



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No.: 5603/2017

In the matter between:

WILLEM ADRIAAN ODENDAAL
ANNA CATHARINA NEL ODENDAAL

1st Applicant
2nd Applicant

and

NUTIGRUN (PTY) LTD

Respondent

HEARD ON: 29 MARCH 2018

JUDGMENT BY: MATHEBULA, J

DELIVERED ON: 19 APRIL 2018

- [1] This is an opposed application for condonation of the late filing of the opposing affidavit. The parties agreed (which agreement was made an Order of Court) that the respondent must file the affidavit not later than 18 December 2017. This Order was not complied with by the applicants and the affidavit was only filed on 30 January 2018.

- [2] It must be emphasised that an application for condonation is not a mere formality. Uniform Rule 27(1) provides that in the absence of an agreement between the parties the court may on application make an order to extend or abridge any time prescribed by the rules or order of the court. However good cause must be shown that the non-observance of the Rule is excusable. The Rules of Court play an important role in ensuring proper functioning of the courts. In matters of this nature the court has a wide discretion which must be exercised judicially upon consideration of all facts.
- [3] The requirements for condonation are that the applicant must file an affidavit dealing satisfactorily with the reason(s) for the delay. This means that sufficient explanation must be provided to enable the court to understand how did the delay come about.
- [4] The first applicant deposed to an affidavit dealing with this aspect. The application together with annexures was served on him by the sheriff. Annexures “FAZ”, “AA1” and “AA2” were not annexed to the application. Letters exchanged between the attorneys requesting the annexures did not yield any results. As one of the measures to obtain the documents, the applicant’s attorneys launched an application in terms of Rule 35 (12). Despite diligent search a complete application was found at the Master’s Office on 26 January 2017. Thereafter followed the process of drafting of the papers, sending them to Marquard to be commissioned and to be returned to Bloemfontein. The documents had to be sent to Marquard because of the failing health of the second applicant who could not travel to Bloemfontein.

- [5] In opposition, it is the version of the respondent that the documents that the applicant is referring to have always been in the possession of the first applicant. They were used in the application for summary judgement granted against the first applicant. These were also sent to the previous attorney. Further that the applicant's attorneys received the complete application on 23 November 2017.
- [6] In the interests of justice, the parties should not easily be denied the opportunity to ventilate their disputes before the court. The first applicant has provided an explanation dealing with how the delay came about. It is not unthinkable that the application would have been missing the annexures as mentioned. It is important to insist on the correct annexures before responding to the allegations. It will be irresponsible to assume the content of the annexures without reading them. The period between 16 December to 15 January is normally the time that the legal fraternity literally close shop. Lastly the period of the delay is not inordinately long to conclude that the applicant's attorneys dealt with this matter in reckless manner.
- [7] The second aspect is that the applicant must satisfy the court that he has a *bona fide* defence or that the action is not ill founded. This means that the applicant must show that his defence is based on facts which if proved would constitute a defence. The matters turns on whether the sequestration order will be beneficial to the creditors. This matter can be ventilated properly when considering the entire application and other procedures that can achieve the same result. To that extent, I am of the view that there is a *bona fide* defence. I am particularly concerned by the prejudice that can

be suffered by the applicants in the event the application is unsuccessful. They are octogenarians who stand to lose everything.

[8] For the foregoing reasons, I am of the view that the costs must follow the results.

[9] Accordingly, I make the following order:-

9.1. The application is granted with costs.

M. A. MATHEBULA, J

On behalf of the appellants:
Instructed by:

Adv. J. M. C. Johnson
Lovius Block
BLOEMFONTEIN

On behalf of the respondent:
Instructed by:

Adv. A. Berry
F J Senekal incorporated
BLOEMFONTEIN