



**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable/Not Reportable

Case no: 6862/2024

In the matter between:

SIDZ MOTORCYCLES RACING (PTY) LTD

APPLICANT

and

JOSEPH REYNOLDS CHEMALY NO

FIRST RESPONDENT

MICHAEL NICOLAS GEORGIU NO

SECOND RESPONDENT

ANDRIANA GEORGIU NO

THIRD RESPONDENT

**[IN THEIR CAPACITIES AS TRUSTEES OF
THE MICHAEL FAMILY TRUST – TMP 2502]**

MANGAUNG METROPOLITAN MUNICIPALITY

FOURTH RESPONDENT

Neutral Citation: *Sidz Motorcycles Racing (Pty) Ltd v Chemaly NO and Others*
(6862/2024) [2025]

Coram: Benade AJ

Heard: 17 April 2025

Delivered: This judgment was handed down in court and electronically by circulation to the parties' representatives by email and released to SAFLII. The date and time for hand-down is deemed to be on **14 May 2025**

Summary: Condonation application for the late filing of opposing affidavit – consideration of the prospects of success, nature of the relief sought and importance of the case for both parties – consideration of reasonableness for applicant to oppose condonation in the light of the poor explanation for time that elapsed – principles of estoppel restated.

ORDER

- 1 Condonation is granted to the respondents for the late filing of their opposing affidavit, with respondents to pay the costs of the applicant in opposing the application for condonation, on scale B as contemplated in rule 69.
- 2 The application is dismissed, with costs on scale B for purposes of rule 69.
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JUDGMENT

Benade AJ

Introduction

[1] The fourth respondent did not oppose and plays no role in these proceedings. I refer to the first three respondents herein as 'the respondents' – which is then a reference to the Michael Family Trust. Regarding the application for condonation, the application was issued on 3 December 2024 with notice of intention to oppose given by the respondents on 18 December 2024. Accordingly, they had, until 27 January 2025, to file an opposing affidavit. With no opposing affidavit filed by 27 January 2025, the application was, on 29 January 2025, enrolled for adjudication on the unopposed roll of 13 February 2025.

[2] On 13 February 2025, Judge van Rhyn issued an order that the matter is postponed to the opposed roll for Thursday, 17 April 2025, with the respondents to deliver their answering affidavit, together with the necessary application for condonation, by 28 February 2025. The respondents did not accomplish such filing by 28 February 2025 with their opposing affidavit (and incorporated therein an application for condonation) filed only on 3 March 2025. Consequently, the applicant's replying affidavit was filed on 14 March 2025 and heads of argument by both parties filed in accordance with normal procedure.

[3] Accordingly, condonation is needed for the elapse of the period between 27 January 2025 and 3 March 2025, taking into consideration that, according to Judge

van Rhyn's order, the application for condonation and the opposing affidavit were actually supposed to have been filed already on 28 February 2025.

[4] The respondents deal with their application for condonation in paragraphs 7 to 18 of the opposing affidavit over only three pages with a prayer that the court is requested 'to condone the late filing of this Answering Affidavit'. I read the prayer to deal with the periods from 27 January 2025 to 28 February 2025 and also the further period to 3 March 2025. I take it that the application is in terms of rule 27 of the Uniform Rules of Court.

[5] Rule 27 is widely worded and, for the exercise of the powers therein, a court is given a wide discretion which must be exercised judicially on a consideration of the facts of each case. The applicant is required to show good cause for condonation. It requires that the application must be *bona fide* and there must not be wilful default or gross negligence. Among the factors that the court typically takes into consideration are: the degree of non-compliance; the explanation of the delay; the prospects of success; the importance of the case; prejudice to the other side, which cannot be compensated by a suitable cost order and the convenience of the court. The court must determine whether the application for condonation is *mala fide* or made with the intention to delay the proceedings. This cannot be found to have been the case regarding this application.

[6] I find the explanation for the delay in filing the application for condonation and/or the opposing affidavit rather poor. It is vaguely worded. Amongst others, it is contended that, by 18 December 2024, the December holidays were upon the respondents and that it was difficult to get everyone together during that period to deal with the application. Thereafter, it was only managed to arrange a consultation with counsel on 11 February 2025 (just before the enrolled date of 13 February 2025) whereafter the order date of 28 February 2025 was also not accomplished. Notwithstanding this very unsatisfactory explanation and elapse of time, I cannot find that it was done specifically with the intention to delay the proceedings. Reluctantly, I am inclined to rather grant the condonation in the light thereof that the period

between 27 January 2025 and 3 March 2025 is not so inordinate and did not cause serious prejudice to the applicant.

[7] In the exercise of my discretion, I pertinently take into consideration the prospects of success, the nature of the relief sought by the applicant and the importance of the case for both parties. It would be unsatisfactory and awkward to determine this application without incorporating the version of the respondents under circumstances where an inordinate delay in the proceedings did not eventuate. In this regard, it is taken into consideration that the application was issued on 3 December 2024 whereafter by 14 March 2025 the replying affidavit had already been filed and the matter argued on 17 April 2025. This is after the auction had already occurred on 14 September 2023 and the second respondent appended his signature on 22 September 2023. I accordingly, reluctantly, grant the condonation but with the respondent (the trust) to pay the applicant's costs incurred regarding opposition to the application for condonation on a party and party scale on scale B for purposes of rule 59. Under the circumstances, it was reasonable for the applicant to oppose the application for condonation in the light of the poor explanation for the time that elapsed.

Merits

[8] The applicant's case is that at an auction that was held on 14 September 2023 it purchased portion 1 of erf 27819, Bloemfontein, extension 54 (also known as Currie Avenue, Mega Park) from the respondent trust. Its case is that, on the day of the auction, it placed a bid on the property in question, was the highest bidder in respect of the property and, after the fall of the hammer, Mr Sydney da Costa appended his signature for and on behalf of the applicant to the conditions of sale.

[9] The rules of the auction were appended as annexure 'FA 4' to the founding affidavit. Therein the following rule appears:

'Every bid shall constitute an offer to purchase, which the seller/Auctioneer may accept or reject in their absolute discretion.'

[10] The conditions of sale were attached as annexure 'FA 5' to the founding affidavit and in the schedule thereof the following term appears:

'This offer shall remain open for acceptance by the Seller for five business days from signature of this Offer to Purchase by the purchaser.'

[11] In clause 3.2 of those conditions of sale, the purchaser confirmed that the offer shall remain open and irrevocable for acceptance by the seller for the duration of the confirmation period which was indicated to be for five business days from date of signature of the offer by the purchaser.

[12] The applicant then states that the respondent trust accepted the offer within the acceptance period and alleges that the first respondent, being duly authorised, counter-signed the conditions of sale on behalf of the respondent trust on 22 September 2023, thereby concluding a binding agreement of sale. It is accepted that the reference to the first respondent in this particular paragraph 19 of the founding affidavit should have been a reference to the second respondent, namely Mr Michael Georgiou NO. The appended signature appears on page 51 of the indexed papers, dated 22 September 2023 at Sandton.

[13] The question thus arises whether the second respondent, who signed on 22 September 2023, was duly authorised. Put otherwise, the question is whether the trustees of the Michael Family Trust, acted jointly. As it is put in *Honoré's South African Law of Trusts*:¹

'Since co-owners must act jointly, trustees must also act jointly.'

[14] In *Nieuwoudt v Vrystaat Mielies (Edms) Bpk*. [2003] ZASCA 128; [2004] 1 All SA 396 (SCA); 2004 (3) SA 486 SCA (*Vrystaat Mielies*) para 16, Harms JA said the following:

'Trustees have to act jointly unless the trust deed provides otherwise and trust deeds seldom do.'

¹ E Cameron, M de Waal and P Solomon-*Honoré's South African Law of Trusts* 6ed (2018) at 381.

[15] The respondents' version, as can be gleaned from the opposing affidavit, is that the trustees of the Michael Family Trust verbally agreed, in principle, that some of its properties may be auctioned off, on condition that a reserve price for each property be set, and, in the event that the auction bid is less than the reserve price, that the written consent of the trustees should first be obtained.

[16] It set a reserve price of R6 million for the property described as Currie Avenue, Mega Park. The highest bid on the property, done by the applicant, was only R2.1 million. Its case then, is that the trustees, up to date, have not agreed to approve the sale agreement, as the said reserve price was not reached at the auction. The respondents' case is then set out in paragraph 27 of the opposing affidavit. It states that, in the acceptance of the offer (by second respondent), the trustees did not act jointly, secondly that no written authority has been signed by all the trustees in terms of which second respondent would have been authorised to accept the highest bid, and thirdly that no written authority by all the trustees existed for purposes of compliance with s 2(1) of the Alienation of Land Act 68 of 1981 (the Alienation of Land Act). Regarding the latter aspect, the point of defence does not seem good as s 3(1) of the Alienation of Land Act provides that the provisions of s 2 do not apply to the sale of land by public auction. Clearly, this particular property was offered by way of public auction. Accordingly, non-compliance with s 2(1) of the Alienation of Land Act does not avail the respondents as a defence.

[17] The respondents then deny that the Michael Family Trust accepted the offer as second respondent, who countersigned the conditions of sale on 22 September 2023, did not have the approval and acceptance of the remaining trustees and he could not sign it without the approval of his co-trustees.

[18] The applicant argued that the burden of proving lack of authority to contract rests on the party setting it up as a defence, and that the respondent did not truly grapple with its alleged lack of authority in its opposing affidavit, but merely contended itself with bare and ambiguous denials. Its case is that the respondent has failed to place sufficient evidence before the court to substantiate its allegation

that the second respondent required the written authorisation of the remaining trustees and/or was not duly authorised to represent the respondent trust when signing the agreement of sale (accepting the offer).

[19] Great emphasis was placed in argument thereon that the respondent trust failed to attach a copy of its trust deed to its opposing affidavit. It was alleged that the respondent trust contended itself with bald and unsubstantiated statements that the first and third respondents have failed to authorise the sale of the property. It was thus submitted that the respondent trust has failed to discharge its onus of proving that the second respondent was not entitled to bind the Michael Family Trust.

[20] I approach this dispute on the basis as set out by Harms DP in *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 SCA; 2009 (1) SACR 361 (SCA); 2009 (4) BCLR 393 (SCA); [2009] 2 All SA 243 (SCA) (*Zuma*) para 27, namely that in motion proceedings, the question of onus does not arise and the approach set out in the preceding paragraph 26 governs irrespective of where the legal or evidential onus lies. In paragraph 26 referred to, the following was said:

'... where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consist of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.'

[21] The aforesaid has also been paraphrased that the relief can be granted only if the facts as stated by the respondents, together with the admitted facts in the applicant's affidavit, justify the granting of the relief (see *Nampesca (SA) Products (Pty) Ltd v Zaderer* 1999 (1) SA 886C at 892H.) Application of the *Plascon-Evans* rules means that the case cannot be determined simply on a weighing of the probabilities as they emerge from the affidavits. In essence, the matter gets decided on the respondent's version.

[22] Applying the above tests, with reference to the words '... the facts alleged by the latter ...', the trustees of the Michael Trust did not act jointly when the second respondent, on 22 September 2023 in Sandton, appended his signature (which appears on page 51 of the indexed papers).

[23] It is not palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting it merely on the papers. There is nothing implausible or far-fetched therein that the trust deed of the Michael Family Trust requires the trustees to act jointly or that authority was not given to second respondent to sign on behalf of all trustees or that all the trustees did not authorise the acceptance of the offer. As was said in paragraph 26 of the opposing affidavit:

'The remaining trustees up to date have however not agreed to approve the sale agreement as the said reserve price was not reached at the auction ...'

[24] I thus find, with application of the test as set out in *Zuma supra*, that on the papers, the second respondent was not mandated and that, when he appended his signature, the trustees did not act together and/or he was not authorised. The application thus stands to be dismissed with costs.

Estoppel?

[25] The applicant has another bow to its arrow. In its replying affidavit, it relies on estoppel. Needless to say it is a new case that was made in the replying affidavit and the respondents had no opportunity to deal with the estoppel aspects raised. In argument, Mr H J van der Merwe, on behalf of the respondents, objected to the new cause of action of estoppel that was raised in reply. He complained that the respondents had no opportunity to answer thereto and that it constitutes an unfair procedure.

(a) I am not satisfied that the respondents are not prejudiced by the new cause of action of estoppel raised in reply. A court will usually not allow the introduction of a new cause of action in a replying affidavit. *Harms: Civil Procedure in the Superior Courts (LexisNexis)* at paragraph B6.37 put it as follows:

'It has been mentioned that normally an applicant must stand or fall by his founding affidavit. It follows from this that an applicant will not be permitted to introduce new matter in reply

except within a very narrow ambit, and the court may ignore or strike out matter in the replying affidavit that should have been contained in the founding affidavit. The present tendency seems to permit greater flexibility, at least in the absence of prejudice.'

(b) As already mentioned, I am not satisfied that the respondents are not prejudiced by estoppel being raised for the first time in reply in motion proceedings. It is the normal procedure in actions to raise it in reply to a defendant's plea, in which reliance was placed on the true facts. In motion proceedings, where the facts and versions are presented to the court on paper, estoppel in reply can only be permitted in the absence of prejudice to the respondents.

[26] But, even if I am wrong in my approach not to allow the applicant to rely on estoppel raised for the first time in its replying affidavit, there are two aspects that need to be dealt with regarding estoppel (and which was not under the circumstances fully flashed out due to estoppel having been raised in reply). That is the issues that a status, legal capacity or jurisdiction which a party does not in law possesses, cannot be conferred on a party through estoppel, and the requirement that a person's reliance on a representation must be reasonable. The first aspect is set out in 9 *Lawsa* 2ed (2005) at para 676 as follows:

'Estoppel, cannot be used in such a way as to give effect to what is not permitted or recognized by law. A court will accordingly not entertain a plea of estoppel if its effect would be to confer on a person or thing, a status, legal capacity or jurisdiction which the person or thing does not in law possess.'

[27] In this case, on the respondents' version, the second respondent was not authorised to, on his own, represent the Michael Family Trust, and also, when he appended his signature on the 20th of September 2023, the trustees did not act jointly as required. Through estoppel, the applicant wishes to override this lack of capacity. Can estoppel be used in such a way to give effect to what is not permitted by law, namely that the second respondent as trustee represents the trust whilst not acting together with and/or jointly with the other trustees?

[28] In *Van der Merwe NO and Others v Hydraberg Hydraulics CC and Others; Van der Merwe NO and Others v Bosman and Others* [2010] ZAWCHC 129; 2010

(5) SA 555 WCC para 31, the court obiter recorded its agreement with the view expressed by Cameron et al in *Honoré's: South African Law of Trusts* paragraph 198, that the rule in the trust law that trustees must act jointly in the discharge of their functions is not a matter of 'internal management', but a matter of capacity. If that be correct, and I agree with it, estoppel cannot be used to confer on the second respondent and/or the Michael Family Trust a legal capacity which it actually on the true facts does not possess.

[29] In *Vrystaat Mielies* at para 20, the court agreed with Cameron et al (as set out *supra*) that the ambit of authority confirmed by a trust deed is not simply a matter of 'internal management' with which outsiders need not concern themselves. The Supreme Court of Appeal thus agreed that the ambit of authority conferred by a trust deed is a matter of legal capacity. This is with reference to the following passage in 9 *Lawsa* 2ed (2005) at 426 at para 426:

'A distinction must be drawn between acts which are *ultra vires* of a statutory body and those which are within such bodies powers if done after some internal formalities have been complied with. In the latter type of case persons dealing with the body may, in the absence of knowledge to the contrary, assume that all the necessary formalities have been complied with, and may plead estoppel if the defence is raised that the necessary formalities were not complied with.'

[30] Whether the trustees must act jointly, or whether the second respondent could have been authorised to act as agent of all the trustees and to bind all the trustees is thus not simply some internal formalities that may be assumed to have been complied with so that an outside party may plead an estoppel if the defence is raised that the necessary formalities were not complied with, and/or that the second respondent were not so authorised. Its effect would be to confer on a trust or trustee a status, legal capacity or jurisdiction, which it does not possess in law.

[31] The second aspect referred to above is that the applicant must establish that its reliance on the alleged representation by the respondents was reasonable (the applicant referred to this requirement in paragraphs 74 and 75 of its heads). It will therefore have had to show that it did not have information which put it upon enquiry

and, generally, that it was not misled by a lack of reasonable care on its part (see *Wolpert v Uitzigt Properties* 1961 (2) SA 257 W at 266G and *Glofinco v ABSA Bank Limited* 2001 (2) SA 1048 WLD at 1059E and 1063G).

[32] In this case, the applicant knew that the seller is the Michael Family Trust. It thus knew that, somewhere, there was a trust deed with specific provisions regarding the capacity of the trustees to bind the trust and it knew, as can be gleaned from the papers, that it (the applicant) was not in possession of such a trust deed. The applicant was not entitled to assume, merely from the fact that one trustee can be authorised to exercise the powers of all of them, that such authorization has in fact been given. That is, on the assumption that the trust deed (which the applicant did not have) would have allowed one trustee to exercise the power of all of them. As it was put by Harms, JA in *Vrystaat Mielies* at para 22:

'What does need to be emphasized is that even if the Turquand-rule is extended to business trusts, and even if a trust deed were to provide that the trustees could delegate the powers to one of their number, the Turquand-rule would without more be of no assistance to third parties. This is because a third party would not be entitled to assume, merely from the fact that one trustee can be authorized to exercise the powers of all of them, that such authorization has in fact been given . . .'

[32] Furthermore, as set out above, the conditions of sale were to the effect that the applicant made an offer which remained open for acceptance by the seller for five business days. The offer still had to be accepted. Thereafter, on 22 September 2023, the applicant could see that only the second respondent appended his signature. The applicant thus had information which it should have enquired upon as it did not know what was contained in the Michael Family's trust deed, did not know what resolutions were passed by the trustees, and, therefore, did not know whether the second respondent had the necessary authority. The applicant knew that only the second respondent signed. Under the circumstances and from the facts on the papers, I am not convinced, for the purposes of estoppel, that the reliance on the representation by the respondents, was reasonable.

[33] The applicant requested permission to file supplementary heads relating to the aspects of the effect of s 3 of the Alienation of Land Act and also regarding

ratification by the respondents. The respondent opposes such reliance on ratification. Needless to say ratification is also a new case that is being made and now in a set of supplementary heads. It is thus not an issue that was raised in the papers and accordingly the respondents had no opportunity to deal with facts in relation thereto. I am also not satisfied that the respondents will not be prejudiced by this new cause of action of ratification. I thus do not allow the introduction of this new cause of action at such a late stage.

[34] For the above reasons, the application stands to be dismissed with costs, for purposes of rule 69, on scale B.

Order:

[35] In the result the following orders are made:

- 1 Condonation is granted to the respondents for the late filing of their opposing affidavit, with respondents to bear the costs of the applicant in opposing the application for condonation, on scale B for purposes of rule 69.
- 2 The application is dismissed, with costs on scale B for purposes of rule 69.


Benade AJ

Appearances

For the applicants:	R van der Merwe
Instructed by:	Badenhorst Attorneys, Bloemfontein
For the respondents:	H J van der Merwe
Instructed by:	E G Cooper Majiedt Inc., Bloemfontein.