

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

"Reportable"

CASE NO: 11521/2021

In the matter between:

STANDARD BANK OF SOUTH AFRICA LTD

Applicant

(Registration Number: 1962/000738/06)

And

BRIAN CHARLES HIGGS

First Respondent

JOHANNA MAGRIETA HIGGS

Second Respondent

Coram: Parker, AJ

Matter heard on Thursday 29 August 2024

Judgment delivered on **Thursday 05 September 2024**, electronically by circulation to the parties' representatives via email.

JUDGMENT

PARKER, AJ

Introduction

Background

[1] For ease of reference the parties shall be cited as Applicant and First Respondent. I had to consider whether to grant a final order of sequestration or to discharge the provisional order of sequestration granted on 3 March 2023. This is a leave to appeal against the whole judgment and order granted by me on 10 January 2024, for the estate of the First Respondent to be placed under a final order of sequestration.

[2] For the sake of clarification, the First Respondent is married to Second Respondent out of community of property.

Timeline

[3] In order to contextualise this appeal, it is most appropriate for me to provide a comprehensive overview of the chronology of events which resulted in my decision. to grant the final order of sequestration:

- 3.1. On 24 November 2006 – a home loan was advanced in the amount of R2 000 000.00.
- 3.2. During July 2008 – consolidation of loans in the amount of R 6 490 000.00.
- 3.3. By late 2016 – several payment moratoriums later, First Respondent was placed under Debt Review.

- 3.4. During April 2017 – First Respondent terminated the Debt Review and a reckless credit application was rejected.
- 3.5. On 10 September 2018 – judgment was granted against First Respondent in the amount of R7 359 064.44.
- 3.6. The period 19 March 2019 to 16 November 2019 – sales in execution ensued. After the Application in terms of Rule 49A(9)(c) for the reconsideration of the reserve price of R13 000 000.00, First Respondent was granted another opportunity to sell the property in the open market for R17 500 000.00 with reserve price of R10 000 000.00 set. Following First Respondent's intention to sell the property the second sale in execution was by default scheduled for 16 November 2019 which led the First Respondent to bring an urgent application to stay the second sale in execution.
- 3.7. On 29 April 2020 – the third sale in execution was postponed due to the COVID-19 pandemic.
- 3.8. On 28 October 2020 – the fourth sale in execution was postponed to 31 March 2021, the First Respondent sought an urgent application to postpone, on the basis that the Stellenbosch property is his primary residence and accommodates a minor and three elderly persons. This application was dismissed with costs.
- 3.9. At the fifth sale in execution, the highest bid for the Stellenbosch property was R2 900 000.00, which was significantly lower than the reserve price set in the sum of R10 000 000.00. This bid was declined.
- 3.10. On 3 March 2023 – a Provisional order of sequestration was granted.

[4] The reasons for granting the final order of sequestration on 10 January 2024 were set out in detail in my judgment and I will not repeat it save where necessary. Much of the same arguments presented to me were dealt with in the Provisional order of sequestration and repeated before me and now reiterated in the appeal.

Appeal

[5] When First Respondent served and filed the leave to appeal, it was initially appealed against the whole judgment on three grounds, including the introduction of new evidence. However, after the Applicant addressed this specific ground in its replying affidavit, the First Respondent sensibly withdrew the purported new evidence at the hearing of the appeal. The grounds of appeal are summarized as:

5.1. The court erred in finding First Respondent factually insolvent.

5.2. The court erred when granting the final order of sequestration, failed to recognize that sequestration was a means to circumvent the provisions of Rule 46(A).

5. 3. The sequestration order impacts First Respondent's rights under section 26 of the Constitution.

The condonation application

[6] First Respondent's leave to appeal was filed late, and a condonation application for the late filing of the appeal ensued. It is trite that there are strict time periods within which to apply for leave to appeal. The leave to appeal ought to have been brought by

the First Respondent on or before 31 January 2024, however on 24 May 2024, First Respondent served its application for leave to appeal.

[7] In so far as the court's discretion to condone the late filing of pleadings in respect of a leave to appeal, the test is whether the condonation, if granted, is in the interests of justice, and for a successful condonation¹ application, in exercising the discretion whether to condone the late filing of the appeal, includes considerations such as, *inter alia*:

7.1 The extent and the cause of the delay,

7.2 The reasonableness of the explanation of such delay,

7.3 The effect of the delay on the administration of justice and the litigants and, lastly,

7.4 The prospects of success.

[8] It is important to note that since the granting of the final order, the sequestration proceedings have advanced to a stage where the first and second meetings of creditors have progressed wherein the joint trustees of the First Respondent's estate have been appointed. The trustees have already taken steps to realise the First Respondent's property, which is the sore point for First Respondent, pointing to nothing else, other than the reason for First Respondent's conduct being dilatory and clutching at straws.

[9] The Applicant contends that following a notice to vacate dated 15 March 2024 addressed to the First Respondent, it was only then that he took steps to pursue the

¹ *Grootboom v National Prosecuting Authority and Another* 2014 (2) SA 68 (CC) paras [20] - [23] and [50].

application for leave to appeal. In the Applicant's view it was simply another strategy to gain more time to occupy the property and frustrate the administration process of the sequestration proceedings.

[10] The First Respondent's two primary justifications for the delay in prosecuting the appeal are that it was caused by his ill health and financial circumstances.

[11] The initial reason for the late filing of the leave to appeal, which was due to ill health, was not elaborated upon beyond a letter dated March 22, 2024, from an unnamed employer of Louis Leipoldt Hospital informing the individual that he had undergone an emergency procedure. It is noteworthy to mention that this letter was sent one week after the First Respondent received the notice to vacate (15 March 2024). The second letter provided was by a Doctor JH. Visser dated 7 May 2024, which records that the First Respondent cancelled an unknown procedure. No details were however provided.

[12] What was required from the First Respondent was a full and frank² disclosure of the reasons for the delay. This did not happen. The delay was not adequately justified by the uncorroborated health issues that the First Respondent purportedly experienced.

[13] The second reason advanced for the delay is that First Respondent experienced financial difficulties. I am mindful that First Respondent has been experiencing financial difficulties since 2018. I could not disagree with the Applicant that if the alleged financial constraints alone were sufficient grounds for litigants to bring late applications for leave to appeal, it will cause chaos. Certainly, it will be a platform to circumvent the procedures and the rules, undermine the justice system and render the period within which to lodge the leave to appeal, that being 15 days, meaningless.

² *Von Abo v President of the Republic of SA* 2009 (5) SA 345 (CC) at para [20].

[14] The Constitutional Court has stipulated in *Van Wyk* that “*an inordinate delay induces the reasonable belief that the order had become unassailable*” and that a litigant is entitled to assume that the losing party has accepted the finality of the order and does not intend to pursue the matter any further.³ The Applicant did not pursue the appeal until 22 April 2024, which was another month after 22 March 2024.

[15] I concur with Applicant’s submission that First Respondent’s conduct is dilatory, as is evidenced by his conduct when he approached his attorneys of record on 2 April 2024 in order to “*discuss the prospect of an appeal as well as to obtain advice in respect of the trustee of my estate’s insistence that I provide the trustee vacant occupation of my home prior to my house having been advertised and sold*”⁴. He only in effect managed to appoint attorneys about 26 April 2024.

[16] I cannot disagree with Applicant’s submission that the inference to be drawn is that the First Respondent’s true motivation for the belated application for the leave to appeal is solely due to the impending and imminent eviction process. The explanation for the delay failed to cover the entire period of the delay which was wanting.⁵

[17] The First Respondent implored the court to consider the condonation application, arguing that there was relatively no prejudice to the Applicant. He also urged Applicant to wait it out a bit longer, in order to reach finality in the litigation and allow the appeal process to unfold. The First Respondent also argued that it was in the interest of justice for the court to exercise a wide discretion for the noncompliance in favour of him, given his right to housing extended beyond himself, to his wife, his major son and tenants who, according to him, occupied the property. The Applicant argued that it took this

³ *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC) para [31].

⁴ Condonation Affidavit at para [12] record page 32.

⁵ *Van Wyk, supra* at para [22].

eviction step when no appeal was noted because it was entitled to seek satisfaction of its claim.

[18] Bearing in mind that this court plays an oversight role as it did, when countered with a Rule 46A, such oversight was exercised when the property was declared specially executable and when the court reconsidered the matter in terms of Rule 46A(9)(c). All the requirements of Rule 46A were met. It was also argued by the Applicant, that despite no payment being made to the applicant for approximately three years, the First Respondent has somehow managed to obtain funds to pay his previous legal representatives and his current attorneys but not towards this debt owed to the Applicant.

[19] I am unable to exercise the discretion to excuse the late filing of the leave to appeal application in the circumstances described in the submissions that have been presented to me. The cause for the delay has not been sufficiently explained to warrant the exercise of a discretion in favour of the First Respondent.

[20] I am fortified by the finding in *Van Wyk*⁶, not to grant condonation after such an inordinate delay, and the absence of a reasonable explanation would undermine the principle of finality. It cannot be in the interest of justice for a litigant to wait it out year on year for satisfaction of its relief and determination of what is entitled to closure⁷. The First Respondent's explanation is rejected as sufficient cause has not been shown for condonation to be granted. Consequently, condonation for the late filing of the appeal is accordingly refused.

Grounds of Appeal

⁶ *Van Wyk, supra* [31].

⁷ *Van Wyk, supra* [23] – [24].

[21] Given that I refused the condonation application and the First Respondent's non-compliance with Uniform Rule of Court 49 (1)(b), there is no need for me to consider the merits of the appeal and the grounds that relate to it.

[22] For the sake of completeness the grounds of appeal are summarized as:

2.1. The court erred in finding First Respondent factually insolvent

2.2. The court erred when granting the final order of sequestration, failed to recognize that sequestration was a means to circumvent the provisions of Rule 46(A).

2.3. The sequestration order impacts First Respondent's rights under section 26 of the Constitution.

[23] Needless to say, had I granted condonation for the late filing of the leave to appeal, I would nevertheless have arrived at the conclusion that there are no compelling reasons for the appeal, as there would be no reasonable prospects of success, alternatively compelling reasons why the appeal should be heard.⁸

[24] The threshold for leave to appeal has lifted, the bar is higher and First Respondent would in any event have been unsuccessful to convince the court on proper grounds that there is a reasonable prospect or a realistic chance of success on appeal.

[25] As stated earlier, I was presented with very much of a stale argument since I had dealt with the grounds of appeal in the judgment and no new grounds were placed

⁸ *MEC for Health, Eastern Cape v Mkhitha* 2016 JDR 2214 (SCA) at paras [16] – [17].

before me on appeal to consider. The judgment dealt with the grounds of appeal as it dealt with factual insolvency and Rule 46(A) comprehensively⁹.

[26] A mere prospect of success, an arguable case, or one that is not hopeless is not enough. *“There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.”*¹⁰

Costs

[27] What has unfolded over a protracted period points me to conclude that First Respondent’s conduct constitutes an abuse of the process. He had numerous indulgences and was determined upon delaying Applicant in its relief. Applicant employed two counsel, a senior and a junior to oppose the appeal. The appeal itself was not complex as the same arguments which were presented in this appeal served before me previously. I am mindful that costs occasioned will be borne from the insolvent estate, however in considering what is reasonable, I am of the view that costs of this appeal need to be curtailed and fair. To burden the estate with the highest scale of fees would be unreasonable given that the arguments were not new, save for the alleged new evidence.

[28] Accordingly it is ordered:

- a) The condonation application is dismissed.
- b) Costs are granted in favour of Applicant, which costs are to be borne from the insolvent estate of the First Respondent, including the Cost of two

⁹ Judgment paras [35] – [39].

¹⁰ *MEC v Health, supra* at para [17].

Counsel, on Scale B for Senior Counsel and Scale A for junior Counsel where so employed.

R K PARKER
ACTING JUDGE OF THE HIGH COURT

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Second

CORAM : RK PARKER, AJ

JUDGMENT BY : RK PARKER, AJ

Counsel for Applicant : Adv. J Muller (SC) and Adv. C Morgan
Instructing Attorney : Edward Nathan Sonnenbergs Inc
Ms L Davids

Counsel for First Respondent : Adv. G Ruther
Instructing Attorney : Suné van der Merwe Attorneys

**Ms S van der Merwe/ Ms D Humphris
c/o Rapp van Zyl Attorneys**

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