhage Transitional Local Council v South African Revenue Service 2004 (1) SA 292 (SCA) at [6].

from the 8 November 2021 to 18 August 2022 were being devoted to alternative litigious endeavours rather than prosecution of the appeal at hand.

[14] The explanation proffered by the appellants is far from adequate. The explanation leaves a substantial period of time spanning the entire period of the delay, unaccounted for. The reason that the appeal could not be prosecuted in accordance with the Rules due to a deliberate decision by the appellants to attempt to interdict the further transfer of the property, does not make sense. There is no reason why the appellants, in the meantime, could not have complied with the Rules in respect of the time periods regarding the prosecution of the appeal.

[15] In **Darries v Sheriff, Magistrate's Court, Wynberg & Another**[3] Plewman JA held as follows regarding the general considerations of the court's approach to condonation:

> "Condonation of the non-observance of the Rules of this Court is not a mere formality. In all cases, some acceptable explanation, not only of, for example, the delay in noting an appeal, but also, where this is the case, any delay in seeking condonation, must be given. An appellant should whenever he realises that he has not complied with the Rules of Court apply for condonation as soon as possible."

[16] Condonation will more readily be granted when there is some deficiency or irregularity in noting or prosecution of the appeal than if no steps at all were taken in connection with the appeal.[4] Since the lodging of the record on 8 November 2021, no further steps were taken in the prosecution of the appeal.

[17] An inordinate delay induces a reasonable belief that the order had become unassailable and after such delay a litigant is entitled to assume that the losing party has accepted the finality of the order and does not intend to pursue the matter further.[5] The appellants failed to respond to the respondents' enquiries regarding

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[3] 1998 (3) SA 34 (SCA) at 40 H- 41E.
[4] Palmer v Goldberg 1961 (3) SA 692 (N) at 701H.
[5] Van Wyk v Unitas (*supra*) at 479H- 480A.

their intention to pursue the appeal further during July 2022. At the hearing of this matter, Mr Reinders informed the court that the property has been sold by the Van der Merwe Trust. Transfer of the property to the buyer has not yet been registered, but is pending.

[18] The basic principle is that a court considering condonation has a discretion, to be exercised judicially upon a consideration of all the facts. In essence, it is a matter of fairness to both sides.[6] Counsel for the appellants, Mr Grobler SC, in his heads of argument contends that the only instance of default was the appellants' failure, after timeously applying for the allocation of a date for the hearing of the appeal, to have the appeal enrolled in accordance with the date provided by the Registrar. What this means, is that the appeal could have been enrolled for hearing during November or December 2021 on a date allocated by the Registrar. I fail to understand why this could not have been done. Notwithstanding the appellants' decision to stop the transfer of the property from the Kopas to the Van der Merwe Trust, a mere notice of enrolment would have prevented the lapsing of the appeal.

[19] What is completely absent from the explanation provided by the appellants is the particularity as to what occurred from 30 June 2022, when Opperman J refused leave to appeal in respect of the interdict application, until 18 August 2022 when the appellants applied for a new date to hear this appeal. Evidently, not even the order refusing leave to appeal on the interdict application, jolted the appellants into action to salvage this appeal. I am of the view that the explanation for the delay in prosecuting the appeal is wholly inadequate. The cumulative effect of the decision not to prosecute the appeal in terms of the provisions of Rule 49, the inadequacy of the explanation relating to the delay and the respondents' interests in finality of the litigation, leads to the conclusion that the application for condonation and re-instatement of the appeal cannot succeed.

[20] Regarding the prospects of success, the appellants contend that they concluded a verbal agreement with the C & D Trust in terms whereof the C & D Trust would advance money to them and as security for such amounts advanced, the C &

[6] Melane v Santam Insurance Co Ltd 1962 (4) SA 531 (A) at 532B-E.

D Trust will hold the property on their behalf. They would then be entitled to repurchase the property from the C & D Trust at a pre-determined price. It was never their intention to conclude an outright deed of sale of the property, nor was it their intention to transfer ownership of the property to the C & D Trust. It was also not the intention of the C & D Trust to acquire ownership of the property.

[21] The argument on behalf of the appellants is that the court *a quo* therefore erred in finding, *inter alia*, that the true agreement between the appellants and the C & D Trust was one of a sale of immovable property. The evidence presented by the appellants however reveal that the appellants made a written offer to sell the property to the C & D Trust on 22 February 2017, which offer was accepted on 1 March 2017. The appellants and the C & D Trust furthermore entered into a separate lease agreement in respect of the property. Clause 22 of the lease agreement constituted same to be the entire agreement between the parties. It was recorded that neither party relies upon any warranties, representations, disclosures or expressions of opinion which have not been incorporated into the lease as a warranty or an undertaking.

[22] The lease agreement granted an option to sell the property to the lessee (the appellants) at a fixed price. During his testimony Mr Kopa conceded that he was not able to re-purchase the property in accordance with the written agreement due to financial constraints. He also realized that the property will be transferred to the C & D Trust. Both appellants signed the Power of Attorney to effect the transfer accordingly. The property was subsequently sold and transferred by the C & D Trust to the Kopas.

[23] I agree with the submissions on behalf of the respondents that the appellants undoubtedly understood that they were to sell their property to the C & D Trust and by doing so they renounced all right, title and interest which they had in respect of the property. There was no moneylending scheme through which they were defrauded. The evidence presented by the appellants during the trial failed to prove that they did not intend to change ownership of the property. The real right was properly and knowingly transferred to the C & D trust. To my mind, the trial court did

not err in its conclusions and rightfully so, dismissed the appellants' claims. The prospects of success are remote and unrealistic.

[24] It has been stated that the existence of prospects of success in favour of the party seeking condonation is not decisive, but it is a weighty factor in favour of condonation. In these circumstances, the appellants' prospects of success, even if they were assumed to be strong, of which I am not convinced, could not salvage the appellants' wholly inadequate explanation.

ORDER:

[25] In the result I would thus make the following order:

The application for condonation and re-instatement of the appeal is dismissed with costs.

VAN RHYN J

I concur.

MBHELE DJP

I concur.

MUSI JP

It is so ordered.

On behalf of the Appellants: **Adv S GROBLER SC**
Adv R VAN DER MERWE

Instructed by: MAREE & PARTNERS ATTORNEYS
BLOEMFONTEIN

On behalf of the First, Second and Fifth Respondents:	**Adv S J REINDERS**
Instructed by:	VAN WYK & PRELLER ATTORNEYS
	BLOEMFONTEIN