

SOUTH AFRICA / JUDGMENT

Nkola v PG Bison Ltd t/a BG Bison Epping (CA237/2019) [2021] ZAECHGHC 8 (28 January 2021)

[2021] ZAECHGHC 8

COURT

Eastern Cape High Court, Grahamstown

BEFORE

NG Beshe, MS Jolwana, S Rugunanan

CASE / FILE NUMBER

CA237/2019

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IN

THE HIGH COURT OF SOUTH AFRICA
(EASTERN
CAPE DIVISION, GRAHAMSTOWN)

Case

No: CA237/2019

In

the matter between:

BONGILE
SAMUEL NKOLA
Appellant
And
PG
BISON LTD t/a BG BISON EPPING
Respondent

JUDGMENT

BESHE J:

- [1] On the 20 March 2013 Van Zyl J (as he then was) gave judgment in favour of the respondent who was the plaintiff in the action against the appellant who was the second defendant, based on a stated case. The question the court was required to determine was whether the second defendant's obligations in terms of a deed of suretyship dated the 4 February 2004 were extinguished by the settlement of the first action, alternatively, at the moment that the

plaintiff and the first defendant entered into the second credit agreement on 29 January 2008, or whether those obligations remained in force in respect of debts incurred by the first defendant in terms of the second credit agreement. The finding of the court a quo was to the effect that the second defendant was not released from his obligations as a surety when the first defendant's indebtedness that arose from the agreement of January 2004 was settled. Appellant was granted leave to appeal the abovementioned judgment on the 1 March 2019, to the full bench of this division.

- [2] The appeal was set down for hearing on the 24 August 2020. On the date appointed for the hearing of the appeal, the appellant gave notice of his intention to apply for the condonation of the late filing of notice of prosecution of the appeal, the late filing of the record of appeal and of the appellant's heads of argument. The time line of events that are relevant to the appeal is common cause between the parties, to wit the following:

Leave to appeal having been granted on the 1 March 2019, appellant delivered a notice of appeal dated the 24 March 2019 on the 25 March 2019. The appellant was required to comply with rule 49 (6) (a) within 60 days after the delivery of a notice of appeal. In terms of Rule 49 (6) (a), an appellant is required to make a written application to the Registrar for a date for the hearing of the appeal. In terms of Subrule 7 (a), the appellant was required to file with the Registrar 3 copies of the record of appeal and 2 copies to the respondent at the same time as the application for a date of hearing of the appeal. It is common cause that this 60 days would have expired on the 17 June 2019. It is also common cause that the appeal was only prosecuted on 8 October 2019. I have already alluded to the fact that the application for condonation of the late prosecution of the appeal was delivered to the respondent about an hour before the appeal was scheduled for hearing. This was clearly as a result of the issue having been raised by the respondent in its heads of argument. The affidavit in support of the condonation application is deposed to by appellant's attorney of record, Mr Justin Andrew Powers. Mr Powers proffers two reasons which he contends attributed to the delay in prosecuting the appeal:

- (i) For nearly 5 months he harboured under a misconception that appellant had died and he was waiting for his estate to be reported to the Master of the High Court and for the latter to appoint an Executor who would then be substituted as appellant in the appeal and provide him with instructions to prosecute the appeal. This came to his attention via a newspaper report that appeared in the Daily Dispatch during the second week of May 2019.
- (ii) He encountered numerous difficulties trying to locate the file in this matter from the Registrar's office in East London as well as at the Grahamstown Registrar's office.

On the 10 May 2019 he sent an email to his correspondent informing them about the passing of the appellant. Over the course of May 2019 he sent several emails to the appellant's wife as well as to appellant's business address and those of two of his employees, made phone calls to the appellant's cell phone numbers he had at the time, to no avail. He made calls to the offices of the Master of High Court in Bhisho, Mthatha and Grahamstown during July and August 2019, only to learn that appellant's estate had not been reported. He visited appellant's house in East London

on 7 August 2019 and found it deserted. The respondent, through its attorney of record required an update regarding the appointment of an executor in respect of appellant's estate. On 3 September 2019, whilst on an official visit to Mthatha, he endeavoured to find appellant's wife. He was able to find her at a rural village outside Mthatha – but lo and behold – he also found the appellant himself who was alive and kicking. Appellant informed him that he had been in hiding due to death threats against him and his family. He was then given authority to prosecute the appeal. Regarding the second reason Mr Powers attributes to the delay he has this to say. The delay also rested in part to the difficulty in obtaining the contents of the court's file, initially from the Registrar's office in East London and later from the office in Grahamstown. This was for the purpose of compiling the appeal record. Once the file was located, the signed copy of the stated case was missing therefrom. He goes on to outline the problems that were brought about by the over-hauling of the filing system in Registrar's office, which hampered efforts to locate the file in question. According to him, the file was ultimately located in September 2019. With the record duly delivered on the 8 October 2019.

The reason for the late filing of both sets of heads of argument, is attributed to the fact that he did not receive the Registrar's notice of set down. He only became aware that the matter was enrolled upon receipt of the appeal roll for third term which he perused on 30 July 2020.

- [3] Mr Powers contends that the respondent will not be prejudiced by the granting of the condonation sought because the matter is ready for hearing. He also contends that good cause has been shown for the granting of the relief sought. Further that the appellant has a reasonable prospect of success in the appeal.
- [4] It is trite that this court has the power to alter the prescribed time limits and to condone and non-compliance

with the rules. Rule 27[1] stipulates that:

“27 Extension of time and removal of bar and condonation

- (1) In the absence of agreement between the parties, the court may upon application on notice and on good cause shown, make an order

extending or abridging any time prescribed by these rules or by an order of court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings or any nature whatsoever upon such terms as to it seems meet.

- (2) Any such extension may be ordered although the application therefor is not made until after expiry of the time prescribed or fixed, and the court ordering any such extension may make such order as to it seems meet as to the recalling, varying or cancelling of the results of the expiry of any time so prescribed or fixed, whether such results flow from the terms of any order or from these rules.
- (3) The court may, on good cause shown, condone any non-compliance with these rules.”

- [5] In *Dengetenge Holdings v Southern Sphere Mining & dev Co Ltd*[2] the following was stated regarding the consideration of applications for condonation:

*“[11] Factors which usually weigh with this Court in considering an application for condonation include the degree of non-compliance, the explanation therefor, the importance of the case, a respondent’s interest in the finality of the judgment of the court below, the convenience of this Court and the avoidance of unnecessary delay in the administration of justice (per Holmes JA in *Federated Employers Fire & General Insurance Co Ltd & another v McKenzie* 1969 (3) SA 360 (A) at 362F-G [also reported at [1969] 3 All SA 424 (A) – Ed]). I shall assume in *Dengetenge*’s favour that the matter is of substantial importance to it. I also accept that there has been no or minimal inconvenience to the court. I, however, cannot be as charitable to the appellant in respect of the remaining factors.”*

- [6] Earlier I alluded to the fact that the application for condonation was only “filed” a short while before the appeal could be heard. It was only delivered to respondent’s attorney of record via electronic mail at 08:41 on the 24 August 2020 the day appointed for the hearing of the appeal. The effect of this is that the respondent could not file an opposing affidavit and merely argued on the papers as they stood at the time. The belated application for condonation was said to have been an oversight on the part of appellant’s attorney of record. The court in *Dengetenge* supra at paragraph [13] had this to say:

“[13] What calls for some acceptable explanation is not only the delay in the filing of the heads argument, but also the delay in seeking condonation. An appellant should, whenever it realises that it has not complied with a rule of court, apply for condonation without delay.”

Similarly in *Mulaudzi v Old Mutual Life Assurance*[3] the court said the following in this regard:

“[26] What calls for an explanation is not only the delay in the timeous prosecution of the appeal, but also the delay in seeking condonation. An appellant should, whenever he realises that he has not complied with a rule of this court, apply for condonation without delay. A full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the court to understand clearly the reasons and to assess the responsibility. Factors which usually weigh with this court in considering an application for condonation include the degree of non-compliance, the explanation therefor, the importance of the case, a respondent’s interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice.”

- [7] There is no explanation why condonation was not sought earlier. With all the hardships Mr Powers asserts he encountered; locating the file, once located, locating the signed copy of the stated case, in getting in touch with appellant’s wife, obtaining appellant’s death certificate (we know a copy thereof was requested by respondent’s attorney of record), establishing whether his estate had been reported at any of the Master’s offices in the division, in my view, he should have realised that he is running out of time with regard to the prosecution of the appeal. According to him, the appellant rose from the dead in September 2019. He became aware then that he had not died but was in hiding for the reason stated. He then took steps to prosecute the appeal, but did not seek condonation for

the late prosecution of the appeal. And there is no explanation why condonation was not sought at an earlier stage.

- [8] Appellant's conduct cannot escape scrutiny either. He has not filed a confirmatory affidavit. From Mr Powers' affidavit, the following emerges: Appellant had been his client for more than 20 years. He has been handling this matter since 2009. We know that leave to appeal the judgment in question was granted on 1 March 2019. According to Mr Powers, during the second week of May 2019, a notice that appellant had died appeared in the Daily Dispatch newspaper. The death notice was not placed before us. If such a notice did appear in the newspaper and the appellant was not dead, had gone into hiding, someone must have been responsible for placing the notice in the newspaper – with the knowledge of the appellant to keep whoever wanted to kill him off his back. But, he could not let his longstanding attorney who was handling a matter where he had allegedly bound himself as a surety and payment in excess of R 2 000 000.00 was claimed from him. In fact, there was a judgment against him in this regard. Incidentally when Mr Powers discovered that he was alive and well, on the 3 September 2019, he was meant to go back to East London in mid-September that year. So, if Mr Powers was made to understand that the threats to his life had been resolved by the police, why were no steps taken to inform him that he was alive and well? Why was he only going to East London in the middle of September? But due to the fact that, as indicated earlier, appellant did not depose to an affidavit, these questions remain unanswered.
- [9] It is trite that the court has a discretion which has to be exercised judicially whether to grant the condonation sought. From the authorities referred to above, it is clear that in exercising such discretion, the court should consider the following factors:

The degree of non-compliance. The explanation given for non-compliance. In the case of delay in seeking condonation, the explanation of such delay. Whether the explanation is acceptable. The respondent's interest in the matter. The need to reach finality in the matters serving before our courts. In other words, the issue of the unnecessary delay in the administration of justice. Prospects of success in the matter. The importance of the matter to the parties.

- [10] A summary of the factors to be considered can also be found in *Melane v Santam Insurance*[4] where the following guidelines were given:

"In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated : they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a rule of a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked. I would add that discursiveness

should be discouraged in canvassing the prospects of success in the affidavits I think that all the foregoing clearly emerge from decisions of this Court, and therefore I need not add to the evergrowing burden of annotations by citing the cases.”

I have already pointed out my difficulties with the explanation proffered for the late prosecution of the appeal. None has been advanced for the delay in seeking the condonation. The delay in prosecuting the appeal is by no means a slight one. The appeal was prosecuted approximately 74 days late. There can be no doubt that the matter is important to both parties. Some R 2 000 000.00 is at stake. This is a matter that has been outstanding as far back as 2 March 2013 when the judgment that is the subject of the appeal was rendered. We are not privy to the reason why leave to appeal same was only made and granted during March 2019.

[11] It is however clear that there has been an inordinate delay in the finalisation of the matter. Whilst it is so that rules of court are not an end in themselves to be observed in their own sake, they exist to provide an inexpensive and expeditious

finalisation of litigation before courts of law.[5] The fact that the respondent has not placed evidence before us that it has suffered any prejudice does not assist the appellant. We know why no such evidence was not placed before us. It was once again due to non-compliance with the rules of this court on the part of the appellant or those representing him. The application for condonation was only delivered less than an hour before the appeal could be heard even though a complaint about the non-compliance with the rules pertaining to appeals was raised by the respondent in its heads of argument. In any event, as I indicated, appellant’s attorney of record should have known that he was out of time with all what he alleges had taken place. Surely this lackadaisical attitude cannot and should not be condoned. I can do no better than point to Bosielo AJ’s remarks in this regard in *Grootboom v National Prosecuting Authority*[6] where he said the following:

“[20] The respondents were late in filing their answering affidavits as well as their written submissions. This delay put a serious hurdle in the way of their quest to be heard in this Court: they had to apply for condonation. It is axiomatic that condoning a party’s non compliance with the rules of court or directions is an indulgence. The court seized with the matter has a discretion whether to grant condonation.

[21] The failure by parties to comply with the rules of court or directions is not of recent origin. Non-compliance has bedevilled our courts at various levels for a long time. Even this Court has not been spared the irritation and inconvenience flowing from a failure by parties to abide by the Rules of this Court.

[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.”

- [12] The parties were invited to address us on the merits of the appeal as well. This was so that we could assess whether the appeal itself had prospects of being successful. This is one of the factors that should enjoy consideration in an application for condonation such as the one before us. The main question on appeal was whether Van Zyl misdirected himself in making the following findings:

That the suretyship contract signed by the applicant on the 4 February 2004 was a continuing suretyship and as such bound the appellant in respect of debts incurred by the company – the first defendant in the action, in terms of a contract between respondent and the company in January 2008. That the suretyship agreement in question was not extinguished upon the settlement of the dispute between the respondent and the company in respect of the debt incurred in 2004, which dispute was settled in 2007.

I do not intend to regurgitate the facts, they are implicit from the ground upon which the appeal is premised.

- [13] The court a quo concluded that appellant was not released from his obligations as a surety when the company’s indebtedness that arose from the January 2004 agreement was settled. That the indebtedness that arose as a result of the 2008 agreement was a cause of “whatever” nature and “however arising” as envisaged in Clause 1 of the deed of suretyship.[7]

- [14] In the relevant part of the deed of suretyship the following is recorded:[8]

SURETYSHIP

I/We the undersigned,

BONGILE SAMUEL NKOLA

do hereby bind myself/ourselves jointly and severally in favour of each of the Companies listed in Schedule “A” hereto, which Schedule shall be regarded as specifically incorporated herein (hereinafter called “the Creditor”) as surety/ies for and co-principal debtor/s in solidum with

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(hereinafter called “the Debtor”) for the due and punctual payment of every sum of money which may now or at any time hereafter be or become owing by the Debtor to the Creditors from whatever cause or causes arising, and for the due performance of every other obligation, however arising, which the Debtor may now or at any time hereafter be or become bound to perform in favour of the Creditors.

I/We hereby agree:-

That these presents shall be continuing covering liability on my/our part for whatever amount/s and whatever other obligation/s will be owing by the Debtor to the Creditors from time to time, notwithstanding any intermediate discharge or settlement of, or fluctuations in, the Debtor's indebtedness to the Creditors and notwithstanding the death, insolvency (which term shall for all the intents and purposes thereof include, but not be limited to, liquidation, sequestration, winding up, or judicial management, in each case, whether provisional or final, voluntary or compulsory) or other legal disability of the debtor, any one or more of us or any other surety/ies for and/or co-principal debtor/s with the Debtor, until the Creditors will have agreed in writing to cancel these presents.

- [15] It is so that the general rule is that the extinction of the principal debt discharges the surety from liability.[9] However, *hoc in casu*, appellant bound himself in terms of the deed of surety before us, the terms of which are clear and unambiguous and not capable of any other meaning. That being the case, the general rule does not find application in the matter. In my view, therefore, the appeal does not enjoy any reasonable prospects of success.
- [16] For all these reasons, I am of the view that the appellant has not made out a case for the indulgence he seeks. He has not shown good cause warranting condonation of his non-compliance with the Rules in question. Rules of court exist for a reason and should be complied with. There can be no doubt that non-compliance with court rules has a negative impact on the administration of justice. It affects the efficiency and effectiveness of the justice system. It is prejudicial to those who seek redress or resolution of disputes through access to the legal system. It can therefore not be lightly condoned by courts lest it continues unabated.
- [17] Accordingly, the application for condonation of the late filing of appellant's notice of prosecution of appeal, as well as the late filing of the record of appeal together with the appeal, are dismissed with costs.

—
NG BESHE

JUDGE OF THE HIGH COURT

I agree.

MS JOLWANA

S RUGUNANAN

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Date Heard : 24 August 2020

Date Reserved : 24 August 2020

Date Delivered : 28 January 2021

[1] Uniform Rules of this court.

[2] [2013] 2 All SA 251 SCA at [11].

[3] 2017

(6) SA 90 SCA at 101 [26].

[4] 1962 (4) SA 531 (A) at 532 C – F.

[5] Federal Trust Ltd v Botha 1978 (3) SA 645 (A) at 654 D.

[6] 2014 (1) BCLR 65 CC at 71 [20] – [21] 72 [22].

[7] Page 79 – 80 of the record.

[8] Page 20 of the record.

[9] Willie's Principles of South African Law 9th Ed: Franscois du Bois page 1020.

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Prepared on 14 October 2026 · Esheria