

SOUTH AFRICA / JUDGMENT

Plaatjie NO and Another v Matsepe NO (A154/2017) [2019] ZAFSHC 88 (6 June 2019)

[2019] ZAFSHC 88

COURT

Free State High Court, Bloemfontein

BEFORE

P J Loubser, C J Musi, M N Mbhele

CASE / FILE NUMBER

A154/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

FREE

STATE DIVISION, BLOEMFONTEIN

Case

no:A154/2017

In

the matter between:

JOSEPH

TEFO PLAATJIE

N.O. 1st

Appellant

(In

his capacity as trustee of the

Plaatjie

Family Trust)

MAREA

MAOSEKA PLAATJIE

N.O. 2nd

Appellant

(In

her capacity as trustee of the

and

TSIU

VINCENT MATSEPE

N.O. Respondent

Insolvent

estate of Joseph Tefo Plaatjie

CORAM: MUSI, JP et MBHELE, J et LOUBSER, J
HEARD ON: 20 MAY 2019

JUDGMENT

BY: LOUBSER, J

DELIVERED ON: 06 JUNE 2019

[1] This is an appeal concerning the interpretation of a clause contained in an Acknowledgement of debt signed by the Appellants in favour of the Respondent. When the Appellants failed or refused to pay in terms thereof, the Respondent launched an application in the court a quo, claiming payment of the debt stipulated in the document, namely the amount of R2.1 million. The application was heard by

Burger, AJ. He granted the claim with costs on an attorney and client scale on 12 December 2016.

[2] On appeal before us, it was contended by the Appellants that the decision of the court below was essentially based on a wrong

interpretation of clause 7 of the Acknowledgement of debt. Also before us, is an application filed by the Appellants for an order granting condonation for their failure to prosecute the appeal timeously. The initial question is therefore whether the default by the Appellants should be condoned and the appeal revived.

[3] The factual background of the matter is largely common cause and the disputes fall within a narrow ambit. The insolvent estate represented by the Respondent, is that of Dr. Joseph Tefo Plaatjie, a medical practitioner of Bloemfontein (the insolvent). He also features as the First Appellant in the Appeal, while the Second Appellant is his sister. The Appellants are the only trustees of the Plaatjie Family Trust.

[4] On 17 May 2013 the insolvent sold his residential property to the Trust for a purchase price of R2.1 million. On the same day, the two Appellants signed an Acknowledgement of Debt confirming that they were indebted to him in the amount of R2.1 million. The introductory words of the document read as follows:

“I/we Joseph Tefo Plaatjie in my capacity as duly authorized trustee of the Plaatjie Family Trust IT 73/13 do hereby acknowledge that we are truly and lawfully indebted.....”

In the second paragraph thereof, the following is stated:

“We promise and undertake to pay the principal debt to the Creditor as follows:

- (a) An initial payment of R500 000-00 on or before 31 December 2018.
- (b) Thereafter R500 000-00 at the end of every five year period thereafter until the balance is paid in full. The balance will attract interest at 5% per year”.

[5] The relevant part of clause 7 of the Acknowledgement reads as follows:

“7. The whole amount will become due and payable if any of the following events occur:

7.1.1 My/our death;

7.1.2 Me/us being sequestrated provisionally or finally;

7.1.3 If I/we surrender or transfer my/our estate;

7.1.4 If I/we fail to satisfy a judgment within 3(three) days of being requested to do so;

7.1.5 If I/we become insolvent or if I/we perform any acts of insolvency;

7.1.6 Any order is made for my/our estate to be administered;

7.1.7 Any order is made for my/our estate to be administered by a curator;

7.1.8 If I/we leave South Africa without notifying the Bank;

7.1.9 In the event I/we fail to make payment or pay an instalment on the due date.”

[6] On 10 December 2015, some two and a half years after the signing of the Acknowledgement of debt, the insolvent was sequestrated. The application for payment in terms of the Acknowledgement of debt was filed by the Respondent in August 2016, some two years and four months before the first instalment was due by the Trust. As could be expected, the Respondent therefore only relied on the sequestration of the First Appellant (clause 7.1.2) for his claim in the court a quo. Burger, AJ found in his Judgment that a reasonable and plausible interpretation of clause 7 must lead to the

conclusion

that the reference to “I/we” means the trustees in their personal capacity and/or the trustees in their official capacity. Because one of them was indeed sequestrated, the full purchase price had consequently become due and payable, he found.

[7] It was contended on behalf of the Appellants that the Judge was wrong in this respect. The “I/we” must be interpreted as a reference to the Trust itself, and since the Trust was not sequestrated, the debt had not become due and payable, so the argument went. The interpretation applied by the Judge, does not make any commercial sense because the sequestration of a trustee would not affect the liability of the Trust itself, it was contended.

[8] At this point I deem it appropriate to return to the question of condonation and the revival of the appeal. Having been granted leave to appeal, the Appellants filed their Notice of Appeal on 24 May

2017. In terms of Rule 49(b)(a) they were obliged to make written application to the Registrar for a date for the hearing of the appeal within the next 60 days. Together with the application for an appeal date, they were obliged to file with the Registrar three copies of the record on

appeal, and with the Respondent two copies thereof.[1]The Appellants therefore had to apply for a date for the hearing of the Appeal and should have filed the record of appeal on or before 17 August 2017. If the necessary copies of the record are not ready at that stage, the Registrar may accept an application for a date of hearing without copies of the record if the application is accompanied by a written agreement between the parties that the copies of the record may be handed in late.[2]If there is no agreement, the Appellant may deliver an application together with an affidavit in which the reasons for his omission to hand in the copies of the record in time are set out, and in which is indicated that an application for condonation of the omission will be made at the hearing of the appeal.[3]

- [9] Rule 49(6)(a) further provides that, if an Appellant fails to apply for a date of hearing of the appeal within the abovementioned period of 60 days, the appeal shall be deemed to have lapsed. The Court to which the appeal is made, may on application of the Appellant, and on good cause shown, reinstate an appeal which has lapsed. The Appellants in this matter have failed to comply with any of the provisions set out above, and the appeal has therefore lapsed. It was only during March 2018 that the attorney acting for the Appellants received the appeal record from the Attorneys for the Respondent, who requested him to peruse same and then to inform whether he is satisfied with the contents thereof. The attorney representing the Appellants filed an affidavit in the condonation application, and surprisingly, it was the only affidavit filed in support of the application. No affidavits were filed by any of the Appellants to explain the reasons for their failure to comply with the Court Rules.

- [10] Their attorney had the following to say in his affidavit to explain their default:

“As I was unable to obtain any funds from the Appellants, I was unable to proceed with the appeal. It needs to be noted that it was not only fees and disbursement that was needed, but also an amount of money that had to be raised as security for the appeal. On 12 March 2018 a letter was received from Mr. Senekal, previously practicing as a director of Matsepes Attorneys, confirming that the appeal has lapsed and enquiring as to whether the Appellants still wish to continue with the appeal. A copy of the aforesaid letter is hereby attached marked Annexure C. Mr Senekal on behalf of Mr. Matsepe N.O. then gave notice of his intention to tax the costs of the court case forming part of this appeal on 8 November 2018, which taxation was opposed, and a notice to oppose is hereby attached marked Annexure D. The Appellants were then informed that this matter is now critical and that they will have to raise funds to continue with this appeal. The necessary funds were obtained, and they are now in a position to proceed with the appeal.”

- [11] The papers before us show that the application for condonation and for reinstatement was only made on 29 January 2019, which was some 10 months after the Appellants had received the appeal record from the Respondent’s attorneys. The delay was no doubt an inordinate and extraordinary one. For instance, in EXPRESS MODEL TRADING 289 CC v DOLPHIN RIDGE BODY CORPORATE (2014) 2 ALL SA 513 (SCA) the Appellant filed its Heads of Argument some 2 months late, and the delay was found to be unacceptable.[4]To make matters even worse for the Appellants, they provided this Court with no explanation at all

for their default. We are not informed of the reasons why the funds needed could not be raised earlier, nor are we informed of how the funds were suddenly obtained when the shoe began to pinch. Not even the amount of money that was eventually raised to continue with the appeal, is disclosed to this Court. In addition, this Court does not know whether the insolvent continued to practice after his sequestration, and if so, what his monthly income and expenses were.

- [12] The principles relating to condonation have become settled in our law, and what is required of an applicant for condonation should be trite knowledge among practitioners who are entrusted with the preparation of appeals to the Court.[5]The degree of non-compliance, the explanation thereof, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the convenience of the court of appeal and the avoidance of unnecessary delay in the administration of justice, are all factors that usually weigh with a court when it considers an application for condonation.[6]While I am prepared to assume in favour of the Appellants that the matter is of substantial importance to them, and that there has been minimal inconvenience caused to this Court, I find it difficult to view the remaining factors with equal indulgence to the Appellants. As for the requirement of an explanation for the delay, it has been stated by the Supreme Court of Appeal,[7]that

“condonation is not to be had merely for the asking. 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. It must be obvious that, if the non-compliance is time-related, then the date, duration and extent of any obstacle on which reliance is placed, must be spelled out.” The application before us is sadly lacking in all these respects.

- [13] The last question to be decided, is whether the prospects of success on the merits of the appeal should be taken into account in such circumstances. More than a decade ago the Constitutional Court[8]has pronounced itself clearly on this question in similar circumstances. It said:

“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. Prospects of success pale into insignificance where, as here, there is an inordinate delay coupled with the absence of a reasonable explanation for the delay”.
[9]

Much earlier the same sentiments were expressed by the Appellate Division (as it then was) in *BLUMENTHAL AND ANOTHER v THOMPSON N.O. and ANOTHER*. [10]In that case, the Court found it unnecessary to make an assessment of the prospects of success. The flagrant breach of the Rules and the absence of any acceptable explanation therefore, rendered the application for condonation unworthy of consideration, the Court stated.

- [14] The position in the application before us, is not different. The delay of some 10 months is inordinate, and there is no explanation whatsoever for that delay. In such circumstances, I am not inclined to consider the prospects of success in the appeal as a factor that could justify the granting of the condonation sought by the Appellants. The application must therefore fail.
- [15] Even if we were to consider the prospects of success, I am not entirely persuaded that the Appellants have good prospects of success in the appeal. At a first glance, the case for the Appellants appear to be appealing, but upon further reflection, there is also much to be said for the submissions made on behalf of the Respondent, namely that the words “me/us” in clause 7.1.2 should be given their ordinary meaning, as the Court a quo did. It cannot therefore be said, without any reservation, that the Appellants have shown good prospects of success.
- [16] In the premises, I make the following order:
1. The application for condonation and for the reinstatement of the appeal is dismissed with costs.
 2. The Applicants for condonation are ordered to pay the costs incurred by the Respondent in opposing the lapsed appeal.

P. J. LOUBSER, J

I agree:

C. J. MUSI, J.P

M.N. MBHELE, J

On behalf of the Appellant: Adv. A.J.R van Rhyn SC

Instructed by: JG Kriek and Cloete

Bloemfontein

On behalf of the Respondent: Adv. D.A Preis SC

Instructed by: F.J Senekal Inc.

/db

[1] Rule 49 (7)(a).

[2] Rule 7(a)(i).

[3] Rule 7(a)(ii)

[4] At paragraph 20 of the Judgment.

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- [5] Uitenhage Transitional Local Council v South African Revenue Service 2004(1) SA 292 (SCA) at par.6
- [6] Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Limited (2013) 2 All SA 251 (SCA) at par.11; Federated Employers Fire and General Insurance Company Ltd v McKenzie 1969(3) SA 360(A) at 362 F-G
- [7] Per Heher, JA in Uitenhage Transitional Local Council v SA Revenue Service, *supra*, at 297 H-J
- [8] In Van Wyk v Unitas Hospital and Others 2008(4) BCLR 442 (CC)
- [9] Par. 31 and 33 of the Judgment.
- [10] 1994(2) SA 118 (AD) at 122 A-B
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