

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 21427/17

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: No
(3)	REVISED YES
<u>22/05/2019</u>	
DATE	<u></u>
	SIGNATURE

In the application for leave to appeal between:

THE ROAD ACCIDENT FUND

APPLICANT

and

BRENDA JACOBS

RESPONDENT

JUDGMENT

COLLIS J:

1. In the present application the applicant is seeking leave to appeal the whole of the judgment and order¹ granted by this court, awarding 100% of the merits in favour of the respondent as well as costs of the proceedings. The court postponed the trial on the issue of quantum *sine die*.
2. The application for leave to appeal is sought in terms of the provisions of section 17(1) (a) (i) and section 17(1) (a) (ii) of the Superior Court's Act, No. 10 of 2013. The applicant contends that the appeal would have a reasonable prospect of success and that there are compelling reasons why the appeal should be heard as the decision of the court is novel given our previous cases on point.
3. A court adjudicating an application for leave to appeal must be persuaded with a measure of certainty that another court will differ from the judgment sought to be appealed.
4. On 17 April 2019, some 5 months after the order of the court was given, the application for leave to appeal was served and lodged with the Registrar of this court. This necessitated the applicant to seek condonation simultaneously with the filing of the application for leave to appeal. Both applications are opposed by the respondent.

APPLICATION FOR CONDONATION

¹ Judgment by Collis J delivered on 23 November 2018

5. In terms of Uniform Rule 49(1)(b) an application for leave to appeal must be made within 15 days of the date of judgment.

6. In this regard and more specifically para 10 to the condonation affidavit the deponent sets out the following:

“The reason the application for leave was not served by 14 December 2018, is because all the necessary persons did not sign off the instruction to the attorneys timeously. This instruction to appeal was given to the attorneys in January. The further delay is that senior counsel had to study the matter and prepare this affidavit. I am advised that if the *dies non* be allowed the application is 23 days late.”

7. In opposition the respondent sets out the following:²

“4.6. The applicant makes bold and unsubstantiated averments to attempt to explain the inordinate delay and fails to attach and provide this Honourable Court with any proof thereof. The applicant has not taken this Honourable Court into its confidence as to why and how such lengthy delay came about.

4.7. The applicant has dearly not only failed to show good cause for the delay in bringing the application for leave to appeal, but has furthermore completely failed to provide reasons for the delay in launching its

² Respondent's Opposing Affidavit paragraphs 4.6 and 4.7

application for condonation. This in itself is fatal to the relief sought by the applicant.”

8. In *Uitenhage Transitional Local Council v South African Revenue Service* 2004

(1) SA 292 (SCA) at paragraph 6, the Court stated the following:

“[6] Condonation is not to be had merely for the asking, a full detailed and accurate account of the causes 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.”

9. What is therefore required is not only an explanation in the timeous prosecution of the appeal, but also the delay in seeking condonation for non-compliance. An application for condonation should be brought without delay and as soon as possible once an applicant realises that he has not complied with a rule of court.³

10. The Constitutional Court in the decision of *eThekweni Municipality v Ingonyama Trust* [2013] JOL 30162 (CC) laid down the following principles in relation to applications for condonation:

³ *Mulaudzi v Old Mutual Life Assurance Company (South Africa) Limited* 2017 (6) SA 90 (SCA) at para [26]

"[28] As stated earlier, two factors assume importance in determining whether condonation should be granted in this case. They are the explanation furnished for the delay and prospects of success. In a proper case these factors may tip the scale against the granting of condonation. In a case where the delay is not a short one the explanation given must not only be satisfactory but must also cover the entire period of the delay. 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 given must be reasonable. The explanation given by the applicant falls far short of these requirements. Her explanation for the inordinate delay is superficial and unconvincing."

11. In argument Mr Fourie appearing on behalf of the respondent, submitted to this court that the reasons given for the delay were bare and unsubstantiated. The reasons given lack details in as far as the names of person(s) who give instructions to appeal and why if such instruction was given to the applicant's attorneys in January 2019, the condonation application was only launched in April 2019. There are furthermore mere bold allegations made with reference to counsel being briefed and when in fact such instruction was given.

12. During argument Mr Williams, appearing on behalf of the applicant, conceded that the applicant has presented a rather weak case for condonation as the explanation furnished lack detail. He however submitted that the appeal has prospect of success in that the applicant fulfils an important function in society and that the finding of this court has wide-ranging ramifications for the applicant.

13. Having regard to the explanation tendered for the inordinate delay in launching the condonation application and the lack of detail given in respect of the persons responsible to action this appeal, I am not persuaded that the reasons given are convincing or has merit.

14. Consequently, I am not persuaded that the application for condonation is merited and is therefore refused.

PROSPECT OF SUCCESS

15. Albeit, that the applicant is unsuccessful in having persuaded this court on granting it condonation, I do find it necessary to deal with the applicant's prospects of success on the merits.

16. As per the notice of application for leave to appeal, the applicant seeks leave against the judgment delivered by this court and against the consequent cost order.

17. In the opposing affidavit and more specifically paragraph 11 thereof ⁴, the deponent sets out the following:

"11.7 As will be dealt with more fully below the delay in launching this application has been so long, that the bill of costs has already been

⁴ Opposing Affidavit para 11

settled, and all the costs due in terms of the court order already paid out to all the various vested parties.

11.8 The applicant's alleged explanation in the delay is further strange in the sense that the bill of costs was already settled by agreement between the applicant and the respondent on 29 February 2019. Not to unduly overburden the papers herein, the first and last page of the taxed bill of costs is attached as Annexure "TV1" hereto.

11.9 These costs were paid to the respondent's legal representatives on 1 April 2019. Proof of payment thereof is attached as Annexure "TV2" thereto."

18. On behalf of the respondent counsel had argued that if the applicant at all times were desirous of appealing this court's decision, it raises suspicion as to why they would agree and in fact pay the costs of the hearing before this court and only thereafter decide to appeal this court's order.

19. During reply, counsel on behalf of the applicant conceded the point that it would be futile to persist with an appeal in respect of the costs given the fact that it has been settled and paid already.

20. What then remains is whether the applicant would have a reasonable prospect of success on the merits or whether there exists a compelling reason why the appeal should be heard.

21. As per the application for leave to appeal, the applicant contends that the evidence presented before court failed to support the notion of the deceased,

a married man at the time, having attracted a duty to support the respondent with whom he had been in an extra-marital relationship for the preceding six years prior to his death. Furthermore, that this court made a finding of the deceased attracting a duty to support the respondent under circumstances where he was still married and at no stage had sought or initiated divorce proceedings. Furthermore, that these findings so made by this court, were made without Mrs Steven being joined to the proceedings, nor this court taking cognisance of the rights of the minor children of the deceased being protected.

22. In this regard Mr Williams argued that for the deceased to have undertaken a duty to support a live-in-partner to whom you are not married when you yourself are a married person, is contentious, *contra bonos mores* and dilutes a spouse's duty of support. Relying on principles enunciated both the Volks⁵ and Paixo⁶ matters counsel submitted that in the cited decisions there existed no impediment on the respective appellants to marry their partners. In Volks the deceased was a widower, before his demise. In Paixo the deceased had divorced his former wife.

23. In contrast Mr Fourie on behalf of the respondent argued that this court's judgment clearly only has a bearing on the liability of the respondent's claim as against the applicant.

24. Furthermore, it was contended that the judgment neither negates nor compromises the claim of the surviving spouse nor the claim of the minor

⁵ Volks N.O v Robinson & Others 2005 (5) BCLR 446 (CC)

⁶ 2012 (6) SA 377 (SCA)

children. The evidence presented before this court is clear. Mrs Stevens made an election to merely institute a claim for loss of support in her representative capacity on behalf of the minor children of the deceased and that she had elected not to institute a claim in her personal capacity.

25. My view is supported by the affidavit obtained from the surviving spouse Mrs Stevens, where she in fact confirms this position. In the said affidavit she reiterated that she will not institute a claim for loss of support as the surviving spouse of the deceased, because prior to his death he was living with the respondent and was in fact supporting the respondent.⁷

26. In turning to the claim instituted by Mrs. Stevens in respect of the minor children, the merits of the minor children's claims have already been settled by the applicant.

27. It is for the reasons set out above that Mr Fourie had argued that the judgement of this court does not negates or compromise the claim of the surviving spouse or any potential claim of the minor children. Furthermore, in respect of the minors' claim, a *quantum* trial has also been set down for later this year being 23 October 2019.

28. The arguments as presented by Mr. Fourie, finds favour with this court.

⁷ Opposing Affidavit – annexure “TV5”

29. Before I conclude, one other point requires consideration. This relates to the pleaded case and subsequent lack of evidence presented by the applicant. In response to the claim instituted by the respondent, the applicant had made an election to file a bare denial.⁸

30. Coupled with the above and of crucial importance are the admissions made by the applicant during a pre-trial conference conducted on 7 November 2018. During the said pre-trial conference, the applicant *inter alia* admitted the following:

30.1 that the deceased was by law responsible to support and/or maintain the plaintiff;

30.2 that the deceased and the respondent lived together as husband and wife for a number of years;

30.3 that the respondent was reliant on the deceased's maintenance and that the deceased did in fact maintain and support the respondent.

31. The bare denial filed by the applicant and the subsequent admissions made during the pre-trial conference, cannot simply be ignored by this court as if it were withdrawn. It remains part of the pleaded case presented by the applicant.

ORDER

32. Given the conspectus of reasons alluded to above, I am therefore not persuaded that the appeal would have a reasonable prospect of success or that there is some other compelling reason as to why the appeal should be heard.

⁸ Particulars of claim para 7 pg. 7 and Defendant's plea para 7 pg. 11.

33. It follows that the application for leave to appeal falls to be dismissed with costs.



COLLIS J
JUDGE OF THE HIGH COURT OF
SOUTH AFRICA

Appearances:

Counsel the Applicant	: Adv. J Williams SC
Attorney for the Applicant	: Matabane Inc.
Counsel for the Respondent	: Adv. Fourie
Attorney for the Respondent	: Liebenberg Attorneys
Dates of Hearing	: 13 May 2019
Date of Judgment	: 22 May 2019