

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

Case No.: 20/2003

In the matter between:

ERIC MATOMELA

Applicant

and

PRESBYTERIAN CHURCH OF AFRICA

Respondent

CORAM:

MUSI, J

HEARD ON:

20 FEBRUARY 2004

DELIVERED ON:

26 FEBRUARY 2004

[1] This is an application for leave to appeal against a judgment I delivered on 5 December 2002 in terms of which I upheld a point *in limine* raised by the then applicant (the respondent) and pursuant to which I granted the orders sought by the respondent. It is an *ex tempore* judgment wherein the full reasons for my decision are given. A brief background to this matter is necessary.

[2] The notice of application for leave to appeal herein was filed on 20 January 2003 whereas the period of 15 days within which it should

have been filed as required by Rule 49(1)(b) expired on 30 December 2002. The notice was thus out of time and an application for condonation became necessary. In the original notice on the file, it is indicated that such application for condonation would be made and that the affidavit of Mr Johan Muller, the applicant's former attorney, would be used in support thereof. No such affidavit was however annexed to the application, and it was apparently not served on the respondent and hence no answering affidavit was filed on behalf of the respondent. A copy was only handed in during the hearing of the application. Nothing transpired since the application was filed and only on 18 December 2003 was a notice of set-down of the application served and filed. The matter was then argued on 20 February 2004. No explanation has been provided as to the long delay in setting the application down nor could counsel for the applicant provide any during the hearing.

- [3] The respondent not only opposes the application for leave to appeal, but also vigorously opposes the application for condonation. In regards to the latter, Mr Cole, for the respondent, filed heads of argument wherein he raises three main grounds on

the basis of which he contends that condonation should be refused, namely prejudice, the respondent's interest in the finality of the judgment and the procedure followed. I shall revert to these issues shortly. Mr Cole also referred to a subsequent court application involving the same parties in the Eastern Cape Division of the High Court heard on 23 January 2003 and annexed a copy of a draft order embodying a settlement reached by the parties and which was made an order of Court. This order has a bearing on the issue of expectation of finality and the question of whether the applicant was *bona fide* in proceeding with the instant application.

- [4] Now it is so that condonation requires a separate, substantive application on notice to all the interested parties duly supported by affidavit and in that context the instant application is procedurally deficient. However, that is not a fatal defect and the important thing is that the intention to apply for condonation and a supporting affidavit were incorporated in the notice of application for leave to appeal. Of course, the fact that the affidavit itself was not served on the respondent is a defect that would have entitled the respondent to object to the hearing of the application for condonation since it had not been given the opportunity of

responding to the affidavit. In the event, however, no such objection was raised and the matter of condonation was fully argued.

- [5] The cardinal question is whether the applicant has set out in the supporting affidavit the necessary explanation for the late noting of the appeal. It is trite that condonation is a matter within the discretion of the Court and is not simply there for the asking. The discretion to condone must be exercised judicially having regard to all the circumstances of the case. The Courts have over the years refrained from providing an exhaustive list of factors that would constitute good cause but have made it clear that that is a matter to be determined by the presiding officer having regard to the circumstances of each case. Guidelines have, however, been laid down as to which factors would be relevant. These factors are not individually decisive, but must be taken in conjunction with each other. Compare **MELANE v SANTAM INSURANCE CO LTD** 1962 (4) SA 531 (A) at 532C-F; **UNITED PLANT HIRE v HILLS** 1976 (1) SA 717 (A) at 720E-G, both of which were referred to by counsel for the respondent.

[6] The only source of the required explanation is the affidavit of the applicant's erstwhile attorney Mr J Muller. But what does it say? He says that he was instructed to attend to the main application herein by Messrs. Michael Randell Incorporated of Port Elizabeth and attended the hearing of 5 December 2002. That is when the matter was argued and he must have noted the judgment wherein full reasons were given in court. He says that on 6 December 2002 he communicated the judgment to his instructing attorneys and on 10 December 2002 he was phoned by another attorney who was not his instructing attorney and told that the applicant wanted to appeal. Pursuant to that he requested reasons for judgment on 20 December 2002. I do not know what that means, but there is no indication on the file of any such request. But what happened thereafter? Nothing, and on 20 December 2002 he went on holiday and returned on 9 January 2003. Why was the application for leave to appeal not lodged before he went on holiday, Mr Muller does not explain. He does not say what were the problems that made it impossible for him to note the appeal. No indication whatsoever is given of the problems that the applicant or his instructing attorneys may have experienced in this regard. Moreover, Mr Muller was

present when judgment was delivered and should surely have been able to prepare the necessary application, at any rate, with the assistance of counsel who argued the matter (who is incidentally a local advocate). All that Mr Muller says is that he got confirmation from his instructing attorneys that it was always the applicant's intention to apply for leave to appeal. It is clear though that he never got instructions until after 9 January 2003. And why were instructions not given timeously it is not known. In my view, no valid explanation has been given.

- [7] The faulty procedure followed and failure to give a valid explanation for the delay are typical of the laxity with which this whole application has been approached. Having lodged the application on 20 January 2003 it took a full 11 months before the matter was enrolled for hearing and again there is no explanation for this inordinate delay. From my own experience in this Division applications of this nature are usually set down and heard within a few months and it can safely be accepted that the Registrar had not been approached to fix a date until towards the end of 2003.

- [8] It is in the above context that the issues of prejudice and the need

for finality should be viewed. As for the question of possible prejudice to the respondent, the supporting affidavit does not address it at all. Mr Williams, for the applicant, argued that the matter should be approached on the basis of the time at which the application was lodged. He submitted that as at that time there could have been no prejudice. He also said that the respondent should have been aware that a late application for leave to appeal to could be lodged and in that context the respondent could not have regarded the matter as closed. He said that at any rate even if the application had been lodged timeously the appeal itself would still have taken time to hear. The latter aspect of the argument is best met with the retort that but we should now be hearing the appeal itself rather than this application. The effect of this out of time application, if granted, would be to postpone finality by yet another year or so. And what has since transpired between the parties is a very relevant consideration. Though the issue of the case in the Eastern Cape Division was raised for the first time in the respondent's heads of argument, it is, as was said by Mr Cole, a matter of public record. The applicant himself is cited as a party therein and he does not deny the existence of such order. In terms of that court order, fresh elections would have been held and the

dispute over leadership of the church resolved, and that is the very dispute that had brought the parties to this Court in the first place. That would render the intended appeal, if successful, redundant save perhaps in relation to costs. It is interesting also to note that this application was set down sometime after the elections in March 2003. The rhetorical question arises whether the applicant has not revived the instant application only because he has fared badly in those elections (and were told by Mr Cole that someone else has been elected Moderator Elect of the church) and now he wants to renege on the agreement that was meant to bring about finality to the dispute over leadership of the church. This would raise a further question of whether the applicant was *bona fide* in his intention to appeal.

[9] The point is that in these circumstances any further delay in bringing about finality to the matter will be gravely prejudicial to the respondent (the church and its members). Nor will it be fair that a matter that has ostensibly been resolved be revived and thus reignite the conflict and the disarray in the affairs of the church.

[10] Now is it so that where the prospects of success on appeal are good

that would be a strong factor to be taken into account. I am, however, not persuaded that there are such prospects in this case. Even if the case may be arguable, that is not the only consideration that should influence the grant of condonation. (Compare **PALMER v GOLDBERG 1961 (3) SA 692 (N) at 698C-D**). *In casu* there are other considerations that far outweigh this factor, especially when taking into account that no valid explanation has been given for the delay in lodging in the application in the first place coupled with the failure to explain the delay in setting it down.

[11] I have come to the conclusion that the applicant has not shown good cause for the grant of condonation and condonation is refused. In the result, the application is dismissed with costs.

H.M. MUSI, J

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On behalf of Respondent:

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