

SOUTH AFRICA / JUDGMENT

Joubert v Drotsky (AR9/2023) [2024] ZAKZPHC 72 (30 August 2024)

[2024] ZAKZPHC 72

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Mossop, Mngadi

CASE / FILE NUMBER

AR9/2023

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

DIVISION, PIETERMARITZBURG

Case

no: AR9/2023

In

the matter between:

CHRISTA
JOUBERT
APPELLANT
and
JURIE
JOHANNES DROTSKY
RESPONDENT

Coram:

Mossop J and Mngadi J

Heard:

23 August 2024

Delivered:

30 August 2024

ORDER

On

appeal from: Regional Court, Durban (sitting as court of first

- instance):
1.
The appellant's application for condonation for the late filing of her notice of appeal is refused.
 2.
The appeal is struck from the roll.
 3.
There shall be no order as to costs.

JUDGMENT

MOSSOP J (MNGADI J concurring):

- [1] This is an appeal against a civil judgment delivered in the Durban regional court on 29 December 2021. The judgment of the regional magistrate was in favour of the respondent and directed the appellant to pay to him an amount of R400 000 on the basis that such amount had been paid to her by the respondent as a loan and not as a gift to her, as alleged by the appellant.
- [2] It is necessary to record at this stage that no heads of argument were delivered by the respondent. I accordingly requested my registrar to make contact with the respondent's attorneys to ascertain why this is the case. An email was received from the respondent's attorneys in reply indicating that the respondent lacks funds to participate in this appeal and I was advised that there will therefore be no appearance for him.
- [3] The appellant commenced the appeal procedure by delivering a notice of appeal. That notice was signed on 12 January 2023 by the appellant's legal representative, Mr van Heerden, who is an advocate of this court who holds a trust account. It appears to have been filed with the clerk of the regional court on 17 January 2023. Regard being had to the fact that judgment was delivered by the regional magistrate on 29 December 2021, it is evident that the notice of appeal was delivered substantially out of time.[1] Approximately a year out of time.[2] The foremost issue that therefore needed to be addressed by the appellant was that of condonation and a condonation application, supported by an affidavit made by the appellant, was delivered.
- [4] Before dealing with the issue of condonation, it is necessary to briefly set out the pattern of facts in this matter in order to allow a proper consideration of the facts advanced in support of the condonation application.
- [5] At the time of the trial in the court a quo, the appellant was the part owner of a caravan park at Illovo Beach, KwaZulu-Natal, known as Wavecrest (the caravan park). The caravan park is not large: it has only 13 caravan sites but it does have 9 flatlets and 2 chalets. One of those 9 flatlets was occupied by the appellant and another was occupied by her daughter, Ms Sarah Lee Joubert (Ms Joubert). Ms Joubert occupied her flatlet free of charge. During either 2009 or 2010, the respondent commenced a romantic relationship with Ms Joubert and moved

into the flatlet that she occupied. This was done with the knowledge and blessing of the appellant. The relationship between the respondent and Ms Joubert deepened and they later became engaged to be married.

- [6] During February 2011, the respondent was involved in a motorcycle accident and suffered severe physical injuries, which included a broken arm, leg, heels, elbow, and collarbone. He was hospitalised for approximately two weeks and once discharged from hospital, was initially immobile and required some assistance for a while to do even the most basic and intimate things. He was incapacitated for several months before being able to resume his employment. In due course, he lodged a claim with the Road Accident Fund (the RAF), which was ultimately settled, and which paid him an amount of approximately R1,8 million (the settlement) on 1 March 2018.
- [7] After receipt of the settlement from the RAF, the respondent used some of it to repay his father for the cost of certain medical treatments that he had received after the accident, and which had been paid for by his father. He also paid some money to his mother. In addition, the respondent paid an amount of R400 100[3] to the appellant, in three payment tranches. The first payment was in the amount of R100 and was made by the respondent on 14 March 2018 to make sure that the banking details that he had for the appellant were correct. Once the accuracy of the banking details was established, the respondent paid an amount of R250 000 to the appellant on 16 March 2018, and a further amount of R150 000 on 20 March 2018. Those payments were not in dispute, and it is around those payments that this appeal moves.
- [8] In each instance, the respondent, when making payment, recorded in his bank statements that it was made in respect of 'long term investment S and J'[4] and the amount of each payment made. That notation only appeared on the respondent's bank statement and not on the appellant's bank statement. It gave an insight into the respondent's view of the transaction.
- [9] The respondent's particulars of claim made out the case that these payments were made consequent upon the conclusion of an oral agreement of loan concluded between himself and the appellant on 14 March 2018. It was pleaded that the loan was repayable on demand. Such demand was made on 4 October 2018, but the appellant failed to repay the money advanced. Legal proceedings commenced, and the appellant ultimately delivered her plea to the respondent's particulars of claim in which she alleged that the payments that she had received from the respondent were a gift from him. The appellant's plea will be considered in greater detail shortly. The trial that then followed led to the judgment of the regional magistrate in respect of which this appeal is brought.

[10] Returning to the condonation application, the appellant states in her affidavit, that when the judgment was handed down, she immediately recognised that the regional magistrate had made an error in finding as she did and states that she had every intention of appealing the judgment. She, however, had no funds to pursue an appeal. The gravamen of her submissions in this regard are captured in the following paragraphs of her condonation affidavit:

‘I made an attempt to mortgage my immovable property to pursue the Notice to Appeal, to avoid launching a condonation application, I approached ABSA Bank but the Bank declined my application based upon my age being a major factor.’

And:

‘I did approach legal aid board but was told that I don’t qualify due to the means test because I own properties.’

Those two extracts constitute her only explanation for the lateness of the notice of appeal.

[11] The reason why the appellant was eventually able to note her intention to appeal was as a result of her ‘coming into possession of some funds’. The source of those funds, and circumstances under which they were acquired by her, was not explained by the appellant. She did, however, state that these funds were acquired by her:

‘... some eight months after the learned Magistrates’ (sic) Judgment.’

Accepting this to be accurate, it appears that these funds were acquired by the appellant on an undisclosed date in August 2022. This must be so because the regional magistrate’s judgment was handed down in December 2021 and August would be the eighth month after that occurred.

[12] Litigation, like just about everything in this life, must have a beginning and an end. The finality of legal proceedings is an accepted underlying ethos of our jurisprudence and is actively pursued because it promotes certainty and allows litigants to know where they stand. Litigation must accordingly be conducted both with intent and with deed and in accordance with the prescribed rules. Prolonged and unnecessary delays in the cycle of litigation are to be deprecated and will not be favourable viewed by a court. This is particularly the case when it comes to appeals. Where there is an inordinate delay in delivering a notice of appeal, a reasonable belief may arise in the mind of the successful party that the judgment delivered in his or her favour has become unassailable.

[13] All of this was summed up in *Van Wyk v Unitas Hospital and another* (Open Democratic Advice Centre as Amicus Curiae),^[5] where the Constitutional Court observed as follows:

‘A litigant is entitled to have closure on litigation. The principle of finality in litigation is intended to allow parties to get on with their lives. After an inordinate delay a litigant is entitled to assume that the losing party has accepted the finality of the order and does not intend to pursue the matter any further. To grant condonation after such an inordinate delay and in the absence of a reasonable explanation, would undermine the principle of finality and cannot be in the interests of justice.’

[14] That, of course, does not mean that condonation cannot ever be granted. A court has a discretion on whether to grant condonation.[6] Court rules which fix time periods for steps to be taken, while definite, are not immutable. Thus, non-compliance may be overlooked

upon the provision of compelling reasons for the failure to comply strictly with those rules. Each condonation application is thus to be decided on its own unique facts, in accordance with developed principles. But such an application must be brought at the earliest opportunity,[7] for any delay in seeking condonation must itself be explained.[8]

[15] The general principle applicable to the determination of condonation applications was set out in Van Wyk as follows:

‘This court has held that the standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success.’ (Footnote omitted.)

[16] The appellant states in her condonation affidavit that she did not ‘simply ignore the rules of this court’. It is difficult to accept that proposition because of the paucity of details in her condonation affidavit. She has advanced no facts that serve to reassure this court that this is the case and that she did not simply acquiesce in the judgment, given the length of the delay between the date of delivery of the judgment and the date of delivery of her notice of appeal. She claims to have attempted to mortgage her property to raise funds: when this was done, what property she attempted to mortgage (for it appears, on her own version, that she has more than one), what she actually did, who she dealt with at ABSA Bank, which ABSA Bank branch she approached, and whether she approached any other financial institutions are but some of the obvious questions that call for an explanation from the appellant, as do the facts that led to her acquiring the funds to eventually prosecute her appeal. She has made no attempt to provide any of this information.

[17] At best, the appellant’s explanation may be categorised as being vague. The attempts at securing a mortgage and approaching Legal Aid, if they occurred, could not have consumed much of the period of the delay. No attempt has been made to explain what the appellant did before, or after, those events. Importantly, if she indeed came into funds in August 2022, she has provided no explanation at all of what occurred between that date and the date of

delivery of her notice of appeal, namely 17 January 2023. It follows that there has been no explanation that covers the full period of the very long delay. The disclosure of dates, for none have been disclosed by her, would have gone some way to showing a purposeful, ongoing attempt by the appellant to bring her appeal to this court. In *Independent Municipal and Allied Trade Union on behalf of Zungu v SA Local Government Bargaining Council and others*,^[9] the court held that:

‘In explaining the reason for the delay it is necessary for the party seeking condonation to fully explain the reason for the delay in order for the court to be in a proper position to assess whether or not the explanation is a good one. This in my view requires an explanation which covers the full length of the delay. The mere listing of significant events which took place during the period in question without an explanation for the time that lapsed between these events does not place a court in a position properly to assess the explanation for the delay. This amounts to nothing more than a recordal of the dates relevant to the processing of a dispute or application, as the case may be.’

^[18] The few significant events that have been mentioned by the appellant are not located in time, if regard is had to the fact that the period that the appellant needs to explain covers approximately a year. Where the non-compliance is time related, as in this case, the Supreme Court of Appeal has observed that ‘the date, duration and extent of any obstacle’ relied upon ‘must be spelled out’.^[10] This has not been done.

^[19] The grant or refusal of condonation is not a mechanical process but one that involves the balancing of often competing factors. Accordingly:

‘... very weak prospects of success may not offset a full, complete and satisfactory explanation for a delay; while strong prospects of success may excuse an inadequate explanation for the delay (to a point)’.^[11]

A combination of an inadequate explanation and poor prospects of success would hold limited prospects of condonation being granted.

^[20] In seeking condonation, an applicant is required to objectively assess his or her prospects of success should condonation be granted. In this regard, the appellant asserts that she has a ‘bona fide or reasonable prospect of success’. In this regard, she submits in her condonation

affidavit that insufficient emphasis was given to something that was said in Afrikaans at the trial. The appellant claims that the respondent said the following to her when informing her that he would make the payments to her:

‘Ma hierdie geld gee ek vir jou om vir oom Chris uit te sorteer sodat Sarah nie met hom in die toekoms hoef te deel nie.’

The appellant claims that this statement establishes that the money was a gift from the respondent and not a loan. The further submission is advanced that the regional magistrate ought to have engaged the services of an Afrikaans interpreter to fully understand the meaning of that statement which, according to the appellant, carries more weight in Afrikaans than it does when translated into English.

- [21] There are a number of difficulties with this submission and the proposition that follows it. Firstly, it presupposes that the regional magistrate did not understand Afrikaans. However, the regional magistrate did understand Afrikaans and she said as much during the trial. Secondly, if the appellant believed that the phrase used held a special meaning that may not be properly comprehended by persons who are not naturally Afrikaans speakers, the duty was on her to lead evidence of an expert on that issue. That was not done.
- [22] The conclusion that the regional magistrate came to in her judgment was not simply based on her understanding of that single sentence. It was based upon a general conspectus of all the evidence led and the weighing up of probabilities that were found to exist. The issue was never taken at the trial that there was anything of special significance in those words beyond their ordinary grammatical meaning or that an interpreter should have been called by the regional magistrate. The appellant appears to believe that a regional magistrate has the powers of a criminal court and may call witnesses as he or she deems necessary.[12] Her legal advisors should have explained to her that this is not the case in civil proceedings, where the parties assume the burden of sourcing and presenting their own evidence to the court. The point is accordingly misguided.
- [23] It further appears to me that there is an issue of some significance that the appellant has overlooked in pressing this argument. It is trite that a dispute between parties litigating against each other is framed by their pleadings. The pleadings 'define the issues as well as the scope and ambit of the dispute between the parties' and they thus 'play a vital role in litigation'. [13] It follows that, as a general proposition, parties may only lead evidence in accordance with what they have pleaded.
- [24] On the issue of the payment of the R400 000, which the appellant admitted receiving from the respondent, the appellant set out in her plea why the money was a gift from the respondent and not a loan. It is helpful in this regard to quote fully from her plea:
- '3.12 During March 2018 the Plaintiff approached the Defendant and told her that he wanted to make a donation to her in the sum of R400 000.00. This donation was to be made as a token of appreciation for:
- 3.12.1 the Defendant's tolerance in not enforcing her rights in respect of rental payments and payment for electricity and water;
- 3.12.2 the costs that the Defendant had incurred in settling some of the Plaintiff's medical expenses during his recuperation after his motor vehicle accident; and

3.12.3 the care that she had herself taken of him and the arrangements she had made for him to be cared for by others.’

[25] The respondent therefore had to meet a case that alleged that he was generally indebted to the appellant. However, the record of proceedings reveals that in presenting her case to the court a quo, the appellant made no effort to establish the fact of such indebtedness or to quantify that alleged indebtedness. The only reference to a figure made by her in her evidence was a statement that she had paid ‘4 000 and something’ towards the cost of an ambulance to transport the respondent from one State hospital to another (a fact that was disputed by the respondent’s father when he later testified).

[26] Instead, contrary to what had been pleaded, the appellant testified as follows when led in chief by her legal representative, Mr Reece:

‘MS C JOUBERT: Mr Drotsky came to me and he said he was going to give me this money to sort out the legal aspect with my ex-husband and he also said to me that he is giving it as a gift to Sarah should I pass away.

MR REECE: Sarah is your daughter?

MS C JOUBERT: Sarah is my daughter. She wouldn’t have to deal with her very difficult father because he is very difficult. If I could resolve this because I had a pending court case with him.’

[27] From this, it appears that three reasons for the payment were now advanced by the appellant: the alleged indebtedness of the respondent as described in her plea; the payment of her legal fees by the respondent arising out of legal proceedings that she had with her ex-husband; and a gift, not to her, but to her daughter, Ms Joubert. The appellant appeared to have abandoned the grounds pleaded by her and embraced new and different reasons. She was precluded from doing so and ought not to have been allowed to advance that version which contradicted her pleaded version. The Afrikaans statement referred to by the appellant in her condonation affidavit is struck by the same prohibition.

[28] A final point raised by the appellant in her condonation application concerning her prospects of success is that the regional magistrate failed to attach sufficient weight to the evidence of a so-called independent witness called by the appellant, namely Ms Botes. Ms Botes was a friend of the appellant and her daughter and testified that she believed the payment had been a gift and not a loan. She, however, had no direct evidence of the arrangement and her opinion of

what the true nature of the transaction was correctly held no attraction for the regional magistrate. Her evidence did not advance

the issue on behalf of the appellant.

[29] Mr Sukdeo, who appeared for the appellant, submitted that a procedural irregularity had occurred at the trial. This submission was grounded in the fact that the appellant had testified first. That is what, indeed, happened, but it happened by agreement between the parties as the following was said by Mr Suhr, who appeared for the respondent, and which was assented to by Mr Reece who, as previously stated, appeared for the appellant:

‘It has been agreed between the parties that the burden of proof is on the defendant and my learned friend will thus be adducing evidence.

COURT: Thank you.

MR REECE: I confirm that’s correct, your worship.’

Who commences to lead evidence at trial is determined by the pleadings and any agreement between the parties. Mr Sukdeo’s submission that the regional magistrate should have interfered and directed the respondent to commence giving evidence has no merit. The fact that the appellant gave evidence first did not have any material impact on the outcome of the trial. All the evidence that could be led was called, considered and evaluated by the court.

[30] The receipt by the appellant of the payment of R400 000 was admitted. Given the specific defence that it was paid to her as a gift, the appellant bore the onus of establishing that proposition,[14] for a gift or donation is not presumed to have occurred simply because one person has paid money to another. Mr Sukdeo submitted in argument that the notation on the respondent’s bank statement previously referred to established that the payments received by the appellant were actually an investment. It is entirely conceivable that a loan may be an investment. For example, holding a savings account with a bank that earns interest is both a loan to the bank and an investment. What is more significant, perhaps by its omission, is that the notation did not refer to the payments as being a gift to the appellant.

[31] In my view, the appellant, did not discharge that onus that she bore and I am unable to discern any misdirection in the reasoning of the regional magistrate in the judgment that she delivered. It appears therefore to me that the appellant does not have good prospects of ultimately succeeding.

[32] The appellant’s condonation application is threadbare and starved of facts. It is inadequate in its content and fails to explain the full period of the delay. Allied to this is the fact that the appellant has poor prospects of success. The law encourages litigants to act with due speed when litigating. Those that do not do so may find the court to be unwilling to come to their assistance when issues arise. The delay in delivering the notice of appeal in this instance is excessively long. If condonation were to be granted, the prized principle of finality would, in my view, be undermined. By virtue of the interplay of all these factors, it appears to me not to be in the interests of justice to condone the late filing of the appellant’s notice of appeal. The appeal is thus not properly before us and must be struck from the roll.

[33] Before concluding, one final issue needs to be addressed. It was mentioned at the beginning of this judgment that the appellant is represented by counsel who holds a trust account. He may therefore be directly consulted by clients without the involvement of an attorney. A reading of the appellant's affidavit in support of her condonation application establishes that it was commissioned by her counsel. Asked about this, Mr Sukdeo submitted that this occasioned no prejudice. I am not able to agree with that submission. The administration of justice is prejudiced when legal practitioners do

not comply with the regulations that govern the administering of oaths.

[34] Regulation 7(1) of the Regulations Governing the Administering of an Oath or Affirmation (the regulations)[15] reads as follows:

‘A commissioner of oaths shall not administer an oath or affirmation relating to a matter in which he has an interest.’

[35] In *Royal Hotel, Dundee, and others v Liquor Licensing Board, Area No 26; Durnacol Recreation Club v Liquor Licensing Board Area, No 26*, [16] this court observed that:

‘... a commissioner of oaths is required to be impartial and unbiased in relation to the subject matter of the affidavit [that he or she commissions] and that, if he is otherwise, he has an interest in the matter’.[17]

The court held that an attorney acting for a party in a matter has an interest in that matter which precludes him from functioning as a commissioner of oaths to attest an affidavit used in that litigation and went on to explain the reasoning behind that conclusion as follows:[18]

‘An attorney practises his profession for gain; he carries on his practice to make a living, albeit he submits to and is bound by

professional rules of conduct. In the course of carrying on his practice, he has an interest to earn fees and in each matter to which he gives attention, that is an interest attributable to him. In addition, and even where he acts *pro Deo* or *pro amico*, he has an interest to improve, increase and consolidate his goodwill, which is a valuable thing; it is to his interest in this respect to bring his client's affairs, whether litigious or otherwise, to a successful conclusion – “success breeds success”. Not only, consequently, has he these financial interests in any matter in which he is acting, but, because it is to his interest to bring his client's affairs to a successful conclusion, he cannot be impartial and unbiased; if he functions as a commissioner of oaths in the matter, he is not independent.’

[36] These words apply with equal force to an advocate who holds a trust account. Counsel ought, therefore, not to have commissioned the respondent's affidavit. This is, quite frankly, an elemental principle and should not have to be discussed in this judgment. Affidavits commissioned in the fashion employed in this matter do not comply with the regulations and are, therefore, not affidavits. By virtue of the decision to which I have come as to the fate of this appeal, it is not necessary to take this point to its logical conclusion, but the facts of

this matter should be a salutary warning

to legal practitioners, who are not aware of the content of the regulations, to familiarise themselves with them.

[37] It does not appear that the respondent has taken any steps in relation to this appeal and did not, as previously recorded, appear at the appeal. It seems fair to me that in those circumstances there should be no order as to costs.

[38] In the circumstances, I would propose the following order:

MOSSOP J

I agree and it is so ordered:

MNGADI J

APPEARANCES

Counsel for the appellant: Mr Sukdeo Instructed by: Advocate H van Heerden Suite 10 Illovo Business Park Lower Illovu Counsel for the respondent: No appearance

- [1] Rule 51(3) of the Magistrates' Court Rules at the time provided as follows: 'An appeal may be noted within 20 days after the date of a judgment appealed against or within 20 days after the registrar or clerk of the court has supplied a copy of the judgment in writing to the party applying therefor, whichever period shall be the longer.'
- [2] There were 384 days between the date upon which judgment was handed down and the date upon which the notice of appeal was filed.
- [3] It was common cause at the trial that notwithstanding the particulars of claim stating that the sum of R400 000 was paid by the respondent to the appellant, the amount actually paid by the respondent to the appellant was R400 100. The respondent limited his claim to the amount of R400 000, possibly to keep it within the jurisdiction of the regional court as the amount of R400 000 is the upper limit of the regional court's monetary jurisdiction. See: Determination of monetary jurisdiction for causes of action in respect of regional divisions, GN 216, GG 37477, 27 March 2014).
- [4] The respondent's first name is Sarah (S) and the respondent's first name is Jurie (J), hence 'S and J'.
- [5] Van Wyk v Unitas Hospital and another (Open Democratic Advice Centre as Amicus Curiae) [2007] ZACC 24; 2008
- (2) SA 472 (CC) para 31 (Van Wyk).
- [6] PAF v SCF [2022] ZASCA 101; 2022 (6) SA 162 (SCA) para 15.
- [7] Commissioner for Inland Revenue v Burger 1956

- [4] SA 446 (A) at 449G-H.
- [8] Mulaudzi v Old Mutual Life Assurance Co (South Africa) Ltd and others
- [2017] ZASCA 88; 2017 (6) SA 90 (SCA) para 26.
- [9] Independent Municipal and Allied Trade Union on behalf of Zungu v SA Local Government Bargaining Council and others (2010) 31 ILJ 1413 (LC) para 13.
- [10] Uitenhage Transitional Local Council v South African Revenue Service 2004 (1) SA 292 (SCA); [2003] 4 All SA 37 (SCA) para 6.
- [11] Valor IT v Premier, North West Province and others
- [2020] ZASCA 62; 2021 (1) SA 42 (SCA) para 38. See also United Plant Hire (Pty) Ltd v Hills and others 1976 (1) SA 717 (A) at 720E-G; Darries v Sheriff, Magistrate's Court, Wynberg, and another 1998 (3) SA 34 (SCA) at 40H-41E.
- [12] See in this regard s 186 of the Criminal Procedure Act 51 of 1977.
- [13] Van Wyk v The MEC: Department of Local Government and Housing of the Gauteng Provincial Government and others [2019] ZASCA 149 para 11.
- [14] Timoney and King v King 1920 AD 133 at 139. In Avis v Verseput 1943 AD 331 at 345 it was held that this principle is based upon the following passage from Voet (39.5.5): 'In dubio autem donatio non praesumitur quamdiu alia conjectura capi potest adeoque qui eam allegat licet in exceptione probare debet', meaning that 'in case of doubt a donation is not presumed as long as any other conjecture or interpretation is possible. And therefore he who alleges a gift - even if it be by way of an exception (when he is sued), ought to prove it'.
- [15] Regulations Governing the Administering of an Oath or Affirmation, GN R 1258, GG 3619, 21 July 1972.
- [16] Royal Hotel, Dundee, and others v Liquor Licensing Board, Area No 26; Durnacol Recreation Club v Liquor Licensing Board Area, No 26 1966
- (2) SA 661 (N).
- [17] Ibid at 668G-H.
- [18] Ibid at 669G-670A.

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Prepared on 9 October 2026 · Esheria