

SOUTH AFRICA / JUDGMENT

IFJ Properties (Pty) Ltd v Brown and Others (32592/2013) [2015] ZAGPPHC 755 (31 August 2015)

[2015] ZAGPPHC 755

COURT

North Gauteng High Court, Pretoria

BEFORE

A.J. Louw

CASE / FILE NUMBER

32592/2013

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IN

THE HIGH COURT OF SOUTH AFRICA

[GAUTENG

DIVISION, PRETORIA]

31/8/15

CASE

NUMBER: 32592/2013

In

the matter between :

IFJ
PROPERTIES (PTY)
LTD
APPLICANT
and
GEOFFREY
ALLEN
BROWN
FIRST RESPONDENT
YVONNE
WILHELMINA BROWN
SECOND RESPONDENT
ANDRE
RADYN THIRD
RESPONDENT
MICHELLE
LEIGH
RADYN
FOURTH RESPONDENT

VYGEBOOM
COUNTY ESTATES
HOMEOWNERS
ASSOCIATION
FIFTH RESPONDENT
ALBERT
LUTHULI LOCAL MUNICIPALITY
SIXTH RESPONDENT
THE
APPOINTED BUILDING CONTROL
OFFICER
OF THE ALBERT LUTHULI
LOCAL
MUNICIPALITY
SEVENTH RESPONDENT
THE
REVIEW BOARD INSTITUTED IN TERMS
OF
SECTION 9 OF THE NATIONAL BUILDING REGULATIONS
AND
BUILDING
STANDARDS
ACT, 103 OF
1977
EIGHTH RESPONDENT

JUDGMENT

A.J. LOUW AJ

- [1] This is a minor skirmish in a review application that was launched by the Applicant on the 4th June 2013 for the review of a decision taken by the Sixth and Seventh Respondents. The minor skirmish grew to an opposed application for condonation by the Applicant.
- [2] The Applicant is represented by senior counsel, Mr Erasmus SC. The only Respondents opposing the condonation are the Sixth and Seventh Respondents. They are represented by Ms Pienaar.
- [3] In its essence the dispute concerns the late filing of the Applicant's supplementary affidavit in the review proceedings. Rule

53(4) makes provision that an applicant for review may within 10 days after the Registrar has made the record available to an applicant, by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of his or her notice of motion and supplement the founding affidavit.

- [4] Before an applicant in review proceedings may file the Rule 53(4) supplementary affidavit, the administrator must first make available the record of the relevant proceedings to the Registrar. See Rule 53(1) and (3).
- [5] It is not in dispute in the proceedings that the Sixth and Seventh Respondents were obliged to make available the record 15 days after 4 June 2013. However, the Sixth and Seventh Respondents filed the record some 10 months later, namely on the 11th April 2014. The Applicant accepted this late filing of the record and thereby condoned the non-compliance with the provisions of Rule 53(1) and (3).
- [6] The Applicant's 10 days after the 11th April 2014 expired on the 25th April 2014. The Applicant failed to deliver and file its

supplementary affidavit on 25 April 2014 but did so on the 30th May 2014.

- [7] Without specific reference to Mr Erasmus, the founding affidavit in the application for condonation explains that the Applicant's counsel was not available to prepare the supplementary affidavit within the prescribed time period as a result of various work related obligations. These included a matter in Namibia and a matter in Cape Town. From the contents of paragraph 14 of the founding affidavit it appears that the opposed application in Cape Town was of an involved nature where the senior counsel of the Applicant (Mr Erasmus) was the leader of a team of four counsel. It is explained that the application was argued in the week of the 1st May 2014 over a number of days thereafter. He thereafter returned to chambers on Monday the 14th May 2014 and could only thereafter devote attention to this matter.
- [8] The founding affidavit mentions the fact that the Sixth and Seventh Respondents took approximately 10 months to file the record.
- [9] The founding affidavit does not make any reference to the merits of the application, the merits being one of the two requirements that an applicant for condonation must address in order to succeed in an application for condonation. Besides raising a defence or claim with reasonable prospects of success, the second requirement is a reasonable explanation for the default. Traditionally it is said that an application for condonation must show good or sufficient cause for condonation. The case law on this shows that a flexible approach which is elastic and not capable of precise definition is followed. In the process the reasonableness of the explanation for the delay, the importance of the issue to be raised in a matter and the prospects of success are of importance. These considerations are interrelated and none of them are individually decisive. See *Melane v Santam Insurance Company Ltd* 1962 (4) SA 531 (A) at 532C - E. See also *Grootboom v NPA* 2014
- (2) SA 68 (CC) at par 20 and 23 on pp75H – 76C.
- [10] The opposing affidavit explains that when the Sixth and Seventh Respondents' attorney of record established that the supplementary

affidavit was delivered late, he directed a letter to the Applicant's attorneys. In the letter a "comprehensive condonation

application" (see paragraph 3.3 of the answering affidavit) was required. See also the undated letter of the Sixth and Seventh

Respondents' attorney or record. Not to be outdone by the letter demanding a condonation application, the attorney of record of the Applicant also waded in with an aggressive reply. The Sixth and Seventh Respondents are reminded of the late filing of the record. Then follows the following: "The insistence of the Respondents for the Applicant to file a Condonation Application regarding its Supplementary Affidavit, is not only arrogant but also constitutes abuse of the Court process especially when one takes into consideration the fact that the 6th and 7th Respondents filed the record approximately 9 months late.

We hereby place on record that should we not, within 7 days from date hereof, receive the First to Seventh Respondents' written acceptance of the late filing of the Applicant's Supplementary Affidavit, the Applicant will proceed with a Condonation Application and will the Applicant seek a punitive Cost Order against the First to Seventh Respondents".

[11] On the 3rd July 2014 the attorney of the Sixth and Seventh Respondents replied to the letter of the Applicant's attorney of

record informing him again that an application for condonation is awaited. The clearly correct point is made in the letter that in litigation, if a party is late in compliance with rules, then that party can request an indulgence from the opposing party. He furthermore correctly points out that no courteous request but rather an instruction "laced with threats" was directed to the Sixth and Seven Responden.

[12] The attorney for the Sixth and Seventh Respondents again complains in the opposing affidavit that the letter from the Applicant's attorney of record is arrogant. He points out in the letter that the reasons for the delay in filing the affidavit are not provided and in fact the Applicant is instructing the Sixth and Seventh Respondents to consent to the late fiing.

[13] Thereafter the condonation application was delivered on the gth July 2014. The attorney for the Sixth and Seventh Respondents is of the view that no bona fide reasons for the delay are given, hence the opposition. The complaint is that the delay was caused by "a third party's conduct without providing a confirmatory affidavit of the said party as required by law". (See paragraph 3.8 of the opposing affidavit).

[14] Then, in this somewhat unnecessary litigation, a supplementary opposing affidavit was filed by the attorney for the Sixth and

Seventh Respondents arising from missing pages in the founding affidavit and in broad terms the same points are made in the supplementary opposing affidavit as in the initial opposing affidavit.

[15] In the replying affidavit the attorney of record of the Applicant denies being arrogant in tone in the letter referred to herein

earlier. He then makes the point that, in view of the lateness of the record, the Sixth and Seventh Respondents were most unreasonable in their approach to the late filing of the supplementary affidavit.

[16] The replying affidavit makes the point that counsel usually do not depose to affidavits and exception is taken to the fact that apparently the veracity of the explanation regarding the unavailability of senior counsel is attacked. Lastly it makes the

point that the Sixth and Seventh Respondents did not raise any grounds of prejudice arising from the late filing of the supplementary affidavit in terms of Rule 53(4).

[17] The explanation for the delay in the founding affidavit is perfectly reasonable and certainly not unusual. The way in which the absence of counsel is dealt with in the affidavit of the attorney of record of the Applicant is also not unusual. There certainly is no reason to distrust the veracity of the explanation.

[18] The Applicant is not without criticism: the letter from the Applicant's attorney of record, demanding condonation is certainly

uncalled for, especially having regard to the fact that the Applicant indeed was substantially late with the filing of the supplementary affidavit.

[19] On the other hand, on receipt of the application for condonation, the filing of an opposing affidavit and a supplementary opposing

affidavit were in my view unnecessary. The opposition was persisted with, hence this judgment.

[20] Counsel for the Sixth and Seventh Respondents, Ms Pienaar, vehemently argued that the explanation for the delay is unacceptable as other counsel could have been involved in settling the supplementary Rule 53(4) affidavit and secondly because no reference to whether the Applicant has a reasonable prospect of success is raised in the application. Accordingly, with reference to the *Melane-supra* matter, and with reference to *Uitenhage Transitional Local Council v South African Revenue Service 2004*

(1) SA 292 (SCA) Ms Pienaar argued that condonation was not to be had merely for the asking and that there was in this case no compliance with

these requirements.

[21] I unfortunately have to differ:

The explanation is perfectly reasonable. It is clear that this is an involved matter wherein a midstream change of counsel to consider the important aspect of whether a supplementary Rule 53(4) affidavit must be filed, simply is a theoretical and highly impractical approach in the greater

scheme of the litigation. It makes perfect sense that the Applicant would require Mr Erasmus SC, who is involved in the matter since its inception to consider the necessity and contents of an important supplementary affidavit. When one has regard to the contents of the Rule 53(4) affidavit, it is clear that this is the second review application regarding the very same building works involving the same parties. I cannot fault the approach that the Applicant's attorney retained the services of Mr Erasmus in order to consider filing and settling the supplementary Rule 53(4) affidavit.

It is indeed so that condonation is not to be had merely for the asking. I take into consideration that there is no reference in the founding affidavit or in the replying affidavit to the prospects of success of the Applicant. However, that is not the end of the matter. I cannot close my eyes for the existence of the Rule 53(4) supplementary affidavit that is available in the court file. It is clear from that affidavit that the supplementary Rule 53(4) affidavit was filed in ongoing litigation extending to a second review application concerning the very same building works. The contents of the supplementary Rule 53(4) affidavit makes it clear that at least in part the dispute concerns, what is stated in the supplementary Rule 53(4) affidavit, to be a matter that already is *res iudicata* between the parties. With reference to the contents of the supplementary opposing affidavit, it is clear that there are reasonable prospects of success.

- [22] With regard to the question of condonation I take into consideration that the Applicant was late with the filing of the supplementary Rule 53(4) affidavit. I take into consideration that the Applicant could have requested an extension of time in a somewhat humbler tone. I take into consideration that the Sixth and Seventh Respondents themselves were approximately 10 months late with the filing of the record. I take into consideration that an acceptable explanation, constituting good cause, is given for the late filing of the affidavit.
- [23] It is so that nothing was said by the Applicant of its prospects of success. I however also take into consideration the existence of the supplementary Rule 53(4) affidavit that clearly sets forth grounds that constitute on the face of it reasonable prospects of success.
- [24] I also take into consideration that no point was made in the opposing affidavits of prejudice to the Sixth and Seventh Respondents or the other Respondents arising from the late filing of the supplementary Rule 53(4) affidavit.
- [25] In the circumstances it appears to me that this whole dispute regarding the filing of the supplementary Rule 53(4) affidavit was an unnecessary diversion.
- [26] Both attorneys were somewhat in remiss. The Applicant's attorney could certainly not demand condonation. A respectful request was necessary. On the other hand the Sixth and Seventh Respondents' attorney could certainly not on grounds of the tone of the

correspondence from the Applicant's attorney proceed to insist upon a fully fledged opposed application to oppose the filing of a short, to the point and clearly relevant supplementary Rule 53(4) affidavit that shows up at least prima facie merit for purposes of the question of condonation. Upon receipt of the application for condonation, the Sixth and Seventh Respondents should have desisted from further opposing the application for condonation.

[27] It is not specifically necessary that the merits be dealt with in the condonation application itself, the documentation in the court file can also be used in order to determine whether there are prospects of success for the applicant for condonation. See: *Smith NO v Brummer* 1954 (3) SA 352 (0). The supplementary Rule 53(4) affidavit is such a document.

[28] Mr Erasmus submitted that an attorney and client scale costs order must be made against the Sixth and Seventh

Respondents. Ms Pienaar submitted that the Applicant must pay the opposed costs of the application for condonation.

[29] The question here is whether the opposition to the application for condonation was reasonable. See: *Goo/ v Policanskv* 1939 CPD 386. See also: *Smith-supra*.

[30] The requirement that an application for condonation be filed as required in the initial letter from the attorney of record of the Sixth and Seventh Respondents, was reasonable. No explanation for the late filing of the supplementary Rule 53(4) application was proffered in the letter from the Applicant's attorney of record. On the contrary, it, instead of requesting, indeed demanded condonation and threatened with special costs orders. On the other hand, after receipt of the application for condonation and being in possession of the supplementary Rule 53(4) affidavit, there were no further grounds for the Sixth and Seventh Respondents to oppose the application for condonation.

[31] In the circumstances I rule that the Applicant must pay the costs of the application for condonation on an unopposed scale and that the Sixth and Seventh Respondents must pay the costs of opposition of the application for condonation.

[32] Mr Erasmus sought costs against the Sixth and Seventh Respondents on an attorney and client scale as well as the costs consequent upon the employment of senior counsel. The condonation application as such is not a matter that requires the appearance of senior counsel.

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

1. Condonation is granted to the Applicant for the late filing of the Applicant's Supplementary Affidavit in terms of Rule 53(4);
2. The period within which the Applicant may have filed the Supplementary Affidavit is extended up and until the 30th May 2014;

3. The Applicant pays the unopposed costs of the application up to and including the 18th July 2014 being date of delivery of the notice to oppose the condonation application.
4. The Sixth and Seventh Respondents pay the opposed costs of the application for condonation as from the 19th July 2014 and thereafter.

AJ LOUW, AJ

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