



**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 : 4518/2012

In the matter between:

TEBOHO VINCENT NTSOERENG

1st Applicant

MAHOKOANE ANGELA NTSOERENG

2nd Applicant

and

ANDRIES HENRY SEBOFI

1st Respondent

A. E. FOURIE N.O. (SHERIFF)

2nd Respondent

IN RE:

ANDRIES HENRY SEBOFI

Plaintiff

and

TEBOHO VINCENT NTSOERENG

Defendant

JUDGMENT BY: **MURRAY AJ**

DATE HEARD: **DECIDED ON WRITTEN ARGUMENT**

DELIVERED ON: **7 JULY 2016**

- [1] This is an application for leave to appeal against Moeng, AJ's, judgment of 19 March 2015, and for condonation for the late filing of the application. The First Respondent was the Plaintiff in the main action and the First Applicant was the Defendant. To obviate confusion, they will be referred to as such throughout.
- [2] On 18 August 2015 the Court requested the parties to select a date for this application to be heard, alternatively to submit heads of argument for the matter to be dealt with in chambers by Mocumie, J. There was no response from the Applicants.
- [3] On 12 May 2016, after more than a year in which the Applicants, despite being *dominus litis* in the application, made no attempt to

pursue or advance their application and failed to file heads of argument despite several requests to do so, the First Respondent filed its heads in order for the application to be dealt with in chambers. On 6 June 2016 the Applicants' attorney of record withdrew for lack of instructions - a pattern which has characterized the Applicants' conduct ever since the First Respondent issued summons against the First Applicant in 2012.

Factual background :

- [4] In November 2012 the First Respondent issued summons against the First Applicant for payment of R130 000.00 due to him in terms of a contract concluded between them personally after the dissolution of the close corporation of which they used to be members. Because of the First Applicant's failure to defend the claim, the First Respondent obtained default judgment against him on 27 January 2013.
- [5] When the First Applicant did not comply with the judgment, the First Respondent issued a writ of execution against his movable property, which yielded only a *nulla bona* return. The First Respondent then filed a Rule 46(1)(a)(ii) application to have the

First Applicant's immovable property declared specially executable.

[6] It transpired during the Rule 46(1)(a)(ii) proceedings that the First Applicant was married in community of property to the Second Applicant. Since the Second Applicant had a direct interest in potential execution of the immovable property, and a right to respond, the First Respondent filed an application to have her joined as a party to the Rule 46(1)(a)(ii) proceedings. On 17 October 2013 Monaledi AJ granted the joinder application by agreement between the parties, and on 7 August 2014 Lekale J declared the Applicants' immovable property specially executable in terms of Rule 46(1)(a)(ii).

[7] In order to prevent execution, the Applicants then applied for both Lekale J's judgment and the order for the Second Applicant's joinder to be rescinded, and for the warrant of execution to be set aside. They contended that an error common to the legal representatives rendered the orders rescindable in terms of the Court's inherent powers under the common law.

[8] The Applicants averred, firstly, that both parties had laboured

under an alleged misapprehension that a writ of execution against immovable property could be issued against the Second Applicant even though no judgment had been entered against her.

[9] They contended, secondly, that by obtaining judgment against the First Applicant in his personal capacity instead of against T.V.N Transport and Projects CC, the First Respondent had committed fraud. This allegation was abandoned during the hearing of the application for rescission, however.

[10] On 19 March 2015 Moeng AJ held that there was no basis for the rescission of Lekale J's judgment which declared the applicants' immovable property specially executable, or for undoing the Second Applicant's joinder, and dismissed the application with costs.

[11] The Applicants then filed the present application for leave to appeal against Moeng AJ's judgment. This they did in May 2015. Since then they have made no effort whatsoever to pursue the application. Quite the contrary: by deliberate inaction they have prevented it from being enrolled, argued or finalised for more than a year now. The said conduct, in my view, clearly demonstrates

their lack of a *bona fide* intention to pursue the appeal. After all, the longer the finalisation of the Application for leave to appeal is delayed, the longer the execution of the warrant against their property is stayed.¹

Condonation:

[12] Moeng AJ's judgment was delivered on 19 March 2015. Despite the last date to apply for leave to appeal in terms of Rule 49 having been 9 April 2015, however, the Applicants only filed for such leave on 12 May 2015, that is, 22 court days late. They therefore need to be granted condonation before the application for leave to appeal can be heard or considered.

[13] It is trite that condonation of the non-observance of the court rules is by no means a mere formality.² In **Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)**³, for instance, the Constitutional Court held that an applicant for condonation must give a full explanation for the delay which must

¹ Rule 49(11) determines that where an application for leave to appeal against or to rescind an order has been made, the operation and the execution of the order in question shall be automatically suspended, pending the outcome or decision of such appeal or application, unless the Court which gave such order, on application of a party otherwise directs.

² *Uitenhage Transitional Local Council v South African Revenue Service* 2004 (1) SA 292 (SCA) at 297H – J.

³ 2008 (2) SA 472 (CC) at 477 E

not only cover the entire period of delay but must also be reasonable. It is for the applicant to explain the reasons for his non-compliance with the time limits⁴ and to satisfy the Court that there is sufficient cause for excusing him from compliance⁵.

[14] Where condonation needs to be asked, as *in casu*, a court has a discretion which is to be judicially exercised with regard to *all* the circumstances of the case. This Court therefore has to keep in mind not only the Applicants' delay in filing their application for leave to appeal, which they ask to be condoned, but also their delay in prosecuting the said application in the context of their prospects of success on the merits of the case.

[15] The principles upon which a court exercises its discretion to condone have been stated as follows:

"in essence it is a question of fairness to both sides. In this enquiry, relevant considerations may include the degree of non-compliance with the rules, the explanation therefor, 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."

⁴ Yunnan Engineering v Chater: 2006(5) SA 571 (T) at 578H-J; Aymac CC v Widgerow 2009(6) SA 433 (W) at 441A.

⁵ Uitenhage Transitional Local Council v South African Revenue Service, 2004 (1) SA 292 (SCA) at 297 H – J; Shaik v Pillay, 2008 (3) SA 59 (N) at 61 H

[16] The First Applicant's only explanation of the delay was to aver that neither he, nor the attorney who had represented him in the rescission application, had been made aware of Moeng AJ's judgment. He alleged that no-one had been notified of the intended delivery of the judgment, which is highly unlikely, and that he only became aware of the judgment on 23 April 2015 when he learnt, for the first time, of the intended sale in execution of his property.

[17] Instead of a full explanation for the delay, the Applicant merely vaguely refers to "*those attorneys*" and "*the said attorneys*" with whom he then allegedly arranged a consultation on 28 April 2015 before he decided to terminate their services and to entrust the matter to his "*current attorneys of record*", whoever they might be. In **Massey-Harris Co (SA) Ltd v Eksteen**⁶ the court held that where the delay is due, or allegedly due, to the mistake or default of a third party, an affidavit by such third party needs to be annexed. But in the present case not one of the Applicants' unidentified attorneys, past or current, has provided a confirmatory affidavit. It is not the first time, furthermore, that the

⁶ 1932 (OPD) 29.

First Applicant has allegedly not received a court order, pleading, application papers or correspondence.

- [18] Even though courts are reluctant to penalise a blameless litigant on account of his attorney's negligence, the Appellate Division has pointed out that:

"There is a limit beyond which a litigant cannot escape the result of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the rules of this court. Considerations *ad miseracordiam* should not be allowed to become an invitation to laxity. The attorney, after all, is the representative whom the litigant has chosen for himself."⁷

- [19] In the instant case the Applicants are far from blameless, and the fact that they have already had six sets of attorneys is a clear indication that the attorneys are not the only ones to blame for the repeated delays in finalising the matter. A demonstration of the Applicants' flagrant disregard for court rules and orders is that Van Zyl J, pursuant to numerous postponements, had to order that the First Applicant be barred from pursuing the first rescission application against the default judgment granted against the First Applicant personally should the Applicants fail to pay, within a specified time, the costs due to the First Respondent in terms of a

⁷ Shaik v Pillay, *supra*, at 61 I – 62 C; Theron v AA Life Assurance Association Ltd, 1995 (4) SA 361 (A) at 365 B

previous court order. They did not pay.

[20] From the case law it has appeared that the cumulative effect of a flagrant breach of the rules of Court in more than one respect and the absence of an acceptable explanation may be such that an application for condonation will not be granted, regardless of the prospects of success.⁸ The Applicants have provided no acceptable explanation for this delay, just as they did not do regarding previous delays.

[21] An important consideration in deciding whether to grant condonation or not, is whether the appeal is frivolous or vexatious, or has been noted not with the *bona fide* intention of seeking to reverse the judgment but for some indirect purpose, e.g. to gain time or harass the other party.⁹

[22] It has been held, too, that a long delay will not be condoned if it is clear that the applicant had not "*throughout desired to prosecute these appeals*".¹⁰ Such desire must appear from the applicant's

⁸ Blumenthal v Thompson NO, 1994 (2) SA 118 (A) at 121 I - J Where it is stressed that this applies even where the blame lies solely with the attorney; Shaik v Pillay, 2008 (3) SA 59 (N) at 62 E

⁹ Beecham Group Plc v South African Druggists Ltd, 1987 (4) SA 869 (T) at 865 D; Lubambu v Presbyterian Church of Africa, 1994 (3) SA 241 (SE) at 245 H; N v Government of the Republic of South Africa (No 3), 2006 (6) SA 575 (D) at 580 A

¹⁰ Van Wyk v Unitas Hospital, *supra*, at 477 E - G

conduct regarding the application for leave to appeal. In my view it is more than reasonable to infer, more than a year after their application was filed, that the Applicants have no real intention to pursue their appeal.

- [23] Far from facilitating the speedy adjudication of their application, the Applicants have frustrated and obstructed the process by failing to abide by the court rules (e.g. by filing a defective, ambiguous application for leave to appeal and by failing to adhere to prescribed time periods); by failing to comply with court orders (such as to pay the costs incurred during past litigation); by failing to respond to correspondence from the court (such as the request for dates and/or written heads of argument to enable Mocumie J to decide the application for leave to appeal) or from the Respondents (for instance to request compliance with court orders or to arrange dates for filing heads); by failing, for months on end, to file heads of argument in order that the matter can be finalised; by pretending not to have received court orders or correspondence despite documentary evidence to the contrary; and by blaming and firing various of their past sets of attorneys, some on the day of the trial, only to reappoint the same ones as

soon as a postponement was refused.¹¹

[24] The Applicants have thus managed to manipulate the system to gain three years of 'grace' in which the First Respondent has been unable to execute its 2013-judgment or to recover the considerable legal costs that have accumulated since then, despite having been successful in every court proceeding in this matter.

[25] The Applicants' blatant disregard for the court rules appear from the way they have conducted the various applications in this matter. They filed two applications for rescission, for instance: the first one on 28 January 2014 a year after default judgment had been granted against the First Applicant personally on 17 January 2013 (which judgment still stands); and the second one against Lekale J's judgment which they filed 49 court days after

¹¹ In *Take & Save Trading CC v Standard Bank of South Africa Ltd* 2004(4) SA 1 (SCA) the Court held that:

"One of the oldest tricks in the book is the practice of some legal practitioners, whenever the shoe pinches, to withdraw from the case (and more often than not to reappear at a later stage), or of clients to terminate the mandate (more often than not at the suggestion of the practitioner), to force the Court to grant a postponement whose party is then unrepresented. Judicial officers have a duty to the Court system, their colleagues, the public and the parties to ensure that this abuse is curbed by, in suitable cases, refusing a postponement. Mere withdrawal by a practitioner or the mere termination of a mandate does not, contrary to popular relief, entitle a party to a postponement as of right."

the judgment and 37 court days after the writ of execution had been executed by attaching the property. Their replying affidavit in the application which lead to Moeng AJ's judgment, was filed 54 court days late, without any application for condonation, a week before the application was heard. In view of their past conduct and their wilful procrastination since the late filing of this application for leave to appeal more than a year ago, I have no doubt that the Applicants' real aim is merely to gain time.

[26] Where an applicant claims the indulgence of condonation, furthermore, it is for him to show that the respondent will not be adversely affected thereby to any substantial degree, and that, even if he were to be so affected, other considerations apply which would persuade the Court to grant the indulgence sought.¹² The First Applicant has made no attempt to show that the First Respondent will not be prejudiced by the late filing and delayed finalisation of this application for leave to appeal.

[27] The late filing of a notice of appeal particularly affects a respondent's interest in the finality of his judgment. *In casu* almost two months had elapsed before the application for leave to

¹² *Finnbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein*, 1985 (4) SA 773 (A) at 790 C

appeal was filed. It is only reasonable to hold that, once the time for noting an appeal has lapsed, a respondent is *prima facie* entitled to adjust his affairs on the premise that his judgment is safe.¹³

[28] Where such late filing is further exacerbated by a subsequent failure, for more than a year, to pursue the application for leave to appeal, it indeed '*induces a reasonable belief that the order had become unassailable*' and that the First Respondent '*is entitled to assume that the [Applicants have] accepted the finality of the order and does not intend to pursue the matter further*'.¹⁴

[29] I respectfully agree with the court in **Van Wyk v Unitas Hospital**, *supra*, furthermore, that to grant condonation after such an inordinate delay and in the absence of a reasonable explanation, '*would undermine the principle of finality in litigation and cannot be in the interests of justice*'.¹⁵

[30] The final reason to refuse condonation in this matter, and which is also fatal to the application for leave to appeal itself, is that the

¹³ Cairn's Executors v Gaarn, 1912 AD 181 at 193; Napier v Tsaperas, 1995 (2) SA 665 (A) at 671 C

¹⁴ Van Wyk v Unitas Hospital, *supra*, at 479 H – 480 A

¹⁵ Van Wyk v Unitas Hospital, *supra*, at 480 A - B

Applicants in my view have no reasonable prospect of success on appeal.

Application for Leave to Appeal:

[32] In addition to the absence of condonation, the application for leave to appeal must fail on the merits, too.

[33] It is trite that in terms of Rule 49(1)(b) the Applicants are bound to the grounds raised in their application for leave to appeal. The rule demands, in peremptory terms¹⁶ that such grounds be clearly and succinctly set out, in clear and unambiguous language. Its purpose is to enable the Court and the respondent to be fully informed of the case the applicant seeks to make out and the respondent is to meet in opposing the application for leave to appeal.¹⁷ The Applicants are required, furthermore, to indicate whether they are relying on errors of fact or on errors of law.

[34] The grounds of appeal set out in the application *in casu*, are anything but clear and unambiguous. The Applicants averred, first of all, that "*the court's dismissal of the application was both legally and*

¹⁶ Songono v Minister of Law and Order, *supra*, at 395 J – 396 A

¹⁷ Songono v Minister of Law and Order, 1996 (4) SA 384 (E) at 385 I - J

factually incorrect and was a misdirection". The grounds on which the Applicants seek to attack the alleged 'misdirection' are set out as follows:

- "2.1.1 *the above Honourable Court misdirected itself by finding that the First Applicant's liability, to the First Respondent, is a joint estate liability whereas, by law factually such a liability is incurred in the First Applicant's ordinary activities of business and is, thus, not a joint estate liability;*
- 2.1.2 *the mistake common to both parties, herein, as a mistake of law cannot ground a rescission of judgment;*
- 2.1.3 *the applicant of the contractual principle of consensus ad idem to the facts of this case was both legally and factually incorrect, as in this case, the parties were of one mind when they misconceived the remedy."*

[35] Patently this Notice of Application for Leave to Appeal does not comply with the peremptory requirements of Rule 49(1)(b). The Applicants do not distinguish between errors of fact and errors of law and, far from being clear and unambiguous, the 'grounds' on which they purport to rely and by which they are bound, are all but incomprehensible.

[36] As Mr Cilliers for the First Respondent argued, what the Applicants

appear to contend, is that the Court in the application for rescission misdirected itself by not finding *"that the liability incurred by the First Applicant towards the First Respondent in an amount of R130,000.00 does not bind the joint estate and cannot be enforced against the joint estate"*.

Applicable test for leave to appeal :

[37] S 17 of the Superior Courts Act, Act 10 of 2013, provides for a new, stricter test for leave to appeal:

"17. Leave to appeal.

(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that –

- (a) (i) the appeal would have a reasonable prospect of success, or*
- (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration."*

[38] Prior to the promulgation of Act 10 of 2013, the test was lower in that it merely required of an applicant to indicate that there is a reasonable possibility that another Court may come to a different finding.¹⁸ That is no longer the case, however. The new higher

¹⁸ State v Ackerman, 1973 (1) SA 765 (A)

test now requires a reasonable prospect of success, not merely a possibility. To determine whether there is such a prospect in the instant case, one needs to examine the validity of the Applicants' allegations of a misconception of the facts and the law in Moeng AJ's judgment.

[39] The Applicants seem to aver that the First Applicant's debt could not bind the joint estate since it was incurred in the ordinary course of his business and could therefore not lead to execution of the immovable property in the joint estate. First of all, that averment is based on the Applicants' own misconception of the legal position regarding the liability of a joint estate in marriages in community of property and the meaning of s 15(6) of the Matrimonial Property Act, Act 88 of 1984 ("the Act"). Secondly, it disregards the fact that the First Applicant was sued in his personal capacity (in a summons to which no plea was filed) and that judgment was obtained against him in his personal capacity (which judgment still stands). And that, as such, he is married in community of property and the joint estate is liable for his debts.

[40] S 14 of the Act determines that spouses in a marriage in community of property have equal powers regarding the

contracting of debts which bind the joint estate and regarding the management of the joint estate.

[41] S 15 of the Act determines that, with the exception of certain acts specified in s 15(2) and s 15(3), such as alienating or mortgaging immovable property belonging to the joint estate, either of the spouses may without the other's consent, perform any juristic act with regard to the joint estate.

[42] And even where a spouse bound the joint estate contrary to the provisions of s 15(2) and (3) or acted without the required consent, s 15(9) protects *bona fide* innocent third parties who contract with such a spouse without knowing that he is married in community of property and lacked consent for the applicable transaction. In such an instance, consent will be deemed to have been given.¹⁹

[43] S 15(6) provides for a spouse married in community of property to be exempted from having to obtain the consent of his spouse for certain of the transactions specified in s 15(2), such as binding himself as surety, if he concludes such transactions in the

¹⁹ Distillers Corporation Ltd v Modise 2001 (4) SA 1071 (O) at [5] on 1075H/I-U and [8] and [9] at 1077E-F

ordinary course of his business. It does not relieve his spouse or the joint estate from liability if he incurs debts in doing so, as the Applicants seem to allege.

[44] S 17(2) of the Act determines that a party to legal proceedings instituted or defended by a spouse may not challenge the validity of the proceedings on the ground of a want of the required consent. And s 17(5) determines that where a debt is recoverable from the joint estate, the spouse who incurred the debt, or both spouses jointly may be sued therefore.²⁰ Such spouse may be sued in his own name and it is not necessary for the other spouse to be joined in the action.²¹ Where judgment is obtained by a creditor against one of the spouses, they are joint debtors and in the event of non-payment, execution can be levied against the joint estate.²²

[45] As Moeng AJ pointed out in his judgment, that is because one of the proprietary consequences of a marriage in community of property is that, during the subsistence of such a marriage, the liabilities of either spouse become the joint liability of both

²⁰ *Zake v Nedcor Bank Ltd* 1999(3) SA 767 (SE) at 770.

²¹ *Zake v Nedcor*, *supra*, at 771.

²² *Strydom v Engen Petroleum Ltd* 2013(2) SA 187 (SCA) at [45] at 202.

spouses and therefore of the joint estate.

[46] A case in point is the decision in **BP Southern Africa (Pty) Ltd v Viljoen**,²³ in which the wife also contended that she was not liable for the debts incurred in the ordinary course of his business by her husband to whom she was married in community of property because the applicant never sued her and had therefore never obtained judgment against her. Hancke J, however, held that the wife was liable for at least half the amount of the default judgment against her husband irrespective of the fact that judgment had not been obtained against her in person.

[47] There was therefore no common mistake between the parties which rendered Lekale J's judgment or the joinder order rescindable as the Applicants alleged. The law is clear: if one spouse in the marriage in community of property incurs debts, even without the consent of the other spouse, either of the spouses can be held liable for such debt, since it is regarded as one incurred by the joint estate.

[48] The order declaring the Applicants' property executable was

²³ 2002 (5) SA 630 (O)

indeed enforceable against the joint estate. Accordingly the warrant of execution is one that is enforceable against the immovable property of the Applicants' joint estate and there is no ground for it to be set aside.

[49] Since the Second Applicant would have had a direct interest in the execution of the immovable property, she was correctly joined as a party to the Rule 46(1)(a)(ii) proceedings, and there would be no justification for rescinding that order either.

[50] There is therefore no merit in the averment that Moeng AJ misdirected himself in dismissing the application to rescind either the joinder order, or Lekale J's judgment which declared the immovable property of the joint estate executable.

[51] The application for leave to appeal against Moeng AJ's judgment consequently has no reasonable prospect of success on the merits on the first leg of the new test as formulated in s 17(1)(a)(i) of Act 10 of 2013 and I am not at liberty to grant leave to appeal on that ground.

[52] Regarding the alternative ground for granting leave stipulated in s

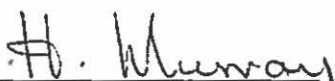
17(1)(a)(ii) of Act 10 of 2013, namely that of “*a compelling reason*” to grant leave, the Applicants appear to contend that s 15(6) read with s 17(5) of the Act have not been addressed before and that that would constitute the required ‘*compelling reason*’ to justify granting leave to appeal based on the second, alternative leg of the new test. This contention is not made in the grounds of appeal set out in the Applicants’ notice and to which they are bound). It, furthermore, has not merit.

[53] After serious consideration of all the circumstances and facts of this protracted case, therefore, I am unable to find either a reasonable prospect of success on appeal or any “*compelling, or truly convincing, reason*”, which could justify the granting of leave to appeal.

[54] In view of the Applicants’ flagrant disregard of the court process and the inordinate delay in the finalisation of this matter which that has caused, I agree with Mr Cilliers that a punitive costs order would be justified.

WHEREFORE the following order is made:

1. Condonation is refused and the application for leave to appeal is dismissed with costs.
2. The Applicants are to pay the said costs on an attorney and client scale.
3. The Second Respondent is to see to service of a copy of this order upon the First and Second Applicants.


H MURRAY, AJ

On behalf of the First Respondent :

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