

SOUTH AFRICA / JUDGMENT

Minister of Defence and Military Veterans and Others v O'Brien N.O and Others (76995/2018) [2020] ZAGPPHC 178 (4 May 2020)

[2020] ZAGPPHC 178

COURT

North Gauteng High Court, Pretoria

BEFORE

AC Basson

CASE / FILE NUMBER

76995/2018

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HIGH

COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

(1)

REPORTABLE: NO.

(2)

OF INTEREST TO OTHER JUDGES: NO.

(3)

REVISED.

CASE

NO: 76995/2018

4/5/2020

In the matter between:

THE MINISTER OF DEFENCE

AND

First Applicant

MILITARY

VETERANS

CHIEF OF THE SOUTH AFRICAN

Second Applicant

NATIONAL DEFENCE

FORCE

SECRETARY OF DEFENCE

AND

Third Applicant

THE SOUTH AFRICAN NATIONAL

DEFENCE FORCE

Fourth Applicant
and
LIEUTENANT COLONEL K.B.
O'BRIEN N.O.
First Respondent
STAFF SERGEANT D.T.
MOKOENA
Second Respondent
LIEUTENANT P.Z.
MABULA
Third Respondent

JUDGEMENT

INTERLOCUTORY APPLICATIONS

AC BASSON, J

- [1] This is an application for condonation for the late filing of the applicants' rule 30 and rule 30A[1] application to have the respondent's answering affidavit in the review application, launched by the applicants as well as the founding affidavit in the counter-application filed by the respondent (in the review application – the main application under case number 76995/18), declared an irregular step and set aside. The applicants (the Minister of Defence and Military Veterans and others) also ask for a cost order on a punitive scale. In the alternative, application is made that the time period within which the applicants may file the rule 30 and rule 30A application, be extended to a period determined by this court.
- [2] Lt Col O'Brien (the respondent in this application) is a former military judge. The applicants filed a review application (the main application) in which they seek to review and set aside two judgments and rulings handed down by the respondent more than three years ago (on 29 August 2016 and 14 October 2016, respectively).

Filing of the review application on 6 November 2018

- [3] The review application was launched on 6 November 2018 - two years after the rulings. This review application is still pending before this court. The review application focuses, inter alia, on comments made by the respondent concerning alleged threats to the judicial independence of military courts.
- [4] The respondent was also brought before a disciplinary board of enquiry convened by a member of the executive to investigate so-called "constitutional exclamations". As a result of these events, the respondent was barred from hearing new cases for the remainder of his assignment as a military judge and his assignment was ultimately not renewed.

[5] In response to the applicants' review application, the respondent filed the rule 53 record on 6 December 2018. On 5 April 2019, the applicants informed the respondent's attorneys that they would not be supplementing their founding papers.

[6] On 28 June 2019, the respondent filed a combined or consolidated answering affidavit in the main application and a founding affidavit in support of his counter-application. In these proceedings the

respondent seeks constitutional remedies primarily to protect the judicial independence of military courts. To date the applicants have not filed a reply nor answer to the respondent's answering affidavit in the review and similar no response was received in regard to the respondent's founding affidavit, filed in support of his counter-application.

Rule 30 and rule 30A notice: 27 August 2019

[7] On 27 August 2019, almost two months after the respondent had filed his answering affidavit and counter-application, the applicants delivered their notice to remove cause of complaint in terms of rule

30 and rule 30A. The essence of the complaint is that it is improper to file a combined affidavit in answer to the founding affidavit in the review application as well as a founding affidavit in support of the counter-application.[2]

[8] On 9 September 2019, the respondent's attorneys responded by stating that there is no substance to these complaints and further denied any non-compliance with the rules. The applicants were pertinently called upon to file their replying affidavit in the review application as well as their answering affidavit in the counter-application without further delay. It was further clear from this correspondence that any application in terms of rule 30 and 30A would be vigorously opposed.

Application in terms of rule 30 and 30A: 26 November 2019

[9] The matter was referred for case management in November 2019. On 26 November 2019, the applicants launched their interlocutory application in terms of rule 30 and 30A, seeking to strike out the combined answering affidavit and counter-application of the respondent.[3]

[10] Because the application in terms of rule 30 and 30A is out of time, the applicants simultaneously filed a condonation application for the late filing of their interlocutory application. The condonation application was set down for hearing on an expedited basis, pursuant such request from the applicants.

[11] The application in terms of rule 30 and 30A states that the applicants "became aware of the irregular step on Wednesday, the 14th of August 2019, during consultation". It then sets out the grounds for the irregularities complained of with reference to rule 30(2)(b). After having listed no less than eleven grounds of complaint, the applicants pray for an order that the rule 30 be uphold with costs on an attorney and client scale and an order setting aside the respondent's founding affidavit and notice of motion in the counter application, together

with his answering affidavit in the main application, as an irregular step. It is stated that the applicants are severely prejudiced by the respondent's "failure to have a proper counter-application" and that the respondent's papers make it impossible for the applicants to reply to his answering affidavit as well as his founding affidavit filed in the counter-application. These allegations are followed by various prayers for relief with reference to the provisions of rule 30A.

Is the opposition to the rule 30 and 30A applications out of time?

- [12] Before I turn to the merits of the condonation application, the following point must first be dealt with. Counsel on behalf of the applicants submitted that the respondent's opposition to the rule 30 and 30A application is out of time and consequently the rule 30 and 30A application is unopposed. In this regard it was contended that the respondent ought to have filed a notice of intention to oppose when it had received the notice in terms of rule 30(2)(b) (on 27 September 2019) and, because they did not, their opposition is out of time.
- [13] There is no substance in this submission: Apart from the fact that rule 30 does not require a party on whom a notice to remove cause of complaint was served to file a notice of intention to oppose, this submission loses sight of the fact that a "notice" does not constitute an "application" as contemplated by the rule. The respondent was only obliged to file a notice of intention to oppose once the "application", as contemplated in rule 30 and 30A was served on him.
- [14] As far as the rule 30 and 30A application is concerned, the respondent duly opposed this application by serving its notice of intention to oppose - signed on 30 November 2019 - on the applicants on 2 December 2019.
- [15] The applicants' condonation application was served on the respondent on 26 November 2019, simultaneously with the rule 30 and 30A application. The notice of motion stipulates that the respondent may deliver a notice of intention to oppose within 5 (five) days of receipt of the application. The respondent filed its notice of intention to oppose on 2 December 2019, which is well within the required time period to do so. The respondent thereafter served its answering affidavit on 6 December 2019. Consequently, the respondent's opposition does not require an application for condonation as contended for by the applicants and the matter before court is opposed.

Respondent's opposition to the condonation application

- [16] The respondent submitted that the condonation application, in any event, falls to be dismissed broadly on two grounds: Firstly, the applicants have failed to establish grounds for condonation and, secondly, there is no merit in their complaints under rule 30 and rule 30A: The filing of a combined affidavit that serves as both the answering affidavit in the main review and the founding affidavit in the counter-application is standard practice. Furthermore, the applicants have failed to demonstrate how this practice breaches the Uniform Rules of Court, nor have they established any prejudice that warrants the drastic

relief sought in their application.

Rule 30 and 30A

[17] Rule 30 of the Uniform states the following:

“30 Irregular proceedings

- (1) A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside.
- (2) An application in terms of subrule (1) shall be on notice to all parties specifying particulars of the irregularity or impropriety alleged, and may be made only if —
 - (a) the applicant has not himself taken a further step in the cause with knowledge of the irregularity;
 - (b) the applicant has, within ten days of becoming aware of the step, by written notice afforded his opponent an opportunity of removing the cause of complaint within ten days;
 - (c) the application is delivered within fifteen days after the expiry of the second period mentioned in paragraph (b) of subrule (2).
- (3) If at the hearing of such application the court is of opinion that the proceeding or step is irregular or improper, it may set it aside in whole or in part, either as against all the parties or as against some of them, and grant leave to amend or make any such order as to it seems meet.”[4]

[18] The following three procedural requirements must be met in any rule 30 application:

- (i) Firstly, the applicant must not have taken a further step with knowledge of the irregularity (rule 30(2)(a));
- (ii) secondly, the applicant must deliver a written notice “within ten days of becoming aware of the step” affording the opponent an opportunity to remove the cause of complaint within ten days (rule 30(2)(b));
- (iii) thirdly, if the cause of complaint is not removed, the applicant must then file an application “on notice to all parties”, specifying particulars of the irregularity alleged, within fifteen days after the expiry of the ten-day notice period in the initial notice to remove cause of complaint (rule 30(1) read with rule 30(2)(b) and (2)(c)).

[19] Rule 30A reads as follows:

“30A Non-compliance with rules

- (1) Where a party fails to comply with these rules or with a request made or notice given pursuant thereto, or with an order or direction made in a judicial case management process referred to in rule 37A, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days from the date of delivery of such notification, to apply for an order—
 - (a) that such rule, notice, request, order or direction be complied with; or
 - (b) that the claim or defence be struck out.
- (2) Where a party fails to comply within the period of 10 days contemplated in subrule (1), application may on notice be made to the court and the court may make such order thereon as it deems fit.”

Was there compliance with the prescribed time periods?

The first delay: The rule 30 and 30A notice is out of time

- [20] In terms of rule 30(2)(b) the ten-day time period begins to run from the date that the party becomes aware of the step and not within 10 (ten) days of becoming aware of the alleged irregularity thereof.[5]
- [21] Did the applicants deliver their notice to remove cause of complaint within 10 (ten) days of “becoming aware of the step” as contemplated in terms of rule 30(2)(b)?
- [22] The respondent’s combined answering affidavit and counter-application in the main review were served on 28 June 2019. The applicants thus became aware of the step as from 28 June 2019.
- [23] The notice in terms of rule 30 and 30A was only served on 27 August 2019 – almost two months after the respondent served his affidavit - therefore well beyond the expiry of the 10 (ten) day period in terms of the rule under which the notice had to have been served.
- [24] The applicants have not sought condonation for this ten-day delay within which the notice to remove cause of complaint had to have been served. In argument it was, however, submitted on behalf of the applicants that it was not necessary to apply for condonation because the applicants only became aware of the irregular step on 14 August 2019.
- [25] There is no merit in this contention. I have already pointed out that the ten-day period begins to run within 10 (ten) days of becoming aware of the step not of the irregularity thereof. In this instance the ten-day period began to run on the date on which the step was taken, namely 28 June 2019.
- [26] In *Minister of Law and Order v Taylor* No[6] the court was faced with a similar question:
“The question is whether the words 'after becoming aware of the irregularity' mean after becoming aware that a step has been taken which is irregular or after becoming aware of the irregularity itself.[7]

The court pertinently rejected the argument that the time period only starts running from the time when the applicant became aware of the fact that the step that was taken is irregular. The court concluded as follows:[8]

“Applicant sought, by notice of motion served on respondent on 22 February 1988, to have the proceedings set aside in terms of Rule 30(1) of the Uniform Rules of Court as being irregular. The application would have been brought within the 15-day period specified in the relevant Rule if it were to be calculated from the date on which defendant had become aware that the step taken by plaintiff was irregular but not if it were calculated from the date on which defendant had become aware of the step without appreciating its irregularity.

Held, that the word 'irregularity' used in Rule 30(1) was merely a reference to a 'step or proceeding' which was irregular and once a party had become aware that a step or proceeding had been taken, and not when the party appreciated the irregularity of the step, the 15-day period started to run against that party.

Held, accordingly, that the application was out of time and, in the absence of an application for condonation, fell to be dismissed.”

[27] The fact that the applicants only became aware of the irregularity on 14 August 2019, when they consulted with their legal representative, is therefore irrelevant.

[28] In respect of the notice to remove cause of complaint in terms of rule 30 and 30A, the applicants are thus out of time. The applicants have failed to provide a satisfying explanation for this delay in their founding affidavit. The only explanation for the delay is to be found in the replying affidavit, namely that they only became aware of the irregularity when they consulted with their legal representatives. This explanation is, for the reasons set out herein below, not satisfactory.

The second delay

[29] The applicants filed their rule 30 and 30A application almost two months late. The fifteen-day period after the lapse of the ten-day period (specified in the notice to remove cause of complaint) lapsed on 1 October 2019. In other words, at best for the applicants their application was due by 1 October 2019. They only served their application in terms of rule 30 and 30A on 26 November 2019.

[30] What makes matters worse for the applicants is the fact that they were made aware by the respondent's legal representatives of the fact that any application in terms of rule 30 and 30A would be late. In a letter dated 9 October 2019, the respondent's legal representatives informed the applicants' legal representatives of their failure to serve any rule 30 and rule 30A application:

“We confirm that your time period in which to serve and file an Application in terms of Rule 30A and Rule 30 lapsed on 01 October 2019 and further, that no such application was brought by your client.

In the circumstances, we hereby demand that you deliver the answering affidavit to our counter application within 5 days of receipt

hereof.”

[31] No response to this letter was forthcoming.

[32] During this time the applicants wrote to the Deputy Judge President requesting judicial case management in respect of their interlocutory applications - which had in any event at that stage not yet been filed or delivered. The respondent agreed that case management was indeed necessary, to ensure that the main application and his counter-application could be progressed without further delay.

[33] The parties hereafter attended a meeting with the acting Deputy Judge President on 28 October 2019.

[34] On 11 November 2019, the attorneys on behalf of the respondent recorded that no application in terms of rule 30 and 30A had yet been filed or delivered. In this letter the respondent’s attorneys called upon the applicants to deliver their application together with a condonation application without further delay.

[35] The applicants only filed their rule 30 and 30A application together with a condonation application on 26 November 2019.

Explanation tendered for the late filing of the rule 30 and 30A application

[36] The explanation tendered in the founding affidavit for this delay is that the matter is now under judicial case management and therefore the setting down of the matter has to be in terms of a directive from the office of the Deputy Judge President or by agreement between the parties.

[37] There is no merit in this submission. The mere fact that a matter has been placed under case management is irrelevant in as far as compliance with the rules is concerned. If regard is had to rule 37A(2)(c) of the rules it is clear that case management does not absolve parties of their duties to comply with the rules:

“(2) *Case management through judicial intervention-*

...

(c) shall be construed and applied in accordance with the principle that, notwithstanding the provisions

herein providing for judicial case management, the primary responsibility remains with the parties and their legal representatives to prepare properly, comply with all rules of court, and act professionally in expediting the matter towards trial and adjudication.”

[38] Moreover, organs of state – such as the applicants in the present instance - are held to a higher standard and must be scrupulous in their compliance with procedural requirements. This was confirmed by the Constitutional Court in *Member of the Executive Council for Health, Eastern Cape & another v Kirland Investments (Pty) Ltd t/a Eye & Lazar Institute*[9] in no uncertain terms:

“...Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure circumventing lifeline. It is the Constitution’s primary agent. It must do right, and it must do it properly.”[10]

[39] It was further contended on behalf of the applicants that they did attempt to enroll the matter but found that there were no available dates until mid-2020. This explanation is disturbing.[11] Congestion on the roll does not excuse the failure to file an application timeously: All litigants face the same difficulty. In

this regard I am in agreement with the submission on behalf of the respondent that if such an excuse were to be accepted, the time

periods specified in rule 30 would be rendered meaningless.

[40] The applicants also contended that the respondent will not be prejudiced by this delay and submitted that the delay can be cured by a cost order. The respondent disagrees with this contention and points out that the belated interlocutory application had the effect of delaying the final resolution of the main review application by at least eight months. It is further contended on behalf of the respondent that he has been prejudice in that he suffered severe harm to his reputation, his career and his family, as a result of the applicants’ unlawful attempts to punish him for the comments he made in 2016. Although the applicants deny that they are punishing the respondent for making the alleged remarks, I am satisfied that the respondent has placed sufficient facts before the court in this application that he is prejudiced by the delay in finalising the main review application.

[41] In respect of the application for condonation, it is therefore concluded that the applicants have not made out a proper case the granting of condonation for the late filing of the applicants’ rule 30 and 30A applications.

Is there any merit to the complaints set out in the rule 30 and rule 30A application?

[42] Apart from the fact that the applicants have not tendered a reasonable explanation for the delay, the eleven alleged causes of complaint, contained in their two notices have, in any event, no merit.

[43] The main cause of complaint seems to be that it is impermissible to file a consolidated affidavit that serves as both an answering affidavit and a founding affidavit in the counter-application. This complaint is without merit. Rule 6(7) of the Uniform Rules does not require a separate or self-standing affidavit in support of a counter-application.[12] The court was also not referred by counsel on behalf of the applicants, to any case law requiring such a self-standing affidavit

in respect of a counter-application.

[44] Harms Civil Procedure in the Superior Courts[13] explains why a separate affidavit raising a counter-application is not required:

“If a respondent requires more than the dismissal of the application and a consequent order for costs, it is incumbent upon

him to make a counter-application. The rules are silent about how this should be done, but by analogy with the bringing of a counterclaim in actions it is unnecessary, although preferable, to file a separate notice of motion. It is sufficient to include the prayers in the answering affidavit. The answering affidavit may also serve as the founding affidavit in the counter-application. The applicant’s replying affidavit then serves additionally as his answering affidavit and the respondent has a right of reply.”

[45] Also, the respondent’s counter-application begins at paragraphs 196 – 248 of the answering affidavit, under the heading counter-application. The applicants cannot be left in any doubt as to the substance of the respondent’s case and are, in my view, able to address the case made out in the counter-application.

[46] In *Graham & another v Law Society, Northern Provinces & others*,[14] an order was similarly sought to set aside a counter-application as an irregular step. The argument was that the counter-application was procedurally irregular, inter alia, because it attempted to ‘reopen the main application and to initiate new, substantive relief’ in respect of matters already adjudicated upon in the main application. Consequently, this effectively amounted to new orders, or would amend or vary the orders granted. The court disagreed with the contention and held that the wording of rule 6(7) permits the bringing of a counter-application by any party to any application. In that matter the applicants were allowed to bring a counter-application and no irregularity was found to have been committed. The court also noted that there was nothing in the rules that required the counter-application to be of the same character as the main application: The counter-application was in fact incidental to the main application. Because the objections were held to be unfounded the application was dismissed and the applicants were ordered to pay costs on the attorney-and-client scale.

[47] It was further contended on behalf of the applicants that the respondent’s affidavit “makes reference to annexures without specifically stating which relevant portions and paragraphs” are relied upon. The applicants do not, however, identify which specific annexures or what portions thereof. The respondent further explains in his affidavit that it was necessary to

attach a substantial number of documents to his affidavit to provide the review court with a full account of the factual background, particularly because the applicants have not done so. I am in agreement with the submission that this complaint does not justify the setting aside of the respondent's affidavit.

- [48] The applicants also take issue with the fact that the respondent uses cross referencing in the ad seriatim section of his affidavit. There is no merit in this complaint. In this regard the respondent explains that some of the issues are dealt with in more detail in the main body of his affidavit and by cross referencing to the main application, unnecessary repetition is avoided.
- [49] The applicants further take issue with aspects of the substance of respondent's affidavit. In paragraph 297 of the answering affidavit, the respondent claims that there was a typographical error in one of his judgements, where reference was made to section 342A(3) (3) of The Criminal Procedure Act[15]. He explains that he intended to refer to section 342(3) (f) of The Criminal Procedure Act instead. Again, there is no merit in this complaint. Not only is it not indicated by the applicants how this constitutes a breach of the Uniform Rules, the applicants cannot be prejudiced by this clarification nor does this correction of a typographical error preclude them from filing their replying and answering affidavits.
- [50] Lastly, in order to succeed in an application under rule 30 and rule 30A, the applicants must satisfy not only that there has been non-compliance with the Rules, but that the non-compliance has caused them prejudice to such a degree that warrants the relief sought. The applicants have not filed any affidavit in support of their rule 30 and rule 30A application/s. Accordingly, they have failed to place any evidence before the court to substantiate any claim of prejudice.

Conclusion

- [51] Having weighed up considerations such as the length of the delay, which is significant, the reasonableness of the explanation for the delay, the prospects of success, the importance of the case, the respondent's interest in finality and whether it would be in the interest of justice to grant condonation, I am of the view that the applicants have not made out a case for condonation.[16] The application for condonation for the late filing of the rule 30 and 30A application is therefore dismissed. I am in agreement with the submission that dismissal should be with costs on a punitive scale. Not only were the applications brought out of time, the applications are misconceived and the reasons tendered for the delay indefensible.

Order

- [52] The following order is made:

1. The application for condonation is dismissed.

2. The Rule 30 and 30A applications are dismissed.
3. The applicants, jointly and severally, the one paying the other to be absolved, are ordered to pay the costs on an attorney and client scale.

AC BASSON

Judge of the High Court

Gauteng Division, Pretoria

Appearances

For the applicants: Adv EK Tsatsi SC

Adv TC Kwindu

Instructed by:

The State Attorney

For the respondent: Adv McConnachie

Instructed by:

Griesel Breytenbach Attorneys

[1] Uniform Rules of Court.

[2] There are eleven causes of complaint. I will refer to them in more detail hereinbelow.

[3] Although rule 6(1) of the rules require that an “application” must be brought on notice of motion and supported by an affidavit as to the facts upon which the applicant relies for relief, rule 6(11) of the rules does not prescribe any form of a notice of motion for interlocutory applications and other applications incidental to pending proceedings. Such application may be brought on notice, supported by such affidavits as the case may require. It is also not essential that the application be supported by affidavits and it may therefore be decided without affidavits.

[4] My emphasis.

[5] Erasmus Superior Court Practice RS 1, 2016, D1-355 comments that Rule 30, in its amended form, “now makes it clear that a party must give notice to his opponent to remove the cause of complaint within ten days of becoming aware of the fact that the step concerned had been taken, and not within ten days of becoming aware of the irregularity of the step.”

[6] 1990 (1) SA 165 (E).

[7] Ibid at page 166C-D.

[8] Quoted from the headnote.

[9] 2014

(3) SA 481 (CC) para 82.

[10] See further *Public Protector v South African Reserve Bank* (CCT107/18) [2019] ZACC 29; 2019 (9) BCLR 1113 (CC); 2019 (6) SA 253 (CC) at para 152. See also: *Grootboom v National Prosecuting Authority and another* 2014

(2) SA 68 (CC): “[30] There is another important dimension to be considered. The respondents are not ordinary litigants. They constitute an essential

part of government. In fact, together with the office of the State Attorney, the respondents sit at the heart of the administration of justice. As organs of state, the Constitution obliges them to 'assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.'”

[11] *Grootboom v National Prosecuting Authority and Another* 2014 (2) SA 68 (CC): “[23] 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.”

[12] See *Truter v Degenaar* 1990 (1) SA 206 (T).

[13] “B.57. Rule 6(7) of the Uniform Rules provides for the following: (a) Any party to any application proceedings may bring a counter-application or may join any party to the same extent as would be competent if the party wishing to bring such counter-application or join such party were a defendant in an action and the other parties to the application were parties to such action. In the latter event the provision of rule 10 will apply. (b) The period prescribed with regard to applications apply to counter-applications: Provided that the court may on good cause shown postpone the hearing of the application.”

[13] “B.57. Rule 6(7) of the Uniform Rules provides for the following:

(a) Any party to any application proceedings may bring a counter-application or may join any party to the same extent as would be competent if the party wishing to bring such counter-application or join such party were a defendant in an action and the other parties to the application were parties to such action. In the latter event the provision of rule 10 will apply.

(b) The period prescribed with regard to applications apply to counter-applications: Provided that the court may on good cause shown postpone the hearing of the application.”

[14] 2016

- (1) SA 279 (GP): “[43] Be that as it may, as I have already found, there is no bar to the remedies sought by the applicants in the counter-application. The relief will be permissible under rule 6(11) read with rule 6(7)(a), or under rule 6(7)(a) alone... The mere quest for new and additional relief, in any event, cannot of itself constitute an irregularity. There is no bar in law or in the rules to a litigant endeavouring to obtain a remedy in a counter-application that is more expansive than, or even unrelated to, relief sought in the main application. As I have said more than once, rule 6(7)(a) imposes no such limitation. Just as nothing prevents a defendant in an action instituting a claim in reconvention that is entirely distinct from the main claim, there is no reason in principle why the same should not apply in an application.”

[15] Act 51 of 1977.

[16] See in general: *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) and *Grootboom v National Prosecuting Authority and Another* 2014

- (2) SA 68 (CC): [22] I have read the judgment by my colleague Zondo J. I agree with him that, based on *Brummer and Van Wyk*, the standard for considering an

application for condonation is the interests of justice. However, the concept 'interests of justice' is so elastic that it is not capable of precise definition. As the two cases demonstrate, it includes: 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. It is crucial to reiterate that both *Brummer and Van Wyk* emphasise that the ultimate determination of what is in the interests of justice must reflect due regard to all the relevant factors but it is not necessarily limited to those mentioned above. The particular circumstances of each case will determine which of these factors are relevant.

[23] 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.”

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crucial to reiterate that both Brummer and Van Wyk emphasise that the ultimate determination of what is in the interests of justice must reflect due regard to all the relevant factors but it is not necessarily limited to those mentioned above. The particular circumstances of each case will determine which of these factors are relevant.

[23] 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.”

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