

Reportable

IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

CASE NO: 13871/2011

In the matter between:

GEORGE AFONSO NO	First Applicant
JUDITH SUSARA WILHEMINA AFONSO NO	Second Applicant

and

EDWARD NATHAN SONNEBERGS INC.	First Respondent
CHARTWELL CENTRE BODY CORPORATE	Second Respondent
KWAZULU-NATAL LAW SOCIETY	Third Respondent
DNCV DE FREITAS NO	Fourth Respondent

JUDGMENT

GORVEN J

1]This application is for the review of a decision made by the third respondent (the Society) in assessing fees charged. The co-trustees of the Afonso Family Trust (the Trustees) own six sections under a Sectional Title Scheme governed by the Sectional Titles Act 95 of 1986. The second respondent (Chartwell), which is the Body Corporate of the Scheme, sued the Trustees. Chartwell required the removal of those parts of structures or buildings erected by the Trustees which, it alleged, encroached on the common property of the Scheme. In the alternative,

Chartwell claimed payment of damages based on what was alleged to be the market value of the parts of the common property encroached upon.

2]That litigation gave rise to a settlement agreement which, in essence, provided for payment by the Trustees of R1.6 million and the extension, at the cost of the Trustees, of those sections owned by the Trustees to incorporate the encroachments. The first respondent (ENS) which had hitherto represented Chartwell, was appointed in the settlement agreement to give effect to its provisions. The settlement agreement made the Trustees liable to pay certain costs. The term bearing on this is found in clause 6.3 and reads as follows:

‘The Trust shall within 10 (ten) days on written request from the Attorneys:-

6.3.1 pay all costs of transfer, conveyancing fees, costs incurred in obtaining mortgagees’ consents as contemplated in clause 4.1.2 above, all other costs necessary to give effect to and implement this Agreement, together with value-added tax in respect of such costs....’

3]After having lodged the documents required for the incorporation of the encroachments, ENS sent its account to the Trustees. The account was for fees of R189 609.07 and disbursements of R1 083.00. The account was queried and, after an exchange of correspondence, was referred to the Society for assessment. The Society determined that the assessment was governed by Rule 16(b) of the Rules of the Society. This rule was promulgated pursuant to s 69(h) of the Attorneys Act 53 of 1979 (the Act) which empowers the Society to ‘prescribe the manner of assessment of the fees payable by any person to a practitioner in respect of the performance of any work other than litigious work and in respect of expenses reasonably incurred by such practitioner in connection with the performance of that work and, *mero motu* or at the request of such person

or practitioner, assess such fees in the prescribed manner.’ Section 74(5) of the Act provides that an ‘assessment of fees in terms of a rule contemplated in section 69 (h) shall be subject to review in all respects as if it were a determination by such officer of a provincial division or high court as is charged with the taxation of fees and charges’. The Society appointed the fourth respondent (de Freitas) as an assessment committee to assess the fee. The dispute was and is between the Trustees and ENS and I will refer to them, except where otherwise necessary, as the parties.

4]Rule 16(b) lists 11 factors to take into account in determining the reasonableness or otherwise of a fee.¹ The Society wrote to the parties on 14 June 2010 calling for their written submissions on each of the factors referred to in the rule. Both parties responded. ENS did so by letter dated 16 September 2010 which ran to 20 pages and dealt in detail with each factor referred to in the rule. The Trustees did so by letter dated 1 November 2010, having seen the submissions of ENS. The covering letter of 2 pages attached 36 pages of correspondence exchanged between the parties after ENS claimed the fees. The documents submitted by the Trustees did not address the factors set out in the rule.

5]The assessment was set for 10 December 2010. One day before that date, the parties agreed that de Freitas would conduct the assessment in two stages. He would first interpret clause 6.3 and determine from that the basis on which fees could be charged by ENS. A hearing took place on that day. On the first issue the Trustees submitted that ENS was only entitled to charge on a conveyancing basis and was bound to the conveyancing tariff guidelines. ENS submitted that it was entitled to charge general fees calculated on a time basis. The second stage was for

¹ The rule requires the body assessing to ‘allow all such fees and disbursements as appear to it to have been reasonable for the performance of the work concerned’ taking into account the 11 listed factors.

de Freitas to assess whether, if the basis on which ENS had charged fees was in principle correct, the fees were reasonable in the light of the criteria set out in Rule 16(b). There is a dispute between the parties as to whether there would be two hearings; ENS contends not while the Trustees say that it was agreed that the parties would be given a further opportunity to debate the actual fees charged once the basis on which they could be charged had been ruled on.

6]De Freitas sent the Society a report dated 14 December 2010 (the first report) setting out his ruling as to the basis of charging the fees. This stated that ‘Afonso Trust is liable for costs as in the manner charged by Edward Nathan Sonnenbergs Incorporated.’ The Council of the Society, without making a ruling, referred the matter back to de Freitas for him ‘to proceed with the actual assessment of the fees’. The parties were informed of this by letter dated 24 February 2011. Mention is made in that letter of the first report but neither of the parties was given a copy. No further hearing took place and further submissions were called for or made. De Freitas submitted a second report to the Society dated 15 March 2011 (the second report). The Society sent the second report as the final assessment to the parties under cover of a letter dated 31 August 2011. This was received by the Trustees on 12 September 2011. The assessment found that the fees charged by ENS were reasonable in the light of the factors set out in Rule 16(b). The parties had already by then been attempting to obtain a copy of the first report from the Society without success. This was finally received by the Trustees on 5 October 2011.

7]The present application is based on the contention of the Trustees that the decision as to the basis of charging fees was wrong and that, before the Society made the determination referred to in the second report, the

parties should have been given the opportunity to make further submissions. The application is clearly brought on the basis of Rule 48 of the Uniform Rules of Court but does not follow the procedure prescribed in the rule. I say that it is brought under the rule for at least the following reasons. First, paragraph 24(d) of the founding affidavit says that the ‘review of taxation is dealt with in Rule 48...which lays down the procedure to be followed’ including that notice to the taxing master be given within 15 days after the decision.² Secondly, the founding affidavit attempts to make out a case for condonation for the Trustees’ failure to comply with that time limit. Thirdly, the amended notice of motion contains a prayer for condonation for ‘failure to launch this application timeously’ based on those averments in the founding affidavit. The amendment was brought about as a result of ENS taking the point in the answering affidavit that no prayer for condonation was included in the relief sought, despite the reliance on Rule 48. Fourthly, in the founding affidavit the Trustees attempt to explain their non-compliance with a different aspect of the rule by saying that ‘it would be artificial to require the Fourth Respondent³ to state a case in terms of Rule 48(1)...because the areas of dispute are clearly identified in the parties’ submissions as set forth in these application papers’. Fifthly, both the basis for condonation and the attempt to avoid that part of the rule requiring notice to state a case are specifically challenged in the answering affidavit and no alternative basis for the application is raised in the replying affidavit. Indeed, in the replying affidavit the Trustees clearly persist in the approach that the application is one brought under the rule.

² Although the rule requires action to be taken by a dissatisfied objector within 15 days after the *allocatur*, the parties are in agreement that the relevant time from which the period runs is the date on which the decision of the Society was made known to the party seeking review.

³ The Notice of Motion, prior to its amendment, and the founding affidavit treat the application as a review of the decision of de Freitas. This is why the reference here is to the fourth respondent. Even after amending the relief sought in the Notice of Motion, the averments in the founding affidavit to this effect were not corrected or said to apply to the Society. It was accepted in argument that it is the decision of the Society that should be subject to review under the rule.

8]In their heads of argument, the Trustees submit for the first time that the application is brought under the common law. Later in their heads, in attempting to deal with the point taken that the procedure in Rule 48 has not been complied with and no condonation other than that concerning the initial time limit is sought in the application, the Trustees submit that the application is brought under the common law alternatively, to the extent applicable, Rule 53. This submission is also called in aid to deal with the failure to comply with the 15 day period in Rule 48. As indicated, the papers do not support these contentions.

9] The Trustees have not complied with a single aspect of Rule 48, despite purporting to bring the application under the rule. They have used the procedure set out in Rule 6 and seek to justify non-compliance with two aspects of Rule 48 whilst simply ignoring all of the others. In the answering affidavit, ENS specifically takes the point of non-compliance with Rule 48 saying that this alone warrants the dismissal of the application. ENS also takes the point that, if it is found that this is not sufficient to be visited with that result, the Trustees have failed to make out a case for the only condonation sought in the application, namely, the failure to comply with the 15 day period imposed by the rule. I shall deal with each of these points *in limine* in turn.

10]As mentioned above, s 74(5) of the Act makes the decision of the Society reviewable as if it was the decision of a High Court taxing master. The procedure for such a review is laid down in Rule 48. The present application, therefore, clearly falls within the ambit of the rule. It is a unique procedure, and differs both from that prescribed in Rule 53 for reviews in general and from that prescribed in Rule 6 for applications in

general. In essence the rule requires the dissatisfied party to notify the taxing master within 15 days that it requires him or her to state a case.⁴ The notice must specify the aspects complained of. The taxing master must supply the stated case to each party within 20 days after receipt of the notice and set out any finding of fact in the stated case. Within 15 days of receipt of the stated case, the parties must make submissions in writing. Within 20 days of receipt of the submissions, the taxing master must furnish the parties with a report. The parties may within 10 days thereafter make further written submissions to the taxing master who shall then forthwith lay the case, together with all of the submissions, before a judge in chambers. The judge has four options, viz. to decide the matter on that basis, to require further information from the taxing master, to hear the parties in chambers or to refer the case for decision to the court.

11]The first issue to determine is whether this procedure must be used if a review falls within the ambit of Rule 48 or whether it is simply available, as one of a number of optional procedures, to a party seeking this kind of review. Section 74(5) was enacted to make the rule apply to this kind of review. This is, in itself, no more than a provision that such a review falls within the ambit of the rule. It does not necessarily mean that the rule must be used. Without the provisions of s 75(4), Rule 48, dealing as it does with taxations by the taxing master, would not apply to such assessments. Whether or not a party is bound to use the rule must be determined by the principles of interpretation of documents, including the peculiar characteristics of the rule. I was not referred to any cases which bear directly on this issue and have also found none myself.

⁴ It has been said that it is not necessary for the taxing master 'to write an essay at this stage' because, once the parties have made their submissions, the taxing master must frame a report. Per Schutz J in *Nedperm Bank Ltd v Desbie (Pty) Ltd* 1995 (2) SA 711 (W) at 713A-B.

12]There is a clear purpose in the provision and formulation of this rule by the legislature. That purpose is to provide a process for the most expeditious, inexpensive and procedurally appropriate resolution of disputes concerning taxations of costs.⁵ It does so without in any way detracting from the common law or constitutional rights of parties,⁶ including the *audi alteram partem* principle. The judge in chambers is required to consider the matter and, if she or he deems it necessary, to call for further information from the taxing master, to call for argument in chambers from the parties or to refer it to court before deciding the review. This discretion allows the judge to tailor the process to meet the exigencies of the specific case. The rule does not shoehorn all matters into an inflexible procedure regardless of the issues. It does not preclude the full ventilation of complex issues or the introduction of voluminous evidence if, in the discretion of the judge, this is deemed appropriate. It also takes into account the stringent requirements, honed over the years, for the successful review of a decision of the taxing master.⁷ It presupposes that the material on which the decision was made had been dealt with by the taxing master. It is clearly designed to avoid the launch of an application such as the present one, which runs to over 390 pages, unless a judge has decided that such an approach is appropriate. These

⁵ *Buonanno v The Taxing Master* 1965 (2) SA 653 (N) at 654E-G; *Templehoff v Aberdeen Municipality* 1948 (1) SA 745 (E) at 747 which latter case dealt with the predecessor to the present Magistrates' Courts Rule 35(3).

⁶ It is instructive that the corresponding rule in the Constitutional Court was utilised in the complex matter of *President of the Republic of South Africa & others v Gauteng Lions Rugby Union & another* 2002 (2) SA 64 (CC) paras 9 and 10 in relation to a bill of costs taxed in the Constitutional Court. In that matter the Constitutional Court did not deem it necessary to call for further written submissions or oral argument. The Constitutional Court utilised the procedure of the rule even though it was not called on to consider its constitutional validity. Neither was the constitutional validity of Rule 48 challenged before me.

⁷ This test has been stated in a number of cases. In essence the reviewing judge or court must come to the conclusion that the taxing master was clearly wrong before the decision is interfered with. *South African Rugby Union* para 13; *Ocean Commodities Inc & others v Standard Bank of SA Ltd & others* 1984 (3) SA 15 (A) at 18F-G; *Visser v Gubb* 1981 (3) SA 753 (C) at 754H-755C; *Lander v O'Meara & another* 2011 (1) SA 204 (D) para 13.

factors strongly militate against an interpretation which gives the parties the option to decide which procedure to adopt.

13]I have not found any case where the review of a taxation fell within the ambit of the rule was dealt with by a different procedure. I was also not referred to any.⁸ There are, however, cases where judges have dealt under the rule with matters where the matter in question might not strictly have fallen within its ambit. Two examples suffice. In *Bowman Gilfillan & Blacklock v Timberit Properties & others*,⁹ the court held that it ‘does not seem to be altogether clear that Rule 48 was intended to refer to a taxation other than a taxation by a Taxing Master in the ordinary sense of that term’.¹⁰ This was not such a taxation, but Milne JP nevertheless dealt with it under Rule 48 and condoned the use of the rule to bring the case before him ‘in so far as it is necessary’.¹¹ Secondly, prior to its amendment, Rule 48 limited the right of review under the rule to a situation where one of the parties had objected to an item in the taxation. Despite this, Caney J dealt under the rule with the review of items taxed down *mero motu* by the taxing master.¹² In deciding to do so, Caney J said the following:

‘I know of no other remedy available to the applicant, unless he were to institute full review proceedings under the provisions of Rule 53, but applying the reasoning of PITTMAN, J.P., in *Templehoff v. Aberdeen Municipality*, 1948 (1) S.A. 745 (E) at p.747, it would be a gross hardship if the applicant were denied the advantage of the

⁸ It may be thought that *Stubbs v Johnson Brothers Properties CC & others* 2004 (1) SA 22 (N) does not deal with the matter under Rule 48. However, a close reading of the judgment shows this was done in that the taxing master stated a case and various persons made written submissions (see 26A and 27E-I). There are many instances where it has been held that the review in question does not fall within the ambit of the rule. See eg *Gran-Or (Edms) Bpk v Bevan* 1969 (2) SA 87 (T); *Mcunu v Southern Insurance Association Ltd* 1977 (2) SA 18 (SEC). This was not the contention of the Trustees in the present matter.

⁹ 1967 (2) SA 542 (N).

¹⁰ At 542G-H.

¹¹ Loc cit.

¹² *Buonanno* (fn 5) at 654E where he labelled the failure of the legislature to provide for that situation a *casus omissus*. It appears, with respect, that Caney J was correct in such characterisation because shortly after the judgment was reported, the rule was amended to include precisely that situation.

inexpensive and expeditious procedure afforded by Rule 48.’¹³

14]The learned judge says that the procedure set out in Rule 53 may be available to a party seeking to review the decision of a taxing master. What is meant is that, if he held that the review did not fall within the ambit of Rule 48, this would be the only means open to the applicant.¹⁴ He is not saying that this can be done where the review falls within the ambit of the rule. He found that there was a *casus omissus* concerning the case before him and dealt with it under the rule on the basis that the applicant would be at a relative disadvantage if use had to be made of Rule 53. His reasoning and decision to deal with the matter lends support to the conclusion that it is, if not necessary (for he did not have to decide that point), at least clearly advantageous for all reviews of taxations which fall within the ambit of Rule 48 to be dealt with under the rule. On his reasoning, parties who cannot make use of the rule suffer hardship.

15]Rule 53 provides that all review proceedings ‘shall’ be brought by way of Rule 53.¹⁵ Despite the use of the word ‘shall’, there is clear authority that this does not prevent a party from using Rule 6 for reviews.¹⁶ However, it has been held that ‘in the ordinary course of events’ general review applications have to be brought under Rule 53.¹⁷ By contrast, the more relaxed wording of Rule 48 provides that a party ‘may’ by notice require the taxing master to state a case. Rule 48 is therefore framed in permissive terms. It may be argued that, since the stricter wording of Rule 53 does not make its use peremptory for matters which fall within its

13 At 654E-F.

14 Some examples of this appear in fn 8.

15 Rule 53 is said to apply ‘[s]ave where any other law otherwise provides’.

16 *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 (A) at 661E-662H.

17 *Van Zyl & others v Government of the Republic of South Africa & others* 2008 (3) SA 294 (SCA) para 36 where Harms ADP said that the failure to follow the rule in that matter had ‘caused much aggravation’.

ambit, there is even less warrant to require parties to use Rule 48 where a review falls within its ambit.

16]Rule 48 differs from Rule 53 because it is one designed with the special process appropriate to a review of taxation in mind. Its provisions are therefore aimed at that kind of review only. It is understandable that where, as with Rule 53, the whole range of reviews falls within the ambit of a rule, the omnibus procedure of the rule may not suit or be necessary for certain reviews. By way of example, Rule 53 is more time consuming than Rule 6. In order to expedite the application, an applicant may well accordingly opt to forego the advantage of having the record and reasons for a decision furnished and thereafter being able to supplement the founding affidavit or amend the relief sought. It is far more likely that a case can be made out that one of many kinds of reviews could more appropriately be dealt with outside of Rule 53 than that the review of a decision of the taxing master could more appropriately be dealt with outside of Rule 48. In addition, in contradistinction to Rule 53 primarily benefiting an applicant,¹⁸ it has been held that the time limits in Rule 48 have been imposed for the benefit of a respondent.¹⁹ I respectfully agree with this finding. It is the respondent in a review of taxation who has accepted the outcome of the taxation and is more likely to desire finality without undue delays and expense. If, in the words of Caney J, ‘it would be a gross hardship if the applicant were denied the advantage of the inexpensive and expeditious procedure afforded by Rule 48’ how much

18 In *Jockey Club*, Kriegler AJA said the following of Rule 53 at 661E-F: ‘On the face of it the Rule was designed to aid an applicant, not to shackle him. Nor could it have been intended that an applicant for review should be obliged, irrespective of the circumstances and whether or not there was any need to invoke the facilitative procedure of the Rule, slavishly – and pointlessly – to adhere to its provisions.’

19 *Preller v Jordaan & another* 1957 (3) SA 201 (O) at 202F-H, which upheld the reasoning of Wessels J in *Maseto & others v Pleskus & others* 1917 TPD 366 at 368. In *Jockey Club* at 662G-H, Kriegler AJA held that Rule 53 confers only incidental and minor benefits on a respondent whereas it confers real benefits on an applicant ‘which he may enjoy if and to the extent needed in his particular circumstances.’

more would it operate as a gross hardship on a respondent if an applicant were entitled to simply ignore the rule at will? If the choice lay with the applicant, an unscrupulous applicant could delay the outcome of the review by avoiding Rule 48 and thus prolonging and rendering more costly the process.

17]If the approach is adopted that the use of Rule 48 is obligatory for reviews falling within its ambit, Rule 27 affords the court a discretion in suitably motivated cases to condone non-compliance. To that extent, such an approach can never be an absolute one. It may be argued that, where condonation is required, the use of Rule 48 could give rise to insuperable practical difficulties. There is, for example, clear authority that a judge in chambers is not empowered to grant condonation for any failure to comply with the rule.²⁰ How then does a party who is out of time obtain condonation? Must the review not then be brought by application to court and therefore not under Rule 48? Not so. The court may be approached to condone any non-compliance with, or an extension of time limits imposed by, the rules.²¹ Once such an application has been granted, the remaining provisions of Rule 48 can be utilised. Such an application can be brought by way of urgency if necessary. All of this leads me to conclude that, where a review falls within the ambit of Rule 48 as does the present one, the party initiating the review is bound to utilise the rule unless a case can be made out for not doing so in whole or in part. Should a party attempt to make out such a case, that party is of course obliged to ask for condonation for its failure to comply with the rule or those parts of it which it claims can not be, or ought not to be, complied with.

20 Per Erasmus J in *Mahomed v Mahomed* 1999 (1) SA 1150 (E) at 1152E-F.

21 Just as a court may be approached to order compliance with the rule if the taxing master does not comply with it as was done in *Tempelhoff* (fn 4) at 748 where the magistrate was ordered to state a case under the relevant Magistrates' Court rule.

18]As I have mentioned, the Trustees correctly accept that the review falls within its ambit and expressly purport to bring the application under the provisions of the rule. They have not complied with any aspect of the rule. A case ought therefore to have been made out for non-compliance with the whole of the rule and the appropriate condonation sought. The only aspect of non-compliance for which the Trustees seek condonation, however, is that relating to the time which they took to initiate the procedure. There is neither an attempt to make out a case, nor a request for condonation, for not complying with other aspects of the rule. As mentioned, the Trustees simply say that, '[h]aving regard to the history of this matter it would be artificial to require the Fourth Respondent to state a case in terms of Rule 48(1)'. Where a case is made out for non-compliance with only one aspect of the rule, it follows that this should be the only aspect not complied with. The Trustees come nowhere near to making out a case for not complying with the rule as a whole. In the absence of a properly motivated application for such relief, the application must therefore fail.

19]The present matter provides a trenchant illustration of the effects of the failure of the Trustees to comply with the rule and shows that requiring them to do so is not unduly technical or formalistic. First, the delay caused by the Trustees having erroneously waited for the first report would have been avoided. Had they made use of the rule, the lack of the first report could have been mentioned, dealt with in the stated case, viewed by the parties and submissions made concerning its finding all within the prescribed periods. Secondly, no case was stated by the Society. The importance of this aspect of the rule has been recognised in a number of cases.²² In *Brener*, Stegmann J said the following concerning

²² *Brener NO v Sonnenberg, Murphy, Les Burnett (Pty) Ltd* (Formerly *D'Arch Masins Benton and Bowless SA (Pty) Ltd*) 1999 (4) SA 503 (W); *Desbie* (fn 4) at 713A–C.

its importance:

‘[I]t is important to bear in mind that the stated case remains the foundation of the parties' initial contentions, of the Taxing Master's report and of the parties' further contentions that are to follow in terms of the Rule. The stated case, if not initially prepared with due care, is likely to create problems that complicate, or even frustrate, the steps in the review proceeding that have still to follow.’²³

Thirdly, I do not have the benefit of a report from the Society.²⁴ Fourthly, the time within which the review will be completed has been extended well beyond that likely to have been taken if the rule had been applied. Based on the times allowed under the rule, the papers would have been laid before a judge at the latest by 12 January 2012, some four months after the second report was furnished to the Trustees. In the event, the application was argued on 12 June 2012, five months after that date. Fifthly, the costs exceed those likely to have been incurred by way of the rule even if the judge in chambers had required further steps to be taken after receiving the review. In my estimate, all of the above mentioned factors confirm the requirement to use the rule or to bring a fully motivated application for condonation. The Trustees have done neither.

23 At 508D-E. At 508F-G he cited in support the dictum of Rabie JA in *Kruger v Sekretaris van Binnelandse Inkomste* 1973 (3) SA 231 (A) at 232E-233A where, dealing with the equivalent Rule in the Appellate Division, he ‘emphasised the importance of stating the case properly at the outset, and some of the problems which can result if the requirements of the Rule are ignored or dealt with in an imprecise or slipshod manner.’

24 When the lack of the stated case and report was raised in argument, the Trustees submitted that the Society has elected to abide the outcome of the application and would therefore not, in all probability, have stated a case or framed a report. There are two fatal difficulties with this submission. First, under the rule the Society would have been obliged to state a case and, after receiving submissions, to have framed a report. As pointed out above, if the Society had not done so, the Trustees could have approached the court for an order requiring the Society to comply. Secondly, as mentioned in fn 3, the founding papers claim relief only to set aside the decision of de Freitas. All the averments in the founding affidavit target the decision as if it was made by de Freitas. When it was pointed out in the answering affidavit that the decision sought to be reviewed is that of the Society, the Trustees amended the relief sought to target the Society. This means that, at the time the application was served on the Society and it decided to abide the decision of the court, no averments had been made concerning its decision nor was its decision sought to be reviewed and set aside. Any election or waiver requires knowledge of all the material facts (*Laws v Rutherford* 1924 AD 261 at 263). The election contended for was therefore not made with the required knowledge of the facts. The submission does not hold water.

20]If I am wrong on the point that condonation should have been sought for all of the aspects of Rule 48 which were not complied with, the question of the application for condonation for the failure to act within 15 days arises. It must be stressed that this application was brought under Rule 48 and not on the basis of the common law or Rule 53. On the Trustees' interpretation, the requisite action should have taken place no later than 26 October which is 15 days after 5 October 2011. In fact, since the only decision sought to be reviewed is that dealt with in the second report which was received by the Trustees on 12 September 2011, the 15 day period begins then and ends on 3 October. The application was launched on 12 December but only served on the Society on 14 December.²⁵ This means that the application was launched three months after receipt of the second report and was more than two months late. In *Kingsborough Town Council v Thirlwell & another*,²⁶ in a review of taxation where no time limit was stipulated in the rule applicable at the time, the court held that a three and a half month delay was unreasonable and that proof of prejudice was not necessary for holding such a delay unreasonable. The application was dismissed with costs.

21]The present matter requires even more prompt action on the part of the Trustees. This is because the legislature has seen fit, since *Kingsborough*, to specify a time limit in Rule 48. A case must therefore be made out, not that the time within which the application was launched was reasonable, but that the failure to comply with the specified time limit should be condoned. This requires concrete evidence as to why the time limit could not reasonably have been complied with in the circumstances of the

²⁵ I will assume, without deciding, for the purpose of this aspect that the mere issue of the papers is sufficient. This was the approach in *BHP Billiton Energy Coal South Africa Ltd v Minister of Mineral Resources & others* 2011 (2) SA 536 (GNP) para 24. In Rule 48, however, notice to the Society within 15 days after the decision is required and it is certainly arguable that service of an application would be required rather than the mere issuing of the application papers.

²⁶ 1957 (4) SA 533 (N).

matter. For the reasons referred to in paragraphs 23 and 24 below, no satisfactory evidence to this effect has been proffered. In any event, as I have said above, the relief sought as a whole is framed under Rule 48 but the condonation requested relates only to one aspect of non-compliance.

22]Even if, contrary to what I have held, it was not necessary to proceed by way of Rule 48 and, in addition, the application can be said to have been brought under Rule 6 (Rule 53 has clearly not been utilised either), the Trustees need to show that the delay for which they seek condonation was not unreasonable in the circumstances. It is therefore necessary to evaluate the case made out by the Trustees for condonation.

23]The Trustees do not say that they were unaware of the time limit fixed by Rule 48. In the letter covering the second report the Society referred specifically to s 74(5) of the Act. On 4 October 2011, ENS called for payment of the costs. This provoked the response that the erstwhile attorney for the Trustees could not obtain instructions from them until he had seen a copy the first report and that a copy had been requested. This position was contested by ENS on the basis that the reasoning in the second report disclosed what had been dealt with in the first. On 6 October, ENS wrote to the Trustees' attorney indicating that, if the Trustees were not satisfied, they should initiate a review. On 11 November, this attorney wrote notifying that he had been instructed to bring review proceedings and had briefed senior counsel for that purpose but that his client was in Johannesburg and the counsel concerned had been involved in trials. ENS responded less than 30 minutes later to reiterate that the reasons for the delay were not accepted and not sufficient. Nothing more was heard until the launch of the application on 12 December. Despite this, all that has, in essence, been said in the

application for condonation is that the first applicant 'is in ill health and...is due to go in for a heart bypass operation', that the bill assessed is voluminous and complex, that it is necessary to interpret clause 6.3 of the settlement agreement, that it took time to obtain advice from senior conveyancers and that the closure of the practice of the Trustees' erstwhile attorney and handing the matter to the their present attorney also delayed matters.

24]This is woefully inadequate. No mention is made in either the founding or the replying affidavit of the fact that senior counsel had been briefed more than one month prior to the launch of the application and why it was not launched shortly thereafter. No particularity is given as to the date on which the first applicant became ill or how that affected his ability to give instructions or what steps were taken to obtain them. Nothing is said as to why the first trustee needed to do anything more than issue instructions since the Trustees' erstwhile attorney deposed to the founding and replying affidavits and their present attorney to an affidavit supporting the replying affidavit. Despite deposing to these affidavits, the erstwhile attorney gives no information about when the winding up of his practice began, what it entailed or how and to what extent it delayed matters. In the light of the clearly communicated attitude of ENS that no delays would be brooked, the paucity of detail in the explanation for the delay borders on the audacious. In attempting to make out a case for condonation it does not even get off the ground, let alone take flight.

25]This is true of the explanation whether the application falls under Rule 48 or not. One must take cognisance that, since such applications should ordinarily be brought under Rule 48, the short time limit will be a factor

influencing the view of a court as to what constitutes a reasonable period within which to bring an application by way of a different procedure. This in turn informs the decision whether the delay is unreasonable. It is at least expected that a detailed explanation is given of the steps taken in attempting to comply and the obstacles which prevented it. The delay of three months is clearly unreasonable in the light of the lack of such explanation. As regards the prospects of success, I am unpersuaded that they weigh in favour of the Trustees for the following brief reasons. The Trustees conceded in argument that clause 6.3 must mean that ENS was to be involved in more than conveyancing and, accordingly, that fees other than conveyancing fees would be incurred. Even in the application the Trustees do not attack the time which ENS says was spent on performing its mandate. The fees charged are all, except in the case of one attorney whose time made up a small fraction of that spent, lower than the usual charge out rate for the people concerned. In any event, this is a matter where the Society is far better qualified to assess reasonableness of both the time spent and the hourly charges than I am.²⁷ It is therefore unlikely that the Trustees would have succeeded on the merits of the review. The lack of prospects of success coupled with the unreasonable delay means that no case for condonation is made out even if the application is dealt with under Rule 6. All of this means that it is unnecessary to go into the merits of the review in any further detail.

26]The parties agreed that, if the Trustees were unsuccessful, the provisions of Rule 48(7) should not apply. ENS did not persist in its prayer for costs on the scale as between attorney and client so nothing further need be said on this aspect.

²⁷ *Wellworths Bazaars Ltd v Chandlers Ltd and Others* 1947 (4) SA 453 (T) 457 – 8
Scott & Another v Poupard & Another 1972 (1) SA 686 (A) 689 F – G; *Lander* (fn 7) para 17.

27]In the result, the application is dismissed with costs.

DATE OF HEARING: 12 June 2012

DATE OF JUDGMENT: 29 June 2012

FOR THE APPLICANTS: HA de Beer SC, instructed by Mooney
Ford Attorneys.

FOR THE 1st RESPONDENT: Max du Plessis, instructed by Edward
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