

SOUTH AFRICA / JUDGMENT

Coetzee and Another v Master of the Free State High Court Bloemfontein and Others (3148/2021) [2023] ZAFSHC 397 (11 October 2023) [2023] ZAFSHC 397

COURT

Free State High Court, Bloemfontein

BEFORE

Naidoo

CASE / FILE NUMBER

3148/2021

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IN

THE HIGH COURT OF SOUTH AFRICA

FREE

STATE DIVISION, BLOEMFONTEIN

Case

Number 3148/2021

In

the matter of:

EMMARENTIA

COETZEE

First

Applicant

KITTY

POTGIETER

Second

Applicant

And

THE

MASTER OF THE FREE STATE HIGH

COURT

BLOEMFONTEIN

First

Respondent

WILLEM

FRANCOIS BOUWER N.O.

Second

Respondent

RONEL

SWART

Third
Respondent,
MARTHINUS
CHRISTIAAN VAN DEN HEEVER

Fourth
Respondent
EMMARON
BOERDERY CC

Fifth
Respondent

CORAM: NAIDOO, J
HEARD

ON: 15 JUNE
2023
DELIVERED
ON: 11
OCTOBER 2023

JUDGMENT

- [1] This matter arises from the administration of the deceased estate of the father of the applicants, Barend Van Den Heever. Adv JMC Johnson represented the applicants and Adv JJ Pretorius represented the fourth and fifth respondents. The estate was finalised and distributed in terms of a Final Liquidation and Distribution Account (L&D Account), which had lain for inspection, as required in terms Administration of Estates Act 66 of 1965. It is not in dispute that such period was from 25 May 2018 to 15 June 2018. No objections were received and the estate was thereafter finalised. Approximately two years later, additional assets in the form of shares were discovered by the second respondent, who is the Executor of the deceased estate, which he sought to distribute amongst the heirs, being the children of the deceased. The heirs are the two applicants, and the third and fourth respondents. The value of the shares was R431 359,46. The applicants refused to accept the distribution and insisted that the second respondent deal with the additional asset in terms of the Act.
- [2] A Supplementary L&D Account was compiled and advertised. The first applicant lodged, with the Master of the High Court, an objection to the Supplementary L&D Account. The objection was dismissed by the Master. The matter before me emanates from an application brought by the applicants to review and set aside the decision of the Master (the main application). It appears that the applicants in this latter mentioned application attempted to object to the initial L&D Account, to which there were no objections and which was already finalised, and made no application for condonation for the late objection. The fourth and fifth respondents brought an application in terms of Uniform Rule 30 for the dismissal of the main application on the grounds, inter alia, of impermissibly attempting object to the L&D Account and on the basis that the notice of motion did not identify the decision of the Master that the applicants sought to review. The court hearing the Rule 30 application,

granted an order (the Chesiwe order) on 15 September 2022, in the following terms:

“1. The Applicants’ notice of motion and application are declared irregular and are set aside in terms of Rule 30(1);

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2. The Applicants are afforded 15 days in which to substitute their notice of motion and application;
3. Should the Applicants fail to so substitute their notice of motion and application timeously and/or satisfactory (sic), the Fourth and Fifth Respondents are granted leave to apply on the same papers, suitably amplified if necessary, for an order that the Applicants’ main application be dismissed with costs;
4. Costs to be costs in the main action”

[3] The 15 days granted to the applicants expired on 6 October 2022. The applicants failed to comply with the court order of 15 September 2022, with the result that, on 8 November 2022, the fourth and fifth respondents issued an application for the dismissal of the main application with costs. That application was enrolled for hearing on 17 November

2022. As a result of a communication addressed to the respondents’ legal representative by the applicants’ legal representative on 16 November 2022, the matter was postponed, on 17 November 2022 to 2 February 2023, when the court ordered the applicants to file a condonation application for the late filing of the amended papers, as well as the amended application papers by 28 November

2022. The amended papers were filed on 25 November 2022 and the condonation application appears to have been filed on 30 November

2022 as the stamp of the Registrar of this Division bears that date.

[4] The fourth and fifth respondents opposed the condonation application. I will deal with the grounds of opposition shortly. The applicants’ attorney of record deposed to the Founding Affidavit in the condonation application. He practises in Bethlehem, in the Free State Province, and his correspondent attorneys in Bloemfontein are the firm of Kramer Weihmann Attorneys. Immediately upon issue of the court order on 15 September 2022, he attempted to obtain a copy of the judgment, but ostensibly had difficulty in doing so. The judgement was only obtained two weeks later on SAFLII on 30 September

2022. He was unable to comment on why the correspondent attorney was not able to obtain the judgment when he requested same on 15 September 2022.

[5] The matter was referred to counsel who required a consultation with the applicants. This was not possible, due to the first applicant’s ill health, which had been ongoing for a few months. It was only on 24 November 2022 that they were able to travel to the first applicant’s hometown, to have the documents signed. In addition to the first applicant’s ill health, the

counsel that was briefed was also unavailable due to his work schedule. It was therefore not possible to consult with the first applicant or finalise the drafting of the papers before 24 November 2022.

- [6] The fourth and fifth respondents, strongly opposed the application for condonation, bemoaning the tardiness of the applicants and their legal representatives for repeatedly failing to comply with the Rules of Court. They implored the court not to condone the applicants' failure to timeously file the amended Notice of Motion and Founding

Affidavit. The respondents also assert that should the court not grant the condonation sought by the applicants, then the main

application should be dismissed with costs, as directed in the Chesiwe order. The fourth and fifth respondents raised a number of issues as grounds for refusing condonation. Firstly, they assert that the applicants have failed to tender a full and comprehensive

explanation of their default in this matter. They also take issue with the applicants' allegation that they were not able to obtain the judgment delivered on 15 September 2022, directing that they file an amended Notice of Motion and Founding Affidavit. The respondents set out a number of instances of errant conduct on the part of the applicants or their legal representatives which militates against the bona fides of the application for condonation. I will refer to these later, where necessary.

- [7] The relevant provisions of Uniform Rule 27 stipulate that:

"(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 any time prescribed by these rules or by an order of court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet.

(2)...

- (3) The court may, on good cause shown, condone any non-compliance with these rules."

- [8] The notion of "good cause" as well as the requirements an applicant must meet before a court will grant condonation, have occupied much judicial attention over the years. This Rule confers a wide discretion on a court to condone any non-compliance with the Rule, subject to the safeguard that good cause must be shown. The courts have refrained from setting out an exhaustive definition of "good cause" for the very reason that it may fetter the discretion which a court enjoys in terms of this Rule. The trite requirement that the court must exercise such discretion judiciously and fairly, taking into account all relevant factors and circumstances, comes into play.

- [9] With regard to the explanation in a condonation application (as in the present matter), for failure to comply with the Rules of Court timeously, it is well settled in our law that the applicant is required to give a full and candid explanation in this regard. The remarks of the court in *Melane v Santam Insurance Co Ltd* 1962(4) SA 531 (A), regarding the test for granting condonation, made almost 60 years ago, are still relevant today:

“In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success and the importance of the case. Ordinarily these facts are interrelated, they are not individually decisive, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate prospects which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent’s interests in finality must not be overlooked.”

- [10] A similar view was held in the matter of *United Plant Hire (Pty) Ltd v Hills* 1990 (1) SA 717 (A) at 720 E-G, where the court stated the position succinctly as follows:

“It is well settled that, in considering applications for condonation, the Court has a discretion to be exercised judicially upon a consideration of all the facts; and that in essence it is a question of fairness to both sides. In this enquiry, relevant considerations may include the degree of non-compliance with the relevant Rules, the explanation therefore, the prospects of success on appeal, the importance of the case, the respondent’s interest in the finality of his judgment, the convenience of the Court, and the avoidance of unnecessary delay in the administration of justice. The list is not exhaustive. These factors are not individually decisive but are interrelated and must be weighed one against the other; thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong”.

- [11] The Constitutional Court (CC) in *Grootboom v National Prosecuting Authority* 2014(2) SA 68 (CC), in dealing with the issue of condonation, reiterated at para [23] on p76 that

It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default.

The CC addressed itself to litigants in para [32] when it said:

I need to remind practitioners and litigants that the rules and court's directions serve a necessary purpose. Their primary aim is to ensure that the business of our courts is run effectively and efficiently. Invariably this will lead to the orderly management of our courts' rolls, which in turn will bring about the expeditious disposal of cases in the most cost-effective manner. This is particularly important given the everincreasing costs of litigation, which if left unchecked will make access to justice too expensive.

[12] The CC then went on to deal with the worrying trend of the manner in which litigants conduct litigation in our courts. In citing the dicta of the CC in *Van Wyk v Unitas Hospital* 2008(2) SA 472 (CC) and *eThekweni Municipality v Ingonyama Trust* 2013(5) BCLR 497(CC), the court said at paras [33] and [34]:

Recently this court has been inundated with cases where there has been disregard for its directions. In its efforts to arrest this unhealthy trend, the court has issued many warnings which have gone largely unheeded....

The language used in both *Van Wyk* and *eThekweni* is unequivocal. The warning is expressed in very stern terms. The picture depicted in the two judgments is disconcerting. One gets the impression that we have reached a stage where litigants and lawyers disregard the rules and directions issued by the court with monotonous regularity. In many instances very flimsy explanations are proffered. In others there is no explanation at all. The prejudice caused to the court is self-evident. A message must be sent to litigants that the rules and the court's directions cannot be disregarded with impunity.

[13] In this matter, it is not in dispute that the applicants failed to comply with the Chesiwe order. The applicants' attorney, Mr De Beer, who deposed to the Founding Affidavit in the Condonation Application, alleges that immediately after the Chesiwe order was delivered on 15 September 2022, he requested a copy of the judgment from his correspondent attorney in Bloemfontein. The latter was not able to assist with a copy of the judgment and Mr De Beer located it only 15 days later, on 30 September 2023 on a digital platform which gives access to all judgments handed down in South Africa. He did not explain why the correspondent was unable to assist. An annexure to the Answering Affidavit was a letter sent via electronic mail (email)

to the parties and/or their legal representatives from Judge Chesiwe's registrar, on 15 September 2022, which included the

applicants' attorney and an employee in the latter's office. The registrar informed them that the judgment was handed down in the Motion Court that morning, and she attached a copy of the judgment to the email. The applicants' or their legal

representative do not deny receipt of this email

[14] It is therefore strange, to say the least, that Mr De Beer would embark on a two-week journey to find a copy of the judgment. He, of course, gives no explanation at all regarding why it took two weeks to obtain the judgment, or why he did not engage the simplest and most

direct route of requesting either Judge Chesiwe's registrar or the fourth and fifth respondents' attorney to furnish him with another copy of the judgment. The applicants have also not dealt with or made further mention of the fact that they would have received the judgment and have been aware of the court order on 15 September 2022. This failure creates doubt about the veracity of the allegations regarding the efforts to obtain a copy of the judgment.

- [15] I pause to mention that when the applicants failed to comply with the Chesiwe order, the fourth and fifth respondents launched an application on 8 November 2022, to have the main application dismissed. The application was duly served on the applicants on 8 November 2022, and was set down for hearing on 17 November 2022. The day before the hearing, on 16 November 2022, the applicant's attorney, Mr De Beer addressed a letter to the fourth and fifth respondents' attorney, seeking a postponement of the matter to a date after 25 January 2023. The reasons for the request were, minter alia, the difficulty in obtaining a copy of the judgment, the unavailability of senior counsel, whom they wished to brief, the serious work pressure experienced by Mr De Beer, his involvement in other matters and the death of his father-in-law. Mr De Beer also indicated that the papers had to be re-drafted and that he could only consult with counsel on 4 December 2022, that due to counsel's

work schedule, the final draft of the papers can only be finalised by 20 January 2023 and will be filed by 25 January 2023. As I indicated earlier, the amended Founding Affidavit was, in fact, filed on 25 November 2022. This was nine days after the fourth and fifth respondents' attorney was advised that the applicants will only be able to file the relevant papers on 25 January

2023. Once again, the veracity of the reasons for the applicants' inability to file the amended papers timeously is called into question and creates the uncomfortable perception that the applicants were hedging their bets and playing for time.

- [16] In the Founding Affidavit to the condonation application, the applicants' explanation for the delay is that the matter was referred to an advocate to consider the judgment of 15 September

2022. The advocate required a consultation with the applicants but in view of the first applicant's ill-health, which had persisted for several months, this was not possible until 24 November 2022. The allegation was that the first applicant was hospitalised on 23 November 2023, but the legal representatives travelled to her home on 24 November 2023 for the papers to be signed. I pause to mention that Mr Johnson advised during oral argument that the allegation concerning the hospitalisation of the first applicant was not correct. Mr De Beer alleges that the amended Notice of Motion and Founding Affidavit were then filed by 28 November 2022. It is common cause, however, that the amended Notice of Motion was not filed or served, and only the amended Founding Affidavit was served on 25 November 2022.

- [17] The papers and the correspondence from the applicants' legal representative indicate not only conflicting reasons for the delay in filing the papers that the applicants were ordered by the court to file, but the explanations are bald, lack detail and do not cover the relevant

periods of delay, for example, the ill-health of the first applicant, which allegedly persisted for many months was not mentioned by Mr De Beer in his letter to the fourth and fifth respondents' attorney as a reason for the delay in filing the papers and necessitating a postponement of the matter on 17 November

2022. No details of the nature, duration and severity of the first applicant's condition were furnished. No explanation is tendered at all for the failure to alert the respondents to these alleged challenges shortly after the application for dismissal was served on the applicants on 8 November 2022. As I indicated earlier, the applicants simply avoided dealing with the fact that the judgment was sent via email to all parties on 15 September 2022 and would have been received by them, but they chose instead to concoct a story

about being obliged to take a circuitous route to obtain a copy of the judgment.

- [18] The matter came before Daffue J for hearing on 2 February 2023, and from the correspondence that his registrar addressed to the parties, it was disturbingly evident that the file was in a deplorable state and not ripe for hearing. It was at that stage that it was pointed out to the applicants that the amended notice of motion had not been filed in the court file. The matter was then postponed to 13 April 2023 for hearing. The applicants indicated that they would investigate the matter. Nothing further was done until the day of the hearing on 13 April 2023 when the applicants served the amended Notice of Motion, again with no indication of the reasons for the applicants having, once more, failed to comply with the Rules of Court. A further serious problem with the amended Notice of Motion is that it made no provision for service on the second respondent, and was not served on him. The applicants however, boldly asserted that the second respondent did not oppose the condonation application. Not having been served with the condonation application, it is no wonder that the second respondent did not oppose it.
- [19] The second respondent filed his Answering papers in the main application, and as participating party to these proceedings, the applicants' legal representative ought to have known that it is an irregularity not to serve the papers on the second respondent, who is the executor of the deceased's estate. Mr Johnson acknowledged this during oral argument in court but asserted that the court has the discretion to order that the papers be served on the second respondent and give him an opportunity to respond. It is apparent that the applicants and their legal representatives have consistently flouted the Rules of Court and then expected the court to come to their rescue, which it has done in the past. It is this type of conduct that the CC addressed in Grootboom, and warned that the courts would not continue to allow such abuse of court processes. I see no reason to take a different approach.
- [20] In considering whether condonation should be granted, the prospects of success in the main application would usually be taken into account by the court. Neither party grappled with the prospects of success in this matter, and this court will refrain from doing so, in view of the other deficiencies in the papers and in procedure that I have mentioned above.

In my view, this is an unfortunate case of siblings locked in a legal battle over money, whereas their differences could have been settled amicably and without resorting to expensive litigation. The bulk of the deceased's estate has already been distributed and the main application concerns a relatively small amount in respect of an asset which was discovered after the estate was finalised, without objection in 2018. The second respondent has set out a detailed exposition of the circumstances leading to the distribution of the additional amount. This court cannot see its way clear to condone numerous instances of the applicants' and their legal representative's failure to comply with the Rules, and their failure to give a full, candid and cogent explanation for such failures.

- [21] Mr Pretorius argued that the interests of justice dictate that condonation should be granted in this matter. However, fairness and the interests of all parties before court are essential components of the interests of justice. The respondents have been brought to court by the applicants who have shown a propensity for not complying with the Rules and abusing the processes of court. The prejudice to the respondents is clear, not only from the point of view that there appears to be no expeditious end in sight for this matter but also in respect of the unnecessary escalation of costs. In my view, it cannot serve the interests of justice to condone the serious defects and deficiencies in the papers and in proceedings, as I have mentioned. The conduct of the applicants has caused unnecessary delays and inconvenience not only to the respondents but also to the court.
- [22] In view of my inclination not to grant condonation in this matter, I consider the impact on the main application. The Chesiwe order declared the Notice of Motion and application to be irregular and set it aside. The applicants were offered an opportunity by the court to amend and substitute the Notice of Motion and the application within a specified time. The applicants failed to avail themselves of this opportunity and filed only the Founding Affidavit some two months later, and only in the face of an application for the dismissal of the main action. This was then followed by an application for such late filing. The position remained that from 15 September 2022, there was no valid main application before this court, and that position still persists. The fourth and fifth respondents seek to enforce paragraph 3 of the Chesiwe order, entitling them to apply for the dismissal of the main application with costs, should the applicants fail to substitute the papers in the main application timeously or satisfactorily. I am of the view that no reason exists to deny the fourth and fifth respondents the relief they seek.

[23] In the circumstances I make the following order:

23.1 The applicants' application for condonation for the late filing of the amended Notice of Motion and Founding Affidavit in case number 3148/2021 is dismissed with costs against the applicants, jointly and severally, the one paying the other to be absolved;

23.2 The application of the fourth and fifth respondents for the dismissal of the main application under case number 3148/2021 is granted with costs against the applicants, jointly and severally, the one paying the other to be absolved.

S NAIDOO J

On Behalf of the Applicants: Mr JF De Beer Instructed by: Human Le Roux & Meyerowitz
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