

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NUMBER: 3046/2018

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED</u>
DATE: <u>11 May 2019</u> SIGNATURE: <u>[Signature]</u>	

In the matter between:

PHOKOANE FRANS PHASHA

APPLICANT

AND

CHUENE PHILENOM MORUDI N.O

FIRST RESPONDENT

MMAFHUTI ELIZABETH MORUDI N.O

SECOND RESPONDENT

PHUTI MARTINA MORUDI N.O

THIRD RESPONDENT

**(IN THEIR CAPACITY AS TRUSTEES
OF THE MASEROLE TRUST)**

POLOKWANE CHAS EVERITT 232 (PTY) LTD

FOURTH RESPONDENT

JUDGEMENT

KGANYAGO J

- [1] The applicant who is the respondent in the main application has brought an application in terms of Rule 27(1) of the Uniform Rules of Court (the Rules) for condonation for late filling of his answering affidavit. The respondents who are the applicants in the main application are opposing the applicant's condonation application.
- [2] The background facts are that the respondents have instituted an eviction application against the applicant. The eviction application was served on the applicant by the sheriff on the 22nd May 2018. In terms of the respondents' notice of motion, the applicant was given ten days within which to enter his notice of intention to oppose, and thereafter file his answering affidavit within ten days.
- [3] The applicant has served his notice of intention to oppose on the 8th June 2018 and filed it with the Court on the 11th June 2018. The applicant served his answering affidavit on the 13th of September 2018 without an application for condonation for late filing of his answering affidavit. The eviction application was set down for the 19th September 2018. On the 19th September 2018 the eviction application was

postponed at the request of the applicant to enable him to file a substantive condonation application.

- [4] According to the applicant he was served with section 4(2) of Act 19 of 1998 order on the 5th June 2018 after he was already served with the eviction application. The section 4(2) order was obtained by the respondents on the 5th of June 2018. The eviction application was initially set down for the 26th June 2018. The applicant alleges that he was not served with the notice of set down notifying him that the eviction application will be heard on the 26th June 2018. The applicant in his founding affidavit has stated that he briefed advocate Mokwena to appear on his behalf on the 26th June 2018, and on that date the matter was removed from the unopposed roll and transferred to the opposed roll.
- [5] On the 11th July 2018 the applicant was served with a notice of set down notifying him that the eviction application has been set down to the opposed roll of the 19th September 2018. According to the applicant, he had until the 9th July 2018 within which to file his answering affidavit. He briefed advocate Mokwena on the 2nd of July 2018 to draft his answering affidavit.
- [6] According to the applicant on the 7th July 2018 he collapsed whilst at home after he experienced a throat blockade. He consulted a medical doctor and was diagnosed with serious or severe throat infection. He was advised to stay indoors in order not to aggravate his condition. The

medication that was prescribed to him made him to be drowsy or dizzy and he had no strength. He became better on the 26th July 2018, and returned to work on the 27th July 2018. No medical certificate to substantiate his allegations was attached.

- [7] On his return to work he found that the advocate has not yet drafted his answering affidavit. The advocate requested him to send him (advocate) the draft answering affidavit together with the notice of motion and founding affidavit for eviction to enable him to settle the answering affidavit. On the same date he complied with the advocate's request by sending the required documents electronically. On the 3rd August 2018 he did a follow up with the advocate and was told that he was too busy with other matters and will attend to his matter as soon as possible.
- [8] On the 12th August 2018 he had a relapse of his illness to the extent that his voice was eroded. He again consulted a doctor. He felt better on the 7th September 2018 and when he contacted the advocate, the answering affidavit was not yet settled and the advocate told him that he was too busy with other Court matters. He then on his own drafted the answering affidavit and have it served on the respondents' attorneys on the 13th September 2018.
- [9] According to the applicant he is 45 days late in serving his answering affidavit, and that the period of lateness is insignificant. If condonation application is not granted he will be prejudiced as he will be evicted without being afforded an opportunity to be heard. The applicant alleged that he is having reasonable prospects of success as he denies entering into the lease agreement with the

first respondent in his capacity as a trustee of Maserole Trust. He further alleges that the respondents have no *locus standi* to institute the eviction application against him in their representative capacities as trustees of the trust as he had no relationship with the trust at all. He further alleges that the eviction application is premature as the respondents have failed to notify him that the lease agreement will be terminated.

- [10] The respondents have served and filed their answering affidavit one day out of time without an application for condonation for late filing of their answering affidavit. Without a substantive application this Court will not *mero motu* or from an application from the bar grant the respondents condonation application. This court will therefore disregard the respondents answering affidavit and proceed to determine the application on the version of the applicant's founding affidavit.
- [11] The factors which a Court must consider when exercising its discretion whether to grant condonation includes the degree of lateness, explanation for the delay, prospects of success, degree of non-compliance with the rules, the importance of the case, the respondent's interest in finality of the judgment of the Court below, the convenience of the Court and the avoidance of unnecessary delay in the administration of justice (**See Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and Others; [2013] 2 All SA 251(SCA) para11**)
- [12] In **Uitenhage Transitional Local Council v SA Revenue Services [2004] (1) SA 292 (SCA) Hefer JA at 297 I-J** said the following:

"... Condonation is not to be had merely for the asking; a full, detailed and accurate account of the cause of the delay and their effects must

be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the non-compliance is time-related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out."

- [13] As per sheriff's return of service, the applicant was served with the eviction application on the 22nd May 2018. In terms of the notice of motion, the applicant was required to notify the respondent's attorneys of his intention to oppose within ten days from service of the application and thereafter within ten days having given notice of his intention to oppose, to file his answering affidavit.
- [14] The applicant has served his notice of intention to oppose the respondents' eviction application on the 8th June 2018. In terms of Rule 6(5) (d) (ii), the applicant had fifteen days after notifying the respondents of his intention to oppose within which to file his answering affidavit. Therefore the applicant had until the 29th June 2018 within which to file his answering affidavit. If he had to comply with the *dies* as they appear on the notice of motion, he had until the 22nd June 2018.
- [15] It is clear that the ten days notice as stated in the respondents' notice of motion is defective. The respondent's section 4(2) order was served on the applicant after the eviction application was already served on the applicant. The section 4(2) order is normally obtained before the eviction application is served as the applicant in that application will be seeking permission and directions from the Court on how to serve the eviction application. The question is whether the two defects can invalidate the respondents' whole eviction application.

- [16] The applicant has failed to comply with the ten days notice as stated on respondents' notice of motion, and also the fifteen days as stated in the rules. The applicant did not show what prejudice he had suffered as a results of these two defects. With regard to section 4(2) order, the respondents in my view have rectified the defects by obtaining the order after the eviction application was served, and have that order served on the applicant before the applicant notified them of his intention to oppose. Therefore, in my view, at this stage the two defects are immaterial and have no bearing on determining whether the applicant's non-compliance with *dies* of serving his answering affidavit should be condoned or not.
- [17] The applicant has notified the respondents of his intention to oppose on the 8th June 2018 and served his answering affidavit on the 13th September 2018 way outside the fifteen days as prescribed by Rule 6(5) (d) (ii). The applicant is a practicing attorney who appears in this Court more often. For a person of his calibre to be out of time for such a period of time in my view is excessive. I therefore disagree with him when he submitted that the period of lateness is insignificant.
- [18] According to the applicant he had until the 9th July 2018 to deliver his answering affidavit as per the notice of motion. The notice of motion that was served on him on the 22nd May 2018 was giving him ten days notice within which to file his notice of intention to oppose and a further ten days within which to file his answering affidavit. Ten days notice from the date of service of his notice of intention to oppose as I have already pointed out above, was expiring on the 22nd June 2018, and if he had to comply in terms of the rules,

he was required to serve and file his answering affidavit by the 29th June 2018.

- [19] The respondents section 4(2) order which was served on the applicant on the 5th June 2018 had the 26th June 2018 as the date on which the eviction application will be heard. The applicant in paragraph 4.2 of his founding affidavit states that after he became aware that the proceeding of the 26th June 2018 was for the eviction application, he timeously briefed his advocate to prepare his answering affidavit. However he does not state when he became aware. This also contradict his paragraph 3.3 of his founding affidavit wherein he stated that the respondents have instituted the eviction proceedings against him on the 18th May 2018. He does not explain what prevented him to file his answering affidavit within fifteen days from the 8th June 2018.
- [20] The applicant further alleged that on the 7th July 2018 he collapsed due to a medical condition wherein the doctor advised him to stay indoors to enable him to recover. That forced him to be at home until the 26th July 2018. However, no medical certificate was attached to substantiate his claim. He further alleges that he had a relapse of the same medical condition on the 12th August 2018 where this time it was worse as his voice had eroded. He had to consult a doctor and he stayed at home until the 7th September 2018. Again no medical certificate was attached to substantiate his claim.
- [21] In my view, the applicant has failed to explain in detail as to what has caused him the delay in filing his answering affidavit. There are some serious deficiencies in his explanation for the delay. In my view, his explanation for the delay is inadequate.

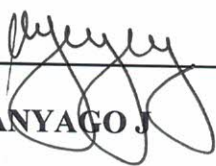
- [22] With regard to prospects of success, from his founding affidavit, he does not dispute being indebted to the respondent and that he is in arrears with his rental payments. He merely stated that he did not enter into the lease agreement with the first respondent in his capacity as a trustee of Maserole Trust. During argument the court enquired from the applicant whether the reasons for non-payments of the monthly rentals was as a result that he did not know where to pay and he said no. In other words he knew where to pay but simply elected not to pay. He had not been paying his rentals since 2017 and he is just staying in that property for free. In his founding affidavit he had stated that he had already made arrangements to liquidate the arrears but has failed to give the full details of such arrangements or to attach proof of such arrangements. In my view, the applicant has no prospects of success in the main application and his intention is to delay the respondents from obtaining judgment against him.
- [23] The applicant when he served his answering affidavit on the 13 September 2018, and as a legal practitioner was well aware that he was out of time in filing his answering affidavit. Despite that he failed to timeously apply for condonation for late filing of his answering affidavit but waited until the 19th September 2018 when he appeared in Court and the matter had to be postponed at his request to enable him to bring a substantive condonation application for late delivery of his answering affidavit. Even though he was ordered to pay costs on a punitive scale, he is deliberately causing delay in the finalisation of this matter. Therefore, in my view the applicant's degree of non-compliance with the rules is grave and is one that the court will not condone.

[24] It follows that the only appropriate order in the circumstances, is the one dismissing the application for condonation of the late filing of his answering affidavit.

[25] The following order is made

25.1 The application for condonation is dismissed.

25.2 There is no order as to costs.



MF KGANYAGO J
JUDGE OF HIGH COURT OF SOUTH AFRICA,
LIMPOPO DIVISION, POLOKWANE

APPEARANCE:

COUNSEL FOR THE APPLICANT	: PF Phasha
INSTRUCTED BY	: Phokoane Phasha Attorneys
COUNSEL FOR 1ST, 2ND & 3RD RESPONDENTS	: J Moolman
INSTRUCTED BY	: Prutt Luyt & De Lange
DATE OF HEARING	: 14 MARCH 2019
DATE OF JUDGEMENT	: 7th May 2019