



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case number: 2020/22584

- [1] REPORTABLE: NO
- [2] OF INTEREST TO OTHER JUDGES: NO
- [3] REVISED: NO

SIGNATURE

DATE: 27 February 2025

In the application for leave to appeal between:

**THE CITY OF JOHANNESBURG METROPOLITAN
MUNICIPALITY**

Applicant

and

NAUDE, YOLANDE GERALDINE

Respondent

In re:

NAUDE, YOLANDE GERALDINE

Plaintiff

and

**THE CITY OF JOHANNESBURG METROPOLITAN
MUNICIPALITY**

Defendant

JUDGMENT

PULLINGER AJ

- [1] This is an application for leave to appeal against the whole of my judgment and order dated 22 July 2024.
- [2] The applicant's "notice of leave to appeal" was delivered on or about 18 September 2024.
- [3] The application for leave to appeal was delivered some forty-three days out of time.
- [4] On 17 October 2024, nearly two months after the application for leave to appeal was delivered, the applicant delivered an application for condonation.
- [5] Sutherland J, as he then was, held in **Panayiotou**,¹ that an application for leave to appeal has not been made for the purposes of Section 18(1) of the Superior Courts Act, 2013 where it has been delivered outside of the time periods prescribed in the Rules of Court, unless and until condonation has been granted. Thus an application for leave to appeal as contemplated in section 17 of the Superior Courts Act has only been made once condonation has been granted.

¹ **Panayiotou v Shoprite Checkers (Pty) Ltd and Others** 2016 (3) SA 110 (GJ) at [14] and [15]

[6] On this basis I shall begin with a consideration of the applicant's condonation application.

[7] Condonation is not a mere formality and even the absence of opposition is not an overriding consideration. An applicant must make out a proper case for "good cause".² If only one element of "good cause" is satisfied, a proper case for condonation will still not have been established. As was said by Miller JA in **Chetty**,³

"It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of default judgement against him, no matter how reasonable and convincing the explanation of his default. And ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have judgment against him rescinded on the ground that he had reasonable prospects of success on the merits. The reason for my saying that the appellant's application for rescission fails on its own demerits is that I am unable to find in his lengthy founding affidavit, or elsewhere in the papers, any reasonable or satisfactory explanation of his default and total failure to offer any opposition whatever to the confirmation on 16 September 1980 of the rule *nisi* issued on 22 April 1980."⁴

[8] This is apposite because of the common requirement of "good cause" in condonation and rescission applications.

[9] In a case such as this, where the applicant's delay is the prominent feature of its condonation application, the threshold the applicant was required to meet appears from **Uitenhage Transitional Local Council**⁵ where the Supreme

² **Saloojee & Another v Minister of Community Development** 1965 (2) SA 135 (A) at 138 E - F

³ **Chetty v Law Society, Transvaal** 1985 (2) SA 756 (A)

⁴ At 765D - E

⁵ **Uitenhage Transitional Local Council v South African Revenue Service** 2004 (1) SA 292 (SCA)

Court of Appeal formulated precisely what is expected of an applicant in such circumstances. It said:

"[6] One would have hoped that the many admonitions concerning what is required of an applicant in a condonation application would be trite knowledge among practitioners who are entrusted with the preparation of appeals to this Court: condonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of the 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 then the date, duration and extent of any obstacle on which reliance is placed must be spelled out."

[10] The Supreme Court of Appeal stridently criticised the appellant's application as consisting of generalised statements without any attempt to relate them to the timeframe of its default or to enlighten the court as to the materiality and effectiveness of any steps taken by the appellant's legal representatives to achieve compliance with the Rules of Court at the earliest opportunity.⁶

[11] The same criticism may fairly be made of the founding affidavit in the applicant's condonation application herein.

[11.1] The deponent to the applicant's founding affidavit, who identified himself as *"the deputy director risk and assurance [of the City]"* says that *"... due to a number of factors it became impossible to file the application in time."* He then provides a timeline of events as follows:

⁶ *Ibid* at [7]

[11.1.1] on 23 July 2024 a copy of the judgment was "given" to the applicant for consideration;

[11.1.2] on 31 July 2024 the applicant presented the judgment to the Legal Department of the applicant for consideration, which department "... *had to go through the transcribed records of the case that was initial [sic] before the above Honourable Court for consideration*"; and

[11.1.3] then on 12 September 2024 counsel was requested to provide advice on prospects of success and a potential apportionment of damages. This opinion was allegedly provided on 17 and on which opinion the applicant allegedly instructed its attorneys to apply for leave to appeal on 18 September 2024.

[11.2] I point out, *en passant*, that the final statement is incorrect. The document styled "Notice of Leave to Appeal" is dated 17 September 2024. This becomes material in the context of my findings concerning the applicant's supine approach to this matter below;

[11.3] Thus concludes the applicant:

"I submit that the delay is not inordinate, and the explanation as given, the circumstances of the delay were beyond the control of the applicant in this application."

- [12] The founding affidavit is singularly lacking in any evidence of who allegedly considered the papers filed of record, when they did so and how long it took them to do so.
- [13] There is no account for the time lapse between 31 July 2024 and 12 September 2024. This delay required an explanation.
- [14] The seven days counsel took to provide a view on the matter is *de minimus* in the context of a forty-three day delay and a near six week period during which allegedly an (unidentified) official considered the transcript of the proceedings before Meyer AJ.
- [15] There are no primary facts⁷ to support the contention that the timeous delivery of an application for leave to appeal was "impossible" as the applicant contends it was, nor can the conclusion that "*...the circumstances of the delay were beyond the control of the applicant*" be sustained.
- [16] By the time the application for leave to appeal was delivered, the applicant and its legal representatives must have known it was out of time. Despite this knowledge, it took a further two months for a condonation application to be delivered. There is no justification for the applicant's failure to explain why the application for condonation itself was delivered so far out of the prescribed time period.

⁷ **Swissborough Diamond Mines v Government of the RSA** 1999 (2) SA 279 (T) at 324D – F; **Die Dros (Pty) Limited and Another v Telefon Beverages CC and Others** 2003 (4) SA 207 (C) at [28]; **Knoop N.O and Another v Gupta and Another** 2021 (3) SA 88 (SCA) at [19]

- [17] Steyn CJ, in **Saloojee**,⁸ when considering a condonation application for the late delivery of a notice of appeal held:

"What calls for some acceptable explanation, is not only the delay in noting an appeal and in lodging the record timeously, but also the delay in seeking condonation. As indicated, *inter alia*, in *Commissioner for Inland Revenue v Burger*, 1956 (4) SA 446 (AD) at p. 449, and in *Meintjies' case*, *supra* at p. 264, an appellant should, whenever he realises that he has not complied with a Rule of Court, apply for condonation without delay. A perusal of the Rules of this Court should have disclosed to the applicants' attorneys that, when they obtained consent to an appeal direct to this Court on 8th October, the time for noting an appeal had already expired. By 18th October, 1963, they knew that the notice of appeal tendered had been rejected by the Registrar as being out of time. From then onwards it must have been quite clear to them that an application for condonation was necessary."

- [18] The applicant's failure to explain in any meaningful manner, "*... the date, duration and extent of any obstacle on which reliance is placed...*" leads to the inference that the applicant was lackadaisical.⁹ The applicant's explanation is wholly inadequate and perhaps even lacking in candour.

- [19] Moreover, the absence of any primary facts leads to the ineluctable conclusion that the deponent to the founding affidavit has no personal knowledge of the allegations to which he deposes. I would have expected the repeated admonitions of this Court concerning individuals in the employ of the applicant deposing to affidavits with no personal knowledge of the facts would by now

⁸ *supra* at 138 H to 129 A; **Commissioner, South African Revenue Service v van der Merwe** 2016 (1) SA 599 (SCA) at 609 F, citing **Commissioner for Inland Revenue v Burger** 1956 (4) SA 466 (A) at 449 G - H

⁹ **Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and Others** [2013] 2 All SA 251 (SCA) at [13]; **Commissioner, South African Revenue Service v van der Merwe** 2016 (1) SA 599 (SCA) at 611 I/J

have resonated with the applicant. Sutherland DJP recently had this to say about this practice:

"[45] The practice of requiring a legal advisor to depose to the affidavits is both a clue to the cause of the debacle and a manifestation of the City's reckless attitude. It should be self-evident that the City's legal advisor has no personal knowledge of the accounting. He cannot ever be more than a conduit. His affidavit craftily states that he makes it based on the information provided to him, deftly evading the typical formula that the deponent has access to and control over the documents *qua* evidence. From whom the facts were truly obtained is never said, and in this wholly unsatisfactory manner, the anonymous officials who compose the accounts are shielded from accountability. If Mr Ngwana is ever be cross-examined on his affidavits it seems likely that embarrassment would soon follow. It must be stated bluntly that the affidavits in litigation should be from persons who administer the accounts. The practice of a legal advisor being a deponent to facts of which he has no personal knowledge must stop."¹⁰

[20] The application for condonation carries little to no probative value even if the apparent hearsay nature thereof is overlooked.

[21] Then there is the question of prejudice that the applicant overlooks.

[21.1] The respondent is a widow.

[21.2] She was successful in her loss of support claim against the applicant.

[21.3] She did not work during the deceased's lifetime and was constrained to re-enter to workforce to support herself and the three minor children

¹⁰ **Millu v City of Johannesburg Metropolitan Municipality and Another** [2024] ZAGPJHC 419 (18 March 2024)

born of her marriage to the deceased on a small salary. She has a very real interest in the finality of this matter.

[21.4] The prejudice to the respondent becomes even more acute when regard is had to the trial before me being a *de novo* trial - Meyer AJ having died before giving judgment in the matter.

[22] Gautchi AJ, on behalf of the full bench of this division, in **Aymac**¹¹ stated the proposition thus:

"Inactivity by one party affects the interest of the other party in the finality of the matter. See in this regard *Federated Employers Fire & General Insurance Co Ltd and Another v McKenzie* 1969 (3) SA 360 (A) at 363A in which Holmes JA said the following concerning the late filing of a notice of appeal:

'The late filing of a notice of appeal particularly affects the respondent's interest in the finality of his judgment - the time for noting an appeal having elapsed, he is *prima facie* entitled to adjust his affairs on the footing that his judgment is safe; see *Cairns' Executors v Gaarn* 1912 AD 181 at p. 193, in which SOLOMON, J.A., said:

'After all the object of the Rule is to put an end to litigation and to let parties know where they stand.'

See also *Minister of Land Affairs and Agriculture and Others v D&F Wevell Trust and Others* 2008 (2) SA 184 (SCA) at 199B - D."

[23] The applicant has not had any regard to the respondent's rights and her interests in the finality of the matter.

¹¹ **Aymac CC v Widgerow** 2009 (6) SA 433 (W) at [40]

[24] The applicant suggests that this matter is one of some importance to the applicant because it

"... raises an important question of law of whether the deceased can benefit from his wrong doing, as the witness who attended at the accident scene indicated that he manner in which the motorcycle broke means that he was not travelling at 60km/h".

But, as will become clear, this contention arises from certain inferences the applicant seeks to draw, in the absence of evidence from which those inferences may correctly be drawn.

[25] But even the ostensible importance of the matter is not sufficient for leave to appeal to be granted,¹² much less the granting of the condonation application.

[26] I am unpersuaded that this is a matter of importance as contemplated in the authorities. There are no issues of public importance, or public interest, nor does it concern a large sum of money.¹³ The application for leave to appeal challenges only factual conclusions reached from an evaluation of the evidence presented in trial.

[27] The applicant's condonation application is unsatisfactory in every respect. Mr Dlali, who appeared for the applicant, correctly conceded as much.

[28] Thus, while the condonation application should simply be refused without consideration of the merits,¹⁴ I am guided by the approach of Heher JA in

¹² **Minister of Justice and Constitutional Development v Southern Africa Litigation Center** 2016 (3) SA 317 (SCA) at 330C

¹³ Compare **Administrateur, Transvaal v van der Merwe** 1994 (4) SA 347 (A) at 357 I; **Alpha Bank BPK en Andere v Registrateur van Banke en Andere** 1996 (1) SA 330 (A) at 339 C - D

¹⁴ **Blumenthal and Another v Thompson NO and Another** 1994 (2) SA 118 (A) at 121 I to 122 B

Uitenhage¹⁵ and Ponnann JA in **Dengetenge** and accordingly consider the merits of the application for leave to appeal in order to assess the applicant's prospects of success. In so doing, I am mindful of the principal laid down in **United Plant Hire**,¹⁶ that

"It is well settled that, in considering applications for condonation, the Court has a discretion, to be exercised judicially upon a consideration of all of 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 therefore, the prospects of success on appeal, the importance of the case, the respondent's interest in the finality of his judgment, the convenience of the Court, and the avoidance of unnecessary delay in the administration of justice. The list is not exhaustive.

These factors are not individually decisive but are interrelated and must be weighed one against the other; thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong."

[29] At the hearing, Mr Dlali quite properly abandoned certain of the grounds raised in the applicant's application for leave to appeal. These concerned Mr Danielson's "opinion" of how the fatal accident occurred and my rejection of Ms Smit's evidence concerning signage.

[30] The applicant does not take issue with the formulation of the dispute that was tried before me.¹⁷ The applicant also accepts that, in the lighting conditions at the time of the fatal accident, the trench in the curve on Louis Botha Avenue could not be seen.¹⁸ In the same way, it does not take issue with the finding that

¹⁵ *supra* at [11]

¹⁶ **United Plant Hire (Pty) Ltd v Hills** 1976 (1) SA 717 (A) at 720 E –G; followed in, *inter alia*, **Minister of Safety and Security and Another v Scott and Another** 2014 (6) SA 1 (SCA) at [16]

¹⁷ Judgment at [14]

¹⁸ Judgment at [16]

the applicant was negligent in not posting signage warning of the curve in the road and the warning of the danger in the road, being the trench.¹⁹

[31] The applicant does persist with two issues. The first concerns the contention that the deceased was speeding and that this contributed to the fatal accident and the second, the "quality" of the evidence upon which Dr de Beer based his opinions and calculations. I use the word "quality" advisedly because the issue concerns the absence of bank statements from which, the applicant contends, the deceased's income and household expenditure could be "verified".

[32] Many of the points in the application for leave to appeal and, as appears from the applicant's heads of argument, overlap. For the sake of brevity, I address the related points together.

[33] The applicant's main contention is that, on the night of the fatal accident, the deceased was riding his motorcycle at a speed in excess of the prescribed speed limit; therefore, so the argument goes, the deceased's own unlawful conduct caused or at the very least contributed, to his death.

[34] During argument Mr Smit, who appeared for the respondent, referred me to certain passages from the transcript of the proceedings before Meyer AJ. Mr Dlali relied on a further passage.

¹⁹ Judgment at [74]

- [35] These passages concern the damage to the deceased's motorcycle pursuant to it colliding with the pavement after striking the trench and the inferences concerning speed which the applicant seeks to draw from those passages.
- [36] These inferences are, at best, speculative. There was no evidence concerning the effect of the weight of the deceased's motorcycle nor any evidence concerning the forces at which a motorcycle fork, such as the one on the model ridden by the deceased, could endure before it would come apart. In the same way, there was no evidence concerning the nature of the pavement and the effect that striking the pavement would have in relation to generating the force necessary for the fork to break.
- [37] The expert witness, Sergeant Lottering declined, both the before me and Meyer AJ, to opine on the deceased's speed. He pointed out that he was not then qualified to make such an estimation and could not, *ex post facto*, do so.
- [38] Mr Danielsen's unchallenged evidence was that the deceased had slowed down for him and another motorcycle rider to catch up with him ahead of them entering the curve. Whether or not they entered the curve together is of little moment. Mr Danielsen gave unchallenged evidence as to why the motorcycle he was riding could not at that point, exceed approximately 60 kilometres per hour.
- [39] Logic dictates that if Mr Danielsen had caught up to the deceased, riding at no more than 60 kilometres per hour, the deceased must have entered the curve at a speed less than that.

[40] But, even if speed played a role, this is insufficient for purposes of contributory negligence.

[41] In **Kottler**²⁰ the full court of the then Transvaal Provincial Division considered the question as to whether excessive speed, *simpliciter*, constituted negligence for the purposes of a delictual claim. The court of appeal held:

"... I have no doubt that the plaintiff established that, though the figure cannot be fixed on the evidence that anything like that mentioned by van den Berg, the defendant was travelling at a speed considerably over 15 miles per an hour. But the question still remains whether, as regards traffic or pedestrians entering the intersection from the South, the defendant's speed constituted negligence. This depends on whether the defendant could, in the circumstances reasonably be expected to anticipate that a pedestrian might not only emerge from behind the wagon, but proceed to run across the street without looking. The answer to this question, in my opinion, is clearly in the negative."²¹

[42] The proposition holds true here; even if it could be established that the deceased had been speeding (and it is my judgment that there is no such evidence to support such a finding), there is no evidence to suggest that speed played a role in the fatal accident, regard being had to the lighting conditions, the existence of the trench and the absence of warning signs.

[43] In the circumstances, the notion advanced by the applicant that the deceased's conduct contributed to his death cannot be sustained. This puts paid to any question of contributory negligence.

²⁰ **Kottler v Jordaan** 1930 TPD 828

²¹ At 829

- [44] In relation to Dr de Beer's opinion and calculations, the applicant contends that on account of Dr de Beer not being in possession of certain bank statements, the facts that gave rise to the conclusions in his report could not be verified.
- [45] The applicant's approach ignores the respondent's direct evidence that she did not work during the deceased's lifetime, that the deceased's earnings supported the family, afforded them certain luxuries and that the deceased was generally paid in cash for the work that he did. This was left unchallenged in cross-examination.
- [46] These were the facts that Dr de Beer relied upon having conducted interviews with the respondent and Mrs Naude (senior). These facts formed the basis of his conclusion that, but for the accident, the deceased's earnings would have remained the same as there was no reason to believe that his work would not have continued in the same vein with the same remuneration and that the business may even have grown.
- [47] In relation to the bank statements, and in cross-examination, Dr de Beer stated that he could not make assumptions based on bank accounts alone because they were incomplete, therefore irrelevant and would not lead to a correct answer. He had obtained further information underpinning his conclusions from the respondent, the deceased's mother, his own research and consideration of the respondent's living circumstances. He disagreed with the proposition put to him that a loss of support claim cannot be found because of the absence of collateral evidence being the said bank statements.

- [48] In relation to living and other expenses, and during cross-examination, the respondent testified that she made payments on behalf of the household with the money given to her by the deceased. This money was given to her in cash which meant that she was well aware of how much the deceased earned and to what uses it was being put. This too was unchallenged in cross-examination. This evidence was supported by Mrs Naude (senior).
- [49] At no point was it put to the respondent in cross-examination or otherwise that the deceased's earnings or the household expenses during his life were overstated.
- [50] Once again, the applicant adduced no evidence to suggest that Dr de Beer's calculations were incorrect nor was it suggested that the respondent's evidence was unreliable. I found that Dr de Beer's conclusions were consistent with the proved facts. This is the approach taken in respect of expert calculations.²²
- [51] I am uncertain as to how it can *bona fide* be contended by the applicant that Dr de Beer's conclusions are incorrect, this in circumstances where it failed to dispute that the bulk of the deceased's earnings were received in cash, given to the respondent to pay household expenses and, axiomatically, therefore not deposited into a bank account.
- [52] The role of bank statements that do not reflect deposits or payments for the reasons aforesaid play no role in this matter.

²² **Dlamini v Road Accident Fund** [2022] 4 All SA 360 (GJ) at [69] to [75]

[53] The applicant's contentions that bank statements are "the best evidence" and were required to establish the respondent's loss of income is, at best, predicated on a misunderstanding of what constitutes "best evidence".

[54] In **De Klerk**,²³ the Supreme Court of Appeal distinguished between that which constitutes "the best evidence available for the purposes of proving damages" and the "best evidence rule". Properly understood, the latter relates to the admissibility of evidence and the former to evidence available to a plaintiff to prove its case. The Supreme Court of Appeal referred to the decision in **Enslin**²⁴ where Galgut J, as he then was, said:

"A plaintiff is ... expected to lead evidence which will enable an accurate assessment to be made if such evidence is available."²⁵

[55] Schutz JA cited, further, the decision in **Lazarus**²⁶ which in turn quoted from **Hersman**²⁷ where De Villiers J drew the distinction between an instance where evidence is available to a plaintiff and is not produced, and circumstances where the best available evidence is produced although "*not entirely of a conclusive character*" concluding that "*... if it is the best evidence available, the Court must use it and arrive at a conclusion based on it.*"²⁸

²³ **De Klerk v Absa Bank Ltd and Others** 2003 (4) SA 315 (SCA) at 37

²⁴ **Enslin v Meyer** 1960 (4) SA 520 (T)

²⁵ At 523G

²⁶ **Lazarus v Rand Steam Laundries** (1946) (Pty) Ltd 1952 (3) SA 49 (T) at 51

²⁷ **Hersman v Shapiro & Co** 1926 TPD 367 at 379

²⁸ At 523 - 524

[56] The former case concerned whether the plaintiff had placed sufficient evidence before the Court to estimate the loss suffered by him pursuant to a motor vehicle accident.

[57] In the latter case, the appeal court considered, *inter alia*, the computation of damages for the non-delivery of certain produce where there was no means of obtaining the value of the produce that ought to have been delivered. It held:

"Looking at all the evidence in regard to price, it seems to me that the plaintiff gave all the evidence which he could possibly give, under the peculiar circumstances of the case, to prove the amount of damages he suffered."²⁹

[58] In **Ndlovu**³⁰ Spilg J criticised a plaintiff for not providing bank statements where these were available and could readily have established his income.³¹ In **Ndlovu**, the bank statements would have served as definitive evidence of the plaintiff's income. In that instance, the bank statements were of clear relevance and would have constituted "best evidence". This is an entirely different scenario from the facts in the present case.

[59] The principle, then, is that a plaintiff in proving its damages, must adduce the most cogent evidence available. This, as **Hersman** shows is dependent upon the circumstances. The most cogent available evidence, in a particular set of circumstances, is "the best evidence".

²⁹ At 379

³⁰ **Ndlovu v Road Accident Fund** 2014 (1) SA 415 (GSJ)

³¹ At [68]

[60] I find, in the circumstances, there is no merit to the challenge on Dr de Beer's findings and calculations.

[61] I conclude therefore, that the applicant does not enjoy any prospects of success on appeal. Thus the applicant fails on both legs of the "good cause" test.

[62] In the result, I make the following order:

The application for condonation is dismissed with costs.



A W PULLINGER
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on 27 February 2025.

DATE OF HEARING: 21 February 2025

DATE OF JUDGMENT: 27 February 2025

APPEARANCES:

COUNSEL FOR THE APPLICANT:

Adv S Dlali

ATTORNEY FOR APPLICANT:

K Matji & Partners Attorneys

COUNSEL FOR THE RESPONDENT:

Adv D J Smit

ATTORNEY FOR THE RESPONDENT:

**Leon JJ van Rensburg
Attorneys**