In the High Court of South Africa
(Western Cape Division, Cape Town)

Case No: 20872/2021

In the matter between:

NOELIOT NOSIWAPHI MENZIWA;APPLICANT

And

NONKULULEKO PRISCILLA NDOKWANA;First Respondent

JIKELEZA JAMES MENZIWA;Second Respondent

THE REGISTRAR OF DEEDS, CAPE TOWN;Third Respondent

Heard: 25 August 2023
Delivered: 22 November 2023

This judgment was handed down electronically by circulation to the parties' representatives via email and released to SAFLII.

JUDGMENT – LEAVE TO APPEAL APPLICATION

LEKHULENI J

[1] This is an application for leave to appeal and condonation for the late prosecution of the application for leave to appeal. The applicant seeks leave to appeal to the Supreme

Court of Appeal, alternatively, to the full bench of this division in terms of section 17(1)(a)(i) of the Superior Courts Act 10 of 2013, against the whole judgment and order of this Court handed down on 28 October 2022. In that judgment, this Court dismissed the applicant's application to nullify a sale agreement for Erf No. 3[…] Nkcaza Street, Khayelitsha, Cape Town, entered into by and between the first and second respondents. In addition, the Court also dismissed the applicant's application for a declaratory order that the third respondent be directed to deregister the registration of transfer of ownership of the said property from the name of the first respondent into the name of the second respondent under the provisions of the Deed Registry Act 47 of 1937.

[2] In terms of Rule 49(1) of the Uniform Rules of Court, the applicant's application for leave to appeal ought to have been filed by 18 November 2022. However, the applicant filed her application in court on 15 May 2023 outside the time limit prescribed in Rule 49(1) of the Uniform Rules of Court. The applicant has since applied for condonation for the late filing of her leave to appeal application. I will consider this application first.

CONDONATION APPLICATION

[3] The law with regard to condonation is well established in our law. It is now trite that the granting or refusal of condonation is a matter of judicial discretion. It involves a value judgment by the court seized with a matter based on the facts of the case before it.[1] A court considering an application for condonation must take into account a range of

[1] *Grootboom v NPA* 2014 (2) SA 68 (CC) at para 35.

considerations. The standard for considering an application for condonation is the interest of justice.[2] An application for condonation should be granted if it is in the interests of justice and refused if it is not.[3] The question whether it is in the interest of justice to grant condonation depends upon the facts and the circumstances of each case. Factors that the courts have crystallised over the years in considering an application for condonation include but are not limited to the nature of the relief sought, the degree of non-compliance, the explanation therefor, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the convenience of the court and the avoidance of unnecessary delay in the administration of justice.[4]

[4] It is also trite that an applicant to a condonation application must give a full explanation for the delay, which must cover the entire period of delay and be reasonable. In *Uitenhage Transitional Local Council v South African Revenue Service*,[5] the Supreme Court of Appeal (*"the SCA"*) noted that 'an application for 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 to enable the court to understand clearly the reasons and to assess the responsibility.' The court noted 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.'

[2] *S v Mecer* 2004 (2) SA 598 (CC) para 4.
[3] *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* 2000 (2) SA 837 (CC) at para 3.
[4] *Federated Employers Fire & General Insurance Co Ltd and Another v McKenzie* 1969 (3) SA 360 (A) at 362F-G.
[5] [2003] 4 AII SA 37 (SCA) para 6.

[5] Reverting to the present matter, I must emphasise that the applicant has not provided a sufficient explanation for the lateness of the application according to the established principles discussed above. The applicant avers that she is unemployed and has no stable source of income. She contends that the delay in prosecuting her application for leave to appeal was caused by a lack of funds and a delay in obtaining an advocate willing to assist her on a *pro bono* basis. The applicant asserted that in November 2022, she received a phone call from her attorneys advising her of the judgment of this court granted against her in respect of the main application. She then expressed her desire to appeal this court's judgment. However, she had a financial challenge in prosecuting the appeal. Notwithstanding, her attorneys indicated their willingness to assist her *pro bono*. On the same month (November 2022), her legal representatives informed her telephonically that they had found Counsel who was prepared to assist her *pro bono* and had prepared the necessary application. Still, they were awaiting the approval or input of an advocate.

[6] However, in December 2022, her attorneys informed her that the said advocate was no longer available to accept the brief. On 12 December 2022, her attorneys addressed a correspondence to the Director of the Women's Legal Resources Centre seeking an appointment of an advocate to assist her in prosecuting the appeal. She received a response from the Women's Legal Resources Centre in February 2023 that her application had been rejected. In March 2023, her niece passed away and was buried on 22 March 2023. As a result, she could only come to Cape Town to see her legal representatives in April 2023. The applicant further averred that she approached different

justice centres and none of them appreciated the strength of her case. On 25 April 2023, she received a call from her legal representatives that they found an advocate who was prepared to help her prosecute the appeal. In short, this is the explanation that the applicant proffered for the delay in applying for leave to appeal in time.

[7] I appreciate that the applicant cites a lack of funds as a factor that occasioned the delay in filing her application timeously. At the time the judgment in the main application was pronounced, the applicant's legal representatives were still representing her. The exchange of email correspondences of 31 October 2022 and 1 November 2022, between the applicant's attorney and advocate Mapoma marked 'AL 1' confirms that Mr Mapoma was still on brief on 31 October 2022 and in November 2022. It is not clear why they did not file the application for leave to appeal then. It must be stressed that at that time, the applicant and her legal representatives knew or should have known that the *dies* for filing the application for leave to appeal was expiring on 18 November 2022.

[8] Furthermore, according to the applicant's contention, her attorney informed her in November 2022 that they had a Counsel who was prepared to assist her *pro bono* and that her attorneys had already prepared the necessary papers and were waiting for comments / inputs from an advocate. Expressed differently, in November 2022, the application for leave to appeal was already prepared. However, the advocate withdrew from the brief in December 2022. With all this information, why the applicant and his legal representatives failed to file this application timeously has not been explained. In other

words, when Mr Mapoma withdrew from the record in December 2022, the *dies* for filing the application for leave to appeal had already expired.

[9] As Mr. Mlamleli, the first respondent's Counsel, correctly pointed out, Mr. Mapoma was still involved in the case during November 2022. However, when he eventually withdrew from the case, it was already more than 15 days after the deadline for filing the leave to appeal application in accordance with the provisions of Rule 49(1). In my opinion, the applicant and her legal representatives failed to recognise and appreciate the urgency of filing the application on time. Most importantly, it has not been explained what prevented the applicant from filing her application within the time frame expressed in Rule 49(1) of the Uniform Rules of Court.

[10] Furthermore, the applicant states that she went to various justice centres to seek legal assistance, and her application was rejected. What militates and compounds the applicant's explanation is that the applicant fails to specify which justice centres she went to. She did not tell which official in these institutions she spoke to. She did not attach any document from at least one of these institutions to confirm or corroborate her averments. In addition, she does not indicate when (month and date) she attended those institutions.

[11] In my view, it is very much doubtful if indeed she ever made any such attempt to seek assistance. It should be emphasised that the applicant was represented by attorneys throughout all relevant times mentioned herein. There are various institutions that the applicant could have approached for assistance if, indeed, lack of funds was the main

impediment. The applicant could have approached Legal Aid South Africa, the Cape Bar, the Legal Practice Council and the Legal Resources Centre, among others, for assistance. There is no evidence to support her claim that she attempted to approach any justice centres besides the sweeping statements in her application.

[12] The uncontroverted evidence proffered by the first respondent in her answering affidavit is that the applicant reignited her appetite to launch this application for leave to appeal as a reaction to the first respondent's attempt to evict the occupiers of the property in dispute (applicant's tenants) on 18 April 2023 in accordance with the eviction order granted by the Khayelitsha Magistrates Court before the commencement of these proceedings. The applicant has not disputed or filed a replying affidavit contesting the averments made by the first respondent that she launched this application because she knew that her application for leave to appeal has the effect of suspending both the eviction order and the order of this court until the appeal is decided. Pursuant to the *Plascon-Evans* rule, the uncontested version of the respondent must be accepted.[6]

[13] The applicant and her attorneys were aware as early as November 2022 that the appellant was out of time and needed to apply for condonation. Despite being aware of this fact, they did not take any action to bring this application. It is important to note that whenever an applicant realises he/she has not complied with a rule, he/she should apply to the court for condonation without delay.[7] Based on the explanation provided, it is evident that there are significant gaps in the applicant's version of events that remain

[6] *Plascon Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) 623 (A).
[7] *Commissioner for Inland Revenue v Burger* 1956 (4) 446 at 449GH).

unexplained. The applicant did not fully disclose all relevant information to the court and her explanation for the delay is incomplete and inadequate to justify granting her application for condonation for the late filing of the application for leave to appeal.

Are there any prospects of success on Appeal?

[14] It is trite that where an application for condonation is made, the applicant should set forth briefly and succinctly such essential information as may enable the court to assess the applicant's prospects of success.[8] The prospects of success are generally important, although not a decisive consideration.[9] The court is bound to assess an applicant's prospects of success as one of the factors relevant to the exercise of its discretion unless the cumulative effect of the other pertinent factors in the case is such as to render the application for condonation obviously unworthy of consideration.[10]

[15] The applicant essentially attacked the court's decision on two grounds. First, the applicant contended that this court erred in finding that the failure by the applicant to join the Master of the High Court or the Executor in the estate of the second respondent was fatal to the application and justified the dismissal of the applicant's application. Secondly, the applicant contended that should the application for condonation succeed and the appeal be dealt with by the court of appeal, the prospects of success favours the

[8] *Rennie v Kamby Frams (Pty) Ltd* 1989 (2) SA 124 (A) at 131E.
[9] *Mulaudzi v Old Mutual Life Assurance (supra)* para 34.
[10] *Fibro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein and Others* 1985 (4) SA 773 (A) at 789C.

applicant. In addition, the applicant contend that this court misdirected itself in failing to apply the legal test applicable to section 15(9)(a) of Act 88 of 1984.

[16] I have dealt extensively with these issues in the written judgment, but for completeness, I summarise herein those findings. I take the liberty to deal with the grounds of appeal *ad seriatim* for the sake of brevity.

Non Joinder of Executor.

[17] This preliminary point must be assessed in light of the marriage in community of property concluded between the parties as well as the prayers the applicant sought in the notice of motion. In paragraphs 2 and 3 of the Notice of Motion, the applicant sought the following prayers:

> "2. That the subsequent registration of transfer of ownership of the property into the name of the first respondent by the third respondent is unlawful and as such, is declared null and void *ab initio*.
>
> 3. That the third respondent is accordingly directed to deregister such registration of transfer of the property from the name of the first respondent into the name of the second respondent in accordance with the provisions of the Deeds Registry Act 47 of 1937."

[18] The first respondent asserted in her answering affidavit that the second respondent passed away towards the end of 2021. Subsequent to the passing of the second

respondent, around December 2021, the applicant conveniently instituted the current legal proceedings. Notably, in the applicant's application for leave to appeal and in the applicant's heads of argument, the applicant argues that this court misdirected itself in finding that when the application was launched the second respondent was long deceased. The applicant has raised concerns in her application for leave to appeal and in her heads of argument that the court made a mistake in its finding that the second respondent had already passed away when the application was filed. The applicant contended that the first respondent did not provide any evidence to this court regarding the date of the second respondent's death, except for hearsay evidence that the second respondent passed away towards the end of 2021. Therefore, the applicant believes that this court misdirected itself in this matter by relying on hearsay evidence.

[19] It was also further contended that when the deceased passed away this application was already in motion. Ostensibly it was suggested that when this application was filed, the deceased was still alive. This argument with respect is erroneous and mistaken and is not borne out by the objective facts as it will be demonstrated hereunder. The following evidence proves this.

[20] The first respondent averred in her answering affidavit that the second respondent passed away towards the end of 2021. In response to these averments, I deem it apposite to quote the applicant's response verbatim. She stated:

> "9.1 In amplification of the above, I submit as a starting point that the death of my husband is a loss which I cannot equate to any financial benefit. Secondly, the

death of my husband was not anticipated by me or any person known to me. In fact, it occurred at the time when my attorneys were already preparing this application. (my emphasis)

…

9.3 For that matter, the second respondent has deposed to an affidavit approximately four months before his passing to which he explained the circumstances surrounding the purported sale and confirmed my version. In this regard, I refer to annexure "R3 above." (my emphasis)

[21] The affidavit of the second respondent is unambiguously clear that when the application was filed or delivered in court, the second respondent was already deceased. The second respondent passed away when the applicant's attorneys were preparing this application but before it could be instituted in this Court. Furthermore, annexure 'R3' referred to hereinabove was commissioned on 29 July 2021. The applicant's version shows that the deceased passed away around November 2021. This application was instituted in December 2021. From the totality of the evidence, it is evident that the second respondent was deceased when the main application was instituted and filed in court.

[22] Notwithstanding, the applicant sought an order from this court that the Registrar of Deeds be directed to register the name of the disputed property into the names of the deceased in his personal capacity. The order that the applicant sought was legally incompetent hence the finding that the non-joinder of the Executor or the Master of High Court was fatal to the applicant's application. The argument that this court relied on

hearsay evidence in finding that the deceased had passed on when the application was filed, is ill-conceived and too fallacious. That argument is not supported by the objective facts placed before this court.

[23] It bears emphasis that the deceased estate is not a legal *persona.*[11] The usual way in which an estate sues, or is sued, is through the executors.[12] In this case, the applicant knew that the second respondent was deceased when the application was launched, yet no application was made to amend the citation of the second respondent at the hearing of the main application. Hence, the court's finding that the non-joinder of the Executor for the Estate of the second respondent was fatal to the applicant's application.

The Deeming Provision in terms of section 15(9)(a) of the MPA

[24] This Court found that the deeming provision envisaged in section 15(9)(a) of the Matrimonial Property Act 88 of 1984 ("the MPA") is intended to protect the interest of bona fide third parties who innocently contracts with a spouse married in community of property who sells their immovable property without prior obtaining the necessary consent of their spouse. It has been argued that this court erred in finding that the first respondent was protected by section 15(9)(a) of the MPA because the first respondent did not place facts demonstrating that she has taken steps or made reasonable enquiries about the marital status of the second respondent or the required consent.

[11] See *Commissioner of Inland Revenue v Emary, No* 1961 (2) SA 621 (A) at 625D.
[12] *Standard Bank Financial Nominees (Pty) Ltd v Lurie* 1978 (3) SA 338 (W) at 346A–B. See also (*Estate Hughes v Fouche* 1930 TPD 41 at 42).

[25] The applicant's legal representative, Mr Lingani, argued that the court's reliance in *Vukeya v Ntshane and Others,*[13] was mistaken because the SCA was wrong in its factual findings and interpretation of section 15(9)(a) of the MPA. According to him, the SCA deviated from previous cases in which the court had interpreted section 15(9)(a) correctly. To support his argument, Mr. Lingani referred the court to the case of *Marais N.O and Another v Maposa and Others,*[14] where the SCA found that a party seeking to rely on the deemed consent is under a legal duty to make reasonable enquiries about the status of the person with whom he or she is contracting.

[26] I do not intend to delve much on the argument of Mr Lingani that the SCA was wrong in its finding save to say that this argument is unfortunate and unsustainable. It is perhaps apposite to remind ourselves that in terms of section 168(3) of the Constitution, the Supreme Court of Appeal is the highest court of appeal except in constitutional matters. This Court is bound by the decisions made by the Supreme Court of Appeal.

[27] Notwithstanding, each case must be dealt with according to its own facts and merits. In my view, the facts in the present matter are like those in *Vukeya v Ntshane and Others.*[15] In this case, the SCA relied on *Mulaudzi v Mudau and Others,*[16] in upholding an appeal in favour of a third party whom it found was protected by section 15(1)(a) of the MPA. In *Vukeya v Ntshane and Others (supra)*, the facts were briefly as follows: a

[13] 2022 (2) SA 452 (SCA).
[14] 2020 (5) SA 111 (SCA).
[15] 2022 (2) SA 452 (SCA).
[16] [2020] ZASC 148 (18 November 2020).

deceased husband was married to his wife in community of property. He sold a house of the joint estate to a third party without the consent of his wife. The executrix, the wife of the deceased husband, became aware of the sale of the property by the deceased to the appellant (third party) without her knowledge or consent as required by section 15(9)(a) of the MPA. She then approached the High Court and sought an order that the deed of transfer in respect of the property be cancelled and that the Registrar of Deeds, give effect to the cancellation of the deed of transfer in the records of the Deeds Registry office, Johannesburg. In the High Court, the executrix contended that she was not aware that the property (their property) had been sold to the appellant (a third party). Despite the appellant's assertion that he did not know that the deceased (the contracting partner) was married and that the deceased had not sought the first respondent's (executrix's) consent, the High Court found in favour of the executrix.

[28] On appeal, the SCA had to consider whether the appellant (the third party) has brought herself within the protection afforded to third party purchasers by section 15(9)(a) of the MPA. The SCA found that the deceased was staying alone when he presented himself as unmarried when he and the appellant concluded the sale agreement. The SCA noted that this was different from the facts in *Visser v Hull,* one of the cases relied upon by the first respondent, (as is this case in the present matter) where the third party was well-known to the contracting spouse, was a relative of his and knew from visiting his home that he lived with and had children by a woman with whom he lived as man and wife.

[29] Crucially, the SCA found two official documents supporting the appellant's version that he was unaware that the deceased was married to the executrix relevant. First, the deed of transfer dated 19 May 2009 referred to the appellant as unmarried. Second, a power of attorney to pass transfer with the deceased's signature appended to it described the deceased as unmarried. This all gave credence to what the appellant stated from the outset, namely that he was not aware that the deceased was married and could not reasonably have known that he was. In these circumstances, the court found that the appellant (third party) could not reasonably have been expected to make further enquiries as suggested by the executrix.

[30] The same principles apply with equal force in the present matter. The applicant resided in the Eastern Cape when the sale agreement was concluded. Furthermore, when the sale agreement was concluded, the second respondent (the deceased) informed the first respondent (third party) and the conveyancing attorneys who attended to the transfer of the immovable property that he was unmarried. In addition, the second respondent also recorded himself as unmarried when he signed the sale agreement.

[31] As Mr Mlaleli correctly pointed out, the marriage status conveyed to the conveyancing attorneys and recorded in the sale agreement was collaborated by the deed of transfer dated 25 November 2010, which was signed in Cape Town. In the deed of transfer, the second respondent was described as unmarried. In addition to these facts, the second respondent deposed to a confirmatory affidavit where he confirmed that at the time of concluding the sale agreement with the first respondent, he indeed stated that he

was not married as he laboured under the impression that customary marriage is not legally recognised.

[32] On a conspectus of all these facts, there can be no doubt whatsoever that the first respondent purchased the property *bona fide* as she did not know that the second respondent was married to the applicant at the time of the sale and transfer of the property. The first respondent was entitled to rely on those representations. Nothing would have given her pause for thought, and required her to enquire further as the applicant's representative suggested.

[33] Consequently, in view of all these considerations, I am of the view that there are no reasonable prospects of success on appeal and the application for condonation and leave to appeal falls to be dismissed.

[34] In the result, I make the following order.

34.1 The applicant’s application for condonation for the late filing of the application for leave to appeal is hereby refused.

34.2 The application for leave to appeal is hereby dismissed.

34.3 The applicant is ordered to pay the costs hereof including the costs of Counsel.

LEKHULENI JD

JUDGE OF THE HIGH COURT