IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

CASE NUMBER: 35672/12

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

09 JUNE 2014
DATE

9/6/2014

In the matter between:

In the matter between:

THE FEDERATION FOR SUSTAINABLE ENVIRONMENT — 1ST APPLICANT

THE SILOBELA CONCERNED COMMUNITY — 2ND APPLICANT

And

THE MINISTER OF WATER AFFAIRS	1ST RESPONDENT
THE DIRECTOR GENERAL: WATER AFFAIRS	2ND RESPONDENT
ACTING CHIEF DIRECTOR GENERAL OF WATER AFFAIRS MPUMALANGA	3RD RESPONDENT
DIRECTOR OF WATER AFFAIRS:	
MPUMALANGA WATER SECTOR	4TH RESPONDENT
REGULATION AND USE	
MEC CO-OPERATIVE GORVANCE AND	5TH RESPONDENT
TRADITIONAL AFFAIRS, MPUMALANGA	
ACTING EXECUTIVE MAYOR:	
THE GERT SIBANDA DISTRICT MUNICIPALITY	6TH RESPONDENT
MUNICIPAL MANAGER: THE GERT SIBANDA DISTRICT MUNICIPALITY	7TH RESPONDENT
MAYOR: THE ALBERT LUTHULI LOCAL MUNICIPALITY	8TH RESPONDENT
MUNICIPAL MANAGER: THE ALBERT	9TH RESPONDENT
LUTHULI LOCAL MUNICIPALITY	
KOMATI CATCHMENT AGENCY	10TH RESPONDENT

JUDGMENT

MAVUNDLA, J.

[1] This is an application condonation and leave to cross appeal against part of the judgment of this court, delivered on the 10 July 2012.

[2] The following facts are common cause:

2.1 Judgment in the main trial was delivered on the 10th July 2012. The court ordered sixth and seventh respondents (The Gert Sibande District Municipality) to take steps to provide temporary emergency drinking water to the residents of Carolina, grant a structural interdict requiring the District to engage with the residents and report to court, and ordered the District Municipality and Chief Albert Luthuli Municipality to pay the costs of the matter.

2.3 On the 26th July 2012, the court granted to the two municipalities leave to appeal and also made an order in terms of rule 49 directing that the order be immediately executable pending the appeal

proceedings. On the 3rd August 2013, the court varied its order of the 26th July 2012 to correct and a patent typographical error.

2.4 On the 14th August 2012 the present applicants filed a notice to cross-appeal in terms of Rule 49(4), without seeking leave to cross appeal.

2.5 The appeal was set down for hearing on the 12 February 2014.

2.6 The sixth to ninth respondents filed and served their heads of argument on the 23rd January 2013, in which for the first time raised the issue of the need to seek leave to cross –appeal.

2.7 On the 12 February 2014 the appeal was postponed *sine die* because the Full Court held that the leave to cross-appeal and application for condonation must serve before the court a quo. The appeal was postponed sine die and no costs were ordered for the postponement.

2.8 The applicant subsequently lodged before this court the present application on the 14TH April 2014.

[3] The grant of an application for condonation is a matter of the discretion of the court. The applicant in an application for condonation, must establish good cause for the delay. By good cause it is meant that he must furnish a satisfactory and acceptable

explanation for the delay, covering the entire period of the delay.[1] Upon becoming aware of the non-compliance, the applicant must promptly approach the court to explain the delay.[2] Secondly, he or she must show that there are reasonable prospects of success on the merits of the appeal.

[4] In *Melane v Santam Insurance Co. Ltd*[3] it was held that:

"In deciding whether sufficient cause has been shown, the basic principle is that the Court has 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, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation"

[5] The explanation proffered by the applicants in respect of the failure to seek in good time the court's leave to cross-appeal was that:

5.1 Various interlocutory hearings to the application for leave to appeal were conducted on urgent basis;

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[1] Vide *Mzizi v S* 2009 (3) ASS SA 246 (SCA) at 249 E paragraph [9]; *Minister of Agriculture and Land Affairs v CJ Rance* 2010 (4) SA 109 (SCA) at 117B-E.

[2] Vide *Mzizi v S* 2009 (3) ASS SA *(supra)* at 249 E paragraph [9]; Minister *of Agriculture and Land Affairs v CJ Rance* (supra)) SA 109 (SCA) at 117D.

[3] 1962 (4) SA 531 (AD).

5.2 Rule 49(4) does not specifically state that a separate application for leave to cross-appeal must be sought;

5.3 The respondents, who are organs of state, failed to timeoulsy alert them of the defective procedure which the applicants were following in not seeking leave to cross-appeal[4].

[6] Rule 49(4) provides as follows:

"A notice of cross-appeal shall be delivered within ten days after delivery of the notice of appeal or within such longer period as may upon good cause shown be permitted and provisions of these rules with regard to appeals shall mutatis apply to cross appeals" It would be noted that this rule clearly states that the rules with regard to appeals shall mutatis mutandis apply. Therefore, a party who intends to cross-appeal must then read rule 49(4) together with the rest of the rules applicable when noting an appeal. Rule 49(1) & (2) clearly state when an application for leave to appeal, implicitly, also a leave to cross-appeal, should be applied for.

[7] In my view, the application for leave to cross-appeal ought to have been sought on the 26th July 2012, which was not done, *in casu*, at the time when leave to appeal was granted to the two municipalities. The fact that the main application was brought under urgent circumstances, is in my view, not a satisfactory excuse for not

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[4] *Phillips v SA Reserve Bank and Others* 2013 (6) SA 450 (SCA) para 50.

having complied with the rules. In my view, the ignorance on the part of the legal representatives of the applicants is not a good excuse; vide herein below.

[8] The legal representatives of the applicants have quite correctly conceded that they were remiss, in so far as not having appreciated that a leave to cross appeal was required.

[9] In the matter of *Regal v African Superlate (Pty) Ltd*[5] the Appellate Court held that "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 normal consequences of such a relationship, no matter what the circumstances of the failure are".

[10] The fact that the applicants themselves are not to blame for the failure to comply with the rules, nor to apply for condonation much earlier, but their legal representatives were, although it is an important fact to be considered, does not necessarily entitle them as of right to be granted condonation. The court in the exercise of its discretion will also have regard to the delay[6]. In the matter of

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[5] 1962 (3) S.A. (A.D.) at 23.

[6] *Vide eThekwini Municipality v Ingonyama Trust* 2014 (3) (SA) 240 (CC) paragraphs [24] et [28]

Immelman v Loubser[7] the Appellate Court refused to grant condonation where the attorneys of the appellant were remiss in filing the record of appeal.

[11] *In casu*, the applicants were alerted of the incorrect procedure they followed, at the time when the respondents filed their heads of argument on the 23 January 2013. Instead of remedying the position then, the applicants chose a supine stance and proceeded to place the appeal for hearing. In my view, the delay was from July 2012 to May 2014, when this matter came before this court. The applicants, in my view, have not furnished a satisfactory explanation covering the entire period of the delay; including the time when they were alerted of the incorrect procedure they were following.

[12] There is no doubt in my mind that the matter is of importance to all the parties concerned. It deals, *inter alia*, with a fundamental right of the community of Caroline to a basic priceless commodity, water[8]. In the matter of *Van Wyk v Unitas Hospital*[9] the Constitutional Court held that: "[20] This Court held that the standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case.

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[7] *(2) SA 'n Ander* 1974 (3) SA. 816 (AD) at pp 823-824.
[8] S27 of the Constitution of The Republic of South Africa, Act 108 of 1996.
[9] 2008 (2) SA 472 (CC) at 477.

Factors that are relevant to this inquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success." Of course, in addition to these factors mentioned in the quoted passage, the prospects of success are also one of the factors to be considered[10].

[13] This court in the judgment delivered on the 26 July 2012 in refusing to make any order against the first to fourth respondents, held as follows: "In my view, to expect of the national government to interfere with administrative issues that resort in the sphere of local government, would negate the very separation of spheres created by the constitution."

[14] In the matter of *Mazibuko v City of Johannesburg* [11] the Constitutional Court held that "...s27 (1)(b), the right to access to sufficient water, coupled with s27(2), it is clear that the right does not require the State upon demand to provide every person with sufficient water without much more; rather it requires the State to take reasonable legislative and other measures progressively to realize the achievement of the right of access to sufficient .water, within available resources."

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[10] *Vide Melane v Santam Insurance Co. Ltd (supra).*
[11] 2010 (4) SA 1 (CC) at 18 para [50] et 19H.

[15] The issue relating to the provision of water in the affected area, at a practical level is according, to the *Mazubuko* matter *(supra),* not within the domain of the first to the fifth respondents. There are no reasonable prospects that on appeal, a decision contrary to what is expressed in the *Mazibuko* decision and by the court *a* quo may be reached. I therefore conclude that there are no prospects of success on appeal on this point. It is my considered view that, to have the national government dragged to participate in the appeal, as is sought through the envisaged cross-appeal, would be an exercise in futility and not in the interest of justice but unfair to the relevant respondents[12].

[16] The applicants in the main trial never sought any order against the eighth and ninth respondents. With the envisaged cross-appeal they seek to have an order made against these respondents. They also have added the tenth respondent who was not cited as a party in the main application.

[17] In the matter of *Donnelly v Barclays National Bank Ltd*[13] it was held that generally speaking, a Court of Appeal will not entertain a point not raised in the court below and especially one not raised on the pleadings in the court below. Thus in principle, a court of appeal will decline to allow a new point to be raised before it unless (i) the point

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[12] *Vide eThekwini Municipality v Ingonyama Trust* (supra) at 248D.
[13] 1990 (1) SA 375 (W) 380H-381B.

is covered by the pleadings; (ii) there would be no unfairness to the other party; (iii) the facts are a common cause or well-nigh incontrovertible; and (iv) there is no ground to thinking that the other or further evidence would have to be produced that could have affected the point.[14]

[18] In my view, it was quite correctly submitted on behalf of the first to fifth respondents that the cross appeal is doomed to fail because the applicants intend to obtain an order against the first to fifth respondents who are not parties to the appeal.

[19] In the premises, taking into account what is stated herein above, I conclude that in the exercise of my discretion the application for condonation and for the leave to cross appeal should be dismissed, as set down herein below.

[20] It is trite that the award of costs is a matter of the discretion of the court. It is equally trite that, generally, the costs follow the event. The applicants, *in casu*, are not in my view pursuing a self serving private commercial interest, but a public interest related issue, water service provision to the public in the affected area of Carolina. Their legal representatives followed an incorrect procedure resulting in the

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[14] Herbsen & Van Winsen The Civil Practice of the High Courts of South Africa 5th ed (2009) 1248.

delay in bringing timeously, the application for condonation and leave to cross appeal. The applicants were therefore not to blame in the failed application. Where the legal representative was remiss in the prosecution of a matter on behalf of his / her client, the costs must be borne by the legal representative and not the client. Having said that, however, the instructing attorneys for the applicants are also the public interest groups which generally assist indigent litigants in bringing to court matters affecting their constitutional rights related matters. In these circumstances, it might discourage such institutions in pursuing and assisting in such matters, as *in casu*, if they do so well knowing that they are exposed to costs orders[15]. In the exercise of my discretion, I shall therefore not mulct neither the applicants, nor their legal representatives with a costs order of this failed application for condonation and leave to cross-appeal. It is therefore appropriate that no order as to costs should be made.

[21] In the premises the following order is made:

(i) The application for condonation and leave to cross-appeal is dismissed.

(ii) No order as to costs is made.

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[15] *Vide Institute for Democracy in South Africa v ANC* 2005 (5) SA 39 (CPD) paragraphs [60] -

N.M. MAVUNDLA

JUDGE OF THE COURT

HEARD ON THE : 22 MAY 2014

DATE OF JUDGEMENT: 09 JUNE 2014

1ST APPLICANTS' ATT: LAWYERS FOR HUMAN RIGHTS

2ND APPLICANTS' ATT: LEGAL RESOURCES CENTRE

1ST 2ND APPLICANTS' ADV: ADV J.R. BRICKILL assisted by ADV G. SNYMAN

1ST -5TH RESPONDENTS' ATT : TWALA ATTORNEYS

1ST -5TH RESPONDENTS' ADV : ADV A.M. JOZANA

6TH –9TH RESPONDENTS' ATT : GUMEDE ATTORNEYS

6TH –10TH RESPONDENTS' ADV: ADV M. NOWITZ