

SOUTH AFRICA / JUDGMENT

Badi and Another v East Cape Cycling and Others (3452/2018) [2019] ZAECPEHC 82 (5 November 2019) [2019] ZAECPEHC 82

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

N P Jaji

CASE / FILE NUMBER

3452/2018

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IN THE HIGH COURT OF
SOUTH AFRICA
EASTERN
CAPE LOCAL DIVISION, PORT ELIZABETH
CASE
NO: 3452/2018
Date Heard: 22
August 2019
Date
Delivered: 05 November 2019
In

the matter between:

LUKHOLO
BADI
FIRST APPLICANT
IMVELI
CYCLING ACADEMY
SECOND APPLICANT
and
EAST CAPE
CYCLING
FIRST RESPONDENT
CYCLING SOUTH AFRICA
SECOND RESPONDENT
AYANDA
KHESWA – TSIKAYI
THIRD
RESPONDENT

JUDGMENT

JAJI J:

- [1] The matter serves before me in the form of applications which are opposed by the respondents. The first application is to compel the respondents to file with the registrar certain documents or information which the applicant contend should be filed together with the record of proceedings. The second application, interlocutory in nature, is that applicants seek an order setting aside as an irregular step the answering affidavit filed by the respondents in the main application.
- [2] Both applications are intertwined arising out of the main application, being a review application to set aside decision of the respondents' tribunal on 04 July 2018.
- [3]

BACKGROUND

(i) APPLICATION TO COMPEL

In this application, applicants contend that it would be just and equitable to grant an order compelling the respondents to file the requested documents. Applicants contended that given the nature of the documents required, given that some of them are determinative of whether or not the respondents at the time of the disciplinary proceedings subject to the present review, had the requisite jurisdiction over the applicants and further the documents are required to enable applicants to comply with the Rules of Court.

(ii) Therefore, applicant seeks an order to furnish the following documents:

- (a) Proof of payment of the applicants' application fees and other documentary evidence of the applicants' registration with and affiliation to the first respondent for the periods 2016 to 2017 and 2017 to 2018;
- (b) The full investigation report into the alleged misconduct on the part of the applicants herein in terms of section 4.1 of respondents' annexure "AA6" (Cycling South Africa disciplinary committee procedure);
- (c) The third respondent's notes and those of other tribunal members, together with their meeting packs;
- (d) The notes and records relating to considerations and deliberations of the adjudicators herein, and
- (e) An audio recording of the disciplinary proceedings under review.

The respondents are required to furnish with the registrar the requested documents / information within five (5) days of service of the order on their attorney of record and respondents be ordered to pay costs of the application.

(iii) APPLICATION TO SET ASIDE AS AN IRREGULAR STEP THE FILING OF THE ANSWERING AFFIDAVIT BY THE RESPONDENTS IN THE MAIN APPLICATION

- (a) The issue for the applicant is whether it would be just and equitable to grant an order setting aside the respondents' answering affidavit as an irregular step given the fact that the filing of the answering affidavit:
- Impedes the applicants from constructing a proper and complete record for purposes of the further conduct of the review as required by Rule 53(3) of the Uniform Rules; and
 - Deprives the applicants of the opportunity to amend / supplement their papers as permitted by Rule 53(4) of the Uniform Rules. Applicants thereby sought an order that the respondents' answering affidavit dated 11 January 2019, filed under cover notice dated 15 January 2019 be set aside and respondents ordered to pay the costs of the application.

[4] RESPONDENTS' RESPONSE

The issue for respondents is whether the documents sought form part of the record. The respondents seek applicants' application be dismissed with costs.

(ii) APPLICATION TO SET ASIDE AS AN IREGULAR STEP, FILING OF THE ANSWERING AFFIDAVIT

- (a) According to the respondents, the issue is whether the applicants have complied with the peremptory prescriptions of Rule 30(1) before bringing the application;
- (b) Whether the answering affidavit was filed prematurely as contended by the applicants is irregular accordingly. The respondents seek the application herein be dismissed with costs.

[5]

FACTS

- (i) On 31 January 2019, applicants filed a notice in terms of Rule 53(3) specifying the required documents for production (annexure "BOA1");
- (ii) On 01 February 2019, respondents responded (annexure "BOA2") that:-
- (a) They have complied with requirements of Rule 53;
 - (b) The recording made as an aide memoir does not form part of the record;
 - (c) Nonetheless, respondents were prepared to provide "your client" with a copy available at respondents' attorneys' offices.

(iii) Under cover of the letter, annexure “BOA3”, dated 01 February 2019, applicants advised respondents and directed them to the provisions of Rule 53. In essence advising that the recording ought to be made available to both court and the applicant.

It is so that the applicant had put respondent on terms and warned of costs implications;

(iv) The respondents neglected to produce the documents despite the notice. Applicant contended that:

- (a) It is prejudiced in that it is unable to comply for purposes of Rule 53(3) (ie filing of copies of portion of the record as may be necessary for review purposes);
- (b) Is deprived right to supplement their founding affidavit (Rule 53(4)) with the information in the documents that respondents are refusing to produce;
- (c) The documents would enable applicants to fully comply with Rule 53(3) and file supplementary affidavit in terms of Rule 53(4).

[6] The respondents disputed that the requested documents form part of the record:

- (a) It was unable to provide the documents within fifteen (15) days. It contended that the record was delivered to the registrar on 14 November 2018;
- (b) It contended that it had no knowledge if in terms of Rule 53(3), the registrar has made record available to applicants;
- (c) Respondents claimed that the record was available to the applicants on 14 November 2018 already. Accordingly, applicants within 10 days of record made available to them, could amend, add, vary their notices and supplement founding affidavits. Respondent further argued that the period to do the above expired on 30 November 2018. Respondents accordingly filed answering affidavits when no supplementary affidavit was filed by applicants. There was no communication from applicants until the answering affidavit was filed;
- (d) Applicants indicated that they intended to file supplementary affidavit and contended that the record was incomplete. The respondents in response to the requested documents contended that:-
 - The record filed was complete and accurate;
 - Respondents reminded applicants of Rule 53(4) regarding applicants' intention to file supplementary affidavit;
 - Any attempt to file supplementary affidavit without procedures of Rule 6(5) / 25(1) and (2) would be irregular;

- Respondents insisted that an informal recording had been made as an aide memoir to third respondent for purposes of compiling formal record which was retained and tendering a copy;
- Respondents denied that applicants are entitled to the documents sought. Respondents further denied that the documents sought form part of the record and were obliged to produce them.

Respondents averred that:

- The document being proof of payment of application did not serve before the tribunal;
- Full investigation report did not serve before the tribunal;
- Outcome of investigation being presented, was in oral evidence;
- It is not understood the meaning of “meeting pack”, to the extent that the third respondent made notes as a further aide memoir to enable her to prepare the formal minutes for approval by tribunal, she has not retained these;
- There are no “notes and records” as requested apart from what is in the record;
- Copy of an audio recording was tendered prior to launch of the application;
- At paragraph 29 of the answering affidavit, respondents contend that its affidavit was filed late and were asking for condonation for late filing. The contention was that respondents briefed counsel who was embroiled in a large matter on a national basis requiring continuous input and response primarily in Johannesburg and Pretoria. The counsel did not inform respondents of the pressure he was under and that he would not in the short term be in the position to assist with the opposition to the application. “Respondents contended “we nevertheless hoped that it would be possible for these papers to be prepared before the matter was set down as it had been.” It tendered wasted costs attended on such postponement occasioned. Respondents prayed for dismissal of first and seconds applicants’ application jointly and severally liable for respondents’ costs.

- [7] Factual matrix regarding allegations by applicants that the filing of respondents’ answering affidavit is an irregular step
- (i) The applicants contend that the irregular step in question is that the respondents’ conduct of filing an answering affidavit without fully complying with Rule 53(1)(b) and before applicants’ compliance with Rule 53(3) and 53(4). The time line was as follows:-
 - (a) 14 November 2018, respondents filed notice of opposition in respect of the main application;
 - (b) 14 November 2018, respondents filed a disciplinary tribunal record with the registrar;
 - (c) 15 January 2019, respondents filed answering affidavits;

- (d) On 31 January 2019, applicants filed notice in terms of Rule 30(2)(b) setting out the irregularity;
- (e) Affording respondents opportunity to remove same, the notice explained clearly the effect especially in light of the notice in terms of Rule 53(3) requesting respondents to produce certain documents for purposes of complying with Rule 53(3);
- (ii) Respondents' response is captured in annexure "LB3" dealing with the application to "remove cause". The applicants responded the same day under cover of letter "LB4" putting respondents' on terms especially regarding the outstanding audio recording of DC proceedings in terms of Rule 53.
- (iii) Respondents responded under cover of letter dated, contents in the form like (" . . we will not be engaging in litigation by correspondence." " . . Our clients have stated their position clearly." "The applicant must proceed as he sees fit.")
- (iv) The respondents have neither removed the cause for complaint nor produced the required documents;
- (v) This is so especially in light of the respondents' concession that it did not file the audio recording of DC proceedings. The applicant submitted that this was an acknowledgement of non-compliance fully with their obligations in terms of Rule 53(1)(b) (dispatching the full record of DC proceedings).

[8]

- (i) In its opposition the respondents contended as stated before that the record was made available to applicants for the purposes of complying with their obligations in terms of Rule 53(3) which to date applicants have not done;
- (ii) Annexure "DE4" is a claim by the respondents that they have filed an accurate and complete record;
- (iii) Sought condonation for the late filing of the answering affidavit.

[9]

- (i) Applicant disputed that respondents complied with its obligations in terms of Rule 53. It argued that:-
 - (a) An incomplete record was delivered to the registrar on 14 November 2018;
 - (b) Respondents conceded to be in possession of audio recordings and have not dispatched same to the registrar;
 - (c) Respondents filed answering affidavit knowing fully well that they have not dispatched the audio recording of DC proceedings;

- (d) No legal justification has been tendered for the refusal to dispatch the audio recordings in question;
- (e) Nowhere in Rule 53(1)(b) is it required for applicants to collect parts of the record or the record from the respondents' attorney or elsewhere;
- (f) Applicant denied that the audio recording of the DC does not form part of the record and denied that it had been produced to applicants and, in any event, respondents are required to dispatch same not produce same (as contended by the respondents at para 31 of the answering affidavit).

(ii) Regarding condonation application, applicants contend that the relief sought by respondents is governed by Rule 27 and the application in this regard should be in terms of Rule 6(1). The application for condonation had to be brought on notice of motion supported by affidavit as to facts upon which applicant relies;

(iii) No proper case is made or good cause shown for late filing of respondents' answering affidavit. The applicant submitted that the court must exercise its discretion regarding the condonation application.

[10]

- (i) The applicant referred court to an SCA decision of *Helen Suzman Foundation v Judicial Service Commission* 2017 JOL 36800 (SCA), regarding:-
 - (a) Primary purpose of Rule 53;
 - (b) Access to the record of proceedings in which decision was made;
 - (c) Rule 53 operates to the benefit of the applicant;
 - (d) It is an important tool in determining objectively what considerations were probably operative in mind of the decision maker when he / she made the decision sought to be reviewed;
 - (e) Applicant must be given access to available information sufficient for it to make its case;
 - (f) Placing parties in equal footing in the assessment of the lawfulness and rationality of such decision;
 - (g) Rule enables court to perform review function to scrutinise the exercise of public power for compliance with constitutional prescripts;
 - (h) Court held that the extent of the record must depend upon facts of each case. In certain cases the decision maker may be required to produce full record of proceedings which includes its deliberations.

(ii) In *Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others* 2012 (6) BCLR 613 (SCA) para 37, the applicant contended that the court held as follows:

“Without the record a court cannot perform its constitutionally entrenched review function, . . . litigant’s right in terms of s 34 of the Constitution to have a justiciable dispute decided in a fair public hearing before a court with all the issues being ventilated, would be infringed.”

(iii) The applicant referred court to the constitution of the first respondent regarding application and payment of fees. The constitution says “. . . shall automatically lose their status as an affiliate if their application fees are not paid within one calendar month of being called upon to do so in writing by the ECC treasurer or secretary.”

(iv) The code of disciplinary procedure document of the second respondent provides for “production of an investigative report which is to be submitted to executive board member representing the matter within acceptable time frames as determined by the commission.” The respondents did not do the above.

(v) Applicant submitted that Rule 53(5)(b) , dealing with delivery of affidavits in answer to review application provides: “within thirty days after the expiry of the time referred to in sub-rule (4), deliver any affidavits he/she may desire in answer to the allegations made by applicant.” In this regard, applicant referred to the matter of *University of the North-West Staff Association and Others v The Camps Rector for the North-West University and Others* (471/2007) [2008] ZANWHC 18 (05 June 2008) para 10, Mogoeng JP (as he then was) held that regarding time when respondent’s answering affidavit is / are to be filed in terms of Rule 53(5)(b). Rule 53(5)(b) states that respondents’ affidavit may be filed within 30 days after expiry of the 10 days which the applicant has within which to amend the notice of motion and supplement his or her or its papers after receipt of the record.”

(vi) Applicant submitted that in the absence of evidence of applicants’ application to first respondent, respondents had no authority to conduct the disciplinary proceedings subject to present review over applicants. It is crucial that the aforesaid evidence be made available to the applicant and the court;

(vii) The mandatory investigative report is necessary that applicants and court be placed in possession of this report to determine the fairness or otherwise of the disciplinary process followed against applicants;

(viii) The applicant argued that the recording made of proceedings (as conceded by respondents’ attorneys to be available) for collection in their offices, such recording should be made available to both applicants and court hearing the matter;

(ix) Failure to provide complete record of proceedings is prejudicial to applicants as they are not in turn placed in position to construct and file complete and proper record for the purposes of review as required by Rule 53(3);

(x) Applicants contended that interests of justice, fairness and openness, transparency dictate that an order be granted in their favour in terms of the notice of motion;

(xi) The respondents in their submission amplified in its heads of argument repeated the same contentions which are contained in their opposing papers, viz:-

- (a) The respondents had advised that an informal recording had been made as an aide memoir to the third respondent for purposes of compiling the formal record and tendered a copy to the appellant;
- (b) Documents referred to in prayers 1(i) and (ii) of the notice of motion did not serve before the tribunal and do not form part of the record;
- (c) Documents sought in prayers 1(iii) and (iv) all of the documents which served before the tribunal are contained in the record and neither the third respondent or the member of the tribunal retained “notes and records”;
- (d) Copy of audio recording made by third respondent s purely as an aide memoir to the preparation of formal minutes and was tendered to applicants prior to launch of the application.

[11] THE LAW

- (i) It is clear from the papers, conceded to an extent by respondents that the record filed was not complete. The respondent stated that “the outcome of investigation being presented was in oral evidence”. It is therefore necessary to have the recording to listen to the oral evidence presented. The copy of the audio cannot be tendered but to be dispatched in terms of Rule

53. It is so that an incomplete record is not a record as contemplated in Rule 53. Applicants have contended that they needed from respondents certain documents in order to comply with Rule 53. So it is not correct for respondents to suggest that applicants were in a position to amend, add or vary their notice of motion and supplement founding affidavit because no complete record was filed by the respondents;

(ii) In the matter of Mark Walters and 19 others v Magistrate T Swarts and Steenkamp and Others case no. 2012/38742, South Gauteng, it was held that Rule 53 does not lend itself naturally or properly as a mechanism for obtaining documents from parties other than those specifically named in Rule 53(1)(b). Rule 53(1)(b) expressly provides only for the presiding officer / tribunal whose decision is sought to be reviewed, to be called upon to produce the record in question (not the attorneys of the respondents even though a tender was made for collection of some documents which tender in itself is not even mentioned in the Rule.)

(iii) The Constitutional Court in Helen Suzman Foundation v Judicial Service Commission 20189 ZACC 8, held that the respondent (JSC) must comply with Rule 53(1)(b) of the Uniform Rules and to deliver the full recordings of the proceedings sought to be reviewed in the main application, including the audio recording and any transcript of the deliberations . . . with costs of two counsel. The court held that there was a need for openness and transparency of the processes of courts themselves. “The public is entitled to know exactly how the judiciary works and to be

reassured that it always functions within the terms of the law and according to time honoured standards of independence, integrity, impartially and fairness.”

This should apply to applicants and respondents as the tribunal. It was held that “exercise of public power, which must be done lawfully and rationally.” Generally, the only way to test the legality of the exercise of this power completely and thoroughly is to afford an applicant for review access to all material relevant to the exercise of power. If a public functionary can withhold information relevant to the decision, there is always a risk that possible illegalities remain uncovered and are thus insulated from scrutiny and review;

(v) In re:- Masetlha v President of the Republic of South Africa and Another [2008] ZACC 6, 2008 (5) SA 31 (CC), Moseneke DJ stated:-

“Ordinarily courts would look favourably on a claim of a litigant to gain access to documents or other information reasonably required to assess or protect a threatened right or to advance a cause of action. This is so because courts take seriously the valid interest of a litigant to be placed in a position to present its case fully during the course of litigation. Whilst weighing meticulously where the interests of justice lie, courts strive to afford a party a reasonable opportunity to achieve its purpose in advancing its case. After all, an adequate opportunity to prepare and present one’s case is a time-honoured part of a litigating party’s right to a fair trial.”

(vi) It was held in the Helen Suzman matter that the deliberations (audio recordings herein) are relevant for purposes of Rule 53 record and that the relevance must be considered in respect of their connection to the impugned decision rather than the pleaded case. The unfairness suffered by a review applicant denied access to deliberations (audio recordings, applicant was not present during DC proceedings) lies in the fact that she/he may have been prevented from making the best possible case. The fact that a number of other relevant documents and reasons distilled from deliberations have been provided does not detract from the unfairness of withholding other relevant information. The information that has been withheld may provide evidence of reviewable irregularities that are not revealed by the other documentation. That is why the Rule requires that all relevant documentation must be provided, unless there is some legally cognisable basis for withholding it.

(vii) In the matter of President of the Republic of South Africa v Democratic Alliance and others 2019 ZACC 35. The court confirmed the decision directing the president to disclose reasons, as well as the relevant part of the record that form the basis for the decision to relieve a Minister and deputy of their constitutional responsibilities. The order from the court was as follows:

“2. The president is to dispatch to the Democratic Alliance’s attorney within five court days of the date of this order:

2.1 The record of all documents and electronic records (including correspondence, contracts memoranda, advices, recommendations, evaluations and reports) that relate to the making of the decisions which are sought to be reviewed and set aside;

2.1 The reasons for these decisions which are sought to be reviewed and set aside.”

(viii) This seems to me to be more detailed and cumbersome than what is requested by the applicants in the matter at hand. In spite of the above, the Constitutional Court granted the order to compel. The court held that the request for reasons and the associated record owed its appropriateness or relevance, in any court to the original challenge. It stated that the irrationality or not on which the main application hinged could only have been properly tested with the aid of a range of factual considerations. The court further stated that the nature and complexity of the kind of decision initially sought to be challenged by way of review must first be closely examined. Regarding the matter at hand, this speaks to issues of application and fees as well as the mandatory investigative

reports. It must be said that it is inconceivable that the respondents did not understand what a “meeting pack” was.

Indeed detailed factual considerations would have to be traversed to do justice to this matter. The Constitutional Court held that “it will be noted from the text of Rule 53 that it does not require that the record be delivered to the applicant for review. Instead, it obliges the decision maker to make delivery to the registrar. So once again in the present matter the tender made by respondents’ attorney for collection of documents or records is clearly not based on Rules.

(ix) The Constitutional Court further held that under Rule 53, once the review papers are served . . . is obliged to submit a record to the registrar. What triggers this obligation is the service of papers. It is not open to the party to take a view that Rule 53 does not apply and would therefore ignore the Rule. It is not for a litigant to determine whether the Rule applies or not. That is a function performed exclusively by the courts. In our system once a Superior Court has declared what a particular law means, all parties affected by it are expected to follow the law as interpreted by the court.

(x) In *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services and another*

(2008) 5 SA 31 (CC) *Re-Masuthla v President RSA*. The court held that “And by extension, the right to open justice must include the right to have access to papers and written arguments which are integral part of court proceedings. That must follow axiomatically, it seems to me, because the public would hardly be in a position to properly assess the legitimacy or fairness of the proceedings if they could observe the proceedings in open court but were denied access to documents that provide the basis for court’s decision. In the matter at hand it is worse because applicants were not present in the DC tribunal proceedings.

(xi) In *Jockey Club of South Africa v Forbes* 1992 ZASCA 237, 1993 (1) SA 649 (A) at 660 Kriegler AJA (as he then was) explained “not infrequently the private citizen is faced with an administrative or quasi-judicial decision adversely affecting his rights, but has no access to the record of the relevant proceedings nor any knowledge of the reasons founding such decision. Were it not for Rule 53 he would be obliged to launch review proceeding in the dark and, depending on the answering affidavit(s) of the respondent(s), he could then apply to amend his

notice of motion and to supplement his founding affidavit. (This is precisely what the respondents are trying to do herein which is prejudicial to applicant.) However, the learned Judge continued . . . Manifestly the procedure created by Rule is to applicants' advantage in that it obviates the delay and expense of an application to amend and provide him with access to record." This is what the respondents are refusing to do.

(xii) In *City of Cape Town v SANRAL* (2015) ZASCA 58, para 36, the court held that "in terms of Rule 53, the right to require the record of the proceedings of a body whose decision is taken on review, is primarily intended to operate for the benefit of the applicant. When an applicant in review proceedings files its supplementary affidavit, after having had sight of the record of the proceedings of a body whose decision is taken on review, is primarily intended to operate for the benefit of the applicant. When an applicant in review proceedings files its supplementary affidavit, after having had sight of the record, it is, in effect fully stating its case for the first time. (This is what the respondents in the matter at hand are losing sight of.) The production of the administrative record is inherently necessary for court to undertake the task of determining the regularity of proceedings sought to be impugned. Without the record, court cannot perform its function (*Democratic Alliance v Acting NDPP* 2012 (3) SA 486 (SCA) para 37.) In the *SANRAL* matter, the court held that "the animating principle therefore has to be that all courts (I may add tribunals) records are by default, public documents that are open to public scrutiny at all times."

[12] The applicants have contended that the filing of the answering affidavit by respondents fully knowing well that they did not dispatch the full record was irregular and was prejudicial to the applicants. Indeed, it is trite that irregularity must be of such a nature that it is calculated to cause prejudice. The applicant has submitted so in its heads of argument. "While it is not necessary for respondents to conduct their proceedings in the strict legal manner required of inferior courts, they must necessarily do so

in a manner that will be just to all parties. If they do not, superior courts will interfere and ensure that natural justice is

done. (Pg 937, *Civil Practice of the Supreme Court of SA*, 4th edition, Van Wisten, Cilliers and Loots.)

[13] Regarding condonation, at paragraph 27, the court in the matter of *Standard Bank of South Africa v Carien Erasmus*, case no 56672/2013 stated that: "the application is based on Rule 27(1) which provides as follows: (1) In the absence of agreement between the parties, the court may upon application on notice and on good cause shown, make an order extending or abridging anytime prescribed by these rules or by an order of court fixed by an order extending or abridging any time for doing any act or taking any steps in connection with any nature whatsoever upon such terms as to it seems to meet."

[14] No such application has been launched in the present matter:

- (a) It is common cause that the respondent did not approach applicant's attorneys or the court for an extension of time within which to deliver its answering affidavit. No correspondence to applicant's attorneys that respondent's counsel was busy as alleged and no request for indulgence was made;
- (b) The answering affidavit was not accompanied by an application for condonation or notice for its late filing;
- (c) Applicant's attorneys were prompted to serve a notice in terms of Rule 30 of Uniform Rules. Respondent contended that would be an irregular step but did not launch any application seeking necessary condonation;
- (d) It is so that court has a discretion to grant or not to grant condonation. One of the considerations in the enquiry is the explanation therefore and prospects of success on appeal. (*United Plant Hire (Pty) Ltd v Hills and Others* 1976 (1) SA 717 A.D at 720 E-F);
- (e) The explanation proffered by respondents is not satisfactory at all. The name of counsel briefed is not mentioned, it is not explained when he/she was briefed, it is not explained precisely when he/she advised respondents that he/she would not be available, it is not clear what contingency measures were taken by respondents upon realising the non-availability of this counsel. It is not enough for respondents to "nonetheless hoped that it would be possible for the papers to be prepared before the matter was set down" without arranging for an alternative counsel. It is not explained why another counsel was not briefed when it was clear that the initial counsel would not be available. From the explanation proffered, it is clear that respondents did nothing even though they knew that their erstwhile counsel would not be available instead they "hoped for the best."
- (f) In *Immelman v Loubster en 'n Ander* 1974 (3) SA 816 (A) at 820D, Muller AR said:

"Dat kondonasie van die versuim van 'n appellant om die Hofreëls na te kom nie net 'n bloete formaliteit is nie, is meermale deur die Hof beklemtoon."

See also *Mentjies v HD Combrinck (Edms) Bpk* 1961 (1) SA 262 (A) at 264A-B, Steyn, HR said:

"Die Hof Reëls stel termynne om nagekom te word, nie slegs vir die gerief van die Hof en om in belang van die regsadministrasie onnodige vertraging by gedinge uit te skakel nie, maar ook omdat die partye, met inbegrip van die teenparty, daar belang by het; en waar 'n appellant vind dat hy in versuim geraak het, is dit sy plig om sonder verdere uitstel aansoek om kondonasie te doen." The respondents did none of the above.

- (g) Explanation of respondents default must be sufficient (See *Siber v Ozen Wholesalers (Pty) Ltd* 1954 SA 345 (A) at 353A. Herein as stated above explanation is not sufficient. Clearly in terms of Rule 27(1) good cause or sufficient cause has not been demonstrated;

- (h) In *Van Wyk v Unitas Hospital and Another* (open Democratic Advice Centre as amicus curiae) [2007] ZACC 24; 2008 (2) SA 472, the court then dealt with its displeasure where litigants do not comply with the time-limits or directions setting out the time

limits. Courts are also unhappy with litigants dumping their matters with their attorneys and failing to make the necessary follow-ups.

Courts have expressed their unhappiness where a litigant blames his attorney without demonstrating that he or she is not to blame for the ineptitude or remissness of his or her attorney. It seems to me that this is precisely what had transpired in the matter at hand. Counsel that was briefed informed respondents' attorney that he / she would not be available, that is clear from the explanation but nothing was done to circumvent what had transpired herein;

- (i) Most importantly, the respondents did not heed the warnings of the SCA as alluded in the matter of *Danries v Sherriff*, Magistrate's Court, Wynberg and Another 1998 (3) SA 34 (SCA), Plewman JA observed that "the number of petitions for condonation of failure to comply with the Rules of Court was a matter of grave concern. (He was referring to SCA which should not be different to our courts (High Court). Regrettably, that trend continues both in High Courts and Magistrate's Courts as evidenced by the number of reported decisions which the issue has been dealt with. In my view, many practitioners continue to believe that condonation is a mere formality. There is a growing trend, particularly with appeals in this court, for practitioners to apply for condonation on the most flimsy of grounds (as is with the present matter). What is even more concerning is that in most cases such applications are made at the very last minute. In most cases as well, the non-compliance with the Rules or directions of a court occur as a result of tardiness on the part of practitioners and not the litigants themselves." This seems to be what had happened in the present matter;
- (j) Clearly, applying the law to the facts of this case, it becomes abundantly clear that the application for condonation should fail. In any event, the prejudice to be suffered should the answering affidavit be allowed in the present matter is clear to all and sundry as alleged by the applicants. I do not have to repeat same. In any event, it is clear that answering affidavit was filed by the respondents knowing fully well that the full record was not dispatched. It is so that the applicants' case for requested documents has to succeed.
- (k) Clearly on the facts, the full record has not been dispatched and as such the filing of answering affidavit was irregular, in any event, no condonation application was forthcoming let alone satisfactory explanation.

[15] COSTS

The conduct of the respondents in this matter has already been highlighted by the applicants. Less said about the sarcastic and

sometimes bellicose tone of the correspondence to a colleague is unjustified. The last time I checked, there was or should be present

a certain decorum amongst colleagues. In any event, putting aside the matter of litigation between parties, what we experienced herein was a classical case of vexatious litigation. The following quote becomes therefore relevant in the circumstances. “In its legal sense ‘vexatious’ mean a frivolous, improper and instituted without sufficient ground to serve solely as an annoyance to the defendant.” This is basically what the respondents did herein.

In *Re Allual Greek Ltd* CPD 532 at 535, Gardener J said in context of a punitive costs order: - “Now sometimes such an order is given because of something in the conduct of a party what the court considers should be punished, malice, misleading the court and things like that but I think the order may also be granted without any reflection upon the party where the proceedings are vexatious, although the intent may not have been that they should be vexatious. There are people who enter into litigation with the most upright purpose and a most firm belief in the justice of their cause, and yet whose proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expense which the other side ought not to bear.” This is precisely what had transpired herein in the present matter. Respondents conceding not to have dispatched audio recordings and further tendering to produce documents available in their attorneys’ office in flagrant disregard of Rule 53. The discretion to be exercised by court regarding costs has to consider the whole case in totality and as such I am of the view that a punitive costs order is justified herein. Costs are indeed in the discretion of the courts even when parties had agreed on costs.

[16]

(i) Therefore, both applications by applicants are granted with costs on attorney scale.

Therefore, I order that:-

(ii) The respondents are ordered to furnish the registrar with the following documents:

- Proof of payment of the applicant’s affiliation and other documentary evidence of the applicant’s registration with and affiliation to the first respondent for the periods 2016 to 2017 and 2017 to 2018;
- The full investigation report into alleged misconduct on the part of first applicant herein in terms of section 4.1 of the respondents’ annexure “AA6” (Disciplinary Procedures document of the second respondent.)
- The third respondent’s notes and those of other tribunal members together with their meeting packs;
- The notes and records relating to considerations and deliberations of the adjudicators herein; and
- An audio recording of the disciplinary proceedings herein;

(iii) That the respondents furnish the registrar with the requested documents and / or information within five

- (5) days of service of this order their attorneys of record;
- (iv) That the respondents' answering affidavit dated 11 January 2019 is set aside;
- (v) That respondents are ordered to pay the costs of both applications on an attorney and client scale.

N P JAJI

JUDGE OF THE HIGH COURT

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