



**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

**Reportable / Not
reportable**

Case no: 1150/2024

In the matter between

HLANO FINANCIAL SERVICES (PTY) LTD

Applicant

and

**THE MEMBER OF THE EXECUTIVE COUNCIL
FOR HUMAN SETTLEMENTS, FREE STATE**

Respondent

Coram: Cronje AJ

Heard: 8 August 2024

Delivered: 26 August 2024

Summary: Application for condonation - Explanation for delay weak - Good cause shown - Condonation granted - Prospects of success - Costs.

ORDER

1. The application for condonation is granted.
2. The Applicant pays the costs of the application, including the costs of senior counsel, to be taxed on scale C.

JUDGMENT

Cronjé, AJ

Introduction

[1] The Applicant brought an application against the Respondent claiming R429 226 178.74 (four hundred and twenty-nine million, two hundred and twenty-six thousand, one hundred and seventy-eight rand and seventy-four cents) according to an undertaking given by the Respondent in favour of the Applicant for 2 602 contractual borrowers. The merits of the main application do not serve before me. I am only called upon to determine whether condonation should be granted to the Respondent for the late filing of its answering affidavit.

Condonation and explanation for the delay

[2] The Registrar issued the application on 27 February 2024. It was served on the Respondent on 29 February 2024 and the State Attorney on 28 February 2024. The Respondent had to file its notice of opposition on or before 22 March 2024. It was, however, only delivered on 25 March 2024.

[3] On the day the answering affidavit was due, 17 April 2024, the Respondent requested an extension until 10 May 2024. The reason proffered was that the attorney in the offices of the State Attorney dealing with the matter was hospitalised.

Subsequently, further extensions were granted to the Respondent, and an indulgence was granted to file the answering affidavit by no later than 10 May 2024. This did not materialise, and the Respondent requested an extension until 24 May 2024. At that stage, the reason for the request was that senior counsel had to be appointed, but was not yet secured.

[4] The Respondent was advised that the application would be enrolled on the unopposed roll for 6 June 2024 if the answering affidavit and an application for condonation for late delivery of the answering affidavit were not received by 23 May 2024. This did not happen, and on 4 June 2024, two days before the application would serve on the unopposed roll, the State Attorney advised that it received urgent instructions to request that the matter be removed from the roll of 6 June 2024 or be postponed by agreement to a later date. The reason for the request was that the Respondent desired to review the Applicant's claims. The Applicant was prepared to have the matter postponed by agreement until 27 June 2024, and an order was granted. All the postponements were made by agreement between the parties.

[5] On 6 June 2024, the State Attorney requested a postponement until 19 June 2024, which provided for the answering affidavit and application for condonation to be filed by 20 June 2024. The Applicant informed the State Attorney that settlement negotiations would not impact the suspended litigation process, and should the Respondent fail to comply with the Court order of 6 June 2024, the Applicant would proceed with the application on 27 June 2024. The Respondent served an answering affidavit electronically on 26 June 2024. There was no self-standing substantive application for condonation.

[6] The answering affidavit commences with delineating issues raised as a defense to the application. They relate to non-joinder, prescription, a history and factual background to the matter, a record of understanding (ROU), a revised record of understanding ('the New Deal'), termination of the New Deal, status of the ROU, the National Housing Code 2000, the National Housing Code 2009, a comparison between the ROU and the New Deal, the 2014 undertaking, the merits of the application, and condonation. A notice of motion did not accompany the condonation application.

[7] The Respondent affirms the chronology as set out by the Applicant. It refers to a meeting that was scheduled in an attempt to reach an amicable solution to resolving the matter. According to it, the first meeting occurred on 14 June 2024, where the Respondent tabled a proposal to settle the dispute. An agreement was reached that the parties would reconvene on 19 June 2024. The Respondent states that it became aware of the rejection of its proposal on the morning of 19 June 2024, and it did not comply with the order granting it an opportunity to file the answering affidavit and condonation application by 20 June 2024.

[8] The Respondent states that whilst the requirements for condonation demand a more comprehensive explanation, it can only say that there was a delay. It states that Senior Counsel was briefed on 6 May 2024. As consultations had to be scheduled for drafting the answering affidavit, it became impossible to file the affidavit by 10 May 2024 without having consulted thoroughly. Consultations took place on 20 May 2024, and it was already known that the matter was set down for 6 June 2024.

[9] The main argument for the Respondent's non-compliance is that the matter involves an exorbitant amount of public funds and that it would unduly prejudice the Respondent. It relies on public interest, and the issues should be addressed in court. It states that the Applicant would not be unduly prejudiced, and the facts set out by the Applicant are seriously disputed. That is all that the Respondent says.

[10] The Applicant, in reply, states that the meagre allegations regarding condonation do not establish good cause. The requirements for condonation were not satisfied, and it did not disclose that it has a *bona fide* defence or prospects for success. It refers to a letter dated 2 July 2024 wherein the Respondent was advised that the Applicant intends to oppose the condonation application.

[11] The Applicant relies on the 2014 undertaking as an offer to make payment of the Applicant's ROU and non-ROU claims. It states that it was implemented, and payments were made over the period. It states that the judgment in *Hlano Financial Services (PTY) Ltd v Member of the Executive Council for Human Settlements and Another*¹ is relevant to the merits of the present matter as it relates to a claim between

¹ *Hlano Financial Services (PTY) Ltd v Member of the Executive Council for Human Settlements and*

the MEC in Gauteng and Applicant in 2017, in which there was a similar undertaking. According to the Applicant, the payment obligations of the contractual borrowers were delegated to the Respondent.

[12] The Applicant states that the Housing Code 2000 provides statutory rights which has a 30-year prescription period, and the 2014 undertaking removes any doubt about prescription. It is prejudiced as it legitimately relied on the implementation of the 2014 undertaking and cannot execute its security to realise the value of the underlying assets.

[13] In reply to the condonation application, it states that the Respondent requested the meeting for settlement purposes before the postponement of 6 June 2014. It made various attempts between 8 June 2014 and 12 June 2024 to enquire from the Respondent about the meeting that the Respondent requested. The Respondent only responded on 12 June 2024 and agreed to a meeting for 14 June 2024. This is not denied in the replying affidavit.²

Arguments

[14] Mr Mene SC, who appears for the Respondent, relies on *Grootboom v National Prosecuting Authority and Another*³ where the Constitutional Court held:

'I have read the judgment by my colleague Zondo J. I agree with him that, based on *Brummer* and *Van Wyk*, the standard for considering an application for condonation is the interests of justice. However, the concept of "interests of justice" is so elastic that it is not capable of precise definition. As the two cases demonstrate, it includes 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. It is crucial to reiterate that both *Brummer* and *Van Wyk* emphasise that the ultimate determination of what is in the interests of justice must reflect due regard to all the relevant factors, but it is not necessarily limited to those mentioned above. The particular circumstances of each case will determine which of these factors are relevant.

Another [2022] ZAGPJHC 645.

² Replying affidavit, para 13.

³ *Grootboom v National Prosecuting Authority and Another* [2013] ZACC 37; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC).

It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default.⁴ (Footnotes omitted.)

[15] He argues that the Respondent approached the settlement negotiations in good faith, but the Applicant had no intention to settle the matter amicably. The lateness of the answering affidavit was communicated to the Applicant.

[16] He submits that the interest of justice demands that condonation be granted as the Respondent disputes that it owes the Applicant monies and that the Applicant has not demonstrated any real prejudice. The amount claimed is, and the Applicant was unreasonable in opposing the application, causing unnecessary delay in disposing of the matter. I understood Mr Mene not to take issue with any of the case law that the Applicant relies on except a passage from *MEC for Health, Eastern Cape and Another v Kirkland Investments (Pty) Ltd*.⁵ on which the Applicant relies.

[17] Mr Snellenburg SC, appearing for the Applicant, submits that there can be no doubt that the Respondent was ordered to file a proper condonation application. Until condonation is granted, the answering affidavit is *pro non scripto*. He argues that the Constitutional Court made it clear in *Mohamed and Another v President of the Republic of South Africa and Others*⁶ that the state must lead by example.

[18] He argues that the procedure of dealing with grounds for condonation at the end of the answering affidavit effectively means that there is no condonation application. The Applicant made it clear that it would entertain settlement proposals in the meantime. However, the onus would be on the Respondent to proceed with such negotiations before its opposing papers became due on 20 June 2024, and should the matter not be settled, its opposing papers, together with its application for condonation

⁴ Ibid paras 22-23; See also: *Van Wyk v Unitas Hospital and Another* [2007] ZACC 24; 2008 (2) SA 472 (CC).

⁵ *MEC for Health, Eastern Cape and Another v Kirkland Investments (Pty) Ltd* [2014] ZACC 6; 2014 (5) BCLR 547 (CC).

⁶ *Mohamed and Another v President of the Republic of South Africa and Others* [2001] ZACC 18; 2001 (3) SA 893 (CC) para [69].

(if so advised), should be filed before or on the 20th June 2024. He argues that the defences raised in the Respondent's answering affidavit have been disposed of in *Hlano Financial Services supra* as issue estoppel.

Discussion

[19] The requirements for condonation are trite and need no repetition.

[20] It has to be accepted that the whole period of delay can be attributed to the Respondent. Although the averments regarding every day of delay are meagre, those that were presented do carry some weight.

[21] An insufficient explanation for the time that passed may be compensated for by good cause. The settlement negotiations did not absolve the Respondent from filing its answering affidavit and condonation application, but there is some explanation for this, too.

[22] The Respondent has, in my view, placed defences on the table. Whether they will eventually carry weight is up to the Court, which hears that application, to decide. It can, however, not be said that they are fictitious, flimsy or without any prospect for success.

[23] When the answering affidavit incorporating the "*condonation application*" was eventually filed, it was not far beyond the time agreed to.

[24] I conclude that condonation should be granted.

Costs

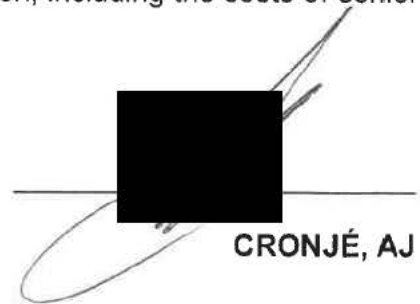
[25] A party seeking condonation is asking for an indulgence. Such a party should ordinarily pay the costs for the indulgence.

[26] In my view, the Respondent prejudged the settlement negotiations' possible outcome. It should have made sure that it would comply with the order. There were, then, many orders that were made. It kept the door open to file papers. It should, on the established principles and the specific facts of this case, pay the Applicant's costs of senior counsel on scale C.

ORDER:

[27] Wherefore the following order is made:

1. The application for condonation is granted.
2. The Respondent pays the costs of the application, including the costs of senior counsel, to be taxed on scale C.



CRONJÉ, AJ

Appearances

For the Applicant:

Adv. B.S. Mene SC
Adv. N.M. Phakama

Instructed by: State Attorney,
Bloemfontein

For the Respondent:

Adv. N. Snellenburg SC

Instructed by:

MAP Attorneys
C/o Van der Merwe & Sorour