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|------------------------------------|----------|
| Reportable:                        | YES / NO |
| Circulate to Judges:               | YES / NO |
| Circulate to Magistrates:          | YES / NO |
| Circulate to Regional Magistrates: | YES / NO |



**IN THE HIGH COURT OF SOUTH AFRICA**  
**NORTHERN CAPE DIVISION, KIMBERLEY**

**Case No: 412/2016**  
**Heard on: 05/08/2016**  
**Delivered on: 16/09/2016**

**In the matter between:**

|                                              |                                 |
|----------------------------------------------|---------------------------------|
| <b>NICOLAUSESAIAS VAN ASWEGEN N.O.</b>       | <b>1<sup>ST</sup> APPLICANT</b> |
| <b>MARIA HELENA SARLINE VAN ASWEGEN N.O.</b> | <b>2<sup>ND</sup> APPLICANT</b> |
| <b>DANIEL JOHANNES TRUTER N.O.</b>           | <b>3<sup>RD</sup> APPLICANT</b> |

**And**

|                             |                                  |
|-----------------------------|----------------------------------|
| <b>GERHARDT AKKER N.O.</b>  | <b>1<sup>ST</sup> RESPONDENT</b> |
| <b>EMILE LAUBSCHER N.O.</b> | <b>2<sup>ND</sup> RESPONDENT</b> |

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**JUDGMENT**

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**MAMOSEBO J**

[1] On 26 February 2016 the applicants in their capacity as trustees of the Van Aswegen Farm Trust, approached Court on an urgent basis for an order in the following terms:

- 1.1 Dispensing with the forms, time periods and manner of service provided for in terms of the Uniform Rules of Court; and hearing the matter as one of urgency in accordance with the provisions of Uniform Rule 6(12);
- 1.2 Directing the respondents to grant applicants, their duly appointed agents and representatives, and staff, access to the farm Allemansvlei for a period of one day, on a date to be determined by the above honourable court;
- 1.3 Directing the respondents to grant the applicants (including their agents, representatives, visitors and staff) immediate access to, and reasonable daily use of the road which is located on the farm known as Valspan which is owned by the Bubesi Trust (of which the respondents are trustees), to enable the applicants to access the farms Skietkop and Greeffsdam;
- 1.4 Directing that the order in para 1.3 shall operate as an interim order, pending the finalisation of an action to be instituted by the applicants, within a time period which the above honourable court may deem appropriate, for the determination of a permanent right of way between the farm known as Boesmanspan which is owned by the Van Aswegen Farm Trust (of which the applicants are trustees) and the farms Skietkop and Greeffsdam via the road located on the farm Valspan;
- 1.5 Costs of the application as between attorney and own client, against the respondents jointly and severally, the one paying, the other to be absolved;
- 1.6 Further and/or alternative relief.

[2] My sister Erasmus AJ granted the aforementioned prayers in exception of the issue of costs which stood over for later determination. The parties

were further ordered to file the papers in respect of costs in accordance with timeframes provided for in the Uniform Rules of Court.

[3] The respondents failed to file their answering affidavit by 18 March 2016, that is, within the 15 days from the date of Erasmus AJ's order, as prescribed by Rule 6(5)(d)(ii) of the Uniform Rules of Court. The applicants' Notice of Set Down dated 06 April 2016 was filed with the Registrar and served on the respondents' correspondent attorneys on 07 April 2016 for the matter to be heard on 22 April 2016 on the unopposed roll. On 22 April 2016 the case was postponed to the opposed roll to be heard on 05 August 2016 as the matter had become opposed.

[4] On 20 April 2016, two days before the matter was heard in the unopposed motion court, Mr Frans Jacobus Lotz, a practicing attorney and the respondents' instructing attorney from Prieska, filed the Answering Affidavit which was 19 court days out of time. Rule 27 stipulates:

***“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 prescribed by these rules or by an order of court or 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.*

*(2) Any such extension may be ordered although the application therefore is not made until after expiry of the time prescribed or fixed, and the court ordering any such extension may make such order as to it seems meet as to the recalling, varying or cancelling of the results of the*

*expiry of any time so prescribed or fixed, whether such results flow from the terms of any order or from these rules.*

**(3) *The court may, on good cause shown, condone any non-compliance with these rules.***” (Own emphasis)

[5] Evidently, the parties did not reach any agreement in respect of the extension. What purports to be an application to court for condonation is found at para 8 of Mr Lotz’s Answering Affidavit:

“8. *Ek wil voorts by die agbare hof pleit om kondonاسie vir die laat liassering van hierdie verklaring en wel op grond van die volgende:*

8.1 *Nadat die hofbevel elektronies aan my versend was op 26 Februarie 2016 het ek my kantoorleër gedagboek tot 14 Maart 2016 sodat ek die nodige stukke tydig kon liasseer. Ek was van 29 Februarie 2016 tot 11 Maart 2016 nie voltyds op kantoor nie.*

8.2 *As gevolg van die administratiewe haakplek in my kantoor is die kantoorleër nie op die bestemde datum aan my oorhandig vir verdere hantering nie.*

8.3 *Gevolgtik het ek eers, toe die Kennisgewing van Terrolle Plasing ontvang is, besef dat ek buite tyd is wat betref die liassering hiervan.*

8.4 *Die situاسie is teweeg gebring deur ‘n blote menslike oorsig en is dit my respektvolle submissie dat my kliënt onregverdig en ernstig benadeel sal word indien kondonاسie nie toegestaan word nie.*

8.5 *Ek pleit dus dat die Agbare Hof die laat liassering hiervan kondoneer.”*

Essentially, the respondents seek to convince me through the affidavit of Mr Lotz that what he describes as “an administrative error” or

“administrative hitch” is adequate to satisfy the requirement of good cause for the late filing of the Answering Affidavit. Mr Van Tonder, counsel for the respondents, argued that it was a “mere oversight” and that it would be unfair and prejudicial to the respondents if condonation was not granted.

- [6] In **Melane v Santam Insurance** 1962 (4) SA 531 (A) at 532B-E the following pronouncement was made by the Court:

*“In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success and the importance of the case. Ordinarily these facts are interrelated, they are not individually decisive, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate prospects which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent’s interests in finality must not be overlooked.”*

- [7] In **Saloojee & another NNO v Minister of Community Development** 1965 (2) SA 135 (A) at 141C Steyn CJ said:

*“I should point out, however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with his attorney. There is a limit beyond which a litigant cannot escape the results 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 misericordiam should not be allowed to become an invitation to laxity. In fact this Court has lately been burdened with an undue increasing number of applications for condonation in which the failure to comply with the Rules of this Court was due to neglect on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are.”*

See also **Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein & others** 1985 (4) SA 773 (A) at 787G–H, where Hoexter JA referred to the:

*“oft-repeated judicial warning that there is a limit beyond which a litigant cannot escape the results of his attorney’s lack of diligence or the insufficiency of the explanation tendered.”*

In **Commissioner for Inland Revenue v Burger** 1956 (4) SA 446 (A) at 449G Centlivres CJ said:

*“Whenever an appellant realizes that he has not complied with a Rule of court he should, without delay, apply for condonation.”*

- [8] In my view, Mr Lotz’s explanation for the failure to apply for condonation and the purported explanation tendered at para 5 (above) is not satisfactory. I am not swayed that condonation should be granted. As pronounced by the Constitutional Court in **Grootboom v National Prosecuting Authority and Another** [2014] 1 BLLR 1 (CC) at para 23 it is now trite that condonation cannot be had for the mere asking.

**I therefore find that the application for condonation cannot succeed.**

### **Costs**

- [9] In order to determine the question of costs it is necessary to provide a brief background of the circumstances that led to the relief sought. The applicants as trustees had to approach court on an urgent basis for interim relief. They required access and reasonable daily use of the road located on the farm known as Valspan which is owned by the Bubesi Trust. The respondents are trustees of this Trust. Correspondence between the parties' attorneys was futile in that the request was met with a refusal without any reasons. Hence the applicants resorted to approaching the court for the stated relief.
- [10] The applicants estimate that as at 18 February 2016 they had 155 artificially inseminated Dorper ewes and Bonsmara cattle on Skietkop and another 155 artificially inseminated Dorper ewes on Greeffsdam. Logically, the applicants had the responsibility and the duty to ensure that the animals have water and the crib facilities were clean to prevent animal deaths. The respondents had locked the gates to the farms and thereby denying the applicants access. The applicants also needed access for one day to remove 20 head of springbuck and eight "boerbokke" from Allemansvlei. No reply was received by the applicants even after indicating to the respondents' attorneys that they will launch an urgent application and seek costs on the scale as between attorney and own client. It is only after the application was launched that the respondents opened the gates at Valspan at 15h00 on 25 February 2016. The applicants found that a pump on Skietkop was damaged and at least 24 pregnant Dorper ewes and one Bonsmara cow had died due to the preventable neglect. They had not inspected Greeffsdam at that stage.

[11] In my view, the applicants had no other option but to approach the court. The sought relief was only settled at the doorstep of the court. They were successful and are generally entitled to their costs. However, the issue that remains is the scale on which such costs should be awarded. The respondents' attorneys allege that they were under the impression that an agreement had been reached to the effect that the gate that gives access to Valspan would be open provided the one on Boesmanspan belonging to the applicants' trust would be opened. I find this submission to be without merit. What is troublesome is the fact that the respondents unreasonably denied the applicants access and it is only once the papers were filed and the matter was set down on an urgent basis for 26 February at 14h00 that the respondents' attorney telephonically informed the applicants' attorney that the respondents would open the gate in question. It seems like they were calling the applicants' bluff. After such an unnecessary litigious exercise they then tender costs on the unopposed party and party scale.

[12] I find the following submission, contained in the respondents' heads of argument and argued orally by Mr Van Tonder, startling:

*"15 It is submitted that the aforesaid is indicative of the fact that the applicants were not bona fide in proceeding with the application, especially with an order for attorney and clients costs, where there was no need for the application to be proceeded with on an opposed basis, under the circumstances where:*

*15.1 The respondents clearly did not intend to oppose the merits of the application;*

*15.2 The respondents have expressly agreed alternatively given an undertaking, to grant access, and*

*15.3 The respondents have tendered the unopposed party and party costs of the application.*



16. *It is therefore submitted that the applicants have no one but themselves to blame for the costs that were incurred after the 25<sup>th</sup> of February 2016.*”

From the correspondence and the explanation furnished by the applicants on how they tried to resolve this matter amicably out of court, bearing in mind the serious risk to the life of the animals they had which, predictably, eventuated. The respondents were indifferent to the animals’ plight.

- [13] The Supreme Court of Appeal in ***Sentrachem Ltd v Prinsloo*** 1997 (2) SA 1 (A) at 21-22 held that a court is entitled to order an unsuccessful litigant to pay the successful party its attorney and own client costs, mindful of the fact that it is a punitive order. The SCA further cautioned the courts in ***AA Alloy Foundry (Pty) Ltd v Titaco Projects (Pty) Ltd*** 2000 (1) SA 639 (SCA) not to use hindsight in assessing the conduct of a party. Harms JA remarked as follows at 648G:

*“It has become notable that a practice has taken root in some jurisdictions of making awards of costs on an attorney and own client scale where someone other than the own client or his privy is involved. Whether such orders are justified or justifiable in the light of decisions of this court may be questioned.”*

- [14] It is within my discretion to award an appropriate order of costs and must do so having applied my mind judiciously. The respondents’ conduct deserves severe opprobrium. It was vexatious and reprehensible. More importantly they were put in *mora* early and in writing that they would seek this stringent court order.

- [15] In the result the following order is made:

**Order**

- 1. The application for condonation for the late filing of the answering affidavit is refused.**
- 2. The respondents are ordered to pay the applicants' costs on the scale as between attorney and own client jointly and severally, the one paying the other to be absolved.**

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**MAMOSEBO J**

**NORTHERN CAPE DIVISION**

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|-------------------------------------|-----------------------------------------------|
| For the applicants:                 | Adv A Eillert                                 |
| Instructed by:                      | Ferreira Associates<br>Engelsman Magabane Inc |
| For the 2 <sup>nd</sup> respondent: | Adv AG Van Tonder                             |
| Instructed by:                      | M & M Van Niekerk<br>Haarhoffs Inc            |