

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NUMBER: 1942/2019

(1)	REPORTABLE: <u>YES/NO</u>
(2)	OF INTEREST TO THE JUDGES: <u>YES/NO</u>
(3)	REVISED.
DATE 3 FEBRUARY 2025 SIGNATURE.....	

In the matter between:

MEC FOR SPORTS ARTS AND CULTURE,

FIRST APPLICANT

LIMPOPO

PREMIER OF LIMPOPO PROVINCE

SECOND APPLICANT

-and-

DUMELA DEVELOPMENT FORUM

FIRST RESPONDENT

PNG CONSTRUCTION

SECOND RESPONDENT

MULAMULA HASANI THOMAS

THIRD RESPONDENT

JUDGMENT

BRESLER AJ:

Introduction:

- [1] The matter came before court on a preferential basis. The First and Second Applicants are the First and Second Respondents in the main application (herein after referred to the 'Applicants') for *inter alia* the review and setting aside of the First Applicant's decision to build a community library at Mulamula Village and not at Dumela Village, and ancillary relief (hereinafter referred to as the 'Review'). The First Respondent in the current proceedings is the Applicant in the Review (hereinafter referred to as the 'First Respondent').
- [2] The First Applicant applies for condonation for the late filing of its Answering affidavit to the Review. From the onset, it stands to be noted that this matter has a considerable procedural history. The Review was issued during March 2019. The Notice of Motion is comprised of Part A and Part B. Part A entails interdictory relief pending finalisation of Part B of the Review. Part A was launched on an urgent basis. It does not appear from the papers before court that relief in Part B was diligently pursued at all relevant times as it has not been finalised notwithstanding

a considerable time having expired since the inception of the matter. It was also intended to be enrolled on the ordinary roll and not on an urgent basis.

- [3] Subsequent to the delivery of the Review, and on the 4th of April 2019, the Applicants delivered a Notice to Abide. It stands to be noted that the Notice to Abide do not pertinently refer to Part A or Part B of the Review. The First and Second Applicant did not file any opposing affidavit at that stage. On the 9th of April 2019, the matter came before the Honourable Judge Kganyago. He struck the matter from the urgent roll due to lack of urgency. It is evident that this only related to the Part A of the Review.
- [4] On the 4th of June 2019, the matter came before the Honourable Judge Muller, who again struck the matter from the roll with costs. It is again clear that only Part A was enrolled for hearing.
- [5] Part B of the Review was then enrolled for hearing on the opposed roll on the 26th of May 2022 before the Honourable MG Phatudi J (as he was then). According to the First Applicant, this belated enrolment approximately 3 (three) years after the striking of Part A of the Review, prompted the First Applicant to deliver its Answering affidavit, incorporating an explanation, and appropriate prayers, addressing the late filing of the said affidavit. At the hearing of the Review, the First Respondent raised an objection to the admissibility of the First Applicant's answering papers on the basis that the First Applicant has delivered a Notice to Oppose and a Notice to Abide, these two notices being mutually destructive.

- [6] Upon hearing arguments on behalf of both parties, the Court directed *inter alia* that the First Applicant is to launch a substantial application for condonation within 10 (ten) days addressing the late filing of its Answering affidavit.
- [7] This application was launched and enrolled for hearing on the 7th of June 2023. On this day, the matter came before the Honourable Madam Justice Naude-Odendaal J. She upheld the point *in limine* that the affidavit in support of the application for Condonation does not comply with the provisions of the **Justices of Peace and Commissioners of Oaths Act**, Act 16 of 1963 in that the Commissioner of Oaths practices in Polokwane but attended to the commissioning in Pretoria on an unstated date in June 2022. The matter was consequently struck with costs.
- [8] Hereafter, it appears that the matter was again enrolled for hearing on the opposed roll on 24 October 2023. The matter was again heard by the Honourable MG Phatudi J (as he was then), who directed that the First Respondent must launch an application for condonation within 10 (ten) days from the date of the said order.
- [9] The current application for Condonation was eventually served on the 8th of November 2023 and was heard by this court on the 28th of October 2024.
- [10] The First Respondent delivered its answering affidavit on the 31st of May 2024, substantially out of time. The Answering affidavit was not accompanied by a substantial application for condonation, nor was any endeavour made to apply for the condonation of the late filing thereof, notwithstanding the pertinent objection raised in the Replying affidavit of the First Applicant.

Issues that require determination:

[11] This Court is called upon to determine:

- 10.1 If the delivery of the Notice to Abide delivered by the First Applicant, negates the Applicant's right to deliver an Answering affidavit;
- 10.2 If condonation should be granted for the filing of the First Applicant's Answering affidavit; and
- 10.3 If condonation should be granted for the late filing of the First Respondent's Answering affidavit to the Condonation application.

The Applicable Legal Principles:

[12] The law pertaining to condonation is well known and often quoted in proceedings of this nature. The High Court has an inherent right to grant condonation where principles of justice and fair play demand it and where the reasons for non-compliance with the time limits has been explained to the satisfaction of the court.¹

The courts have refrained from attempting to frame a comprehensive definition of

¹ *SA Shipping Co Ltd v Liquidators Promoters Ltd* 1918 TPD 606; *SWA Munisipale Personeel Vereniging v Minister of Labour* 1978 (1) SA 1027 (SWA); *Yunnen Engineering CC v Chater* 2006 (5) SA 571 (T)

what constitutes good (and sufficient) cause for the granting of condonation as this would hamper the court in exercising its discretion.²

- [13] In **United Plant Hire (Pty) Ltd v Hills**³ the principles upon which the court exercises its discretion have been stated as follows:

'It is well settled that, in considering applications for condonation, the court has a discretion, to be exercised judicially upon a consideration of all the facts; and that in essence it is a question of fairness to both sides. In this enquiry, relevant considerations may include the degree of non-compliance with the rules, the explanation therefor, the prospects of success on appeal, the importance of the case, the respondent's interest in the finality of the judgment, the convenience of the court, and the avoidance of unnecessary delay in the administration of justice. The list is not exhaustive.'

- [14] In **Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)**⁴ the following was stated:

'This court has held that the standard for considering an application for condonation is the interests of justice. Whether it is in the interest of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry include, but are not limited to the

² Erasmus, **Superior Court Practice**, Revision Service 3, 2016 on D1 – 670

³ 1976 (1) SA 717 (A) at 720 E – G

⁴ 2008 (2) SA 472 (CC) at 477A – B

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.'

- [15] In **Bertie van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others**⁵ the Constitutional Court held that in determining whether condonation may be granted, lateness is not the only consideration. The test for condonation is whether it is in the interest of justice to grant condonation.
- [16] In **Ferris v FirstRand Bank**,⁶ the court again confirmed that lateness is not the only consideration and that the test for condonation is whether it is in the interest of justice to grant it.
- [17] *In casu*, the First Applicant explained that the Notice to Abide related to Part A of the Review only. This Court has no reason to believe that this explanation is untrue or contrived. Be that as it may, it appears from the papers before Court that the First Respondent has neither delivered a Notice in terms of Uniform Rule 30, nor did the First Respondent apply for the striking out of the affidavit. Of particular importance is the fact that the First Respondent does not raise any substantial prejudice that may be suffered by it should the Answering affidavit be allowed into the record of the proceedings.

⁵ 2010 (2) SA 181 (CC)

⁶ 2014 (3) SA 39 (CC)

- [18] Although somewhat different circumstances, the Western Cape High Court has stated in the case of ***Clairison's CC v MEC for Local Government, Environmental Affairs and Development Planning and Another***⁷ held that a respondent is entitled to set out his position on an application. The court also deals extensively with the filing of the said affidavit potentially being an abuse of the court process but ultimately finds that no such abuse is present.
- [19] Likewise, in the current matter, the First Applicant explicitly sets out why the answering affidavit was delivered at this late stage. There was a considerable change in circumstances. The project has long since been finalised. This prompted the delivery of the Answering affidavit.
- [20] As to the Notice to Abide that was previously delivered, it was already indicated herein before that the Court accepts the explanation from the First Applicant that the intent was to only abide to Part A being granted.
- [21] A further aspect that is of relevant to this matter, is the fact that the Court has already, on no less than two occasions, directed that an application for condonation should be delivered. It follows that the Court, by implication, already found that it is procedurally possible to file an Answering affidavit provided condonation is granted.
- [22] In this Court's view, condonation for the late filing of the affidavit and allowing the First Applicant to file the said affidavit, is undeniable related to the current *status quo* on the project forming the subject of the Review. The Court hearing the Review in due course must be apprised of all relevant facts to enable that court to make a

⁷ 2012 (3) SA 128 (WCC)

just and equitable finding and to determine the appropriate remedy should the Review ultimately be successful. That court will be at a serious disadvantage should the information contained in the Answering affidavit of the First Applicant simply be ignored.

[23] On this basis, it follows that the interest of justice demands that condonation be granted. The First Applicant has extensively dealt with the reason why it delayed in delivering its Answering affidavit and have shown to have a reasonable prospect of succeeding in the opposition of the Review.

[24] As to the fact that the First Respondent failed to deliver any application for condonation, notwithstanding being some 6 months out of time with the delivery of their Answering affidavit, this Court is of the view that the said Answering affidavit should be disregarded as it is not properly before court.

[25] In the case of ***Uitenhage Transitional Local Council v SA Revenue Services***⁸ the Supreme Court of Appeal held:

‘... condonation is not to be had merely for the asking; a full, detailed and accurate account of the cause of delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the non-compliance is time-related

⁸ 2004 (1) SA 292 (SCA) at 297I – J

then the date, duration and extent of any obstacle on which reliance is placed must be spelled out.'

- [26] *In casu* the First Respondent did not launch any substantial application for condonation. On this basis, the Answering affidavit stands to be disregarded.

Costs:

- [27] In an application for condonation costs is normally awarded against the party seeking an indulgence. In this matter this court is of the view that neither party came to court with proverbial clean hands. The First Applicant, although successful with its application for condonation, has caused a considerably delay in prosecuting the application itself due to its inaccuracy and inadequacy of its papers. It stands to be noted that the First Respondent has been appropriately compensated by means of the cost orders granted in this matter to date and this Court therefore need not deal with the cost implication of the previous appearances.

- [28] Likewise, the First Respondent failed to address its failure to comply with the timeframes enunciated in the Uniform Rules of Court. It is a classic example of the pot calling the kettle black. The First Respondent wants to penalise the First Applicant for its failure to observe the Uniform Rules, whilst making themselves guilty of the same oversight.

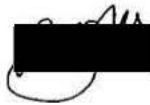
- [29] Under these circumstances, this Court is of the view that it would not be in the interest of justice if the First Applicant carry the costs of these proceedings,

notwithstanding them asking an indulgence from the Court. A more reasonable approach would be to order each party to pay its own costs. This might also serve as a deterrent to the parties in the future not to burden the rolls unnecessarily with papers that do not conform to legal prescripts.

Order:

[30] **In the result the following order is made:**

- 30.1 The First Applicant's late filing of its Answering affidavit to the Review is condoned.**
- 30.2 Each party is ordered to pay its own costs pursuant to the Application for Condonation.**



M BRESLER AJ
ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

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DATE OF JUDGMENT : 3 February 2025