

/SG

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE: 10 March 2017

CASE NO: 74204/2015

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO
- (2) OF INTEREST TO OTHERS JUDGES: YES/NO
- (3) REVISED

DATE _____ SIGNATURE _____

In the matter between:

DIRK JACOBUS RIVE NOTHNAGEL

APPLICANT

In re:

DIRK JAKOBUS RIVE NOTHNAGEL

APPLICANT

And

THE LAW SOCIETY OF THE NORTHERN PROVINCE

RESPONDENT

JUDGMENT

MAKHOBABA, AJ

- [1] In this matter before us the applicant is the respondent in the main application and the respondent the applicant in the main application.
- [2]. The application is based on the provisions rule 27 of the Uniform Rules of Court. It is about condonation which applicant seeks for the late filing of its answering affidavit to respondent's application for his re-admission as an attorney.
- [3] The applicant was represented by Mr Smith whereas the respondent represented himself. This application has been separated from the main action. The main action will be heard separately.
- [4] The applicant had been practising as an attorney on his own account since August 2001 under the name and style of Dirk Nothnagel until on 23 April 2010 when he was suspended from practice. On 24 August 2010 his name was removed from the roll of practicing attorneys. The applicant lodged an application to be re-admitted as an attorney which application was set down for hearing to 1 August 2016. On 30 May 2016 the court ordered the applicant to deliver its answering affidavit in the main application within (15) fifteen days from the date of the order. The applicant did not comply with this court order and only served the relevant answering affidavit on the respondent only 29 July 2016 one court day before the hearing of the main application. The applicant was informed by the Judge's clerk that the matter had become opposed and it would be postponed *sine die*.

[5] The crux of the matter before us is the condonation for the late filing of applicant's answering affidavit. The application is opposed by the respondent.

[6] In explaining the delay for filing the answering affidavit on time counsel for the respondent gave the reasons as follows:

6.1 The papers the applicant had to go through to refute respondent's assertions in his founding affidavit were too voluminous.

6.2 The importance and nature of the main application which may adversely affect the administration of attorneys profession should the court not hear the applicant's submissions about this matter.

6.3 In his address to us counsel for the applicant conceded that applicant erred by not informing the respondent timeously of the delay in filing the answering affidavit.

[7] In opposing the application respondent submitted that: –

7.1 The respondent has been in possession of a full set of the voluminous papers in the matter since April 2016.

7.2 The Attorney's Fidelity Fund has been in possession of the respondent's affidavit since May 2016.

- 7.3 Respondent was at all times represented by senior attorneys who deal with these types of applications on a daily basis and that there is no valid excuse for the respondent's failure to file its answering affidavit timeously.
- 7.4 Respondent failed to state when it realised that it would be unable to comply with the court order and that steps taken if any to address the delay.
- 7.5 On 22 June 2016 respondent enrolled the matter on the unopposed roll. Still there was no reply or request for time extensions to the respondent's attorneys or record.
- 7.6 Respondent blatantly disregarded a direct court order to deliver the answering affidavit by a certain date and thereafter refused to take steps to mitigate the prejudice of such late delivery.
- [8] This application before us is based on rule 27(1) which provides as follows:

“27. Extension of time and removal of Bar and condonation

- (1) In the absence of agreement between the parties, the court may upon application on notice and on good cause shown, make an order extending or abridging any time prescribe by the rules or by an order of court

fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet.”

[9] As stated above the issue before us is to determine whether applicant has indeed established that it is entitled to the relief that it seeks.

[10] The use of the word “may” in rule 27(1) denotes that the court has a discretion to grant or not to grant condonation. In *United Plant Hire (Pty) Ltd v Hills and Others* 1976 (1) SA 717 (A) 720E-F HOLMES, J said:

“It is well settled that in considering application for condonation, the court has a discretion to be exercised judicially upon a consideration of all of the facts; and that in essence it is a question of fairness to both sides. In this enquiry, relevant considerations may include the degrees of non-compliance with the rules, the explanation therefore, the prospects of success on appeal, the importance of the case, the respondent’s interest in the finality of his judgment, the convenience of the court and the avoidance of unnecessary delay in the administration of justice.”

In *Smith NO v Brummer NO and Another* 1954 (3) SA 352 at 358 the court summarised what needs to be taken into account as follows: —

- (i) Whether a reasonable explanation has been given for the neglect.
- (ii) Whether the application is *bona fide* and not brought with the intention to delay the other party's claim.
- (iii) Whether there is absence of reckless or wilful neglect of the court rules.
- (iv) Whether or not applicant's case is ill founded.
- (v) Whether there is prejudice, such cannot be compensated with a proper costs order.

See also *Van Wyk v Unitas Hospital and Another (open Democratic Advice centre as amicus curiae)* 2008 (2) SA 472 at 33; *Meintjies v HD Combrinck (Edms) Bpk* 1961 (1) SA 262 (A) at 263-264.

In *Uitenhage Transitional Local Council v South African Revenue Service* 2004 (1) SA 292 (SCA) paragraph 6 the court said:

“Condonation is not to be had merely for the asking; a full detailed and accurate account of the causes of the delay and their effect 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 then date, duration and

extent of any obstacle on which reliance is placed must be spelled out.”

- [11] Furthermore the applicant must show with the evidence at its disposal that he is entitled to the relief that he seeks. See also *Bayat and Others v Hansa and Another* 1955 (3) SA 547 (A).

- [12] Whether the application is *bona fide*

During his address to the court Counsel for the applicant conceded that failure to inform the respondent of the delay cannot be justified. However, in my view, there is nothing on the papers that shows that the applicant was not *bona fide* and intentionally delayed the other party's application.

- [13] Absence of reckless or wilful neglect of the court rules

Counsel for the applicant submitted that due to the respondent's denial that he was indebted to some of the creditors the Attorney's Fidelity Fund had reimbursed, applicant had to sift through a number of papers and compile a detailed response to the respondent's founding affidavit. Considering the response of the applicant to the respondent's affidavit I find it difficult to ... that the applicant wilfully neglected the provisions of rule 27. It is clear to me that for the applicant laboriously prepared the answering affidavit was time consuming the applicant was not in flagrant and gross delay. See *Ferreira v Ntshingila* 1990 (4) SA 271 (A).

[14] Whether or not applicant's case is ill-founded

The applicant's answering affidavit to the respondent's founding affidavit is supported by a number of annexures and affidavits. The allegations made against the respondent in the answering affidavit are very grave and serious if they are accepted in the main application the respondent is likely to fail in his application and the applicant in this application is likely to succeed in the main application. If this application fails it may adversely affect the regulation of attorneys practice.

[15] Reasonable explanation

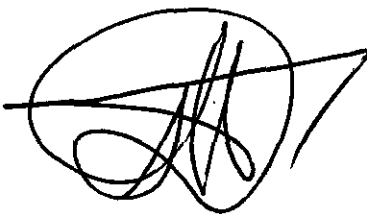
Taking all the factors, submissions by both parties as well as the volume of the record in this matter before us I am of the view that the applicant gave us a reasonable explanation. In *Van Wyk v Unitas Hospital and Another supra* the court on paragraph 33 said "prospects of success pale into insignificance where, as here, there is an inordinate delay coupled with the absence of a reasonable explanation for the delay".

[16] Taking the above into account, it is my view that the applicant complied with all the requirements listed in Rule 27 and also the requirements listed in *Smith NO v Brummer NO and Another supra*. Furthermore, taking all the relevant factors cumulatively the application for condonation is worthy to be considered and, in my view, it must succeed.

[17] Finally the matter of costs. The main application is still to be heard by another court. I am of the view that a costs order should be argued and finalised at the hearing of the main application.

[18] In the result: –

- (a) The application for condonation is granted.
- (b) Costs are reserved for the main application.



D MAKHOB
ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA

I agree, and it is so ordered



P MABUSE
JUDGE OF THE GAUTENG DIVISION, PRETORIA

Appearances

<u>Heard on:</u>	3 March 2017
<u>Counsel for the Applicant:</u>	In person
<u>Counsel for the Respondent:</u>	Adv. PH Smith
<u>Instructed by:</u>	Rooth and Wessels Inc.
<u>Date of Judgment:</u>	10 March 2017