

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case no. 1604/2004

In the case between:

DANIE LOUW HANDELAARS BK

Applicant

and

NEUHOFF AND VAN DEVENTER
PETRUS JACOBUS ANTON NEUHOFF

First Responded
Second Responded

HEARD ON: 28 OCTOBER 2005

JUDGMENT: RAMPAL, J

DELIVERD ON: 30 JULY 2007

[1] Two applications were presented to me on Friday the 28 October 2005. The one which was the main was about leave to appeal the other which was ancillary to the main was about condonation. On behalf of the applicants appeared Mr. D. Louw, the sole director of the Close Corporation. Mr. Berridge appeared for the respondents, an incorporated law

firm and its former director. I then reserved the judgment but neglected to diarise the file. The judgment remained outstanding until Malherbe JP recently contacted me while I was recuperating at home from a surgical operation. I deeply regret the delay. The delay was due to an inadvertent oversight on my part. I apologise to the parties for all the inconvenience occasioned by my neglect.

[2] I deem it necessary to detail the historic background of this matter. At one point the respondents were the plaintiff's attorneys. They initially acted for the plaintiff in a civil dispute between the plaintiff and an entity called Prolong. For some reason the relationship between the applicant and the respondents later broke down. As a result of the breakdown the respondents withdrew from the matter.

[3] In that matter the applicant was sued by Prolong. In turn the applicant filed a counter claim against Prolong. The applicant claimed from Prolong an amount of approximately R2.5 million for payment of an alleged commission owing by

Prolong to the applicant. That case was heard by H.M. Musi J who granted absolution from the instance in respect of the applicant's counter claim.

[4] The applicant was aggrieved by an order of absolution from the instance. The applicant felt that the respondents were responsible for its unsuccessful bid to recover the alleged commission from Prolong. The applicant alleged that the second respondent was obliged to have finalised the commission agreement between the applicant and Prolong. Therefore the applicant held the respondents responsible for its loss and sued the respondents in the present matter.

[5] Although the applicant claimed an amount of R2.5 million from Prolong by way of a counter claim the applicant as the plaintiff now claims approximately R7.8 million against the respondents as the defendants. It must be pointed out that the applicant's damages are purportedly calculated in accordance with annexure "A" to its particulars of claim. Now annexure "A" shows an alleged loss of some R11

million and not R7.8 million. At the time the matter was argued before me the applicant had not been able to clarify the discrepancy between R11 million and R7.8 million despite the respondents' request.

[6] On the 2nd March 2004 the respondents successfully applied for an order in terms of which I ordered the applicant to furnish security for the respondents' costs in the pending action between the parties. On that occasion advocate C. Sadler appeared for the applicant and advocate B. Berridge for the respondents. Having heard argument I ordered the applicants to furnish security in the amount of R150 000, 00. I directed the applicants to furnish such security within thirty days of the order. It is this order which the applicant seeks leave to appeal against.

[7] In terms of the order I granted on the 2nd March 2004 the applicant had to furnish security for the respondent's cost in the sum of R150 000,00 within thirty days in default of which

I granted the respondents leave to apply to this court on the same papers duly amended for the dismissal of the applicant's action.

- [8] The thirty day period provided for in the court order I made on the 2nd March 2004 expired on the 19th April 2004. The applicant took no steps whatsoever to comply with the order I made within the time stipulated therein. Rule 49(1)(b) provides that an application for leave to appeal has to be lodged within a period of fifteen days from the date of the order so appealed against. The fifteen day period provided for in this rule expired on the 24th March 2004. By then no leave to appeal application had been filed by the applicant.

- [9] Since the applicant did not comply with either of the aforesaid two deadlines in terms of the court order and in terms of the rules the respondents launch an application for the dismissal of the applicant's claim against them on the

22nd April 2004. The dismissal application was filed under case number 1174/04. It was enrolled for hearing on the 29th April 2004.

[10] On the 28th April 2004, the day before the respondents' application for the dismissal of the applicant's action was due to be heard the applicant terminated the mandate of its new attorneys. At that time the applicant's attorney was ascertain Mr. Michael Saltz of Kaplan and Saltz Attorneys of Johannesburg.

[11] In his argument before me, Mr. Berridge submitted that the only reasonable inference which could be drawn from the applicant's conduct whereby he terminated the mandate of his attorneys a day before the respondents' were to apply for the dismissal of its action is that the supposed termination of the attorneys mandate, the very date before the dismissal application was due to be heard amounted to no more than a deliberately engineered attempt to secure a postponement of

the matter. He argued that this was particularly so in the light of the fact that the applicant had taken no steps either to comply with the order I made or the relevant rule I mentioned above.

[12] On the 29th April 2004 Mr. Louw, the applicant's sole director, in person appeared on behalf of the applicant. He told the court that he no longer had legal representation and could not afford the services of legal representatives since he was possessed with no funds whatsoever. The application for the dismissal of the applicant's claim against the respondents was nonetheless postponed until the 13th April 2004 so as to enable the applicant to obtain the services of a lawyer.

[13] By the 13th May 2004 the applicant had still not procured the services of a lawyer. Once again Mr. Louw appeared in person on behalf of the applicant. At approximately 09h00

on the 13th May 2004 Mr. Louw served two documents both entitled Aansoek tot Verlof tot Appèl upon the respondents' offices.

[14] The aforesaid documents or pleadings do not in any measure comply with the requisites for a notice of application for leave to appeal but more importantly such pleadings were in any event hopelessly out of time and were not accompanied by the requisite application for condonation of there lateness.

[15] Notwithstanding such material defects in the applicant's pleadings the court granted the applicant yet a further indulgence and postponed the matter to the 3rd June 2004 and ordered the applicant to deliver the necessary application for condonation by no later than the 27th May 2004.

[16] On the 27th May 2004 the applicant then served a document entitled Aansoek vir Kondonasie. This document itself was irregular. It did not constitute a proper condonation application since, among others, there was no accompanied affidavit detailing the ground upon which the applicant contended that it was entitled to a requisite condonation. In addition to the above yet another document entitled Aansoek tot Verlof tot Appèl was also delivered. There were numerous and voluminous annexure attached to this pleading including an affidavit. The merits of the main action between the applicant and Prolong were canvassed at length. Needless too say that they were totally irrelevant. The deponent of the affidavit was none other than Mr. Danie Louw himself. The affidavit was signed and sworn to on the 25th May 2004.

[17] Once again the documents on which the applicant relies were irregular. With this various documents the applicant has made an attempt to fully argue the merits not only of its

claim against the respondents but also the case between it and Prolong. This is impermissible and the document has to be completely disregarded in its entirety. It has to be born in mind that the issue before the court is the question of security for costs and nothing more.

[18] The applicant's deponent has levelled scurrilous and defamatory allegations against the respondents in its documentations which are not only irrelevant but also scandalous and vexations. It is clear to me that these documents do not represent an accurate or fair recordal of either the facts or events. It was wholly improper for the applicant who has approached these proceedings in the manner which it has adopted. The affidavits to which Mr. Louw deposed on the 15th May 2004 was particularly couched in distasteful terms.

[19] The order I granted in favour of the respondents against the applicant on the 2nd March 2004 was determined on the

basis of the papers and affidavits which had been filed in that application. The application through Mr. Louw is now attempting to raise a host of not only new but also entirely irrelevant matters in the subsequent papers filed on behalf of the applicant. Once again this is improper. At this stage of the proceedings the plaintiff cannot be allowed to introduce new matters into the papers which was not before me at the time when the relevant application for the furnishing of security for costs was argued.

[20] What needs to be determined at this stage is whether firstly there is a proper application for condonation before me and if so whether that application sufficiently explains the inordinate delay on the part of the applicant so as to persuade me to come to its assistance yet again. Secondly, what needs to be determined in relation to the order for security for costs it whether there is any reasonable prospect of another court coming to a different concluding to the one I reached if leave to appeal is granted.

[21] As I have already mentioned the applicant's application for condonation is not an application for condonation in the true or proper sense of the word. Its simply comprises a document which is not deposed to under oath and therefore properly place the relevant facts before the court. The accertions contained in that document even if taken at face value are still of no assistance to the applicant since they do not contained a sufficient explanation for the delay. The condonation which the applicant requires and purports to seek is devoid of any elementary averments to sustain it. I can find nothing in it to redeem the very weak application for leave to appeal not. The delay was quite excessive.

[22] I do not wish to deal with the matter at length. It is a futile exercise doing so. In his answering affidavit the second respondent P.J.A. Neuhoff says the following at paragraph 36.3:

“36.3 The situation becomes even more curious and, with respect, suspicious when regard is had to annexure

“**AA2**” hereto, being a letter dated 7 May 2004 from Mr Saltz to Mr Louw in which Mr Saltz states that: “**Due to your lack of funds herein we are unable to act further on your behalf**”. No explanation is proffered as to why, if the plaintiff had genuinely terminated Mr Saltz’s mandate on 28 April 2004 (as per annexure “**AA1**” hereto), Mr Saltz would himself withdraw as attorney of record some two weeks later due to a lack of funds.”

[23] In my view the foregoing averments have substance. On the 28th April 2004 the applicant used a ploy to obtain a postponement he did not deserve by purporting to terminate the mandate of his attorney. The same attorney’s letter of the 7th May 2004 clearly demonstrates that the mandate never genuinely terminated at all. The applicants’ latest attorneys Kaplan & Saltz withdrew because the applicant did not place them in funds. That is precisely the reason which prompted the respondents also to withdraw. It is therefore quite clear that the applicant is impecunious. There can be

no better justification for the order I made on the 2nd March 2004 for the applicant to provide security for the cost of the respondents.

[24] It is also significant to stress that the applicant remained completely supine since May 2004 and has taken no steps whatsoever to prosecute its purported intention to appeal. I get the distinct impression that the applicant does not have the serious intention of taking the matter further on appeal and that his purported wish to have leave to appeal was simply prompted by the respondents' application for the dismissal of the applicant's action and all the implications of such decision. Therefore, I am inclined to refuse both applications. Here the prospects of success on appeal are so poor that it would serve no useful purpose to grant the condonation application, however meritorious it might have been.

[25] In the light of the foregoing I have come to the conclusion

that the application for leave to appeal as well as the application for condonation was so fundamentally defective that they both deserve to be dismissed outright.

[26] Accordingly I make the following order:

22.1 The applicant's application for condonation for the late delayed filing of an application for leave to appeal is refused.

22.2 The applicant's application for leave to appeal is also refused.

22.3 The applicant is directed to pay to the respondents the costs of both applications.

M. H. RAMPAL, J

On behalf of the applicant:

Mr. Danie Louw
Instructed by:
Danie Louw Handelaars BK
BLOEMFONTEIN

On behalf of respondents:

Mr. C. Berrigde
Instructed by:
Webber Wentzel Bowens
JOHANNESBURG

/em