

SOUTH AFRICA / JUDGMENT

Ngqushwa Municipality and Others v Economic Freedom Fighters and Others (446/2018) [2020] ZAECBHC 15 (17 June 2020) [2020] ZAECBHC 15

COURT

Eastern Cape High Court, Bhisho

BEFORE

B Hartle

CASE / FILE NUMBER

446/2018

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NOT

REPORTABLE

IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE LOCAL DIVISION, BHISHO)

Case

No. 446/2018

In

the matter between:

NGQUSHWA
MUNICIPALITY
First Applicant
MAYOR
OF NGQUSHWA MUNICIPAL
COUNCIL
Second Applicant
SPEAKER
OF NGQUSHWA
MUNICIPAL
COUNCIL
Third Applicant
and
ECONOMIC FREEDOM
FIGHTERS
First
Respondent
SIHOSENKOZI
GWAVU

Second Respondent
MLODOLOZI
MANKEYA
Third Respondent
MEC FOR
COOPERATIVE GOVERNANCE
AND TRADITIONAL
AFFAIRS
Fourth Respondent

JUDGMENT

HARTLE J

- [1] The applicants, the first to third respondents in the main application, sought an order by way of an interlocutory application condoning the late delivery of their answering affidavits and a Rule 7 notice which they filed in the main application in anticipation of the present relief being granted. Costs were sought only in the event of the respondents opposing the application. The first to third respondents, the applicants in the main application, are opposing the application.
- [2] The purpose of the application, according to the applicants, is to allow the parties an opportunity to “properly ventilate” the issues outlined in the main application. By granting them the indulgence sought, they will be able to rely on a defence which they seek to raise on the merits as opposed to arguing only a question of law which was raised in an earlier notice filed on their behalf in terms of Rule 6 (5) (d) (iii), which I believe it is fairly safe to say does not serve the interests of the applicants. Indeed, the claim in the notice is that the main application should fail for lack of a so-called essential averment that the Municipality falls within a certain category of municipality that may establish an Executive Committee.[1] Not only is its status as such a municipality common cause, but the fact that it is entitled to establish an Executive Committee at all is pivotal to the belated defence that the applicants seek to introduce.
- [3] The applicants explain that the reason for the late introduction of their answering affidavits is that they obtained a second legal opinion in December 2018 that the Municipality had a defence to the main application whereas they had been advised by their prior legal representatives, whose mandate they terminated on 11 January 2019, that they held no prospects of a successful opposition to the relief sought in the main application. Along the lines of the advice given earlier, the Municipality had, a month or so after filing a notice of intention to oppose the application, simply filed a notice of intention to raise a point of law at the hearing without filing any answering affidavits, ostensibly electing thereby and at the time not to raise a defence on the merits.

- [4] Evidently wasting no time after obtaining the last legal opinion, the Municipality's present attorneys of record filed a notice of acting together with the Rule 7 notice on 24 January 2019 and followed this up by the launch of the present application delivered

together with the proposed answering affidavits on 28 January 2019.

- [5] In the main application, which was launched in June 2018, the first to third respondents seek an order that the establishment of the Executive Committee of the Municipality on 3 August 2016 is declared "not to be fairly representative of the opposition parties"[2] (sic) and a further order that the Council consider and decide their request for the appointment of a member from their ranks to the Executive Committee of the Municipality.[3]

- [6] The gist of the present advice given to the applicants is that, far from being unfair, the Council had on 25 October 2017, months before the launch of the main application, resolved at a caucus meeting at which the second respondent himself was present, that it had adopted an alternative mechanism to elect members of the executive committee as permitted in terms of section 43 (3) of the Municipal Structures Act, No. 117 of 1998 ("The Structures Act"), rather than employing proportional representation as envisaged by section 43 (2) of the Act in respect of the impugned election which, in terms of sub-section 3, can be deviated from. The latter sub-section provides that a municipal council may determine any alternative mechanism for the election of an executive committee, provided it complies with section 160 (8) of the Constitution.[4] They claim that the respondents omitted to disclose the adoption of this resolution which in the municipality's view remains valid and lawful until set aside by a court of law, and that this in effect renders their complaint that the Executive Committee of the Council is not properly constituted and does not comply with the provisions of the law without any valid basis whatsoever.

- [7] As for the Rule 7 notice, the applicants do not in their founding affidavit in the present application give any context for it being

filed when it was or its significance to the main application, neither do they indicate when it came to their attention that the

second and third respondents' who, although self-evidently on the face of the founding affidavits were purporting to represent the interests of the first respondent, might not have had the necessary authority to act on its behalf in prosecuting the matter, or its attorneys the authority to represent the first respondent in instituting the litigation. Indeed, I had to search the court file to see what was in the notice rather than gleaning this information from the present application.

- [8] Rule 7(1) provides as follows:

“Subject to the provisions of sub-rules (2) and (3) a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed, where after such person may no longer act unless he satisfies the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application.”

- [9] Fortunately, this issue resolved itself without the court having to determine whether the belated challenge of authority should be condoned under the circumstances. By the date of the hearing the respondents had replied to the Rule 7 notice which required that a resolution (by the first respondent authorizing the second and third respondents to institute the main application on its behalf) and power of attorney (by the first respondent authorizing the respondents’ attorneys to institute and prosecute the main application at its behest) be provided to the Municipality’s new attorneys in order to avoid the consequence that, should it fail to do so, the applicants would “apply for the dismissal of the application at the hearing of the matter.”
- [10] I was thus informed that this part of the relief prayed for had become academic and that no order would be sought in this respect.

Still the applicants were wont to suggest that the fact that the respondents had in the meantime complied with the notice somehow

amounted to a recognition that their authority to prosecute the main application on behalf of the first respondent was unclear or the disputation thereof legitimately raised, thereby vindicating this leg of the application, but the applicants in my view failed to explain in the present application the basis for the disputation at all, or its timing in relation to when the Municipality should have become aware of the fact that the second and third respondents, and the respondents’ attorneys, were purporting to act on behalf of the first respondent, supposedly without authority.

- [11] The issue of the notice was just simply not given any context in the application for condonation, nor thought as to why it was included in the prayers. This is demonstrated even in the way the relief sought was framed in the notice of application in this respect,

namely that: “the delayed delivery of the 1st, 2nd and 3rd Applicant’s....Rule 7 Notice is condoned, and that the date on which theRule 7 Notice was required to be delivered

is extended to the date on which theRule 7 Notice was actually delivered.”[5] Why the notice was “required to be delivered” at all, why they suggest its delivery was “delayed,” and why such delay ought to have been condoned in the circumstances is not canvassed by them at all in their papers. If a litigant in an application for condonation cannot even be bothered to indicate when he/she/it was supposed to do something that he/she/it has fallen foul of, or why he/she/it deserves the intervention of the court by way of an order of condonation, he/she/it should not be surprised when such an application is dismissed outright with costs following that result,

perhaps even on a punitive scale. Indeed, if this were the only relief being sought in the interlocutory application, I would have had no hesitation in dismissing it with an appropriate costs order.

- [12] Although the applicants abandoned this part of the relief sought, I am inclined to agree with the respondents' submission that the filing of the notice, more than seven months after the issue of the main application without any context given why it was necessary to be filed at that late stage, appeared to be vexatious and sought to delay the finalization of the matter unnecessarily. Even in the present application the applicants contended in their replying affidavit that the second respondents' authority to act on behalf of the first and third respondents and to depose to affidavits on their behalf in opposing the application for condonation was in contention, thus suggesting that they should be non-suited as charlatan opponents. Whilst the provisions of Rule 7 validly avail as the appropriate remedy for a litigant who wishes legitimately to challenge the authority of a person to act on behalf of another in legal proceedings,[6] even if filed very late into those proceedings, it should not be used as a device to frustrate a litigant's right of access to court. It does not sit well with me that the Municipality, although seeking the indulgence of this court, should opportunistically seek to preclude the respondents from having a voice in the present application whereas the issue of the late notice to challenge the authority of their attorney and two of the respondents is the very subject matter of the condonation application.[7]
- [13] That leaves the issue of the late delivery of the answering affidavit. In opposing the matter, the respondents in their answering affidavit do not appear to suggest that the belated defence sought to be raised by the applicants in the main application is without merit or any prospects of success.
- [14] They do however resist the present application on the basis that there has been an unreasonable delay on the part of the applicants in bringing the supplementation to their defence which has caused them certain prejudice. This criticism is not without merit. In this respect the applicants initially missed the opportunity to file either answering affidavit or notice of intention to raise a question of law until after the respondents had in fact enrolled the matter for hearing on the unopposed contested roll on 14 August 2018. It was only after an indulgence was granted to them by the removal of the matter from that roll on 8 August 2018[8] that the applicants were galvanized into filing the notice in terms of Rule 6 (5)(d)(iii), more than a month after filing their notice to oppose, without any request to condone this delay either. In response, the respondents filed a replying affidavit to the applicants' point of law on 22 August 2018 (now a waste it seems given the subsequent developments), and thereafter promptly

complied with this court's case management directive and the Joint Rules of Practice in preparing the file and readying the matter for hearing on the basis of the very limited opposition raised by the Rule 6 (5) (d) (iii) notice, namely: that the respondents

- although purportedly basing their case on the provisions of section 43 (2) of the Structures Act, had failed to aver that the Municipality “falls into any of (the) types of municipalities mentioned in section 42 (1) of the Act.”[9]
- [15] Preparation of the main application for hearing included the filing of the respondents’ Heads of Argument and the necessary Practice Note which the applicants themselves could not be bothered to file, in breach of the Joint Rules of Practice of this court and the relevant case management directive.
- [16] Shortly before the matter was then due to be heard on the opposed roll, on 14 February 2019, the change-of-guard happened when the applicants’ current attorneys were substituted as their attorneys of record. Although one is sympathetic to the fact that the change might have been necessary and that this brought forth a new legal opinion and a different handling of the matter, the respondents’ efforts to move the matter along in respectful observance of all that they were required to do to have the dispute (such as it then existed) finally determined was again shortchanged, ostensibly without any offer to pay their wasted costs.
- [17] The respondents submit that there is no reasonable explanation provided by the applicants in their papers why this court should come to their assistance at this advanced stage of proceedings (save that they appointed new attorneys and obtained a different legal opinion) when the pleadings have already closed and the proverbial battle lines drawn as it were, nor good reason to now accept the supplementary affidavit. They submit, correctly so, that condonation is not there merely for the asking.[10] They also complain, justifiably in my view, that whereas the applicants should be providing a full, detailed and accurate account of the delay, its extent and cause, and the reasons therefor to enable the court to understand and assess their motives and conduct, the motivation volunteered in the application does not cut it. Indeed, as with the issue of the Rule 7 notice, they have also not bothered in respect of this part of the relief sought to indicate when in their view the answering affidavit ought to have been delivered, or what the extent of the delay is that this court should be taking into account. Further, they appear to be oblivious to the prejudice occasioned to the respondents or that it is a significant factor which must be weighed in the balance, simply contenting themselves with the bald statement that the respondents are not prejudiced by the Municipality’s failure to timeously file their answering affidavits. Since it has not occurred to them that any prejudice exists, I assume this to be the reason why they have not offered any wasted costs to negate the negative consequences of their delay in supplementing a defence on the merits.
- [18] The question as to the extent of the delay in this matter, although not articulated by the applicants, can however be deduced by reference to the provisions of Rule 6 (5) (d) which sets out the election which a party opposing the grant of an order sought in a notice of motion has at its disposal, as follows:
- (d) Any person opposing the grant of an order sought in the notice of motion must-

- (i) within the time stated in the said notice, give applicant notice, in writing, that he or she intends to oppose the application, and in such notice appoint an address within 15 kilometres of the office of the registrar, at which such person will accept notice and service of all documents, as well as such person's postal, facsimile or electronic mail address where available;
- (ii) within fifteen days of notifying the applicant of his or her intention to oppose the application, deliver his or her answering affidavit, if any, together with any relevant documents; and
- (iii) if he or she intends to raise any question of law only he or she must deliver notice of his or her intention to do so within the time stated in the preceding sub-paragraph, setting forth such question."

[19] Where a respondent wishes to rely on a point of law only, he is required to deliver a notice to that effect in lieu of an affidavit setting forth such point. This is the course initially adopted by the applicants and they should have done so within 15 days of 21 June

2018. The notice to raise the question of law was however only delivered on 2 August 2018, without seeking condonation and in in a feeble attempt in my view to present a nominal opposition to the matter because the respondents had gone ahead and enrolled the application for hearing on the unopposed contested roll in the absence of the applicants having delivered any answering affidavits or notice to raise a question of law.

[20] Where a respondent wishes to rely on the merits as well, or in the alternative, on a point of law he ought to file affidavits on the merits (also within 15 days of filing a notice to oppose) and argue the legal point (in limine if appropriate). Self-evidently the applicants elected by the date of filing their answering affidavits on 28 January 2019 to eschew what was relied on in their Rule 6 (5) (d) (iii) notice and in the present application beg the leave of this court to allow them now to supplement or rather to raise a defence on the merits. It may still have been open to them to hold out and argue the preliminary point, but they would have been at risk that if that sole argument did not hold up (a strong likelihood in my view), that a court would have been slow to allow the late delivery of answering affidavits. I expect that this is the reason why therefore, shortly after their new attorneys were substituted on the record, they provisionally filed their answering affidavits together with the present application for condonation.

[21] In practice it is salutary to file an affidavit on the merits irrespective of whether a preliminary point is to be raised because

only in appropriate or exceptional circumstances will a court allow the late filing of affidavits where a preliminary point has

failed.[11] Failure to do so on the merits does not deprive the court of its discretion to allow the late filing of affidavits, but it follows logically that a respondent is at risk that a court may hold that such failure was to gain time and might be slow in such circumstances to allow the late delivery thereof.[12] In the present instance the applicants made clear that they were going to

steer a different direction from the moment when their new attorneys officially came on board and I have no reason to doubt their bona fides in this respect, particularly since they wasted no time in launching the present application. It is just unfortunate that they did not acknowledge in their affidavits the extent of the delay up until then or how this about-turn had or would prejudice the respondents who had prepared their case up to that point on the premise that there was no defence on the merits.

[22] These deficiencies in the application notwithstanding, the court may still, on good cause shown, condone any non-compliance with the rules.[13] It is a trite principle that in assessing whether good cause has been shown the court is accorded a wide discretion which must be exercised judicially on a consideration of the facts of each case. In essence it is a matter of fairness to both sides. A judicial discretion is not an absolute or unqualified discretion but must be exercised in accordance with recognized principles.[14]

[23] Certain factors have been indicated as being usually relevant but the weight to be given to any factor depends on the particular circumstances of each case. These factors are not individually decisive but must be weighed the one against the other. For instance, a slight delay and a good explanation may compensate for weak prospects of success. The cogency of any factor will vary according to the circumstances, including the particular rule that has been infringed. In each case the question is whether good or sufficient cause has been shown for the relief sought. Good cause requires that the application be bona fide. Wilful default or gross negligence will often preclude a finding of good cause. Sufficient cause includes the applicant's

prospects of success.[15]

[24] Among the factors that the court has regard to are: the degree of non-compliance, the explanation of the delay, the prospects of success, the importance of the case, the nature of the relief, the other party's interest in finality (an inordinate

delay induces a reasonable belief that the order had become unassailable), prejudice to the other side, the convenience of

the court, the avoidance of unnecessary delay in the administration of justice and the degree of negligence of the persons responsible

for the non-compliance.[16]

[25] The court must also determine if the application for condonation is bona fide or made with the intention to delay the proceedings and whether there is real prejudice for the opponents of the condonation seeker. A court may condone non-compliance with time limits even where no application for condonation has been brought. Condonation will be granted if it is in the interests of justice to do so, and if there appear to be reasonable prospects of success, in this instance in the belated defence sought to be raised. It is trite that the interests of justice require that all issues pertaining to a matter be ventilated fully and for all parties to be given the opportunity to state their case as comprehensively as possible.[17] (I believe

that this is what will be achieved by the order which I intend to make herein.)

[26] The court is reluctant to penalize a litigant for the lawyer's conduct, but there are limits beyond which a litigant cannot escape the results of his lawyer's lack of diligence. Where a litigant relies on the ineptitude or negligence of his lawyer, he should show that it is not to be imputed to him. In this regard some allowance must be made for bona fide errors and omissions, and fault can only preclude relief in the event of intentional disregard, indifference, or gross negligence.[18]

[27] Although the applicants were required to place their case on the merits before the court by way of affidavit within the normal time limits and in accordance with the normal procedures prescribed by the rules, they are in my view not so egregiously out of time in relation to when they obtained a second legal opinion and took steps to change the course of conducting their defence. It is regrettable that the respondents were prejudiced, but this prejudice is largely limited in my opinion to wasted costs which I believe the respondents ought to have tendered along the way and which the respondents should have been more astute to insist upon.

[28] The prejudice to the applicants if they are denied the opportunity to present their defence on the merits is an aspect which weighs

significantly with me. It is abundantly plain that the notice in terms of Rule 6 (5) (d) (iii) filed earlier does not serve their

interests in the least bit and that the defence raised in the answering affidavits is an arguable one which they should in the

interests of justice be allowed to ventilate. It is also one which I accept is of importance to the Municipality because it tests the proposition that the composition of the Executive Committee of its Council is improper and in breach of the law and Constitution.

I accept too that it is of concern to them that the respondents, in making out their case in the founding papers have not been

forthcoming (so they allege), regarding the resolution adopted on 25 October 2017, which raises a different slant to their complaint that the Council is, in a practically vindictive manner, ignoring the interests of the opposition parties.[19]

[29] A further significant contention, which should receive traction at the hearing, is that the order of the retrospective appointment of one of the first respondent's members as contemplated by them to the date of the establishment of the executive committee (albeit not included in the prayers in the Notice of Motion), assuming that the declarator sought is granted, might not be competent or desirable.

[30] In the premises, on an objective prospectus of all the facts, and taking into account the above established principles, I am inclined to grant the applicants the relief sought permitting them to file their proposed answering affidavits out of time even though they have somewhat perfunctorily motivated why condonation should be granted and as if it were merely for the asking.

[31] As for costs, the respondents were in my view justified in opposing the application based on the unexplained delay and poorly motivated

request for condonation and should be entitled to their costs. The applicants should also in my view, on the basis of the indulgence

sought by them, make good on the obvious prejudice caused to the respondents who incurred the wasted costs of twice enrolling the

matter to be argued on the limited basis of the applicants' notice in terms of Rule 6 (5) (d) (iii), and of filing an abortive

reply to a notice that clearly lacked any imagination.

[32] In the result I issue the following order (using the appellation of the parties as in the main application):

1. The late filing of the first to third respondents' answering affidavits in the main application is condoned.
2. The applicants are directed to file their replying affidavit, if any, to the respondents' answering affidavits, within ten

(10) days of this order

3. The registrar is requested thereafter, at the close of pleadings, to allocate a preferent date for the hearing of the main application.
4. The first to third respondents are to pay the costs of this interlocutory application jointly and severally, the one paying the other to be absolved.
5. The first to third respondents are to pay the following additional costs of the applicants incurred in the main application:

5.1 The wasted costs occasioned by the removal of the matter from the unopposed contested roll of 14 August 2018;

5.2 the wasted cost, if any, in respect of drafting and filing their Reply to the first to third respondents' aborted notice in terms of Rule 6 (5) (d) (iii); and

5.3 the wasted costs, if any, occasioned by the applicants' aborted preparation for the anticipated opposed hearing on 14 February 2019, including the filing of their practice note and Heads of Argument.

B HARTLE

JUDGE OF THE HIGH COURT

DATE OF HEARING: 21 May 2020

DATE OF JUDGMENT: 17 June 2020

APPEARANCES:

For the applicants: Adv. S Patel instructed by Lionel Trichardt & Associates care of Mlonyeni & Lesele Inc., East London (ref. Mr. Trichardt).

For the 1st to 3rd respondents: Adv. V Sangoni instructed by Ayabonga Koswana Attorneys c/o Mandla Falithenjwa Inc., King Williams Town.

For the 4th respondent: No appearance

- [1] Section 42 of the Municipal Structures Act, No. 117 of 1998 (“The Structures Act”) provides that only municipalities of certain types, mentioned in the section, may establish an executive committee.
- [2] Section 43 (2) of the Structures Act provides that an Executive Committee must be composed in such a way that the parties’ interests are represented in the municipal council in substantially the same proportions they are represented in the council.
- [3] The prayers in the notion of motion are scant compared to what the respondents seem to be holding out for as explained in their affidavits and pre-litigation correspondence placing the applicants on terms.
- [4] The applicants rely on the matter of Democratic Alliance v African National Congress and Others, CPD, Case No 8590 /02, as authority for the proposition that the alternative mechanism chosen does not need to result in proportional representation for it to be consistent with democracy.
- [5] The applicants’ application was premised on the provisions of Rule 27 (1) whereas the unique provisions of Rule 7, read together with Rule 27 (3), apply and would require some explanation or context to be given.
- [6] Firststrand Bank Ltd v Hazan and Another; Firststrand Bank Ltd v Hazan Wholesalers and Distributors CC [2016] 2 All SA 112 (GJ).
- [7] They appeared to accept that the “admissibility” (sic) of both the answering affidavit and the Rule 7 notice was conditional upon condonation being granted by this court.
- [8] The notice of removal does not clarify that the applicants are to bear the wasted costs occasioned thereby, although it appears that they tendered costs on a” party and party (unopposed) scale of the court.”(sic)

- [9] In the concluding paragraph of the Notice the applicants assert that “in the absence of an averment to that effect the (respondents) are not entitled to the relief that they seek.”
- [10] See *Uitenhage Transitional Local Council v South African Revenue Service* [2003] 4 All SA 37 (SCA), 2004 (1) SA 292 (SCA) at [6]; *Sayed v The State* (530/2017) [2017] ZASCA 156 (24 November 2017).
- [11] *Governing Body of the Winterberg Agricultural High School v Premier of the Eastern Cape* [1996] 3 All SA 71 (E) 77; *Kolbatschenko v King* NO [2001] 4 All SA 107 (C) 126.
- [12] *De la Guerre v Ronald Bobroff & Partners Incorporated and Others* [2013] JOL 30002 (GNP) at 10.
- [13] Uniform Rule 27 (3), read together with sub-rule (1). The latter sub-rule empowers a court in an application such as the present one, if good cause is shown, to make an order extending any time period prescribed by the Uniform rules for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet. In my view this would include an appropriate costs order.
- [14] Harmse’s Civil Procedure in the Superior Courts at B 27.6 incorporating the relevant footnotes.
- [15] Harmse’s Commentary on section 27 (3), *supra*.
- [16] Harmse’s Commentary on section 27 (3), *supra*.
- [17] Harmse’s Commentary on section 27 (3), *supra*.
- [18] Harmse’s Commentary on section 27 (3), *supra*.
- [19] The respondents allege in this respect that the first and second applicants have been “cavalier” and are “deliberately neglecting” to address their needs and those of the constituencies they represent in the Municipality.

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