

SOUTH AFRICA / JUDGMENT

Rand Water Board v Rautenbach and Another (4654/2019) [2020] ZAGPPHC 89 (26 February 2020)

[2020] ZAGPPHC 89

COURT

North Gauteng High Court, Pretoria

BEFORE

Kubushi

CASE / FILE NUMBER

4654/2019

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IN

THE HIGH COURT OF SOUTH AFRICA
(GAUTENG
DIVISION, PRETORIA)

Case

No: 4654/2019

DATE:

26/2 2020

In

the matter between:

RAND
WATER
BOARD APPLICANT
and
IANTHE
FLORENCE RAUTENBACH
FIRST RESPONDENT
TSHWANE
METROPOLITAN MUNICIPALITY SECOND
RESPONDENT

JUDGMENT

KUBUSHI J,

INTRODUCTION

- [1] The relief sought in the application is for condonation for the late filing of a replying affidavit. The applicant herein is also the applicant in the main application wherein the applicant was to file the replying affidavit.
- [2] In the main application, the applicant seeks an order for the demolition and removal of all structures erected by the first respondent, which structures are said to be encroaching on the servitude the applicant holds over the remainder of a portion of land situated on the Farm Garsfontein. The first respondent is one of the property owners on the said land who is affected by the said servitude.
- [3] The first respondent is opposing the main application and has filed an answering affidavit thereto and a counter-application. It is this answering affidavit that the applicant should have answered by filing the replying affidavit.
- [4] The second respondent is cited in the papers for any interest it may have in terms of any applicable law and is, thus, not opposing both the main and condonation applications.
- [5] When the parties appeared before me, the first respondent, who had set the matter down for hearing, was under the impression that the main application was to be heard. The applicant, on the other hand, laboured under the impression that the condonation application was to be heard first before the main application. It is correct that the main application could not be proceeded with before the condonation application was dispensed with. I, therefore, ruled that the condonation application be heard and decided before the main application could be heard.

MATRIX

- [6] The main application was served on the first respondent by the applicant on 31 January 2019. The first respondent served her answering affidavit on the applicant's attorneys on 8 April 2019. Two days after such service, that is, on 10 April 2019 the first respondent filed her counter-application.
- [7] Arguments are raised in the papers by both parties for and against the first respondent's answering affidavit being filed out of time without a condonation application. I am not going to dwell into those arguments as in this application I am not called on to decide that issue.
- [8] On 11 July 2019 the applicant filed its replying affidavit, which ostensibly served as the applicant's answer to the first defendant's

counter-application. The replying affidavit was filed almost three months out of time and without a condonation application .

- [9] In response to the delivery of the answering affidavit, the first respondent filed a Rule 30 (2) (b) notice complaining that the applicant has not applied to court for the extension of the time limits prescribed for the service of its replying affidavit, notice of intention to oppose the counter-application and the answering affidavit thereto. In the same notice, the first respondent called on the applicant to remove the cause of complaint within ten (10) days from the date of service of the notice.
- [10] The applicant filed a notice to oppose the counter-application and has subsequently filed the condonation application.
- [11] The first respondent is also opposing the condonation application on the grounds that the application was filed late and does not make out a case for condonation. The crux, therefore, is whether the applicant should be granted condonation to file the replying affidavit out of time.

THE LEGISLATIVE FRAMEWORK

- [12] An applicant for a condonation application approaches court for relief in terms of Rule 27 (3) of the Uniform Rules of Court. The sub-rule authorises the court to, on 'good cause shown', condone any non-compliance with the Rules of Court. The court is said to be vested with a wide discretion in this respect, but with the added safeguard for the applicant to show good cause, for the court to exercise the discretion.[1]
- [13] Courts have consistently refrained from attempting to formulate an exhaustive definition for what constitutes "good cause".
- [14] The Appellate Division (as it then was) in its judgment in *Melane v Sanlam Insurance Co Ltd*, [2] had this to say in its explanation of the phrase 'good cause shown':

"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 therefore, 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 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 along delay. And the respondent's interest in finality must not be overlooked."

[15] In recent years the Constitutional Court in *Van Wyk v Unitas Hospital* relying on a previous decision of the same court in *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others*[3] set a standard for the court's consideration of an application for condonation along the following lines:

"[20] The Court has held that the standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry include but are limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success.

[16] It follows, therefore, that in order to succeed in its application the applicant must show that, it is in the interests of justice, that the application be granted. In proving the interests of justice, the applicant must prove 'good cause'. It is trite that 'good cause' requires the applicant to furnish a full, reasonable and acceptable explanation, for the full period of delay including the cause of the delay.

DISCUSSION

[17] For the reasons that follow hereunder, it is my view that it is in the interest of justice that the applicant be granted condonation to file the replying affidavit even though it is out of time.

[18] The first ground of opposition that I seek to deal with is that the condonation application itself was received out of time on 30 July

2019. The argument is that the applicant in this regard, failed to comply with the first respondent's rule 30 (2) (b)[4] notice requesting the applicant to remove the cause of complaint within ten

(10) days after receipt of such notice.

[19] It is common cause that when the applicant filed the replying affidavit the time allotted for the filing thereof had expired. It is also not in dispute that when the condonation application was filed, the time period of ten (10) days set out in the rule 30

(2) (b) notice had expired, as well. The applicant approached court, in accordance with Uniform Rule 27 (3), for the condonation of non-compliance with the rules, that is, non-compliance with the time allotted for filing of the replying affidavit. In terms of subrule (2) thereof, the condonation may be ordered although the application therefor is not made until after the expiry of the time prescribed or fixed.

[20] It is, therefore, my view that, in terms of sub-rule 27 (2), the applicant was still entitled to apply for condonation. The application for condonation is, therefore, properly before this court.

- [21] The gravamen of the applicant's case is that it filed the replying affidavit out of time because it sought to resolve the issues that arose in its founding papers out of court.
- [22] In the explanation it proffers for the delay, the applicant states in its papers that there are five other properties which are similarly affected and facing the same litigation as the first respondent. There are, therefore, six property owners who face the same litigation based on generally the same set of facts and grounds.
- [23] Around 4 March 2019, after the applications against each of the said respective property owners were filed, a suggestion was made that all these applications be joined and that the parties agree on the dates for filing their respective answering affidavits. There was also a suggestion by the other property owners to the effect that the extent of their properties' encroachment or infringement into the applicant's servitude be settled first. The suggestion appeared feasible to the applicant as a manner to find common ground with the property owners in resolving the issues out of court or at least in limiting the issues. As a result, an invitation was extended, for the date of 20 June 2019, to all the six affected property owners, including the first respondent, to attend an onsite inspection to determine the extent of the infringement or encroachment of each property into the applicant's servitude. For various reasons, which are not relevant for purposes of this judgment, the first respondent did not honour the invite.
- [24] The applicant argues that it has always sought to find a solution to the issues raised in its founding papers but had to come to court when it became apparent that none of the property owners affected were interested in resolving the matter. However, when a suggestion was made to it to determine the extent of the encroachment of the respective properties, it lunched onto the suggestion and organised a site inspection for all the involved property owners.
- [25] Although the first respondent argues that she was not part of the property owners who wanted to resolve the matter out of court, it is, however, evident from the papers that in an earlier written communication to the applicant, the first respondent had indicated that she be allowed an opportunity to correct or remove any infringement or encroachment that may be shown to her by the applicant. For that, reason, I find it sensible that the applicant included her in the invite to the site inspection.
- [26] It is for these considerations that no reply was filed when it ought to have been filed. According to the applicant a draft of the replying affidavit was prepared during the early period of May 2019 but was held back pending the outcome of the onsite inspection; a fact which, the first respondent appears not to be in dispute with.

- [27] I am in agreement with the applicant that the explanation it advanced for delaying to file the replying affidavit, is not unreasonable. It was for a good cause that the applicant sought first to explore possibilities of resolving the issues out of court. I am also satisfied that the applicant opted to find a solution to the issues, or tried to limit the issues around the extent to which the first respondent and other affected property owners' properties encroached into the applicant's servitude; rather than proceed straight to court.
- [28] The delay, in my view, was not so egregious to warrant a dismissal of the application for condonation, out of hand and is properly accounted for by the applicant. The evidence in the papers indicates that the suggestion for an inspection was made on 4 March
2019. Already on 8 April 2019 when the first respondent filed the answering affidavit the applicant was already seized with the process of the onsite inspection. The replying affidavit as already alluded was prepared in early May 2019.
- [29] The invite to all the property owners was sent out by the applicant on 10 June 2019. On 11 June 2019, the first respondent's attorneys wrote to the applicant's attorneys indicating that they have not received the applicant's replying affidavit. The following day, on 12 June 2019, the applicant's attorneys wrote back asking the first respondent's attorneys whether in the light of their letter the first respondent would not be attending the inspection in loco and wanted to proceed with the matter. The first respondent's attorneys wrote back on 13 June 2019, indicating that the first respondent has not as yet decided to attend the inspection in loco.
- [30] From the 13 June 2019 until 20 June 2019, the applicant's attorneys had no knowledge that the applicant would not be attending the inspection in loco or that she wanted the matter to proceed. On 13 June 2019 the first respondent's attorneys addressed a letter to the applicant's attorneys confirming and earlier telephonic conversation and requesting that a formal invitation be addressed to them to attend the inspection in loco. The invitation was, as such, formally extended to the first respondent.
- [31] It was only on 20 June 2019 when the applicant's attorneys received a letter from the first respondent's attorneys complaining of the manner in which the first respondent was invited to the onsite inspection that they became aware that the first respondent would not be attending the arranged onsite inspection and wanted the matter to be proceeded with.
- [32] The aforesaid is, to me, an indication that the applicant could not have proceeded to file the replying affidavit without the first respondent's attorneys informing the applicant's attorneys that the first respondent would not be attending the onsite inspection and further that she did not want to participate in the process the applicant was undertaking.

- [33] The issues arising from the applicant's founding papers are extremely important and ought to be attended to as a matter of urgency. The service of water to the surrounding communities, which is a legislative and constitutional duty of the applicant per the servitude, is a basic human right. In deciding the main application, the court must have all the facts pertaining to the matter. In not allowing the replying affidavit will be a miscarriage of justice.
- [34] The applicant's contention is that the replying affidavit served also as an answer to the counter application as such there is no need for an application for the condonation of the late filing of the notice to oppose.
- [35] The numerous issues raised by the first respondent in opposition to the content of the replying affidavit are not for this court to consider. The court deciding the main application is best suited to decide such issues.
- [36] I hold that it was not unreasonable for the applicant to seek to explore the possibilities of an out of court settlement of the issues or to limit the issues where possible. The application ought therefore to be granted.

COSTS

- [37] Although the first respondent opposed the application, the applicant approached the court for an indulgence and would ordinarily be mulcted with the costs. However, in the circumstances of this matter, as I have found, the delay was for a good cause. As such, no costs order should be granted against any of the parties.

ORDER

- [38] Consequently I make the following order:

1. Condonation is granted for the late filing of the applicant's replying affidavit.
2. Costs are costs in the application.

EM KUBUSHI

JUDGE OF THE HIGH COURT

APPEARANCE:

Applicant's Counsel ::Adv. V.P Ngutshana

Applicant's Attorneys: Rabofiri R. Inc. Attorneys

Respondents Representative: Mr G. Wagenaar (an Attorney)

Respondents Attorneys: Gerhard Wagenaar Attorneys

[1] See Erasmus:Superior Court Practice 2nd Volume 2 p D1-326.

[2] 1962 (4) SA 531 (A) at 532B-E

- [3] 2000 (3) SA 837 (CC). See also *Grootboom v National Prosecuting Authority and Another* 2014 (21 SA 68 (CC) para 23.
- [4] 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, 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.
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