

SOUTH AFRICA / JUDGMENT

Eskom v Nikelo (CA38/18) [2018]

ZAECMHC 48 (21 August 2018)

[2018] ZAECMHC 48

COURT

Eastern Cape High Court, Mthatha

BEFORE

J D Huisamen, R E Griffiths

CASE / FILE NUMBER

CA38/18

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION - MTHATHA)

CASE NO.: CA 38/18

COURT A QUO CASE NO.: 226/15

In the matter between:

ESKOM Appellant (Respondent in Court a quo) and VUSUMZI NIKELO Respondent (Applicant in Court a quo)

FULL BENCH APPEAL JUDGMENT

HUISAMEN AJ

- [1] This is an application for condonation of the failure of Eskom (Appellant) to prosecute its appeal against an order of Pakade J, which order confirmed a rule nisi which had directed the appellant to forthwith reconnect the electricity supply to the respondent's homestead at Tsolo.
- [2] The respondent has filed the appeal record and, as I understand the situation, the appeal is also before us should the application for condonation be successful.
- [3] The time line relevant to the application for condonation can be summarized as follows:
- (a) On 28 January 2015 the respondent launched an urgent application in the Mthatha High Court for the reconnection of the electricity supply to the homestead where he was residing with his wife. The property in question is registered in the name of the respondent's wife.
- (b) On 29 January 2015 the application papers were served on the appellant;

- (c) On 3 February 2015 a rule nisi was issued;
- (d) On 3 February 2015 the appellant reconnected the respondent's electricity supply;
- (e) On 5 February 2015 the appellant filed its notice of opposition;
- (f) On 25 February 2015 the appellant filed its answering affidavit;
- (g) On 17 April 2015 the respondent filed his replying affidavit;
- (h) On 1 September 2015 the rule nisi was confirmed by Pakade J in an ex tempore order;
- (i) On 1 September 2015 the appellant filed its request for reasons;
- (j) On 13 June 2016 the written reasons for the order were handed down;
- (k) On 4 July 2016 the appellant filed its application for leave to appeal;
- (l) On 17 March 2017 the application for leave to appeal was heard and granted by Makaula J;
- (m) Shortly after the granting of the leave to appeal the appellant's Mthatha attorneys sought authorization from the appellant's

Johannesburg attorneys to prosecute the appeal;

- (n) During July 2017 the appellant's Johannesburg attorneys instructed the appellant's Mthatha attorneys to proceed with the appeal;
- (o) The Appellant's Mthatha attorneys thereafter instructed someone at their office to brief counsel to prepare the notice of appeal;
- (p) The appellant's attorneys assumed that this was done;
- (q) On 25 September 2017 the appellant's attorneys realized that the notice of appeal had not been prepared and filed. In terms of Rule 49(2) the notice of appeal had to be delivered to all the parties within 20 days after the date upon which leave to appeal was granted or within such longer period as may upon good cause shown be permitted;
- (r) During September 2017 the appellant's attorneys enquired from counsel's chambers as to whether the notice of appeal had been drafted, but were advised that counsel was overseas and would only be back in chambers during the week of 10 October 2017;
- (s) On 10 October 2017 the appellant's attorneys contacted counsel's chambers but were informed that he had not yet reported for work.
- (t) On 14 October 2017 the appellant's attorneys managed to get hold of the appellant's counsel, who advised that he had never received the brief to prepare the notice of appeal;
- (u) On 17 October 2017 the appellant's attorneys again instructed counsel to prepare the notice of appeal;
- (v) The notice of appeal was eventually filed on 19 October 2017;

- (w) The appellant thereafter had 60 days within which to apply for a date for the hearing of the appeal in terms of Rule 49(6)(a);
 - (x) At the same time as the application for a date for the hearing of the appeal the appellant had to file the appeal record in terms of Rule 49(7)(a);
 - (y) If the appellant failed to apply for a date for the hearing of the appeal, the respondent was entitled to apply for such a date within ten days after the expiry of the period of 60 days referred to in Rule 49(6)(a);
 - (z) The appellant did not apply for a date for the hearing of an appeal within the aforesaid period of 60 days;
- (aa) On 22 February 2018 the respondent applied for a date for the hearing of the appeal (this occurred within the period of ten days prescribed in Rule 49(6)(a);
- (bb) On 4 May 2018 the respondent filed the appeal record.

[4] In its notice of application for condonation the appellant seeks the following relief:

“1. Condoning Appellant’s/Applicant’s failure to prosecute this appeal within the time frames set by the Rules of this

Honourable Court.

- 2. That Appellant’s appeal is reinstated forthwith.
 - 3. That Appellant is granted leave to prosecute its appeal.
 - 4. That costs of this application be costs in the appeal.”
- [5] The application is for condonation for the late filing of the notice of appeal, as well as for the failure to apply for a date for the appeal and for the failure to file a record of appeal.
- [6] As I understand the provisions of Rule 49, it is not necessary for the reinstatement of the appeal in this matter as the appeal has not lapsed in terms of the provisions of Rule 49(6)(a), because the respondent duly applied for the set down of the appeal within the prescribed period of ten days set out in Rule 49(6)(a).
- [7] The general requirements for condonation can be summarized as follows:
- (a) That the delay was not significant;
 - (b) That there was a reasonable explanation for the delay;
 - (c) That the appeal has reasonable prospects of success (if the explanation for the delay passed muster);
 - (d) That the case is important and that it is in the public interest that it be resolved.[1]

- [8] The Supreme Court of Appeal has held that condonation “is not to be had merely for the asking”.[2]
- [9] Factors to be considered in deciding an application for condonation include:
- (a) The degree of non-compliance;
 - (b) The explanation therefor;
 - (c) The importance of the case;
 - (d) A respondent’s interest in the finality of the judgment of the Court below;
 - (e) The convenience of the Court; and
 - (f) The avoidance of unnecessary delay in the administration of justice.[3]
- [10] As far as the significance of the appellant’s failure to prosecute the appeal and the explanation for the delay tendered by the appellant are concerned, leave to appeal was granted on 17 March 2017, whereas the notice of appeal was only filed on 19 October 2017, some seven months later. This can hardly be described as an insignificant delay.
- [11] The appellant was obliged to place all relevant and necessary facts before the Court to argue its case for condonation. It appears that no valid external reason prohibited the appellant from filing its notice of appeal at an earlier date. This is particularly relevant to the period from July 2017, when the appellant’s Johannesburg attorneys instructed the appellant’s Mthatha attorneys to proceed with the appeal, and the ultimate filing of the notice of appeal on 19 October 2017. The appellant has furthermore advanced no explanation why it did not apply for a date for the hearing of the appeal within the prescribed period of 60 days, or why it did not file the appeal record. As stated above, the record was filed by the respondent.
- [12] It is furthermore incumbent on a party to apply for condonation as soon as possible after he realizes that he has not complied with a rule of court.[4]
- [13] The appellant bears the onus of showing good cause for its delay. If no good cause is offered, the application for condonation must fail.
- [14] Notably, the Constitutional Court has held with regard to condonation applications that, in a case where the delay is not a short one, the explanation given must not only be satisfactory but must also cover the entire period of the delay.[5]
- [15] In *Van der Merwe* the Supreme Court of Appeal heard an application for condonation where the applicant filed its papers some five months late. The Court referred with approval to the *Uitenhage* matter[6], where it had stated:

”One would have hoped that the many admonitions concerning what is required of an applicant in a condonation application would be trite knowledge among practitioners who are entrusted with the preparation of appeals to this Court: 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

so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious 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.” [7]

[16] Whilst the applicant in *Van der Merwe* had explained the reasons for its breach of the Court Rules in a general manner, and had put forward events in a chronological

fashion, the Court was not satisfied that the applicant had satisfactorily answered to its delay, and reprimanded the applicant

for not providing a sufficiently thorough and detailed explanation of the circumstances contributing to the delay.[8] The Court stated that this lack of a sufficiently thorough explanation demonstrated an obvious lack of attention to matters that plainly called for an explanation, and evinced a failure to fully and candidly enlighten the Court, as the applicant was obliged to do. The Court went on to find that the explanation proffered by the applicant was woefully inadequate and that it was impossible to hold that the delay in bringing this application had been explained in a manner which was even remotely satisfactory.[9]

[17] In the *Beweging vir Christelike-Volkseie Onderwys* matter, Plasket AJA held as follows (at para [27]):

“The delay in this case – 18 months for the filing of a replying affidavit – is excessively long. No effort was made to apply for the condonation of the delay as soon as possible, and no explanation is given for this failure. Condonation was only applied for when the reply was eventually filed, and De Villiers, making a virtue out of necessity, stated that the filing of the reply was slowed down by the fact that a condonation application had to be drafted as well. The explanation for the delay of 18 months is unacceptable. Indeed, it is no explanation at all because of its vagueness and the long periods that remain unexplained. I consider the non-observance of the rules to be so flagrant and gross that there is no need to consider the prospects of success in the extension application. There are simply no factors that I can find that favour the grant of condonation. In the result, however strong those prospects of success could be, condonation for the late filing of the reply must be refused.”

[18] Dilatoriness in itself is an independent ground for refusing an application for rescission, as the Supreme Court of Appeal remarked, albeit obiter, in *Pitelli v Everton Garden Projects CC* 2010 (5) SA 171 (SCA) at paragraph [37]:

“...in view of the course that the proceedings against Mr Pitelli and his company have taken, which in my view has clearly been dilatory from beginning to end [t]he court below cannot be faulted for having refused to rescind its order on any basis, and I consider there to be no prospect that it might be reversed on appeal...”

[19] In the absence of a satisfactory explanation of the delay, it is unnecessary for this Court to consider the prospects of success of the appeal. In *Van der Merwe*[10], the Court stated that in cases of flagrant breaches of the Rules of Court, especially where there is no acceptable explanation therefor, the indulgence of condonation may be refused whatever the merits of the matter. This applies even where the blame lies solely with the attorney of the particular

party. The Court held that the breaches of the Rules in that matter were of such a nature, and the explanation offered so unacceptable and wanting, that condonation should be refused, irrespective of the applicant's prospects of success.

- [20] In this matter the dilatoriness of the appellant in the conduct of the appeal is particularly significant. No satisfactory explanation is proffered to explain the delay between 7 March 2017 and 19 October 2017. The explanation that the appellant had to obtain the leave of the appellant's Johannesburg attorneys to prosecute the appeal, after leave to appeal had been granted on 7 March 2017, is unconvincing. After all, the appellant's attorneys plainly had the necessary authority to apply for leave to appeal. Implied in this authority would presumably have been the authority to prosecute the appeal to its final conclusion. The explanation for the further period from July 2017 to the end of September 2017 is equally unconvincing.

The appellant has failed to provide any evidence of:

- (a) the exact date when counsel was briefed; and
- (b) any steps taken by appellant's attorney to enquire from counsel what progress had been made in the matter.

- [21] In addition, the failure on the part of the appellant to apply for a date for the hearing of the appeal and to file the appeal record, remains unexplained to this day.

- [22] I am therefore not convinced that the appellant has satisfactorily explained the entire period of the delay. This is therefore, in my view, a matter where condonation can be refused without reference to the appellant's prospects of success.

- [23] But even if the prospects of success needed to be considered, I am not convinced that the appellant has satisfied this requirement either. The only reference in the condonation application to prospects of success is to be found in paragraph 13.2 of the founding affidavit where the appellant states that there are prospects of success on appeal and that another Court may arrive at a different conclusion than that reached by the Court a quo. This singular submission is hardly sufficient to establish the requirement of a bona fide defence. It was plainly incumbent upon the appellant to set out the factual or legal basis for its contention as part of the application for condonation.[11] This has not been done.

- [24] However, and even if this Court were to have regard to the main application papers to determine the appellant's prospects of success, I am not convinced, for the reasons that follow, that Pakade J was wrong in confirming the rule nisi.

- [25] The appellant was cited in the main application on the basis that it was "the functionary in charge for providing electricity at Qanda A/A in the district of Tsolo in the Eastern Cape Province". This allegation was not disputed by the appellant. It is not clear if the respondent was an end user of electricity in terms of the Electricity Regulation Act No. 4 of 2006, and if so, who the licensee responsible was for the distribution of electricity in the area in question. I therefore assume, for purposes of this application, that the appellant has been

supplying electricity directly to the respondent's home in terms of some or other service delivery agreement, details of which, if such an agreement exists, have not been placed before us.

- [26] It is not the appellant's case that the respondent, or his wife, were in arrears in respect of the periodic payment of their electricity bills.
- [27] The crux of the appellant's defence was that, in terms of the Occupational Health and Safety Act No. 85 of 1993 (the OHSA), the appellant was obliged to disconnect the electricity supply where it posed a danger or threat to the safety of the occupants of any structure. This the appellant could do, so it was contended, without the consent of the occupants or owner of the structure in the case of an emergency.
- [28] The OHSA provides for the health and safety of persons at work and for the health and safety of persons in connection with the use of plant and machinery. I am not convinced that the provisions of the OHSA were, in the circumstances, applicable to the facts of this matter. We have furthermore not been referred to any specific provision of the OHSA, or any other legislation for that matter, which would have permitted the appellant to disconnect the respondent's electricity supply, in the circumstances of this particular matter, without any prior notice, or any express statutory authority, or court order, or contractual entitlement, permitting it to do so.
- [29] The appellant's contention of an imminent emergency as a reason for the termination of the electricity, assuming that this would have entitled the appellant to interfere with the electricity supply to the respondent's home, is also unconvincing for the following reasons:
- (a) The appellant became aware of the need for a deviation of the electricity supply to the respondent's premises during June 2014 when the respondent went to the appellant's offices in Mthatha to apply for a line deviation.
 - (b) During September 2014 the appellant supplied a quotation for the deviation to the respondent's wife. The deviation would cost R52 791.81.
 - (c) The respondent and his wife refused to pay this sum, contending that the appellant had previously undertaken to do the deviation at its own cost. The appellant denies the existence of such an undertaking.
 - (d) The appellant's case is that it informed the respondent that there was nothing the appellant could do regarding the line deviation until such time as the quoted sum was paid.
 - (e) The electricity supply was then only cut off on 5 December 2014, some six months after the appellant had become aware of the need for a deviation of the electricity supply to the respondent's residence.

(f) The inference is in my view justified that the true reason for the termination of the electricity supply was not an emergency situation, but rather the dispute regarding the payment of the costs of the deviation.

[30] During the hearing before Pakade J counsel for the appellant furthermore conceded that the rule nisi was final in effect and should be confirmed, but he resisted a cost order against the appellant.

[31] This concession was probably correctly made as the remedy sought by the respondent was in the form of a mandament van spolie. The essence of the mandament van spolie is that the person who has been deprived of his or her possession must first be restored to his or her former position before the

merits of the case can be considered.[12]

[32] A mandament van spolie is available where a person has been deprived unlawfully of his or her possession of movables or immovable property, as well as where a person has been deprived unlawfully of his or her quasi-possession of other incorporeal rights.[13] A spoliation order is meant to prevent the taking of possession otherwise than in accordance with the law. Its underlying philosophy

is that no one should resort to self-help to obtain or regain possession. The main purpose of the mandament van spolie is therefore to preserve public order by restraining persons from taking the law into their own hands and by inducing them to follow

due process. This applies equally if the despoiler is an individual or a government entity or functionary.[14]

[33] The possessory nature of the mandament van spolie gave the respondent the necessary locus standi to bring the application, notwithstanding the fact that he was not the registered owner of the property in question.

[34] Our Courts have on a number of occasions granted a mandament van spolie where the supply of electricity had been terminated.[15]

[35] In essence a mandament van spolie order is final in effect.[16] It was contended before us by counsel for the appellant that the form of the rule nisi reserved the appellant's right to contend on the return day that the termination of the electricity supply was lawful. Even if there was in principle merit in this contention, which is not necessary for us to decide in this matter, I am not convinced that the appellant has established any convincing basis, for the reasons set out above and on the specific facts of this matter, to justify its decision to terminate the electricity supply to the respondent's premises in the manner in which the appellant did herein.

- [36] The respondent was, together with his wife as the registered owner of the property, in undisturbed possession of the supply of electricity, which was disconnected without his or her consent or a court order. As explained above, I am unconvinced that the appellant acted lawfully in disconnecting the electricity in the manner in which it did.
- [37] The reconnection of the electricity supply to the respondent's residence on 3 February 2015 restored the status quo ante. All that remained was the issue of costs. During the hearing before us counsel for the appellant suggested that each party should pay their own costs. However, the respondent was successful in the matter and was plainly entitled to his costs. Pakade J, in the circumstances, correctly confirmed the rule nisi, with costs.
- [38] I wish to make it clear that the outcome of this appeal does not establish a precedent which would preclude the appellant from terminating the supply of electricity in accordance with any relevant legislative, contractual or other authority to do so. Insofar as the appellant has incurred costs to rectify the supply of electricity to the respondent's home, its right to institute an action to recover these costs in the normal course also remains unaffected.
- [39] However, on the facts of this particular matter, a rule nisi was granted. The confirmation of the rule nisi was later conceded by the appellant. This was, in my view, fatal to the appellant's case on the merits.
- [40] In the result the application for condonation is dismissed, with costs.

The appeal is also dismissed, with costs.

J D HUISAMEN

ACTING JUDGE OF THE HIGH COURT

I agree

R E GRIFFITHS

JUDGE OF THE HIGH COURT

I T STRETCH

COUNSEL FOR APPELLANT: Mr Matyumza

INSTRUCTED BY: Mafungo Tshaka Inc.

ATTORNEY FOR RESPONDENT: Mr Notyesi

INSTRUCTED BY: Mvuzo Notyesi Inc.

HEARD ON: 06 August 2018

DELIVERED ON: 21 August 2018

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- [1] These requirements are derived from the oft-cited case of *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532C-F
- [2] In *Commissioner, South African Revenue Service v Van der Merwe* 2016(1) SA 599 (SCA) [11], where the Supreme Court of Appeal referred to *Uitenhage Transitional Local Council v South African Revenue Service* 200 4
- (1) SA 292 (SCA) para 6
- [3] See *Van der Merwe* (supra)
- [4] See *Darries v Sheriff, Magistrate's Court, Wynberg and Another* 1998(3) SA 34 (SCA) at 40 H to 41E, as quoted in *Beweging vir Christelik- Volkseie Onderwys v Minister of Education and Others* [2012] 2 All SA 462(SCA) para 26
- [5] *Ethekwini Municipality v Ingonyama Trust* 2013
- (5) BCLR 497 CC
- [6] See n2 (supra)
- [7] See *Van der Merwe* (supra) para 12
- [8] At paras
- [13] – [15]
- [9] At para [15]
- [10] At para [19]
- [11] See *Darries* (n4 above) at 40H - 41E
- [12] See *LAWSA – Mandament van Spolie*, paragraph 93
- [13] See *LAWSA* (supra), paragraph 94
- [14] See *Ngqukumba v Minister of Safety and Security and Others* 2014 (2) SACR 325 (CC) at [10] and [11]
- [15] See *Naidoo v Moodley* 1982 (4) SA 82 (T), *Frowman v Herbmore Timber and Hardware (Pty) Ltd* 1984 (3) SA 609 (W) and *Nisenbaum & Nisenbaum v Express Buildings (Pty) Ltd* 1953 (1) SA 246 (W)
- [16] See *Nienaber v Stuckey* 1946 AD 1049 at 1053

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