



**IN THE HIGH OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

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| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: YES |

Date: **2 September 2022** Signature: *R. Neukircher*

Case No: **11862/2012**

In the matter between:

**THE NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS**

Applicant

and

JOHANNES COENRAAD WESSELS
THE MINISTER OF POLICE

First Respondent

Second Respondent

JUDGMENT – APPLICATION FOR LEAVE TO APPEAL

NEUKIRCHER J:

[1] This is an application for leave to appeal (LTA) the judgment and order handed down by me on 19 October 2019. The LTA is dated 16 February 2022 and was uploaded to Caselines on 20 April 2022. I received the notification of the application on 11 August 2022 and asked the parties to file heads of argument by 26 August 2022 – the application was decided on paper. The parties are referred to herein as they were a quo.

[2] Together with this inordinately¹ late application, the defendant filed an application for condonation. In this application the defendant states:

- 2.1 that the State Attorney and the defendant only became aware of the judgment in March 2021 when the plaintiff delivered a Notice of Taxation;
- 2.2 the defendant's attorney left the Office of the State Attorney and *"the matter was allocated to a new attorney who knew nothing about it"*;
- 2.3 that no-one was notified of the judgment being handed down and the counsel who attended to the trial were not informed of the date of handing down of judgment and neither did the plaintiff inform defendant of this;
- 2.4 after the judgment was received in March 2021, counsel (who appeared at the trial) was requested to prepare a memo on prospects of success on appeal and advised defendant there were none²;
- 2.5 the defendant was not satisfied with counsels advice and directed the State Attorney to obtain a record of the trial and instruct new counsel who advised that there are prospects of success³;

¹ Which is conceded by the defendant – it is 25 months late

² When this memo was received is not stated

³ No dates are provided for any of this

2.6 the record of the trial proceedings “were only received recently”⁴;

2.7 that there are very good prospects of success on appeal.

[3] In **Van Wyk v Unitas Hospital (Open Democratic Advice Centre as amicus curiae)**⁵ the court stated:

“[20] This Court has held that the standard for considering an application for condonation is the interest of justice. Whether it is in the interest of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this inquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success.”

The applicant must give a full explanation for the delay and the explanation must cover the entire period of delay and the explanation must be reasonable. Condonation in that case was refused because the applicants “*explanation for the inordinate delay*⁶ *was superficial and unconvincing.*”⁷

[4] In **Valor IT v Premier, North West Province**⁸ it was stated that the prospects of success on the merits also play a role in the grant or refusal of the application of the application as “*[i]t must be borne in mind that the grant or refusal of condonation is not a mechanical process but one that involves the balancing of often compelling factors. So, for instance, very weak prospects*

⁴ No date is provided

⁵ 2008 (2) SA 472 (CC) at paragraph 20

⁶ Which was 11 months

⁷ At paragraph 22

⁸ 2021 (1) SA 42 (SCA) at paragraph 38

of success may not offer a full, complete and satisfactory explanation for a delay; while strong merits of success may exercise an adequate explanation for the delay (to a point)."

THE DELAY

[5] The true extent of the defendant's delay with regard to the LTA is apparent from the plaintiff's answering affidavit:

5.1 the Notice of Taxation was served on the State Attorney on 6 August 2020;

5.2 the Bill of Costs was then taxed on 2 March 2021 and the taxed Bill of Costs was emailed to Ms Tshivhase at the State Attorney on 15 March 2021;

5.3 the LTA was filed only after the Sheriff had attached Defendant's property pursuant to a writ of execution on 7 February 2022;

5.4 a letter, written by Ms Tshivhase to plaintiff's attorney dated 18 February 2022 is also rather elucidating in that she states inter alia:

"3. *The hearing of the quantum aspect on the matter was postponed during the month of November 2021 after the National Director of Public Prosecutor indicated that it sought to consider its options, especially regarding prospects of appeal as it was considering the issue.*

4. *We have since considered our options and client has instructed us to proceed launch appeal against the judgment i(n) the matter.*

5. *We learned that you had nevertheless prepared and taxed the bill of costs in the trial and the money is apparently due and payable*

to your good-self. However, when you prepared and taxed the bill of costs, on 02nd March 2021, client had not taken a decision to appeal the judgment in the matter, which it now has.

6. *We understand that subsequent to taxing the bill of costs, you have served our client with a writ of execution dated 02nd December 2021 and demanded payment.*
7. *We have been instructed that the Sheriff, upon not being paid the amount presented to client as owing in terms of the taxed bill of costs, then attached several assets (all of which – motor vehicles) belonging to client.*
8. *We wish to inform you, as you may already be aware at the present moment that we have since issued the notice of application for leave to appeal (“Leave to Appeal”) as well as the application for condonation against the late filing of leave to appeal. Both have already been issued and served upon your good-self.*
9. *You are therefore hereby requested not proceed with the execution of the writ pending finalization of the appeal proceedings and any other ancillary process...”*

[6] Paragraph 3 of the Letter is rather interesting as it appears that the quantum portion of this trial was set down for hearing in November 2021 at which stage the defendant was considering its options, especially regarding the prospects of appeal. This some 8 months after, on its own version, it became aware of the judgment. It also appears that at the time the Bill of Costs was taxed on 2

March 2021 it *“had not taken a decision to appeal the judgment in the matter.”*

And thus it appears that, at best for defendant, it had knowledge of the judgment on 2 March 2021.

[7] However, the defendant has simply failed to deal with the fact that a Notice of Taxation was served on the State Attorney on 6 August 2020 which is 18 months before the LTA was served and 7 months prior to the actual taxation. In fact, the defendant has objectively failed to deal with any of the important information upon which it seeks leave to satisfy this court that it has provided a full and satisfactory explanation for its delay such that this court should grant condonation:

7.1 firstly, no confirmatory affidavit is attached by any person who has actual and direct knowledge of the facts of this matter;

7.2 the application is silent on:

- a) the receipt of the Notice of Taxation on 6 August 2022;
- b) the date on which the defendant's original counsel were briefed to furnish a memo on prospects on success on appeal;
- c) the date on which this advice was received;
- d) the date on which the defendant instructed the State Attorney to apply for the transcript of the trial proceedings and also what steps were taken and when to obtain it;
- e) when the transcript was received;
- f) when new counsel was briefed to advise on prospects of success on appeal;
- g) when this advice was received;

- h) when the defendant's former attorney left the Office of State Attorney;
- i) when the new attorney was allocated and received the file; and
- j) when the instruction to draft the LTA was given.

[8] It is trite that condonation is not simply for the asking⁹. In **Van Wyk** (supra) the court stated:

"[31] There is an important principle involved here. An inordinate delay induces a reasonable belief that the order had become unassailable. This is a belief that the hospital entertained and it was reasonable for it to do so. It waited for some time before it took steps to recover its costs. A litigant is entitled to have closure on litigation. The principle of finality in litigation is intended to allow parties to get on with their lives. After an inordinate 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 any further. To grant condonation after such an inordinate delay and in the absence of a reasonable explanation, would undermine the principle of finality and cannot be in the interests of justice;

[32] It is true the case raises an important question concerning the constitutional right of access to information. This in itself is no reason to come to the assistance of litigant who has been dilatory in the conduct of litigation. This court has previously refused to come to the assistance of litigants where there was a delay of some nine months regardless of the issue raised;

⁹ Uitenhage Transitional Local Council v SARS 2004 (1) SA 292 (SCA) at 297 I-J
Grootboom v National Prosecuting Authority 2014 (2) SA 68 (CC)

[33] *The applicant has submitted that her application for leave to appeal bears prospects of success. Prospects of success pale into insignificance where, as here, there is an inordinate delay coupled with the absence of a reasonable explanation for the delay.*"

[9] In **Grootboom** (supra)¹⁰, the Constitutional Court also held:

"[51] The interests of justice must be determined with reference to all relevant factors. However, some of the factors may justifiably be left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success."

[10] Given the undeniable length of time it took the defendant to file the LTA, it is difficult to imagine any argument could be made that plaintiff was not under the impression that the matter had been finalised. Thus the cumulative effect of the above-mentioned factors are such that the application for condonation should be refused¹¹ and that it is unnecessary to consider the prospects of success as they are immaterial in these circumstances¹².

[11] Even were I persuaded that condonation should be granted, I am in any event of the view that – having read the judgment, the LTA and the heads of argument provided by both parties – there are no prospects of success on appeal and that the LTA should be refused.

¹⁰ See also *Steenkamp and Others v Edcon Ltd* [2019] 11 BLLR1189 (CC) at paragraph 36

¹¹ *Mulaudzi v Old Mutual Life Assurance Co (South Africa) Ltd and Others* 2017 (6) SA 90 (SCA) at paragraph 34 – 35

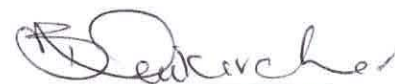
Also *Colett v Commission for Conciliation, Mediation and Arbitration and Others* [2014] 6 BLLR 523 (LAC)

¹² *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532 C-D

ORDER

[12] The order I make is the following:

1. The application to condone the late filing of the application for leave to appeal is dismissed.
2. The application for leave to appeal is refused.
3. The application (the National Director of Public Prosecutions) is ordered to pay the costs of the application for condonation and the application for leave to appeal.



NEUKIRCHER J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 2 September 2022.

For the applicant	: Advocate M Makhubele
Instructed by	: The State Attorney, Pretoria
 For the 1 st respondent	 : Advocate TWG Bester SC
Instructed by	: Robert H Kanarek Attorneys