



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

JUDGMENT

Not Reportable

Case no: 16999/2023

In the matter between:

ROBIN ROY SCHLEICH

Applicant

and

BRIAN RAMON LANTON

First Respondent

REGISTRAR OF DEEDS, CAPE TOWN

Second Respondent

CRAIG SCHNEIDER ASSOCIATES

Third Respondent

THE CITY OF CAPE TOWN

Fourth Respondent

CAPITEC BANK LTD

Fifth Respondent

Neutral citation:

Coram: COOKE AJ

Heard: 7 August 2025

Delivered: 12 September 2025

Summary: Costs of urgent application – condonation of late affidavit

ORDER

[1] The application for the condonation of the late delivery of the first respondent's answering affidavit is granted, with the costs of the application to be paid by the first respondent, including the costs of two counsel, with senior counsel on scale C and junior counsel on scale B.

[2] The costs of the application dated 19 March 2024 shall be paid by the first respondent, including the costs of two counsel, with senior counsel on scale C and junior counsel on scale B.

JUDGMENT

[1] In this matter, on 17 April 2024, Saldanha J granted an order by agreement between the applicant and the first respondent (referred to as Mr Schleich and Mr Lanton) in terms of which the latter was directed to make application to the fourth respondent ('the City') for an extension of the period within which he is to comply with certain provisions relating to the consolidation and subdivision of a property in

Noordhoek. I shall refer to the application before Saldanha J as ‘the extension application’.

- [2] In terms of the order of Saldanha J, the question of costs was postponed for hearing on the opposed motion court roll. This question is now before me, and the crisp issue which falls for determination is whether Mr Lanton should pay the costs of the extension application. Related to this question, is a subsidiary issue, namely whether the late delivery of Mr Lanton’s answering affidavit should be condoned. The costs issue must be decided on broad and general lines.¹ I therefore only set out those facts which, in my view, are essential to the determination of this issue.
- [3] On 4 October 2023, Mr Schleich launched an application for an order directing that Mr Lanton transfer a property to him (‘the transfer application’). This application was opposed by Mr Lanton, and, on 5 December 2023, an order was granted by agreement in terms of which the transfer application was postponed for hearing on 4 June 2024. Mr Schleich was conscious of the fact that the consolidation and subdivision approval granted by the City was due to expire just two days after this hearing date, on 6 June 2024. Therefore, on 12 December 2023, his attorneys addressed a letter to Mr Lanton’s attorneys in which they requested Mr Lanton to provide an irrevocable, written undertaking that he will apply to the City for the extension of that period to prevent the lapse of the approval. Mr Lanton was requested to give the undertaking by 16 January 2024.
- [4] No undertaking was given by this date. Various emails were then exchanged between the attorneys, and it appears that settlement discussions were also held. On 27 February 2024, Mr Lanton’s attorneys sent an email to Mr Schleich’s attorneys stating that they are ‘applying for an extension of the sub-division approval and will keep you advised in that regard. We have instructed an engineer who is well versed in the ways of the City in that regard.’ Thereafter, on 8 March

¹ *Gamlan Investments (Pty) Ltd and Another v Trillion Cape (Pty) Ltd and Another* 1996 (3) SA 692 (CPD) at 700C-701H.

2024, Mr Schleich's attorneys sent a letter to Mr Lanton's attorneys in which they noted that despite the agreement to make an application to extend the date for subdivision approval, Mr Lanton had failed to do so. Mr Schleich's attorneys advised that should the application for an approval not be made by 13 March 2024, an urgent application would be brought.

[5] It is apparent that at around this time, a building professional (Mr Gordon) had been appointed by Mr Lanton to deal with the extension application, and he was taking steps to obtain the City's approval. However, Mr Schleich's attorneys were not kept fully informed of these developments. Notwithstanding the request that the application for approval be made by 13 March 2024, Mr Lanton failed to do so. This led Mr Schleich to launch an urgent application on 19 March 2024 for various orders, including a direction that Mr Lanton make application to the City for an extension of the applicable period for consolidation and subdivision (ie the extension application). It appears that on that same day, Mr Gordon uploaded the extension of validity application on the City's online portal (DAMS).

[6] On 27 March 2024, Mr Lanton's attorneys sent a 'without prejudice' letter to Mr Schleich's attorneys in which they quoted correspondence received from Mr Gordon which indicated that the application for approval had been lodged. Mr Lanton's attorneys requested that the court application be withdrawn immediately 'as it is moot'. Mr Schleich's attorneys responded on 11 April 2024, recording that their client had been forced to launch the application and Mr Lanton should therefore be liable for the costs of the application. They stated further that '...given the history of this matter, our client requires the comfort of a court order'. Mr Lanton's attorneys replied on the following day stating that their client would oppose any costs order. The order of Saldanha J was then granted by agreement on 17 April 2024. This order provided that the question of costs was postponed for hearing on the opposed motion roll on 13 February 2025. In due course, on 19 August 2024, the City granted the approval sought.

[7] On 30 January 2025, Mr Schleich's legal representatives delivered a practice note and heads of argument. A few days later, on 5 February 2025, Mr Lanton brought an application to condone the late delivery of his answering affidavit. The application was supported by an affidavit deposed to by his attorney. The attorney sought to explain the delay by stating that he did not make a note of the 13 February 2025 hearing date in his diary and the matter slipped his mind, as well as that of his counsel. It was only when the practice note and heads of argument were delivered, that the attorney realised that the hearing was imminent. On about 9 February 2025, Mr Schleich delivered an affidavit which served as an answering affidavit in the condonation application, and a replying affidavit in the main application. On 14 February 2025, by agreement between the parties, the hearing was postponed by Mapoma AJ to 7 August 2025, with no order as to costs.

[8] In my view, the explanation for the late delivery of the answering affidavit is not convincing. Regardless of the hearing date, Mr Lanton and his legal representatives should have been aware that Mr Lanton needed to file an answering affidavit if he wished to place evidence before the court dealing with the costs issue. Having said that, some of the information put up in the answering and replying affidavits is relevant to the determination of the question of costs. These affidavits provide insight into the events that transpired after the application was launched. I am therefore, reluctant to exclude them. I also do not believe that Mr Schleich will suffer any prejudice that cannot be cured by a costs order if the affidavit is admitted. Therefore, in the particular circumstances of this case, I consider that it would be in the interests of justice to admit the answering affidavit, and condonation is therefore granted. Mr Lanton seeks an indulgence, and the costs of the application should thus be paid by him, including the costs of two counsel.

[9] To my mind, the main question is whether Mr Schleich acted reasonably in launching the application on 19 March 2024, having regard to the information which had been provided by Mr Lanton's attorneys. Mr Lanton submits that the extension application was 'precipitous and heavy-handed'. I disagree. In my view, Mr Schleich

acted prudently. Although Mr Lanton's attorneys had indicated two weeks earlier that they 'are applying' for an extension, they had added that they would keep Mr Schleich's attorneys advised in that regard. As it turns out, they failed to keep Mr Schleich's attorneys advised and even though Mr Gordon was taking steps to compile the application, Mr Schleich's attorneys were not apprised of the steps being taken. The use of the present progressive tense – 'we are applying' - also introduced uncertainty as to when, exactly, the application would be made. The extension was a matter of importance to Mr Schleich, and I do not think Mr Schleich may be criticised for preferring not to leave the matter in abeyance until shortly before the lapsing date. Such an approach would be fraught with perils.

[10] Furthermore, Mr Schleich's attorneys addressed the letter of 8 March 2024 (being a Friday) in which they expressly warned that an application would be made to court if the approval application had not been lodged by 13 March 2024. Also on 8 March 2024, Mr Gordon informed Mr Lanton's attorneys that he expected to be able to submit the application during the following week. But this information was not passed on to Mr Schleich's attorneys. In the face of the demand from Mr Schleich's attorneys, I would have expected Mr Lanton's attorneys to have informed them what steps had been taken by Mr Gordon. They failed to do so and in the circumstances, I do not think Mr Schleich can be blamed for launching the extension application a few days later.

[11] A related question is whether Mr Schleich should have withdrawn the extension application after receiving the letter from Mr Lanton's attorneys on 27 March 2024. This letter was marked 'without prejudice', presumably because a proposal was made that the transfer application be resolved on the basis that an agreed order be taken, without any order for costs being made. In my view, if an application had been submitted to the City, it did not make sense pursuing an order compelling Mr Lanton to do what had already been done. There does, however, appear to be some uncertainty as to whether a complete application had been made, as the correspondence indicates that certain documents were only uploaded in April. In my

view, the factual question should have been resolved before Saldanha J was asked to make an order which presupposed the absence of an application.

[12] Nonetheless, the parties did not agree on the question of costs, and therefore, the application had not been resolved altogether. It was therefore necessary for Mr Schleich to continue with the application, at least for the purposes of the order postponing the question of costs. In the result, while I have reservations regarding the persistence with the prayer compelling Mr Lanton to make an extension application, this is not material to the question of costs. I am therefore persuaded that Mr Schleich acted reasonably in not withdrawing the application after receiving the letter of 27 March 2024.

[13] The final issue which requires consideration is the scale of costs. Mr Schleich requested that the costs be ordered on the attorney and client scale. He placed reliance upon clause 9 of the sale agreement which provides that if either party commits a breach of the agreement and/or fails to comply with any of the provisions, and fails to comply with a notice to remedy, then the aggrieved party shall be entitled, but not obliged, without prejudice to any other rights or remedies which he or she may have in law, including the right to claim damages: (a) to cancel the agreement; and (b) to claim immediate performance and/or payment of the obligations in terms thereof, in which case the defaulting party shall be liable for all legal costs incurred by the non-defaulting party on the attorney and own client scale.

[14] It is alleged by Mr Schleich that Mr Lanton failed to comply with clause 10 of the sale agreement which provides, amongst other things, that he must sign and/or execute all necessary documents in a timeous manner and take all reasonable steps to ensure that other persons perform all such acts required to complete the transaction. In my view, it is not clear that Mr Lanton breached this obligation. The problem, rather, was that he failed to convey to Mr Schleich that he had taken the applicable steps. Furthermore, although a court would generally recognise the

agreement reached by the parties regarding the scale of costs, a court is not bound by such agreement.² Moreover, the validity of the sale agreement has been placed in issue for the reasons set out in more detail in the judgment delivered under case number 2025-001018. In all the circumstances, I do not consider that this is a case which warrants a punitive costs order.

[15] Although the extension application devolved to a narrow dispute regarding costs, it is connected to a series of other cases, one of which was heard together with the extension application. Both parties employed two counsel for the two matters that came before me, and I think it would be fair if Mr Schleich were to be entitled to recover the costs of both his counsel. For these reasons I make the order set out above.

Cooke AJ:

DJ COOKE
ACTING JUDGE OF THE HIGH COURT

Appearances

For applicant: RG Patrick SC and H Beviss-Challinor
Instructed by: Clyde & Co.

For first respondent: E Fagan SC and A Price
Instructed by: Slabbert Venter Yanoutsos Inc.

² *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045 (SCA) paras 25-6 - as a matter of policy and principle, a court should not, and must not, permit the ouster of its discretion because of agreement between the parties with regard to costs. See more recently *Road Accident Fund and Others v Hlatswayo and Others* 2025 JDR 0932 (SCA) paras 21-2.