



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

Case no: 62487/16

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED. YES
<u>26 February 2021</u> DATE	
<i>[Signature]</i> SIGNATURE	

In the matter between:

KANIVEST 3146 CC

First Applicant

KOOP DE VRIES STYGER
Applicant

Second

And

PETATYPE CC

First Respondent

SHIREEN VAN DER SCHYFF

Second Respondent

THE BODY CORPORATE OF THE HAMILTON FORUM

SHARE TITLE SCHEME

Third Respondent

NEUKIRCHER J:

1] This is an application brought in terms of the provisions of s31 of the Arbitration

Act No 42 of 1965 which states:

“(1) An award may, on the application to a court of competent jurisdiction by any party to the reference after due notice to the other party or parties, be made an order of court ...”

- 2] The arbitration was presided over by (retired) Judge Southwood and his award was made available to the parties on 8 August 2019. It is this award that applicants seek to have made an order of this court.
- 3] The present application is premised (in the founding affidavit) on the allegation that the respondents¹ abandoned their appeal by failing to comply with the provisions of Rule 49 of the uniform Rules of Court. However, on a reading of the papers in their entirety, which includes the correspondence that was made available as part of the affidavits, it appears that the allegation is that the appeal has lapsed as it was not prosecuted timeously.
- 4] Mr Basson² correctly conceded during his argument that the appeal had in fact lapsed. According to his calculation it lapsed on 2 December 2019; according to applicants' calculation it lapsed on 28 November 2019, i.e. the same day that this application was served. It is Mr Basson's argument that a) the application was premature and that b) as it was based on a purported abandonment of the appeal, instead of the lapsing thereof, the relief sought was not competent.

¹ The appeal was lodged by and this application opposed (respectively) by first and second respondents who shall be referred to as “the respondents” in this judgment

² Who appears for the respondents

- 5] In any event, as I was informed from the bar, the respondents had now filed an application for condonation and reinstatement of the appeal³ - this was done on Friday 5 February 2021⁴. The argument was therefore that, given this, the respondents would be irreparably prejudiced were I to grant this application and, in any event, the prospects of success on appeal should be considered in order to come to a decision in this application.

The facts

- 6] The genesis of the matter is to be found in the action proceedings instituted by first respondent against first applicant in the Gauteng Division, Pretoria under case no 85567/2014. It appears that first respondent obtained judgment on 19 June 2015 against first applicant and on 23 November 2016 the first applicant served an application for rescission of that judgment.

- 7] The rescission application resulted in an order granted by Mavundla J⁵, by agreement between the parties, *inter alia*, as follows:

7.1 the application for rescission was successful;

7.2 the main application and issues and the costs of the rescission application were referred to Arbitration and

“8. The Rules of Court in respect of a trial in the High Court shall apply in regard to discovery, pre-trial, further particulars and other applicable procedures;

11. The ruling of the arbitrator on the merits shall be subject to an

³ This was not placed before me nor was I provided with a copy

⁴ The matter was argued before me on 8 February 2021

⁵ On 2 November 2017

appeal to three arbitrators to be agreed on and failing agreement within 10 days, the Chairman of the Law Society of the Northern Provinces shall be requested to appoint an arbitration appeal panel....”

- 8] The parties indeed proceeded to arbitration and, as already stated, the award was handed down on 8 August 2019. The award was in favour of the present applicants who were claimants in that arbitration.
- 9] On 12 August 2019 respondents’ attorney wrote to applicants’ attorney and notified them of respondents’ intention to note an appeal and to suggest *“that a meeting be arranged to discuss the way forward and what form and manner the appeal should take.”*
- 10] On 14 August 2019 that meeting took place and the following agreement was reached:
- 10.1 that (retired) Judges Harms and du Plessis would be appointed as two of the three member Appeal Tribunal (the Tribunal) with the third to be nominated by respondents⁶;
 - 10.2 the appointments were made subject to the availability of the Tribunal to finalise the appeal by end 2019;
 - 10.3 the respondents would file a Notice of Appeal by 6 September 2019;
 - 10.4 the first applicant would file its notice of cross-appeal by 20 September 2019;

⁶

It was later agreed that this would be Adv Rip SC

10.5 the parties would meet before 18 October 2019 to finalise the appeal record; and

10.6 “6. As far as we did not deal with any specific matter the Rules of the High Court will apply”⁷

11] The Notice of Appeal was served on 5 September 2019 and the Notice of Cross-Appeal on 16 September 2019.

12] However, this is where compliance with the agreement⁸ ended as, although the instruction to type a record was given to the transcriber on 19 September 2019 and her quote received on 4 October 2019, it was only on 19 November 2019 that the 50% deposit sought in that quote⁹ was paid.

13] According to the quote of 4 October 2019 a record (unless urgent transcription was required) would take 2-3 weeks. But this is still not the end – the transcriber informed respondents that she would not be available for any typing from end November 2019¹⁰ as her offices would be closed.

14] Therefore, when the instruction to commence typing was given on 19 November 2019 it was clear that it was highly unlikely that a transcript would be received timeously in terms of Rule 49(7)(a) and, of course, the meeting scheduled for

⁷ i.e. Rule 49. This is common cause between the parties, and in their answering affidavit the respondents state:

“4.6 It has always been the agreement and my understanding that the Uniform Rules of Court would remain applicable”

⁸ Par 10 *supra*

⁹ Which was a requirement to commencing the transcription

¹⁰ This in an email dated 5 November 2019. She states in an affidavit filed and which is attached to the replying affidavit, that her office was closed from 28 November 2019 until 18 January 2020

18 October 2019 to “finalise the appeal record” could not take place and neither could the finalisation of the appeal¹¹.

- 15] According to the respondents’ attorney, despite enquiries directed by him to the transcriber in mid-January 2020, the transcription was only received on 15 February 2020 and it took until 25 February 2020 to deliver it to applicants.
- 16] From the flurry of correspondence thereafter between the parties’ attorneys, it is clear that applicants took the view that the respondents had abandoned the appeal as firstly, the record was not filed timeously and, secondly, no date of hearing had been sought from the Tribunal within the time period set out in Rule 49.
- 17] As a result, on 28 November 2019 the applicants launched the present application.
- 18] Then, on 11 December 2019 the respondents’ attorney informed applicants’ attorney that:
- 18.1 it is denied that respondents had abandoned the appeal;
- 18.2 the 70 days provided for in Rule 49(6)(a) only lapses on 12 December 2019;
- 18.3 his client instructed him *“to immediately request a date for the hearing of the appeal and cross-appeal”* which would be done *“in writing today the 11th of December 2019 so as to ensure that our client’s appeal does*

¹¹

Par 10.2 *supra*

not lapse”;

18.4 the application was therefore premature.

19] The response to this letter is dated 25 February 2020 in which the following is stated:

19.1 the appeal lapsed on 29 November 2019;

19.2 there is no proof that the Tribunal was requested to set a date of hearing on 11 December 2019;

19.3 there was no proof that the Tribunal was properly constituted;

19.4 in terms of Rule 49(6)(a) the appeal had lapsed;

19.5 there was no compliance with Rule 49(7)(1)(i) or (ii);

19.6 there had been no compliance with Rule 43(13);

19.7 the record filed *“constituted but an extract from the evidence as transcribed by the stenographer”* and there was non-compliance with Rule 49(7)(a).

20] The relevant portions of Rule 49 read as follows:

“49 Civil Appeals from the High Court

(1) ...

(2) If leave to appeal to the full court is granted the notice of appeal shall be delivered to all the parties within twenty days after the date upon which leave was granted or within such longer period as may upon good cause shown be permitted.

(3) The notice of appeal shall state whether the whole or part only of the judgment or order is appealed against and if only part of such judgment or order

is appealed against, it shall state which part and shall further specify the finding of fact and/or ruling of law appealed against and the grounds upon which the appeal is founded.

(4) A notice of cross-appeal shall be delivered within ten days after delivery of the notice of appeal or within such longer period as may upon good cause shown be permitted and the provisions of these Rules with regard to appeals shall mutatis mutandis apply to cross-appeals..

(5)...

(6) (a) Within sixty days after delivery of a notice of appeal, an appellant shall make written application to the registrar of the division where the appeal is to be heard for a date for the hearing of such appeal and shall at the same time furnish him with his full residential address and the name and address of every other party to the appeal and if the appellant fails to do so a respondent may within ten days after the expiry of the said period of sixty days, as in the case of the appellant, apply for the set down of the appeal or cross-appeal which he may have noted. If no such application is made by either party the appeal and cross-appeal shall be deemed to have lapsed: Provided that a respondent shall have the right to apply for an order for his wasted costs.

(b) The court to which the appeal is made may, on application of the appellant or cross-appellant, and upon good cause shown, reinstate an appeal or cross-appeal which has lapsed.

(7) (a) At the same time as the application for a date for the hearing of an appeal in terms of subrule (6) (a) of this rule the appellant shall file with the registrar three copies of the record on appeal and shall furnish two

copies to the respondent. The registrar shall further be provided with a complete index and copies of all papers, documents and exhibits in the case, except formal and immaterial documents: Provided that such omissions shall be referred to in the said index. If the necessary copies of the record are not ready at that stage, the registrar may accept an application for a date of hearing without the necessary copies if-

(i) the application is accompanied by a written agreement between the parties that the copies of the record may be handed in late; or

(ii) failing such agreement, the appellant delivers an application together with an affidavit in which the reasons for his omission to hand in the copies of the record in time are set out and in which is indicated that an application for condonation of the omission will be made at the hearing of the appeal.

(b) The two copies of the record to be served on the respondent shall be served at the same time as the filing of the aforementioned three copies with the registrar.

(c) After delivery of the copies of the record, the registrar of the court that is to hear the appeal or cross-appeal shall assign a date for the hearing of the appeal or for the application for condonation and appeal, as the case may be, and shall set the appeal down for hearing on the said date and shall give the parties at least twenty days' notice in writing of the date so assigned.

(d) If the party who applied for a date for the hearing of the appeal neglects or fails to file or deliver the said copies of the record within 40

days after the acceptance by the registrar of the application for a date of hearing in terms of subrule (7) (a) the other party may approach the court for an order that the application has lapsed.

(8) ...

(9) By consent of the parties, exhibits and annexures having no bearing on the point at issue in the appeal and immaterial portions of lengthy documents may be omitted. Such consent, setting out what documents or parts thereof have been omitted, shall be signed by the parties and shall be included in the record on appeal. The court hearing the appeal may order that the whole of the record be placed before it.

(10) ...

(11) Where an appeal has been noted or an application for leave to appeal against or to rescind, correct, review or vary an order of a court has been made, the operation and execution of the order in question shall be suspended, pending the decision of such appeal or application, unless the court which gave such order, on the application of a party, otherwise directs.

(12) If the order referred to in subrule (11) is carried into execution by order of the court the party requesting such execution shall, unless the court otherwise orders, before such execution enter into such security as the parties may agree or the registrar may decide for the restitution of any sum obtained upon such execution. The registrar's decision shall be final.

(13) (a) Unless the respondent waives his or her right to security or the court in granting leave to appeal or subsequently on application to it, has

released the appellant wholly or partially from that obligation, the appellant shall, before lodging copies of the record on appeal with the registrar, enter into good and sufficient security for the respondent's costs of appeal.

(b) In the event of failure by the parties to agree on the amount of security, the registrar shall fix the amount and the appellant shall enter into security in the amount so fixed or such percentage thereof as the court has determined, as the case may be. “

21] At this stage it is common cause that:

21.1 the appeal “record”¹² was filed late;

21.2 whilst respondents’ attorney had stated that he intended to ask the Tribunal for a date of hearing, there is no proof that he had in fact done so;

21.3 there is no proof that respondents had provided security for the costs of the appeal;

21.4 the correctness of the appeal record is disputed;

21.5 when this application was launched, and when the answering affidavit was filed, the respondents had not yet launched their application for condonation and reinstatement of the appeal – as stated, this was only done on Friday 5 February 2021¹³

22] What is also common cause is that the respondents filed their answering

¹² It being apparent from the correspondence that the record was actually incomplete and it was undisputed that the parties had not yet agreed on what would constitute the appeal record

¹³ And no copy was provided to me

affidavit to the present application on 7 August 2020 where the following timeline is relevant:

- 22.1 the application was served on 28 November 2019;
- 22.2 notice of intention to oppose was filed on 11 December 2019;
- 22.3 the answering affidavit was thus due on or before 8 January 2020¹⁴;
- 22.4 in a letter of 19 December 2019 the respondents' attorney stated that if the application was not withdrawn, the answering affidavit would be filed by the third week of January 2020;
- 22.5 the application was not withdrawn and no answering affidavit was filed by the Friday of the third week in January 2020¹⁵.

23] In fact, there is no explanation in any correspondence as to why the answering affidavit was not, or could not be, filed in the indicated period. Instead, it is clear that when no affidavit was received by end July 2020¹⁶, the applicants filed a Notice of Set Down on the unopposed motion roll for 25 August 2020. This appears to have galvanised the respondents into action and when the affidavit was finally served on 7 August 2020, the application was removed from the unopposed roll.

24] The applicants have objected to the late filing of the answering affidavit and have asked that it be struck out.

¹⁴ Rule 6(5)(d)(ii)

¹⁵ ie. at best for respondents by 24 January 2020 (the last week not being a full week as 1 January 2020 was a Wednesday)

¹⁶ ie. more than six months later

The answering affidavit and condonation

25] Mr Scheepers¹⁷ argues that respondents' explanation for the late answering affidavit is wholly inadequate as not only have respondents failed to disclose that they undertook to file the affidavit in late January 2020, but they failed to disclose why they did not adhere to their undertaking . He argues that their explanation for the lateness is simply inadequate and does not cover the entire period in question.

26] In **Van Wyk v Unitas Hospital and Another**¹⁸ (**Van Wyk**) the following was stated in respect of an application for condonation:

“This court has held that the standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry 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 ...

An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And, what is more, the explanation must be reasonable...¹⁹

¹⁷ For applicants

¹⁸ 2008(2) SA 472 (CC) at paras [20] and [22]

¹⁹ In that case the appellant took 11 months for her to decide whether or not to appeal and blamed the delay on her attempt to decide whether or not to appeal and on a lack of funds (ie. she did “not have unlimited funds”) – the condonation application was dismissed

27] In this matter the respondents' explanation is the following:

27.1 the letter of 19 December 2019 is set out which includes the undertaking to file the answering affidavit by the third week of January 2020²⁰;

27.2 *"4.24 On 16 January 2020 my offices followed up with Ms Beetje on the status regarding the transcription.*

4.25 The typed record of the proceedings was received from Ms Beetje on 16 February 2020.

4.26 On 25 February 2020 the record of the proceedings, as typed by Ms Beetje, was delivered.

4.27 On 27 February 2020, subsequent to the delivery of the record as typed by the Ms Beetje, the applicants attorneys of record addressed correspondence reiterating its version of the time periods, alleging that the respondents appeal had lapsed and stating the applicants do not agree with the record filed and stated that according to their views the respondents failed to comply with the relevant Rules of Court and that the letter therefore serves as a notice in terms of Uniform Rules 30(2) and 30A(i), (Annexure "JC12");

4.28 As the respondents had every intention of prosecuting its appeal to finality and instructed our offices accordingly, they had no other option but to wait for the record to be finalised and typed before any further steps could be taken.

4.29 Due to the National Lockdown which commenced on 27 March 2020 it is logical that the allocation of a date for the hearing of the

²⁰

In setting this out, the respondents have disclosed their undertaking

appeal would only be arranged once the lockdown has expired.

4.30 *In light of the facts, as more fully set out herein above, it is clear that the respondents, at all relevant times, had the bona fide intention to proceed with their appeal and to prosecute their appeal to finality.*

4.31 *As previously communicated and insofar as it may be necessary, respondents as well as the applicants insofar as they intend to proceed with their cross-appeal would have to apply in terms of the provisions of Uniform Rule 49(6)(b) for the reinstatement of the appeal and the cross-appeal..."*

28] The respondents then set out their prospects of success on appeal and conclude:

"5.1 I submit that the respondents, at all relevant times have been bona fide in their attempts to prosecute the appeal and were hampered due to circumstances beyond their control.

5.2 The explanation as set out herein above read together with the respondents prospects of success constitute good cause for the purposes of consideration of any application made to reinstate the respondents appeal insofar as it may be necessary and insofar as the respondents appeal have lapsed.(sic)

5.3 The application launched by the applicants is premature and should be dismissed."

29] Later in the answering affidavit, under a heading of *"Condonation for the late*

filing of the answering affidavit”, the respondents add the following:

- 29.1 the attorneys’ offices closed on 19 December 2019 for the festive season and only re-opened on 6 January 2020;
- 29.2 upon receipt of the record the respondents requested an opinion on their prospects of success on appeal *“which opinion was obtained”*²¹;
- 29.3 the National Lockdown commenced on 26 March 2020 and it was *“clear that the probability of having the appeal heard in the near future was slim to none”*;
- 29.4 due to the restrictions of movement imposed by the lockdown *“it was impossible for the respondents to properly consult with its instructing attorney and counsel in order to draft this opposing affidavit” and the respondents were only in a position to consult and give instructions “during the course of July 2020”*.

30] Given this, the respondents request

- 30.1 condonation for the late filing of the answering affidavit; and
- 30.2 that the application be dismissed with costs alternatively be postponed pending the outcome of the appeal and cross-appeal.

31] In **Grootboom v National Prosecuting Authority and Another**²² (**Grootboom**) Bosielo AJ noted that the court seized of the matter has the discretion whether to grant or refuse condonation and that the test to be applied

²¹ No details whatsoever have been given regarding who was briefed or when, nor when the opinion was received

²² (CCT 08/13) [2013] ZACC 37; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC); [2014] 1 BLLR 1 (CC); (2014) 35 ILJ 121 (CC) (21 October 2013) at para [50]

is the interests of justice²³

32] To decide this the court will apply the following standard:

*“...the standard for considering an application for condonation is the interests of justice. However, the concept “interests of justice” is so elastic that it is not capable of precise definition. As the two cases demonstrate, it includes: 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. It is crucial to reiterate that both Brummer and Van Wyk emphasise that the ultimate determination of what is in the interests of justice must reflect due regard to all the relevant factors but it is not necessarily limited to those mentioned above. The particular circumstances of each case will determine which of these factors are relevant”.*²⁴.

33] However in **Grootboom_Zondo J** (as he then was) also stated:

“.... The interests of justice must be determined with reference to all the relevant factors. However, some 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. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success,

²³ At para [22]

²⁴ Also South African Broadcasting Corporation SOC Limited v South African Broadcasting Corporation Pension Fund and Others (17/29163) [2019] ZAGPJHC 86; [2019] 2 All SA 512 (GJ); 2019 (4) SA 608 (GJ) (18 January 2019)

*condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party. As a general proposition the various factors are not individually decisive but should all be taken into account to arrive at a conclusion as to what is in the interest of justice*²⁵.

The delay

34] To summarise respondents' case on this issue, the reason for the delay in filing their affidavit²⁶ was because:

- 34.1 the record was not available timeously;
- 34.2 the attorneys' offices were closed from 19 December 2019 to 6 January 2020;
- 34.3 the record was only received on 16 February 2020;
- 34.4 National Lockdown commenced on 26 March 2020 and it was impossible to consult to draft the answering affidavit;
- 34.5 they were only able to consult in July 2020.

35] But where this argument fails is in the detail:

- 35.1 by the time the undertaking of 19 December 2019 was given, previous correspondence between the parties had made it abundantly clear that applicants were of the view that respondents had failed to prosecute their

²⁵ Grootboom at para [51]

²⁶ Either by 8 Jan 2020 (ie. The 15 day period in terms of Rule 6) or the third week of January 2020 as per their undertaking of 19 December 2019

appeal timeously / properly and it had been abandoned or had lapsed.

Service of the application simply confirmed this;

- 35.2 the respondents letter of 19 December 2019 demanding withdrawal of the application appears to be no more than a play for time – and by that stage instructions could, and should, have been given to commence drafting the answering affidavit as well as the application for reinstatement of the appeal. At the very latest, instruction should have been given on 6 January 2020 when respondents attorney's offices re-opened. On their own version there is no indication that this occurred;
- 35.3 by the time Lockdown commenced on 26 March 2020 two months had passed since the date on which the affidavit would be filed pursuant to the undertaking – there is absolutely no explanation provided regarding why the affidavit was not filed either on the timeline per the undertaking, or before Lockdown started;
- 35.4 whilst I am aware of the difficulties experienced by legal practitioners in obtaining essential service permits in the initial phases of Lockdown²⁷ this cannot be used as an excuse when it comes to consultations. The courts in Gauteng have run constantly (and with initially very few exceptions) throughout Lockdown via videoconferencing using either Microsoft Teams or Zoom and this includes the Urgent Court where affidavits are drafted on very short notice. There is no reason why a consultation could not have been set up in this matter using one of the above methods. In addition to these, WhatsApp has a videoconferencing facility as does Telgram and Skype. Any one of these methods could

²⁷

Having encountered this issue whilst presiding over the many courts in the past +- 11 months

and should have been used to consult. Furthermore, draft affidavits could be circulated via email and further videoconferences convened to finalise those;

35.5 no explanation has been given as to whether these methods were even attempted;

35.6 in July 2020 South Africa was still in Lockdown – at that stage it was at Level 3 – and the excuse used in paragraph 29.4 *supra* rings hollow. What is more is that no details are given on exactly when the consultation eventually took place in July 2020 or why it took until 8 August 2020 to file the answering affidavit. There is also no explanation that has been placed before me to explain why it took until 5 February 2021 to file an application for condonation and reinstatement of the appeal.

36] When considering whether condonation should be granted in the factual matrix presented in the present application, and even were there prospects of success, the respondents would not necessarily overcome the hurdle of their failure to prosecute their appeal timeously or their failure to provide a full explanation for their lapses as set out *supra*. In fact, in **Aymac CC v Widgerow**²⁸ the full court hearing an application for condonation, and in similar factual circumstances to the present²⁹, stated in following **United Plant Hire (Pty) Ltd v Hills and**

²⁸ 2009 (6) SA 433 (WLD) at para [34], [38] and [41]

²⁹ In an appeal which had lapsed and in which the appellant had brought an application for condonation and reinstatement. Although the notice of appeal in Aymac was filed timeously, the date for the hearing of the appeal was filed late, the appeal record was filed late, as were the powers of attorney. To compound matters, the application for reinstatement was also not filed “at the earliest opportunity” - at para [34]

Others³⁰ and Saloojee and Another NO v Minister of Community Development³¹:

“[41] ...If the appellants in this matter were granted a reinstatement it is hard to conceive of a matter, where the prospects of success favour the appellant in which a reinstatement could be refused. I am sorry for the appellants in this matter, since, as I have indicated, their appeal would otherwise have succeeded, but this is not a case where we can turn a blind eye to the omissions of their chosen agents. They have their remedy in law. But I also bear in mind that the appellants themselves are not entirely free from blame. They knew at least since the judgment of Snyders J of the remissness of their attorney, and yet allowed the situation to continue.”

37] In my view there is a complete dearth of information to consider the present application for condonation. I am of the view that the extent of the delay is unacceptably excessive and coupled with this the complete failure of the respondents to explain the delay has resulted in my view that there is no need to consider prospects of success.³²

38] I am also of the view that, in any event, to allow a postponement of the matter

³⁰ 1976 (1) SA 717 (A) at 720 E-G

³¹ 1965 (2) SA 135 (A) at 141 C-E

³² See Van Wyk (supra) “ [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. And the issue is moot. There is now a growing trend for litigants in this Court to disregard time limits without seeking condonation. Last term alone, in eight out of ten matters, litigants did not comply with the time limits or the directions setting out the time limits. In some cases litigants either did not apply for condonation at all or if they did, they put up flimsy explanations. This non-compliance with the time limits or the Rules of Court resulted in one matter being postponed and the other being struck from the roll. This is undesirable. This practice must be stopped in its tracks.”

until the Tribunal has considered the application for condonation and reinstatement would not be in the interests of justice. It is however in the interests of justice that any proceedings should be conducted as expeditiously as possible in order to achieve finality as “justice delayed is justice denied.” In this matter, the proceedings were initiated in 2014³³. It is now seven years later and the applicants are seeking, and are entitled to, finality.

- 39] Therefore, given the above circumstances, to grant condonation for late filing of the answering affidavit would condone the respondents’ conduct and given the concession that the appeal has in fact lapsed makes the distinction between an “abandonment” and a “lapsing” semantics in circumstances where there simply is no appeal at all. The issue of whether this application is premature or not is also irrelevant in light of the fact that the appeal has lapsed. To dismiss it would only trigger another application which would be a waste of time and costs and further delay the finalisation of the matter.

Conclusion

- 40] Thus condonation is refused and the answering affidavit is struck out.
- 41] This being so, I am of the view that the application should succeed and the arbitration award made on 8 August 2019 should be made an order of court and costs should follow the result.

³³

Par 6 *supra*

Order

42] The order I thus make is the following:

42.1 the arbitration award handed down on 8 August 2019 is made an order of court;

42.2 the respondents are ordered to pay the applicants costs.



NEUKIRCHER J

Date of hearing: 9 February 2021

Date of judgment: 26 February 2021

Hearing conducted via videoconferencing

Delivered: This judgement 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 26 February 2021.

Counsel for applicants: Adv GJ Scheepers
Instructed by: Jaco Roos Attorneys Inc
Counsel for respondents: Adv JGW Basson
Instructed by: Jacques Classen Attorneys