

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case Number: **2021/53980**

(1) REPORTABLE:
(2) OF INTEREST TO OTHER JUDGES:
(3) REVISED:

SIGNATURE

DATE

In the matter between:

ARTWELL MNISI
(IDENTITY NUMBER: [...])

Applicant

And

INNOCENTIA THANDEKA NHLAPHO
(IDENTITY NUMBER: [...])

Respondent

Judgment

GREEN, AJ

1. This application arises from an unfortunate recourse to formality by both parties. I will refer to the parties as they are referred to in the main application to avoid confusion of switching roles of applicant and respondent in that which served before me.

2. Before me is an application by the respondent for an order that the applicant has not correctly applied for condonation for the late filing of her replying affidavit.

That application was in turn met with an application to strike out by the applicant. This has generated a great many pages of affidavit.

3. The main application is one in which the applicant seeks an order that will have the effect of dividing the applicant and the respondent's interests in an immovable property. Commendably the parties engaged in a mediation process to see whether they could resolve their dispute. Regrettably the mediation process did not bear fruit.

4. The applicant filed her replying affidavit late. Included within her replying affidavit is a section headed "Condonation" in which the applicant sets out the grounds upon which she seeks condonation for the late filing of her replying affidavit.

5. The respondent's objection to the applicant's request for condonation is that the applicant did not deliver a condonation application as contemplated by Rule 6, but instead embodied her request for condonation within her replying affidavit.

6. At the commencement of the hearing I enquired from the parties what it was that I was required to determine in this application. I made this enquiry because in the notice of motion that serves before me the respondent seeks an order that I declare that the applicant has not correctly sought condonation and that her replying affidavit be struck out, and as an alternative, and in the event that I find that there is a valid condonation application then the respondent seeks leave to file a further affidavit to deal with what is suggested to be new matter contained within the replying affidavit. On my assessment the alternative relief sought by the respondent implies that I am required to determine the merits of the condonation application if I were to find that it was properly brought. Both the applicant and the respondent's counsel dealt with this and after some debate there was agreement that the issues that I am required to determine in this application are the following:

6.1. Firstly, is there a condonation application. This was referred to as the Rule 30A application;

6.2. Secondly, should the applicant's application to strike out be granted. This was referred to as the striking out application;

6.3. Thirdly, should condonation be granted on the merits. This arises only if I find that there is a condonation application.

6.4. Fourthly, should the respondent be granted leave to file a further affidavit to deal with new matter in the replying affidavit. Again, this only arises if I find that there is a condonation application, and if I find that condonation ought to be granted.

Is there a condonation application?

7. The point of the respondent's submissions in this respect is that the applicant is enjoined to follow Rule 6 and must bring a separate, and substantive, application for condonation. An application for condonation cannot, so the respondent argued, be incorporated into the replying affidavit.

8. The respondent is undoubtedly correct that the preferable way in which to seek condonation is to do so by following the procedure set out in Rule 6. It does not however follow that where a different procedure is employed a court ought to ignore which is put up by a party.

9. In my experience there are matters where parties have sought condonation within the affidavit that has been filed, and without delivering a separate application as contemplated in Rule 6. Sometimes it is suggested that the condonation will be sought at the hearing of the matter. That is not ideal, but it is a process that is sometimes employed.

10. In this matter the respondent has recognised that what the applicant has sought to do is to apply for condonation. There is no suggestion that the respondent does not know what the applicant has done, and that he is accordingly unsure of the case he must deal with. That being so it is my view that it would be wasteful to the parties, in the circumstances of this matter, and at this stage of the proceedings, to ignore which has already been traversed by the parties.

11. Further, courts ought, in my view, to regulate their processes to ensure that parties receive a fair, efficient and expeditious hearing. Courts are not slavishly

bound to the Rules but are instead required to use the rules to facilitate the fairness and efficiency of the hearing.

12. In my view the point taken by the respondent that Rule 6 has not been followed where there is what is plainly a request for condonation contained within the replying affidavit amounts to placing form above substance, and would result in an inefficient process. I have already said that the respondent understood the applicant to be applying for condonation and so there is no unfairness to the respondent if Rule 6 is not followed.

13. I therefore find that the applicant has bought a condonation application for the late filing of her replying affidavit. In making this finding I should not be understood to be condoning the non-compliance with Rule 6 as universally acceptable. My finding is limited to the facts of this matter, and to the regulation of the process in this matter.

The striking out application

14. Mr Dhlamini who appeared for the applicant did not press the striking out application and it was agreed that it is not necessary for me to decide the merits of that application.

15. I will deal with the costs of the striking out application below.

The merits of the condonation

16. When dealing with condonation the applicant has dealt with the usual requirements of explaining her delay, her prospects of success and the absence of prejudice to the respondent.

17. Mr Phaswane who appeared for the respondent urged me to refuse the condonation on its merits. In advancing this argument he focused on the applicant's explanation for her delay.

18. In respect of the applicant's explanation for her delay Mr Phaswane urged me to start the clock for counting the delay from August 2022 which is when the replying affidavit would have been due if it had been filed 10 days after the answering

affidavit. The difficulty with that approach is that the respondent had agreed to allow the applicant to file her reply by 10 February 2023 and in so doing had agreed to extend the time for the filing of the replying affidavit. This extension of time is consistent with the applicant's reference to settlement discussions having broken down in February 2023. In my view the delay that requires explanation is to be counted from 10 February 2023.

19. When explaining her delay the applicant has picked up the story from 9 March 2023 when she terminated the mandate of her erstwhile attorneys and explained how she had to pay her erstwhile attorneys, retrieve her file and allow her new attorneys to get up to speed and prepare the replying affidavit. What is conspicuous by its absence is an explanation of what occurred in February 2023. Mr Phaswane made the point that this ought to have been explained. I agree. Mr Dhlamini who appeared for the applicant suggested that the applicant's erstwhile attorneys had not kept her informed of the developments in the matter and that is why their mandate was terminated. That is not on the papers and Mr Dhlamini accepted that. At the end of the day the applicant's explanation of her delay is not as comprehensive as it could have been.

20. However, against the explanation for the delay I must weigh the prejudice the respondent will suffer if condonation is granted. The only cognisable prejudice to the respondent was the delay in the progression of the main matter. That said this application has delayed the progression of the main matter for a year. It therefore seems fair to conclude that delay in the progression of the main matter is not substantial prejudice for the respondent.

21. The applicant has set out that she has reasonable prospects of success. On the papers before me it cannot be said that the applicant's claim is flawed. Given that this is condonation application I do not express any firm views on the strength of the applicant's claim, that being something for the court that will deal with the main application; but I do find that the applicant has sufficient prospects of success to sustain a condonation application.

22. Notwithstanding the deficiencies in the applicant's explanation for her delay I am of the view that the applicant has made out a case for the condonation for the

late filing of her replying affidavit. I will therefore condone the applicant's late filing of her replying affidavit.

Should the respondent file a further affidavit?

23. During argument Mr Phaswane was asked to point out the paragraphs in the reply that contained new matter to which the respondent wished to file a further affidavit. There was some debate about this. In the end two issues were identified namely: the issues in paragraphs 30 and 34 of the reply dealing with the payment of the bond and the rates; and the issue in paragraph 170 dealing with a cost order on a *de bonis propriis* basis.

24. The *de bonis propriis* cost order is new matter. On my reading of the reply there are no facts alleged to indicate that a *de bonis propriis* order might be granted. However, and as an abundance of caution, I will grant leave the respondent's attorneys to file an affidavit in answer to the request for a *de bonis propriis* cost order.

25. Whether the issues in paragraphs 30 and 34 are new matter is arguable. In an effort to ensure that this matter is not further delayed and that the parties have given an opportunity to say what they need to, I will err on the side of caution and allow a further affidavit to be filed on the issues in paragraphs 30 and 34.

26. In granting leave to the respondent and his attorney to file further affidavits I make the point that those further affidavits must be confined only the issues that are circumscribed in the those paragraphs. Further, and at the risk of stating the obvious, but I do so because of the style and language that has been employed in the papers so far, I remind the parties that the further affidavits should set out only the further facts on which the respondent relies. Affidavits are not the place where a matter is to be argued, and emotive and adjectival language seldom adds to the content of the facts.

Costs

27. Costs are a matter of discretion.

28. In this matter the respondent's R30 is to be dismissed. To balance this there is the applicant's application to strike out which although not dismissed is not decided in favour of the applicant. In this sense both parties have lost an application.

29. My decision to grant condonation has a preliminary assessment of the merits of the main matter bound up in it. Time will tell whether my preliminary assessment of the merits of the main matter is correct. That being so, and in the context of this matter, the fair order for the costs in respect of the applicant's application for condonation is to make the costs of that application costs in the cause. The rules relating to costs have been changed with effect from 12 April 2024 and that I am required to indicate the scale on which Counsels fees are to be taxed. I will direct that counsel's fees are to be taxed on scale A.

30. In the joint practice note it is recorded that Mr Phaswane appeared in this matter *pro amico*. That is in the best traditions of the Bar to assist litigants in obtaining representation, and he is to be condemned for that.

31. For the reasons set out above I make the following order:

1. The respondent's application in terms of R30 A to declare that the applicant had not applied for condonation is dismissed.
2. There is no order on the merits of the applicant's striking out application.
3. The late filing of the applicant's replying affidavit is condoned.
4. The respondent is granted leave to file a further affidavit in response to paragraphs 30 and 34 of the replying affidavit should he wish to do so.
5. The respondent's attorneys are granted leave to file an affidavit, should they so wish, in response to the allegations of a *de bonis propriis* cost order in paragraph 170 of the replying affidavit should they wish to do so.
6. There will be no order for costs in respect of the respondent's application in terms of R30A and the applicant's application to strike out.
7. The costs of the applicant's application for condonation will be costs in the cause, such costs to be on the scale between party and party and counsel's costs to be on scale A.

I. GREEN

Acting Judge of the High Court
Gauteng Division of the High Court, Johannesburg

Delivered: This judgment was prepared and authored by the Judge whose name is reflected on 16 April 2024 and is handed down electronically by circulation to the parties/their legal representatives by e mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 16 April 2024.

Date of hearing: 15 April 2024

Date of delivery of judgment: 16 April 2024

Appearances:

For the plaintiff: Adv MS Phaswane

Instructed by: Qhali Attorneys

For the defendant: Adv Phillip Dhlamini

Instructed by: SN Mazibuko Attorneys