



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES / NO

(3) REVISED

2023.10.23

DATE

SIGNATURE

CASE NO: 18229/2011

Date: 23 October 2023

In the matter between:

MALESELA FRANS MOSUWE

Applicant

and

MINISTER OF POLICE

First Respondent

MINISTER OF JUSTICE AND CORRECTIONAL

Second Respondent

SERVICES

JUDGMENT

MABUSE J

[1] This matter conflates two applications. The first one is an application to condone the Applicant's failure to comply with rule 49(1)(b) of the Uniform Rules of Court (the rules) regarding the order and judgment (the judgment) of this court handed down on 11 August 2021 within the period set forth in that rule. The second one is an application for leave to appeal to either the Full Court of the Gauteng Division or the Supreme Court of Appeal against a refusal by this Court to condone the Applicant's late service of a notice and for non-compliance with the provisions of section 3(1)(a) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 (the Act) and for leave to pursue his claim against the Respondents with pleadings already filed. Both these applications are opposed by the Respondents.

[2] By agreement between the parties the two applications were heard together. The parties informed the court that it could make determinations on the applications as it pleased. It was made clear to the parties that if the application for condonation was unsuccessful, the application for leave to appeal would automatically fail.

[3] In its consideration of the application of the condonation, the court will have regard to, inter alia, the following factors:

[3.1] the explanation tendered for the delay.

[3.2] the degree of noncompliance.

[3.3] the prospect of success.

[3.4] I the importance of the case.

[4] It is unnecessary to set out the reasons for this Court's judgment both on the merits of the judgment and the order of the Court in which it refused the Applicant's condonation application. The facts which led to this application for condonation appear from the founding affidavit of Mr Sello Isaac Makhafola (Mr Makhafola), the Applicant's attorney of record. But there are certain allegations by the said attorney which should be dealt with. These facts disclose not only ignorance of the Rules of Court but an incredible degree of negligence by an attorney in the prosecution of an appeal of the Applicant.

[5] In his founding affidavit, Mr Makhafola testified that he received the judgment on 11 August 2021. Upon receipt of the judgment and, believing that counsel would attend to the brief within the time limits set out by the rules, he emailed it immediately to his counsel with instructions that counsel should proceed to prepare an application for leave to appeal. In terms of rule 49(1)(b) the said application for leave to appeal was supposed to be lodged within 15 court days reckoned from 12 August 2021, failing which the Applicant's attorneys would be obliged, in terms of rule 27, to lodge an application for condonation.

[6] He was in court on 30 August 2021. He was busy attending to trials for the whole month of August 2021. As a result, he was only able to consider the judgment after August 2021, which means only in September 2021.

[7] On 1 September 2021 he called counsel to find out if counsel had emailed to him the application for leave to appeal and, if not, how far he was with its preparation. There is no indication in his testimony whether he was able, on this occasion, to speak to counsel. After 1 September 2021, he made several calls to counsel, without any success. Counsel was not available. His testimony is silent on this aspect. One can only surmise that he did not speak to counsel for the whole of September 2021, until the first week of October 2021.

[8] In the first week of October 2021, by which time the period mentioned in rule 49(1)(b) would have passed and during a pre-trial conference, he enquired from counsel whether he had prepared the application for leave to appeal. Counsel only promised to forward to him the draft of the application on that evening. Counsel never did. Nowhere in his affidavit does he state that he had advised counsel that the matter was urgent. He also does not state that he advised counsel that the time for lodging the application for leave to appeal had expired. Quite obviously he did not put any pressure on counsel to expedite the preparation of the application for leave to appeal. He certainly did not regard this matter as urgent. He called counsel again on subsequent days, but counsel was not available. So, counsel never returned his calls. There is no evidence in this regard.

[9] On 21 October 2021 he briefed another counsel to prepare the application for leave to appeal. This new counsel, Adv Kwindu, provided him with a draft application for leave to appeal on 13 November 2021, even then only for the purposes of perusal and discussion. It is difficult to fathom out what exactly took counsel so long, from 21 October 2021 to 13 November 2021, to prepare a draft for purposes of perusal and discussion. No explanation has been furnished in this regard. It was while he was perusing the draft application for leave to appeal that it dawned on him that an application for condonation was necessary. The impression that the attorney has given as to when it dawned upon him that an application for condonation

was required, constitutes a convincing indication that the attorney was not even aware of the provisions of rule 49(1)(b) or, if he was aware of those provisions, he simply ignored them.

[10] On 26 January 2022, his counsel provided him with the final application for leave to appeal and having done so, requested him to proceed with an application for condonation. He could only complete the preparation of the application for condonation on 30 January 2022. That is the current application before court. Still, no explanation has been furnished why it took his second counsel so long to prepare an application for condonation, from 13 November 2021 to 26 January 2022.

[11] He submits, based on the foregoing, that:

[11.1] he has done everything to comply with the rules of this court but was only disappointed;

by his first counsel;

[11.2] the Applicant was aware of the need to deliver an application for condonation and that

he would proceed with same when time came;

[11.3] the delay was caused by his previous counsel who had undertaken to prepare the

application for leave to appeal but who failed to do so.

[12] Eventually Mr Makhafola failed not only to comply with the requirements of rule 49(1)(b) but also to deliver the application for leave to appeal within a reasonable time of 1 September 2021. He attributes the delay to the conduct of his first counsel and his busy schedule as an attorney.

[13] According to Mr Makhafola, on 11 August 2021 he emailed immediately a copy of the judgment to counsel with instructions to counsel to proceed with the preparation of the application for leave to appeal

[14] Mr Makhafola states further that: *“I submit that I believed that counsel on brief will attend to prepare leave to appeal in order for us to submit same within the prescribed time limit, however it turned out not to be the case.”*

No reasons have been furnished in his evidence why he believed that counsel on brief would prepare the application for leave to appeal on time. The buck stops with the attorney. An attorney does not brief counsel to do something and thereafter adopt a supine attitude with the hope that counsel will do the necessary, without being followed up by the attorney. It behoved the attorney to make a follow up. If he failed to do so, then he is negligent. He is guilty of dereliction of duty.

[15] On the last day, in other words, the 1st of September 2021, he called counsel to establish how far counsel was with the preparation of the application for leave to appeal. He does not disclose what was said or what happened during this conversation, if there ever was a conversation, whether he spoke to counsel or not or whether he did not find counsel. But the 1st of September 2021, being the last day on which the applicant had to deliver his application for leave to appeal, still the attorney did nothing even when he was aware that he did not have any assurance that the application for leave to appeal would be delivered on that date. Once he realised that he had some difficulties with complying with the time frames set out in the rules of court, he had the following options to take:

[15.1] firstly, without delay, he could have approached the other side, in terms of rule 27(1), and requested their consent to the late filing of the application for leave to appeal; or, if the other side refused,

[15.2] secondly, he could have approached the Court urgently on notice for an extension of an order extending or abridging any time prescribed by rule 49(1)(b). An application for extension of time may be entertained by a single judge and not only by the court hearing the appeal.

[16] Mr Makhafola did not follow either of the two avenues open to him. The founding affidavit hardly contains an explanation why he did not utilise the provisions of rule 27(1) of the rules of court or the provisions of Rule 49(1)(b) when he was aware that once the 1st of September 2021 passed, so would the 15 days set out in Rule 49(1)(b). Quite clearly, this application for condonation asked for is based on the attorney's ignorance of the Rules that provide for applications for leave to appeal. One would have thought that the attorney would have taken the trouble to study the Rules of this Court regarding appeals and condonations, which are only two. So, this court is of the view that the attorney's explanation is unsatisfactory. There are no bona fide errors or omissions. In my view, it is inevitable that the delay was entirely due to the neglect of the Applicant's attorney. While this court accepts that courts are reluctant to penalise a litigant for the conduct of such litigant's attorney, it accepts, at the same time, that there are limits through which a litigant cannot escape the result of the lawyer's lack of diligence. This was demonstrated in **Saloojee and Another, NNO v Minister of Community Development 1965 (2) 135 (A.D.)** In this judgement it is stated that:

“Condonation of the non-observance of the Rules of the Appellate Division is by no means a mere formality. It is for the applicant to satisfy that Division that there is sufficient cause for excusing him from compliance, and the fact that the respondent has no objection, although not irrelevant, is by no means an overriding consideration.

An appellant should, whenever he realises that he has not complied with a Rule of Court, apply for condonation without delay.”

In this case, the attorney waited for 152 days, which includes weekends, to launch an application for condonation. This, in my view, is an inordinate delay. There is no explanation as to why he did not realize immediately that an application for condonation was required.

[17] In his heads of argument counsel for the Respondents referred the court to paragraph [39] of the judgment of **Minister of Agriculture and Land Affairs v C.J. Rance 2010 (4) SA109 (SCA)**, where the court had following to say:

“Condonation must be applied for as soon as the party concerned realises that it is required. The onus to satisfy the court that all requirements under section 4(b) of the Act have been met is on the Applicant.”

This matter deals with an issue relating to whether the Respondent, C J Rance, had satisfied the requirements of s 3(4)(b) of the Act. Prescription was not an issue. It found that the court below had granted condonation for the late delivery of the notice in terms of rule 3(1)(a) in circumstances where the Respondent had not satisfied the requirements of section 3(4)(ii) and (iii).

In Saloojee’s judgment above, the court stated at p. 141C-E that:

“There is a limit beyond which a litigant cannot escape the results of his attorney’s lack of diligence, or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations ad misericordiam should not be allowed to become an invitation to laxity. In fact, this court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the Rules of this Court was due to neglect on the part of the attorney. The attorney, after, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condemnation of a failure to comply with a Rule of

Court, the litigant should be absolved from the normal consequences of such relationship, no matter what the circumstances of the failure are.”

[18] Where a litigant relies on the ineptitude or negligence of his lawyer, he should show that it is not to be imputed to him. See in this regard, **Louw v Louw 1965(3) SA 750 [E.C.D.]** In this application, the Applicant has, unfortunately, not filed any affidavit in which he attributes the failure to comply with the Rules of Court to his attorney.

[19] Rules of Court, or some of them, set out time limits within which litigants, or some of them, are obliged to take certain steps. Litigants are, for purposes of progress, fairness, and expedience, obliged to always obey the rules under which they operate In this regard, see paragraph [14] of the judgment of **Minister of Agriculture and Land Affairs v C J Rance 2010(4) SA 109 page 113** in which the court cited with approval paragraph [9] of the judgment of **Mohlomi v Minister of Defence 1997(1) SA 124 (CC)**. In terms of the provisions of Rule 27(3) of the Rules of Court, the Court may, on good cause shown, condone any non-compliance with these rules. Certain factors are usually relevant. The weight to be given to such factors depends on the circumstances of each case. These factors are not individually decisive. They must be weighed the one against the other. The courts have a discretion that must be exercised judicially upon a consideration of the facts of each case. In essence it is a matter of fairness to both sides.

Considering the evidence of Mr Makhafola that he was busy with trials the whole of August 2021, I am of the view that the following observation by Rumpff J.A. in **Kgobane and Another v Minister of Justice and Another 1969(3) SA 365 [A.D]** at p.369A-C is apposite: *“The attorney for the applicants attributed his neglect to observe the Rules of this Court and to ensure that his instructions were carried out to his working under pressure and being away from his office. When an attorney tells this Court, in effect, that he is too busy to study the Rules*

of this Court and to supervise the prosecution of an appeal, his explanation is quite unacceptable. In my view this is one of the worst cases of disregard of the Rules of this Court that have come before it. Not only was there an appalling remissness by the attorney's assistant in prosecuting the appeal but a persistent failure on the part of the attorney to acquaint himself with Rules of this Court, even after he had become aware that did not know them. The result of this gross negligence of the attorney and his assistant was an inordinate delay." Accordingly, this court finds that the explanation given by Mr Makhafola is unacceptable. Over and above it lacks essential details.

[20] It is of paramount importance to point out the reason, or one of the reasons, why a client would approach a particular attorney for legal assistance. This is crucial because it demonstrates the confidence that a client has in the skills with which an attorney performs his duties. Your client comes to you because, in his view, you are a specialist in a particular field. In fact, as far as he is concerned, you are supposed to be: "*a man of affairs*". If it were not for that, your client would not have come to you.

[21] In his application for admission as an attorney, an applicant, such as Mr Makhafola, will often state in his founding affidavit that during training or during his tenure as a candidate attorney, he was taught, among others, the Rules of Court and how they operate. He will declare that he knows how such rules operate. The attorneys' duties include, inter alia, not only to read the Rules of Court but to learn them and to know how they operate. Therefore, this court must accept that the attorney had learned rule 49 of the Rules of Court and that he knows how it operates. In **Moaki v Reckitt and Coleman (Africa) Ltd and Another 1968 (3) 98 A.D. at page 101**, the court had the following to say about the elementary obligation of an attorney to know the rules under which he operates:

“An attorney who is instructed to prosecute an appeal is in duty bound to acquaint himself with the procedure prescribed by the Rules of Court to which a matter is being taken on appeal.”

He therefore knew or should have known that leave to appeal against the judgment or order of the court was required and that, where such leave was not applied for at the time of the judgment or order, such leave to appeal had to be applied for within 15 days after the date of the order or judgement appealed against.

[22] Legal Practitioners in this country have a reasonable standard of care that is expected from them and to which they strive as a profession. Once such care is below that standard and causes harm to a client, the attorney opens himself up to a claim by his client on the basis that his claim prescribed while it was in his hands. The Applicant’s attorney was obliged to pursue the Applicant’s claim with reasonable care, skill, and diligence. Mokgoatlheng J. as he then was, cited with approval, in **Ramonyai v L P Molohe Attorneys (2010/29310) [2014] ZAGPJHC 65 (257 Feruary 2014)**, the following passage from **Honey & Blanckenberg v Law 1966(2) SA 43 (R) at p.46E-G**:

“An attorney’s liability arises out of contract and his exact duty towards his client depends on what he is employed to do..... In the performance of his duty or mandate, as attorney holds himself out to his clients as possessing adequate skill, knowledge and learning for the purpose of conducting all business that he undertakes. If, therefore, he causes loss or damage to his client owing to a want of such knowledge as he ought to possess, or the want of such care he ought to exercise, he is guilty of negligence giving rise to an action for damages by his client.”

In conclusion on this aspect, I am of the view that the Applicant has not satisfied this Court that good cause exists for the granting of condonation in this application.

[23] I now turn to the prospects of the applicant's appeal. To succeed with his application for coordination it is important that the applicant should show the prospects of success of the appeal, if the application for leave is granted. The judgment dealt with all the relevant issues and, in all fairness to the reader of these documents, I do not intend repeating in this judgment what is already stated regarding the prospects of success in the judgment that is sought to be appealed against. I do however, respectfully refer to that judgment for the exposition of those issues in Annexure "SM2" to the founding affidavit of Mr Makhafola. Those issues demonstrate conclusively, in my view, that if granted leave to appeal, the applicant will not have any prospect of success. For instance, in his amended particulars of claim (poc) and in his counsel's heads of argument, the Applicant's cause of action is based on the events that took place on or about July 2003 at Polokwane. In his argument in the application for condonation for the Applicant's late service of the s 3(1)(a) notice of the Act, counsel contended that the Applicant's cause of action did not arise in July 2003 but did so in October 2008 when he received the court order in which he was notified of the success of his appeal. Now in his current application for leave to appeal, counsel contends that the Applicant acquired knowledge of the debt on 2nd December 2009. This was never the Applicant's initial case that the Respondents had to meet. This aspect was dealt with in paragraph [23] of the judgment. Be that as it may, as I already have indicated, I have dealt with this issue in the judgement. I dealt with the Applicant's failure to comply with the provisions of s 3(1)(a) of the Act and with the circumstances under which, in terms of s 3(4)(b)(i) of the Act, a court may not grant condonation (see paragraphs [21] and [22] of the judgment). I am satisfied that the Applicant has no prospects of success, if granted leave to appeal. The judgment dealt with other factors which show clearly that it will serve no useful purpose to grant the Applicant's application for condonation. In my view, the appeal lacks merit and therefore, condonation ought to be refused. See in this regard **Marco Fishing (Pty) Ltd v Germfarm Investments (Pty) Ltd**

[2003] 4 All SA 614 (C) at paras 31-33, where the Court per Van Reenen J had the following to say:

“[31] It is generally accepted that there are two primary requirements for the favourable exercise by a court of its discretion as regards the granting of condonation. The first is that the party requiring condonation must provide an explanation of how the default came about in sufficient detail to enable the court to assess his/her/its conduct and motives. (Silber v Ozen Wholesalers (Pty) Ltd 1954(2) SA 345 (A) at 353(A).

The second is that the party seeking condonation must satisfy the court that he/she/it has a bona fide cause of action. (See Promedia Drukkers en Uitgewers (Edms) Bpk v Kaimowitz and Others 1996 (4) SA 411 (C) at 418C or defence. (See: Chetty v Law Society Transvaal 1985 (2) SA 756 (A) at 765B-C which prima facie carries some prospects of success. These requirements are not individually decisive but interrelated and are weighed the one against the other as well as against an additional requirement namely, the absence of prejudice that cannot be cured by an appropriate order of costs.

[32]

[33] I have already found that Gemfarm’s affidavits of 11 February 2003 and 13 February 2003 constitute an abuse of the process of this court and would fall to be struck out admitted. That being the case, the application for condonation fails on two grounds. The first is the inadequacy of the explanation for the default affidavits in question timeously and the second is the same practical and policy considerations that prompt courts to refuse an indulgence in respect of proceedings that lack merit. (My own underlining) (See Bloemfontein Board Nominees Ltd v Maloney’s Eye Properties BK en n’ Ander 1993(3) SA 4742 (O) at 446L-447B.”

But there is another aspect that militates against the granting of the application for condonation. The Applicant's attention has been drawn to that aspect, but no steps have been taken on behalf of the Applicant to remedy the situation. That aspect is a plea of non-joinder (see paragraph [24] of the judgment) of the Minister of Constitutional Development, who is responsible for the actions of judicial officers. This special plea is not dismissive of the Applicant's claim but nevertheless it is a plea that has been taken on the papers and which this court must consider.

[24] There are, however, other reasons why the application could be dismissed. Included in those reasons is the fact that the Applicant's attorneys lacked candour in failing to inform the appeal court that:

"The matter went on appeal on the 6th of October 2008 before the Transvaal Provincial Division under case number A545/2005 and the said appeal was successful. Our client was therefore released.

This is what was stated in the Applicant's attorney's letter dated 2 December 2009. That is how the matter of the Applicant's appeal was placed before the court. This information was of paramount importance, and I have stated the reason for its importance in paragraph [19] of the judgment.

In conclusion on this point, I am of the view that there are no prospects of success and the application for condonation should be refused, on this point alone. There are no merits in the application for leave to appeal.

[25] Finally, it is the conduct of the Applicant's legal team that determines whether they regarded the matter as important. From the analysis of the evidence adduced, it is quiet plain that the Applicant's legal team did not regard this matter as important. This is demonstrated in

the nonchalant and lackadaisical way in which they handled a simple application for leave to appeal; the lengthy periods it took them just to prepare the application and to lodge it and their complete disdain of the Rues of Court.

[26] In the light of the order I contemplate making in this application for condonation, I deem it unnecessary to deal with the application for leave to appeal. The Order I make consequently is as follows:

The Application for Condonation is hereby refused.



P M MABUSE

JUDGE OF THE HIGH COURT

Appearances

Counsel for the Applicant:	Adv T C Kwinda
Instructed by:	Makhafola & Verster Inc;
Counsel for the Respondents:	Adv F Phamba
Instructed by:	The State Attorney
Date of hearing:	14 June 2023
Date of Judgment:	23 October 2023.