THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case no: 660/2019

In the matter between:

WILHELM GEORGE HUYSAMEN	**FIRST APPELLANT**
CONSTANTIA TONIA HUYSAMEN	**SECOND APPELLANT**
and	
ABSA BANK LTD	**FIRST RESPONDENT**
KOLMAN, JAROD	**SECOND RESPONDENT**
DU PLESSIS, PHILIP	**THIRD**
RESPONDENT	
REGISTRAR OF DEEDS, PRETORIA	**FOURTH RESPONDENT**
THE SHERIFF, SANDTON SOUTH	**FIFTH RESPONDENT**
INVESTEC BANK LIMITED	**SIXTH RESPONDENT**

Neutral citation: *Huysamen & another v Absa Bank Limited & others* (660/2019) [2020] ZASCA 127 (12 October 2020)

Coram: CACHALIA, DAMBUZA, DLODLO NICHOLLS JJA and MATOJANE AJA

Heard: 25 August 2020

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be at 10h00 on 12 October 2020.

Summary: Application for condonation – adequacy of explanation for delay – attorney remiss – section 5 (1) of the Insolvency Act 24 of 1936 considered.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Manamela AJ sitting as court of first instance):

1. The application for condonation of the late filing of the notice of appeal and reinstatement of the appeal is dismissed with costs on an attorney and client scale including costs-consequent upon the employment of two counsel.

2 The costs in (1) above are to be paid by the applicants and their attorney *de bonis propriis,* jointly and severally, the one paying the other to be absolved.

JUDGMENT

Dlodlo JA (Cachalia, Dambuza, Nicholls JJA and Matojane AJA concurring):

[1] This is an application for condonation for the late filing of a notice of appeal and the reinstatement of a lapsed appeal. The appeal is against a judgment of the Gauteng Division of the High Court, Pretoria (the high court) dismissing an application by the applicants to set aside a sale in execution of immovable property for being offensive to the provisions of s 5(1) of the Insolvency Act 24 of 1936 (the Act). The applicants' complaint was that the sale was unlawful because they had already published notices surrendering their estates in terms of s 4(1) of the Act at the time of the sale, which had the effect of prohibiting the sale from proceeding. The applicants currently reside on the property known as Erf […] Parkmore, Johannesburg (the property). After dismissing the application the high court granted leave to appeal to this court.

Facts

[2] The applicants, who jointly owned the property, defaulted on their bond repayment obligations. This prompted Absa to proceed with legal action against them by way of summons. On 16 April 2012, judgment was granted against the applicants for payment of R1 691 958 together with interest at a rate of 15.5% per annum compounded monthly, calculated from 7 November 2008 to date of payment and costs on an attorney and client scale. On 28 February 2013, the property was declared executable.

[3] The applicants' indebtedness to Absa was secured by three mortgage bonds registered against the property, securing the capital and additional sums mentioned therein and interest. The mortgage bonds served as continuing covering security for 'each and every sum in which the mortgagor may now or hereafter become indebted to (Absa)'. A writ of attachment of the property was served on the first appellant personally on 3 May 2013. On 31 May 2013, Absa caused advertisements of the sale in execution, scheduled for 18 June 2013, to be published.

[4] On 13 June 2013, the notice was served on the first applicant personally. On the same date, the applicants applied for the voluntary surrender of their estates. They also lodged a statement of their affairs as contemplated in s 4(3) of the Act with the Master of the High Court. On 14 June 2013, the applicants caused a notice of their intention to apply for the surrender of their estates to be published in the Government Gazette.

[5] The applicants did not, at the time, inform the Sheriff or Absa of the aforementioned publications or their intended surrender applications. According to Absa, by June 2013, they were indebted to it in the sum of R3 292 106. Absa obtained a judgment debt against them, and the property, which Absa held as collateral, was declared executable. In their statement of affairs, the applicants did not disclose the existence of the judgment debt against them. Neither did

they disclose the full extent of their indebtedness to Absa. They declared the sum total of their joint indebtedness to Absa to be only R1 741 310 (R870 655 each). They valued the property at R2 400 000. According to their statement of affairs, the first applicant's security was limited to R869 400. This was not true because Absa's security was unlimited.

[6] On 18 June 2013 (as scheduled), the property was sold in execution. It was bought by the second and third respondents (the purchasers). The applicants' attorneys posted a notice of the surrender application to all creditors, including Absa. This was a day after the purchase of the property. The notice was received by Absa's insolvency department on 5 July 2013. Absa's attorneys involved in the foreclosure action against the applicants first acquired knowledge of publication of the surrender notices and the intended applications when they were informed telephonically by the applicants' attorney on 5 August 2013. On 18 November 2014, the transfer of the property to the purchasers was registered.

[7] In April 2015, the applicants unsuccessfully brought an application in the high court to set aside of the sale in execution. In their application, they contended that the sale was unlawful because the notice of the surrender had the effect of suspending any sale in execution in accordance with the provisions of s 5(1) of the Act. In the alternative, the applicants contended that they had entered into a settlement agreement with Absa. The high court dismissed their application on 14 August 2017. Leave to appeal to this court was granted by the high court on 21 September 2018. The notice of appeal should have been lodged with the Registrar of this Court by 22 October 2018, but was not and the appeal lapsed. The applicants have thus brought an application for condonation for the late filing of the notice of appeal and reinstatement of the appeal. Absa and the purchasers resist the condonation application on various grounds.

Condonation

[8] The notice of appeal to this court (as mentioned above) was due on or before 22 October 2018. It was not filed until 13 June 2019. On 23 October 2018, the applicants' attorney was advised by counsel that the appeal would lapse on 23 October 2018 if the notice of appeal was not served on the Registrar of this Court by then. Counsel was then requested to attend to the preparation of the notice of appeal. The notice was only forwarded to the correspondent attorneys in Bloemfontein (Honey Attorneys) on 23 October 2018 with instructions to file it with the Registrar of this Court. On the same date, the Registrar declined to accept the notice because it was late. Honey Attorneys informed the instructing attorneys promptly by email. The email was received by one of the firms' secretaries (Ms Olivier) who did not alert the applicants' attorney of its contents. She, instead, discussed this with a candidate attorney, who undertook to draft a condonation application. But he never did. The applicants' attorney only became aware of this months later.

[9] The applicants' attorney does not explain why the appeal was dealt with by a candidate attorney or why he made no enquiries from the candidate attorney or Honey Attorneys regarding the status of the appeal. On his calculation of the relevant time periods, the appeal would have lapsed on 24 February 2019 in terms of Rule 8(3) for failure to file the record. According to him, efforts were made from 11 January 2019 to 13 May 2019 to obtain a transcript of the argument in the high court. But the delay amounting to 104 days is not explained. It was only on 21 May 2018 that he discovered that the notice of appeal had never been filed. He was apparently advised on 22 May 2019 that it was not necessary to include the transcript of the argument in the appeal record. Lastly, although the founding affidavit in the condonation application was deposed to on 6 June 2019, it was only on 10 June 2019 that the notice of motion was signed. The condonation application was filed in this Court only on 13 June 2019.

[10] The approach this Court adopts in determining whether to grant condonation is well-known. In *Dengetenge Holdings*[1] Ponnan JA held that factors relevant to the discretion to grant or refuse condonation include 'the degree of non-compliance, the explanation therefor, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice.' Fleshing out the aforementioned general considerations, Plewman JA in the *Darries*[2] stated the following:

'Condonation of the non-observance of the rules of this court is not a mere formality. In all cases, some acceptable explanation, not only of, for example, the delay in noting the appeal, but also, where this is the case, any delay in seeking condonation, must be given. An appellant should whenever he realises that he has not complied with a rule of court apply for condonation as soon as possible. Nor should it simply be assumed that, where non-compliance was due entirely to the neglect of the appellants' attorney that condonation will be granted. In applications of this sort the applicants' prospects of success are in general an important though not decisive consideration. When application is made for condonation it is advisable that the petition should set forth briefly and succinctly such essential information as may enable the Court to assess the appellant's prospects of success. But appellant's prospect of success is but one of the factors relevant to the exercise of the court's discretion, unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation obviously unworthy of consideration. Where non-observance of the Rules has been flagrant and gross an application for condonation should not be granted, whatever the prospects of success might be.'[3]

It does not follow that if the cause of delay in complying with the rules is the conduct of the applicants' attorney, condonation will be granted. Thus in *Saloojee*, Steyn CJ held:

'I should point out, however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit

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[1] *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and Others* (619/12) [2013] ZASCA 5; [2013] 2 All SA 251 (SCA) para 11.
[2] *Darries v Sheriff Magistrate's Court, Wynberg and Another* [1998] ZASCA 18; 1998(3) SA 34 (SCA) at 40H-41E.
[3] *Saloojee and Another NNO v Minister of Community Development* 1965 (2) SA 135 (A).

beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have disastrous effect upon the observance of the Rules of this Court. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity. In fact, this Court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the Rules of this Court was due to neglect on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such relationship, no matter what the circumstances of the failure are.'

Similarly, in *Tshivhase Royal Council and another,* Nestadt JA stated that this Court 'has often said that in cases of flagrant breaches of the Rules, especially where there is no acceptable explanation therefor, the indulgence of condonation may be refused whatever the merits of the appeal are; this applies even where the blame lies solely with the attorney.'[4]

[11] An applicant for condonation must give a reasonable and full explanation covering the entire period of the delay.[5] The applicants and their attorney have failed in this regard. It is totally unhelpful for the applicants' attorney to tell this court that he was waiting for funds to brief counsel to draft the notice of the appeal. This Court has long held that the drafting of a notice of appeal is ordinarily an attorney's work.[6] There is no reason why an attorney has to brief counsel to draft a notice of appeal. It is also no excuse for him to attribute the delay to the applicants' impecuniosity because, as we gather, he is acting on a contingency basis.

[12] It is not acceptable for an attorney to place reliance on his inexperience in conducting appeals in this Court. In terms of Rule 8(b)(j)(i) the record shall not contain argument. In any event, an attorney who is instructed to note an appeal

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[4] *Tshivhase Royal Council and Another v Tshivhase and Another* [1992] ZASCA 185; 1992 (4) SA 852 (AD) at 859E-F.
[5] *Van Wyk v Unitas Hospital and Another* [2007] ZACC 24; 2008 (2) SA 472 (CC) para 22.
[6] *Darries* fn 2 above at 42A-B.

is duty bound to acquaint him or herself with the rules of the court in which the appeal is to be prosecuted.[7] One searches in vain for an explanation of his failure to comply with this basic duty. The delay in the preparation of the record during the period covered by the months November and December 2018 has not been explained. The attorney merely says that he attempted to obtain the transcript of the argument in the court a quo. Of course this was a misguided endeavour. But at the very least one would have expected that the nature, extent and timing of those attempts would be set out. There are some explanations of what transpired during January to 13 May 2019. The applicants' attorney informs this court that Honey Attorneys told him on 22 May that it was not necessary to have the argument transcribed for appeal purposes. But he then waited until 27 May 2019 to obtain a quotation from Pro Recordings, a professional recording and transcription service, to prepare the record. The record had still not been lodged at the time of deposing to his affidavit, despite the inordinate delay and patent urgency of the matter. The respondents' interest in the finality of the judgment of the court a quo remains a factor which will always weigh with this court.[8]

[13] The applicants wrongly contend that the respondents would suffer no prejudice if the condonation application is granted. One gathers from the record in this matter that the applicants have made no payments to Absa in respect of the property since 2011. They have also made no payments to the purchasers of the property after the sale and transfer thereof. In essence, they have been living on the property for 8 years rent free while the purchasers remain liable for insurance of the property, municipal charges in relation thereto and their mortgage bond instalments to Investec Bank. This is prejudice enough. The explanation the applicants have given in the present case is neither full nor satisfactory. There was, I must add, gross negligence on the part of the

[7] *Ferreira v Ntshingila* [1989] ZASCA 149; 1990 (4) SA 271 (A) at 281G-E.
[8] *Ferreira* supra, see also *Federated Employers Fire General Insurance Co Ltd and Another v McKenzie* 1969 (3) SA 360 (A).

applicants' attorney in leaving the matter in the hands of an unsupervised candidate attorney.

[14] The question is whether the applicants' condonation application should be granted despite their attorney having been remiss in fulfilling his duty to them. Courts, in general, are ordinarily loath to penalise a litigant on account of his attorneys' negligence. But in *Reinecke*,[9] this Court warned litigants that the time had come that it should be no excuse. Attorneys are members of the Court. The Court expects them to know and uphold the Rules of the court in which they practise. A litigant can derive no benefit from the ineptitude of his attorney. After all the attorney is the litigant's chosen legal representative. If one's legal representative has poorly executed the mandate, one must suffer the consequences. In any event, the applicants themselves are not without blame. It would be unreasonable to accept that once a client has given instruction to an attorney, he or she can sit back and do nothing. The applicants herein, it would seem, hardly enquired from their attorney as to the progress with the appeal. They sprang into action only upon receipt of an eviction application served on them on 13 May 2019 at the instance of the purchasers. This, seemingly, prompted the applicants and their attorney to launch this condonation application on 10 June 2019. The purchasers thus contend that this condonation application is not bona fide and is merely designed to delay the ultimate eviction of the applicants from the property. One cannot take issue with the purchasers' contention in this regard. Accordingly, the applicants have not satisfied the onus on them to show that condonation should be granted.

[15] The application for condonation must also fail because the prospects of success are weak. Absa, in its answering affidavit, contended that the publication of the notices to surrender the applicants' respective estates on 14 June 2013 was with the ulterior motive of frustrating Absa's endeavours to execute upon its judgment. There was no bona fide intention to benefit the body of creditors as a

[9] *Reinecke v Incorporated General Insurances Ltd* 1974 (2) SA 84 (A) at 92F.

whole. This was not refuted in reply by the applicants. It constitutes a formidable obstacle for the applicants. There is no explanation why they resorted to abuse of s 5(1) of the Act. In *Firstrand Bank Limited*,[10] Binns-ward J stated the following in paragraph 7 of the judgment:

'Nothing in the relevant provisions of the Act supports the notion that a notice of surrender may, or can, legitimately be given with the primary object of frustrating sales in execution, or to provide a debtor with a moratorium against the sale in execution of his property while he considers his position and decides whether or not he should proceed with the presentation of an application for the acceptance of his surrender. Compare *Ex parte Stepney*, in which even the postponement of an application for voluntary surrender brought bona fide was refused because such a course would in substance *"sanction the device of putting a notice in the Gazette without a real intention to surrender, and thus locking up the assets, while the estate is left in the hands of the insolvent"*- something which a court could not be seen to countenance.'

Binns-ward J made it clear in paragraph 8 that:

'The notice of surrender tells the world, the debtor's creditors and his employees that he will be applying for acceptance of surrender of his estate. "It does not inform them he is taking time to consider his options." To use the notice procedure for a purpose for which it is not intended is to misrepresent the debtor's position to the legally interested third parties and, when there are pending sales in execution involved, to cause s 5(1) of the Act to operate in circumstances in which it clearly was not intended to apply; in other words, to act not only contra legem, but also in fraudem legis. The misrepresentation is plainly mala fide when it occurs in the context of deliberate misuse of the statutory provisions.'

[16] Applicants in voluntary sequestrations have a duty to make full and honest disclosure of the material facts.[11] And it is the duty of the court to consider carefully a friendly sequestration application to determine whether the process will be of advantage to the creditors. It is in this sense that an applicant's good faith is an important consideration in a sequestration application. The remarks in

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[10] *Firstrand Bank Limited v Consumer Guardian Services (Pty) Limited and others* [2014] ZAWCHC 27.

[11] *Arentzen v Nedbank* Ltd 2013 (1) SA 49 (KZP paras [5], [6] and [7].

Edkins,[12]which the applicants rely upon, that the mala fides of the insolvent debtor is irrelevant when considering the lawfulness of a sale in execution, is not a general principle. It must be understood in the light of the context that in that case the judgement debtor was in fact sequestrated and a trustee took control of the estate. It is against this background that the debtor's lack of good faith there became irrelevant.

[17] The reliance by the applicants on the judgment of this court in *Edkins* is therefore misplaced. In *Edkins* this court found that the provisions of s 5 did not apply as the sale in execution preceded the publication of the notice to surrender. It was found that s 4 was the applicable section, and the court then held that 'upon publication of a notice in terms of s 4(1) of the Act, the provisions of section 20(1)(c) and (2)(a) immediately come into operation. The effect thereof is that control of the insolvent estate vests in the Master until a trustee has been appointed and thereafter the estate will vest in the trustee.' In *Edkins*, this court also found that the Sheriff could not have lawfully proceeded to transfer the property to the purchaser upon becoming aware of the sequestration of the insolvent. Instead the purchaser should have approached the court in terms of s 20(1)(c) read with subsection (2)(a) to pass transfer.

[18] Of course s 20 (1)(a) of the Act provides for a stay in execution as soon as the Sheriff becomes aware of the sequestration of an insolvents' estate. However where, as in this case, the sheriff could not have been aware of the publication of a notice of surrender a sale in execution is not unlawful under s 5. In terms of s 5 a sale in execution becomes unlawful if it occurs after the publication of the notice of surrender. In principle where a sale is not unlawful under s 5(1) of the Act, transfer of the immovable property is not prohibited by the publication of a surrender notice where there has been no supervening sequestration. *Edkins* is therefore distinguishable from this case in that it concerned a supervening sequestration (between the sale in execution and the transfer of immovable

[12] *Fourie and Another NNO v Edkins* [2013] ZASCA 117; 2013 (6) SA 576 (SCA).

property under attachment).[13] In this case it is common cause that the applicants' estate was never sequestrated until the property was transferred to the purchasers.

[19] In this case it is further discomforting that on 6 November 2013 the surrender applications were postponed indefinitely and nothing was done until a year later, when the property was transferred to the purchasers.

[20] The applicants' misleading statement of affairs lodged with the Master of the high court on 13 June 2013 in which they understated their indebtedness to Absa by 50 percent runs contrary to the duty of full and honest disclosure. So is their misrepresentation to an unsuspecting employee of Absa to the effect that the bank (Absa) held only two mortgage bonds, when in fact there were three. It is not surprising that when Absa discovered the extent of deliberate misrepresentation of facts by the applicants it withdrew from settlement negotiations.

[21] For these reasons, the following order is made.

1. The application for condonation of the late filing of the notice of appeal and reinstatement of the appeal is dismissed with costs on an attorney and client scale including costs-consequent upon the employment of two counsel.

2 The costs in (1) above are to be paid by the applicants and their attorney *de bonis propriis*, jointly and severally, the one paying the other to be absolved

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DLODLO JA

JUDGE OF APPEAL

[13] For that reason it is unnecessary for us to discuss the academic debate on the dichotomy between *Edkins* and *De Villiers v Delta Cables(Pty) Ltd* 1992 (1) SA 9 (SCA).

Appearances

For First and Second appellant:	M H Van Twisk
Instructed by:	DLBM Attorneys Inc, Pretoria
	Honey Attorneys, Bloemfontein
For First respondent:	P Stais SC
Instructed by:	Smit Sewgoolam Inc, Durban
	Peyper Attoorneys, Bloemfontein.
For Second and Third respondents:	M Oppenheimer
Instructed by:	Schilndlers Attorneys, Johannesburg
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