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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case Number: 2019/38649

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
28 Feb 2025 _____	
DATE	SIGNATURE

S[...]: J[...] J[...] O[...]

(Identity Number: 4[...])

Applicant

Applicant in the main application /
Respondent in the counterapplication /
Applicant in the condonation
application

S[...]: C[...] E[...]

(born VAN EMMENIS)

(Identity Number: 5[...])

Respondent

Respondent in the main application/
Applicant in the counterapplication /
Respondent in the condonation
application

JUDGMENT

Introduction

[1] In these proceedings, the applicant applies for condonation of the late delivery of the applicant's replying affidavit in the main application and the answering affidavit in the counterapplication. The applicant in the condonation application is the applicant in the main application, and is the first respondent in the counterapplication. The respondent in this condonation application is the first respondent in the main application and the applicant in the counterapplication.

Background

[2] The main application and counterapplication concern a judgment handed down by Crutchfield J on 9 May 2022. The details of this judgment are not important in these proceedings except to say that the respondent alleges that, by an oversight by her legal representatives, estate agent's commission was not included in the calculation of the amount awarded by the learned judge.

[3] The applicant has been represented by two sets of attorneys. Initially the applicant was represented by Jurgens Bekker Attorneys and on 26 March 2024 DPS Attorneys were substituted as the applicant's attorneys (the applicant's current attorneys).

[4] Considerable correspondence was exchanged between the applicant's previous and current attorneys and the respondent's attorneys. Again it is not necessary to deal in detail with this correspondence except to say-

- a. the respondent states that the replying affidavit was due on 25 August 2023 and the answering affidavit was due on 15 September 2023; the applicant alleges that the agreed date for the filing of the replying and answering affidavits was 20 October 2023;
- b. the answering affidavit was served on 15 January 2024 and the replying affidavit was served on 19 January 2024 but these affidavits were only filed on Caselines on 4 June 2024. It was on this day that the applicant's current attorneys say that they saw the answering and replying affidavits for the first time;

- c. no application for condonation was made nor was condonation sought in either of these affidavits. The respondent therefore caused a notices in terms of rule 30/30A to be delivered to the applicant;
- d. between 22 February 2024 and 26 March 2024 there was a flurry of correspondence caused by the applicant addressing a letter to the Honourable Sutherland DJP in which the applicant made various complaints regarding the judgment of Crutchfield J;
- e. on 25 April 2024 the applicant's current attorneys (having been substituted on 26 March 2024) sent a letter to the respondent's attorneys requesting condonation for the late filing of the affidavits. In this letter the applicant tendered to pay the wasted costs occasioned by the rule 30/30A notices and application;
- f. on 15 May 2024 the respondent's attorneys sent a letter to the applicant's attorneys stating that condonation would not be granted;
- g. on 21 June 2024 the applicant launched this application for condonation.

[5] The applicant's previous attorneys deposed to an affidavit in which the deponent took full responsibility for the lateness of the serving of the answering and replying affidavits. This explains (rather than excuses) the delay up to 19 January 2024.

[6] From 19 January 2024 to 25 April 2024 (being the date the applicant's current attorneys requested that the late filing of the affidavits be condoned), the delay is apparently accounted for partially by the strange decision of the applicant to engage the Honourable Sutherland DJP in correspondence, partially by the applicant's decision to change attorneys and partially by the time taken by the applicant's current attorneys and counsel becoming familiar with the issues involved. As to the latter I do have some sympathy with the applicant's current attorneys and counsel – the papers on Caselines number nearly 2000 pages. In addition I think, from reading the applicant's affidavit, that the applicant was naïve, rather than intentionally dilatory, in his approach to this litigation.

[7] It is against this broad background, where it is apparent the applicant's previous attorneys and the applicant himself are mainly to blame for the delay, that

the applicant seeks condonation of the late filing of the answering and replying affidavits.

Condonation

[8] It is trite that condonation is an indulgence granted by the court and the court has the discretion to allow or deny it¹. The granting or refusal of condonation is a matter of judicial discretion, involving a value judgment based on the facts of each case.

[9] The standard for considering an application for any condonation is the interests of justice. The concept 'interests of justice' is not capable of precise definition. In relation to the condonation for the late filing of affidavits it includes but is not limited to -

- a. the extent and cause of the delay and the reasonableness of the explanation for the delay,
- b. the nature of the proceedings, the contents of the affidavits and the prospects of success,
- c. the prejudice to any other party or parties.

[10] As succinctly stated by Oosthuizen-Senekal CSP AJ²:

The test is no more nor less than that of justice and equity, that is a question of fairness to both sides as to whether or not further sets of affidavits should be permitted.

[11] In my opinion in this matter, on balance, condonation should be granted. It is true that the explanation for the delay is barely acceptable. Nevertheless, the main application and counterapplication concern allegations by the respondent that, by an oversight by her legal representatives, the award by Crutchfield J on 9 May 2022 was incorrect. It is in the interests of justice that the affidavits in question be taken

¹ Grootboom v National Prosecuting Authority 2014 1 BCLR 65 (CC); 2014 2 SA 68 (CC)

² Neutron Energy Africa (Pty) Ltd v Hengyi Electrical Co Ltd (58561/2021) [2023] ZAGPJHC 1307

into account and that the matter be finalised on the basis that all the facts adduced by all the parties are considered.

[12] I therefore condone the late filing of the applicant's replying affidavit in the main application and the applicant's answering affidavit in the counterapplication.

Costs

[13] The applicant seeks an indulgence from this court. Furthermore, when the delay has been as lengthy as it has been in this case, I think that the respondent was entitled to require the applicant to satisfy the court that condonation should be granted.

[14] The respondent requested, in argument, that because of the applicant's conduct, the court should order the applicant to pay the respondent's costs on scale B as provided for in Rule 67A. As stated by Wilson J, the focus of rule 67A is not on the conduct of the losing party. Its focus is primarily on the nature of the case, and, secondarily, on the way that the successful party presented it. The misconduct of the unsuccessful party is irrelevant once a court has declined to award a punitive costs order³.

[15] I do not think, in the circumstances of this case, a punitive costs order against the applicant is justified.

Order

A. The late service and filing of the applicant's replying affidavit in the main application, deposited on 18 January 2024 and served on 19 January 2024, is hereby condoned.

B. The late service and filing of the applicant's answering affidavit in the counterapplication, deposited on 21 November 2023 and served on 10 January 2024, is hereby condoned.

³ Mashavha v Enaex Africa (Pty) Ltd (2022/18404) [2024] ZAGPJHC 387; 2025 (1) SA 466 (GJ) (22 April 2024)

C. The applicant shall pay the respondent's costs of this application for condonation, including costs of counsel on scale A, in accordance with Rule 67A of the uniform rules of court.

D. The applicant shall pay the costs of the unopposed Rule 30/30A application.

A MITCHELL

Acting Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading it to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 28 February 2025.

HEARD ON: 19 February 2025

DECIDED ON: 28 February 2025

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