



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

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

SIGNATURE

DATE: 5 March 2025

Case No. 2022/00966

In the matter between:

THE STATE ATTORNEY

Applicant

and

VIWE SAMUEL NOTSHE

First Respondent

SOLICITOR-GENERAL OF SOUTH AFRICA

Second Respondent

JUDGMENT

WILSON J:

- 1 On 11 September 2024, I gave judgment directing the applicant, the State Attorney, to honour over R5 million in unpaid invoices presented by the first respondent, Mr. Notshe. The deadline for seeking leave to appeal against my judgment came and went in early October 2024. On 19 November 2024, Mr. Notshe's attorney wrote to the State Attorney and asked the State Attorney to

pay the judgment debt, or face execution on it. His letter was ignored. On 27 November 2024, Mr. Notshe's attorney issued a writ of execution. On 4 December 2024, the Sheriff attached a range of office equipment at the State Attorney's office. Still, the State Attorney did nothing, either to prevent the sale of its goods, or to challenge my judgment.

2 On 27 January 2025, the Sheriff took the further step of garnishing the State Attorney's bank account. That finally appears to have incited a response. On 28 January 2025, the State Attorney served an application for leave to appeal against my judgment of 11 September 2024, together with an application for condonation. The State Attorney filed its applications with the registrar on 4 February 2025.

3 Both applications were enrolled before me on 5 March 2025. Mr. Mhambi, who appeared for the State Attorney, accepted that he was obliged first to obtain condonation for the late filing of the application for leave to appeal. He nonetheless addressed the prospects of success in the State Attorney's proposed appeal in the context of the condonation application.

4 The test applicable to applications for condonation is so well-known it barely needs repeating. A court considers the nature and degree of non-compliance with a rule, the explanation for that non-compliance, any prejudice caused by the non-compliance, and the applicant's prospects of success in the main case. Each of these considerations is weighed with the aim of promoting the interests of justice on the facts of each matter, which is a court's fundamental pre-occupation (*Grootboom v National Prosecuting Authority* 2014 (2) SA 68 (CC) paragraph 22).

- 5 In this case, the degree of non-compliance is substantial. The State Attorney's application for leave to appeal was just under four months late. The prejudice to Mr. Notshe is likewise clear. He had developed the good faith impression that the judgment had become final, and he went to the trouble and expense of executing on it. For two and a half months after the first steps toward execution were taken, the State Attorney said nothing to him. It did not say that it would seek to appeal the judgment. Nor did it say that it was considering doing so.
- 6 The explanation for the delay is extremely poor. It was first said that the Solicitor-General's contract expired on 30 September 2024, and an acting Solicitor-General was appointed for a six-month period from 1 October 2024. When pressed on what that meant, Mr. Mhambi's submission was that the former Solicitor-General could not be expected to take steps to appeal my judgment so close to the end of his term, and that the acting Solicitor-General experienced a "backlog" of matters when she took office on 1 October 2024. That "backlog", together with the leave of absence that the head of the Johannesburg State Attorney's office took over December 2024, meant that the acting Solicitor-General could not consider the matter until mid-January 2025.
- 7 Neither the former nor the acting Solicitor-General deposed to an affidavit setting out why they did not pay attention to the matter during their respective tenures. Nor was it explained why the Solicitor-General's input was necessary before an appeal could be pursued. No description of the "backlog" apparently experienced by the new Solicitor-General was proffered. Nor was any account

given of the level of priority, if any, assigned to this matter in that “backlog”. In light of those absences, Mr. Mhambi was ultimately constrained to submit that his case on condonation was really that I should give both Solicitors-General a grace period at the beginning and at the end of their terms, during which I should simply overlook their inaction.

8 As bad as that case is, it may have been made up for by a good case on the merits of the appeal. But those merits are hopeless. It is common cause that the judgment I gave on Mr. Notshe’s unpaid invoices related to work he had actually done for the State Attorney, and to invoices that his instructing attorneys had approved and forwarded for payment. Most if not all of those invoices predated the tenure of the current head of the State Attorney’s Johannesburg office, Ms. Mobeng. Ms. Mobeng nonetheless claimed the right to withhold payment on those invoices because of an investigation carried out by the Special Investigation Unit (SIU) into amounts already paid to Mr. Notshe on other work done by him for the State Attorney. Ms. Mobeng claimed the right to set the payments due on the unpaid invoices off against any amount that Mr. Notshe might be obliged to repay as a result of the SIU investigation.

9 In my judgment *a quo*, I found that no such set-off was legally permissible. But even if it were, the problem with Ms. Mobeng’s submission is that the SIU has expressed no interest at all in the particular invoices on which I ordered payment. Nor was either party able to point me to any respect in which the SIU has found that Mr. Notshe was liable to repay the sums that were the focus of its investigation. In these circumstances, there was no basis on which the State Attorney could lawfully withhold payment on the invoices before me.

Perhaps realising this, Ms. Mobeng's answering affidavit *a quo* was, for the most part, an invoice-by-invoice critique of Mr. Notshe's claims, in which she – quite recklessly – alleged that Mr. Notshe had engaged in over-reaching, dishonesty, double-briefing and other unethical conduct. However, since most if not all of the invoices were approved for work done prior to Ms. Mobeng's tenure, Ms. Mobeng plainly had no personal knowledge of the nature of the work or the basis on which Mr. Notshe had charged for it. She advanced no explanation of why her predecessor and the specific briefing attorneys who instructed Mr. Notshe had approved the invoices for payment. Nor were any affidavits – confirmatory or otherwise – put up from those attorneys. While Ms. Mobeng appeared to assert in her affidavit that her critique of Mr. Notshe's affidavits amounted to admissible hearsay, no application to receive that hearsay evidence was brought.

10 Finally, Mr. Mhambi suggested that my judgment ought not to have been granted without joining the SIU. He was, however, unable to explain what interest the SIU had in these proceedings, given that the invoices on which I ordered payment never formed part of its investigation.

11 For all these reasons, the appeal proposed is stillborn. Whatever merit it may have certainly cannot make up for the appalling explanation advanced for the lateness of the application for leave to appeal. Condonation must be refused.

12 Mr. Vobi, who appeared for Mr. Notshe, submitted that the condonation application was brought in bad faith, since it was only pursued to stave off execution of my judgment, rather than because of any genuine belief in the merits of the proposed appeal. The facts before me are certainly open to that

interpretation, but I need not go that far. Even without the taint of bad faith, the application cannot succeed.

13 Accordingly –

13.1 The application for condonation for the late filing of the applicant's application for leave to appeal is dismissed.

13.2 The applicant is directed to pay the costs of the application.



S D J WILSON
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 5 March 2025.

HEARD ON: 5 March 2025

DECIDED ON: 5 March 2025

For the Applicant: MH Mhambi
Instructed by the State Attorney

For the First Respondent: I Vobi
Instructed by Buthelezi NF Attorneys