

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO PROVINCIAL DIVISION, POLOKWANE)

CASE NO: 5555/2016

(1)	REPORTABLE: <u>YES/NO</u>
(2)	OF INTEREST TO THE JUDGES: <u>YES/NO</u>
(3)	REVISED: <u> </u>
DATE: <u>19/03/18</u> SIGNATURE: <u>[Signature]</u>	

In the matter between:

**SAFETY & SECURITY SECTOR EDUCATION
TRAINING AUTHORITY**

APPLICANT

And

MASTOFUSION (PTY) LTD

RESPONDENT

 JUDGMENT

KGANYAGO J

- [1] The applicant (defendant in the main action) has brought an application for condonation for the late delivery of its objection in terms of Rule 28(3) to the respondent's (the plaintiff in the main action) notice of amendment of its particulars of claim dated 23rd March 2017. The respondent is opposing the applicant's application.
- [2] According to the applicant, on the 2nd March 2017 it delivered a notice of exception to the respondent's particulars of claim. The respondent in turn served its notice of intention to amend its particulars of claim on the 24th March 2017. The applicant was supposed to have delivered its objection to the respondent's intended amendment on or before the 7th April 2017. The applicant realized on the 8th April 2017 that it has been labouring under a misapprehension that it was supposed to deliver its objection by Monday the 10th April 2017. Upon realizing its misapprehension it immediately prepared the present application for condonation. The applicant also served its objection on the respondent on the 10th April 2017.
- [3] The application for condonation was duly served on the respondent. On receipt of the application, the respondent wrote a letter to the applicant's

attorneys notifying them that their notice of motion was defective. The applicant served an amended notice of motion on the respondent on the 8th May 2017. The respondent served its notice to oppose on the 22nd May 2017 and its opposing affidavit on the 13th June 2017.

- [4] In its answering affidavit the respondent has raised a point *in limine* of non-compliance with the rules. However, this point *in limine* was abandoned by the respondent when the matter was argued before the Court on the 21st February 2018. The respondent raised another point *in limine* from the bar arguing that the applicant's heads of arguments were defective. The respondent also abandoned this point *in limine*.
- [5] On the merits of the applicant's application, the respondent has submitted that the applicant's attorney did not exercise great care towards the matter, and was therefore in willful default. The respondent is of the view that the applicant will not suffer any prejudice if condonation is not granted, and also that the applicant has no prospects of success with its objection to the respondent's intended amendment to its particulars of claim.

- [6] It is trite that condonation is not to be had merely by asking, a full detailed and accurate account of the causes of 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. (See **Uitenage Transitional Local Council v South African Revenue Services 2004(1) SA 292 (SCA)** at paragraph 6).
- [7] Factors which are usually taken into consideration by the Court in determining an application for condonation include the degree of lateness, the explanation therefore, the prospects of success and the importance of the case. (See **Melane v Santam Insurance 1962 (4) SA 531 (A)** and **Dengetenge Holdings (PTY) LTD v Southern Sphere Mining and Development Company Ltd & Others [2013]ZASCA 5**).
- [8] A party seeking condonation should, whenever he realizes that he has not complied with the Rule of this Court, apply for condonation without

delay. The applicant was supposed to serve its objection on the respondent's intended amendment by the 7th April 2017. It realized on the 8th April 2017 that it has not complied with the rules of this Court. On the 10th April 2017 it served its application for condonation on the respondent. In my view the applicant did not delay in filing its application after realizing that it did not comply with the rules of this Court.

[9] A full, detailed and accurate account of the causes of delay must be furnished. The applicant's legal representative has taken this court into confidence and stated that he had been labouring under a misapprehension that the objection should be delivered by the 10th April 2017. The question is whether the conduct of the applicant's attorney in failing to serve the objection timeously amounted to negligence on his part.

[10]. It is trite law that negligence on the part of the attorney will not necessarily exonerate the litigant. In this case the applicant's attorney was aware that he was supposed to file an objection and had a wrong date in mind on which he had to serve the applicant's objection. In my view, the applicant's attorney's conduct does not amount to negligence but was merely an honest mistake. The attorney who had deposed the

affidavit for the condonation application has given a full explanation of what caused the delay. The applicant when it realizes that it was out of time, it was only one day late. In my view the applicant was not extremely out of time of serving and filing its objection. The Court is satisfied that the applicant's explanation is adequate.

[11] The relief which the respondent is seeking against the applicant involves public funds. Therefore, this matter in my view is of public importance.

[12] The applicant has already served and filed its objection to the respondent's intended amendment to its particulars of claim. On perusal of the said objection, the applicant is having a fairly good chance of prospects of success. However, that will be determined after the matter was properly argued in Court.

[13] The respondent in opposing the applicant's application has also relied on technical grounds. The respondent argues that they want to see this matter been finalized speedily. In my view it does not seem that the respondent will suffer any prejudice if condonation is granted, as it is still having an opportunity to oppose the applicant's objection.

- [14] The respondent in opposing the applicant's application for condonation has relied on the case of **Rabie v De Wit (A320/12) [2013] (WCC)** at paragraph 17 where the court said:

"Thus in Trans-Africa Insurance Ltd, supra, the requirement of prejudice was reaffirmed by Schreiner JA, who quoted with approval what was held by a Full Bench in Foster v Carlis and Houthakker in a similar context:

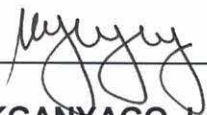
'It seems to me impossible to construe the rule otherwise than as conferring upon the court the power to condone any such irregularity or impropriety because the contrary view would convert the latter part of the rule into an instruction to the court to set aside the irregular or impropriety proceedings...It seems to me, therefore that the court is entitled to overlook in proper cases any irregularity in procedure which does not work any substantial prejudice to the other party [emphasis added]'

- [15] In my view the Rabie v De Wit case is self-defeating to the respondent's case. The principle as formulated in that case is that the Court has a discretion to overlook any irregularity in procedure which does not cause prejudice to the other party. I have already held in paragraph 13 *supra* that the respondent will not suffer any prejudice if the applicant's condonation application is granted. The failure by the applicant to timeously serve and file its objection relates to procedure. The Court is

therefore satisfied that the applicant has shown good cause why its condonation application should be granted.

[16] In the result the following order is made:

16.1 The applicant's application for condonation for late delivery of its objection in terms of Rule 28(3) to the respondent's notice of amendment of its particulars of claim dated 23rd March 2017 is granted with costs.



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

Appearances

- | | | |
|----------------------|---|--------------------------|
| 1. For the applicant | : | Adv TF Mathibedi SC |
| 2. Instructed by | : | Maboku Mangena Attorneys |

3. For the Respondents : Adv Maake
4. Instructed by : Myburg Ralenala Attorneys
5. Date of Argument : 21st February 2018
6. Date of Judgment : 20th March 2018