

SOUTH AFRICA / JUDGMENT

Wilson and Others v Mbombela Local Municipality and Others (19621/2004, A19/2008)

[2012] ZAGPPHC 315 (27 November 2012)

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COURT

North Gauteng High Court, Pretoria

BEFORE

C.P. Rabie, R.G. Tolmay, H.J. de Vos

CASE / FILE NUMBER

19621/2004, A19/2008

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NOT

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

GAUTENG DIVISION : PRETORIA

CASE

NO:19621.2004-A19.2008

DATE:27/11/2012

In

the matter between:

RICHARD

FRASER

WILSON.....

1st Appellant

(1st

Applicant a quo)

DR

J J

TOERIEN.....2nd

Appellant

(4th

Applicant a quo)

RAYMOND

HERMAN

BEZUIDENHOUT.....3rd

Appellant
(7th
Applicant a quo)
TREVOR
MIDDLETON.....4th
Appellant
(10th
Applicant a quo)
and
MBOMBELA
LOCAL
MUNICIPALITY.....1st
Respondent
HENDRIK
GERHARDUS ABRAM
SNYMAN.....2nd
Respondent
THE
REGISTRAR OF DEEDS.
PRETORIA.....3rd
Respondent

JUDGEMENT

1. This is an appeal, with leave of the Supreme Court of Appeal, against the order of the Court a quo, per Bosielo J, of 6 October 2005, dismissing the application for the review of certain administrative actions of the first respondent taken in terms of the Transvaal Town Planning and Townships Ordinance 15 of 1986 (“The Town Planning Ordinance”).
2. The application was dismissed on the basis that the appellants delayed unreasonably in instituting the review proceedings, with the Court a quo declining to condone this delay.
3. The Court a quo refused an application for leave to appeal. Four of the original ten applicants, i.e., the present appellants, petitioned the Supreme Court of Appeal for leave to appeal and such was granted on 26 August 2006 to appeal to this court.
4. However, the appellants did not deliver their Notice of Appeal timeously and similarly failed to prosecute the appeal by failing to apply for a trial date timeously and also by failing to file the record and copies thereof timeously.

It is common cause that as a result of the aforesaid, the appeal lapsed. The appellants thereupon filed two condonation applications relating to the aforesaid and an application for reinstatement of the appeal in order to attempt to have the appeal reinstated. Both applications for condonation and for reinstatement of the appeal were opposed by the first and second respondents. This court has to adjudicate those applications in initio.

Background

5. The second respondent is the owner of Portion 125 of the Farm The Rest, 454 JT (“the property”), just outside the town of Nelspruit. During 2001 he commenced the business of a sports bar on the property. The sports bar attracted customers and the increased traffic to the property and the music and noise resulting from the activities during the evenings, resulted in the appellants, as neighbouring land owners, complaining to the second respondent. Eventually the appellants sought the assistance of the authorities. The second respondent did not have the required authority to conduct the business of a bar and he eventually closed the sports bar.
6. Thereafter, on 19 March 2002, the second respondent lodged an application with the first respondent in terms of section 96 of the Town Planning Ordinance for the establishment of a township on the property. Simultaneously therewith the second respondent applied for the zoning of two of the erven in the proposed township for use as a restaurant/place of refreshment and amusement. Such a zoning would have allowed for a bar to be operated on the property.
7. The second respondent’s application was duly advertised but the appellants failed to timeously object to the application.

However, they were informed by the first respondent of a public hearing to be held on 27 June 2002 at which the matter was to be

addressed. At the hearing the first appellant submitted a memorandum on behalf of the appellants and also addressed the committee of the first respondent hosting the meeting and submitted the objections of the appellants in writing.

8. In essence, the appellants raised three objections. Firstly, they submitted that the road connecting their properties and that of the second respondent to the nearest public road, was a private road, and they objected to the increased traffic on that road as a result of patronage of the sports bar. I may add in passing that the appellants’ attitude was that the second respondent was still conducting the business of a sports bar, while the second respondent said that by then he had closed the sports bar. Nothing, however, turns on this aspect. Secondly, the appellants objected to the unacceptable noise which they said was generated late at night as a result of patronage of the sports bar. Thirdly, they said that there was insufficient water from boreholes to accommodate the substantially increased usage and sewerage facilities.
9. More importantly, however, is that the appellants stated specifically in their subsequent review application, and also in argument before this court, that they would not have opposed the second respondent’s application for the establishment of a township had it not been that the second respondent sought to have erf 8 zoned as a place of refreshment. It was stated that if the erf had also been zoned as residential, the appellants’ attitude to the township application would have been different. The main concern of the

appellants had always been the conducting of a bar which, incidentally, and as mentioned before, they say the second respondent is still conducting to this day.

10. After the aforesaid hearing on 27 June 2002 the first respondent resolved on 29 July 2002 to approve the application, subject to certain conditions, and on 19 August 2002 informed the appellants thereof in writing. The property was approved as a township with nine erven: and only one of the erven, erf 8, was zoned differently. Erf 8 was not zoned as applied for by the second respondent but as a place of refreshment. The zoning as a place of refreshment would only have allowed for the erf to be used as a restaurant and not as a bar. The other eight erven were zoned for special residential purposes.
11. In the aforesaid letter of 19 August 2002 the appellants were also advised by the Directorate: Technical Services of the first

respondent that they may appeal against the decision in terms of section 139 of the Town Planning Ordinance. The appellants took up this invitation and lodged an appeal with the Mpumalanga Townships Board.

12. In the proceedings before the Townships Board the second respondent objected in limine to the appellants' right to appeal since the relevant legislation only allowed for an appeal by an "objector", which the appellants were not. This was because the appellants have failed to timeously object to the second respondent's application after publication thereof. The appeiiants were thus only "interested parties" and not "objectors", and, as

such, had no right of appeal. The Townships Board upheld the second respondent's objections and the appeal was struck from the roll. The appellants were informed of the Townships Board's decision on 20 May 2003.

13. On 18 June 2003 the first respondent issued a certificate in terms of section 101 of the Town Planning Ordinance, certifying that the second respondent had complied with the conditions set by the first respondent. This certificate was withdrawn and a fresh one issued on 29 October 2003. On 10 February 2004 the property, which was then known as Nelspruit Extension 32, was declared an approved township in terms of section 103 of the Town Planning Ordinance.
14. On 29 July 2004 the appellants and the other applicants launched the review application before ihe court a quo. Principally the applicants sought to review the first respondent's decision of 27 July 2002 to approve the establishment of the Township, and, in particular, the decision to zone one of the erven in the Township as a special place of refreshment. The main ground on which the application was based was the alleged non compliance of the conditions which were originally set for the establishment of the township and which, according to the appellants, had not been complied with.
15. The certificates in terms of sections 101 and 103 were also sought to be reviewed and set aside for basically the same reason.

16. The first respondent and the second respondent opposed the application

and apart from responding to the allegations in the founding papers, also submitted in limine, inter alia, that there was an unreasonable delay in the bringing of the application and that it was brought outside the period of 180 days allowed for by the provisions of the Promotion of Administrative Justice Act, Act 3 of 2000 ("PAJA").

17. Regarding the delay the court a quo analysed all the facts as they played out over time and regarding the appeal proceedings before the Townships Board found that the appellants had known since the hearing on 27 June 2002 that they were not "objectors" as envisaged in the Town Planning Ordinance, and consequently that they had known since that date that they would not be entitled to appeal to the Townships Board. That being the case the court found the period which it took the appellants to launch the review application to be 2 days short of two years, calculating from the day of the original decision by the first respondent.
18. The court a quo also referred to the fact that even if the period is calculated from the day of the dismissal of the appeal by the Townships Board, being 22 May 2003, it still leaves a period of some fourteen months which transpired before the appellants launched the review application.
19. The court found that the appellants failed to explain the long delay and that the rather bald submission that it would be in the interest of justice to entertain the application, was not sufficient. The court a quo found the delay to be unreasonable in the circumstances of the case. In deciding the question whether condonation should be granted to the appellants the court referred, inter alia, to *Wolgroeiërs Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978(1) SA 12 (A) at p41 D-F. The court also referred to the fact that since 29 July 2002 the second respondent had commenced to set up his restaurant and the court referred to the negative consequences which would result for the second respondent if the review should succeed at such a late stage. Considerations of harm and the interests of finality to administrative proceedings were some of the factors considered by the court in finally deciding that the appellants' delay was inordinate and unreasonable and that condonation should be refused. The application was thus refused on the basis of the first point in limine and the court found it unnecessary to deal with the other issues raised by the parties.
20. In respect of costs the court a quo made a punitive order against the appellants. In deciding this issue the court, inter alia, referred to the merits of the application. It found that the main thrust of the application was directed against the bar which the second respondent was allegedly operating. As stated before the first respondent did not zone the particular erf in a manner that would allow for the conducting of a bar, but merely as a place of refreshment, i.e., a place from where a restaurant business may be conducted.
21. The court a quo found that if the second respondent was in fact operating a bar, as alleged by the appellants, the appellants'

remedy would not be to take the first respondent's decision regarding the establishment of the township on review but to lodge a formal complaint with either the police, the

Liquor Board or any other competent authority. The court thus found the application to be misconceived. It further found the appellants'

persistence in proceeding with the application, which the court described as "still-born", despite being alerted to the inherent difficulties, as particularly worrisome and one of the important considerations for finding the appellants' conduct an abuse of the court's process which could not be condoned and in respect of which the court should show its displeasure. These factors resulted in the punitive costs order.

22. I shall deal with the aforesaid issues again below but need to first refer to the failure by the appellants to prosecute the appeal and their applications for condonation in that regard.

The Present Appeal

23. In granting leave to appeal against the judgment and order of the court a quo, the Supreme Court of Appeal directed the appellants to file their Notice of Appeal within 20 days. That directive accords with Rule 49(2) of the Uniform Rules of Court. The result was that the appellants had to file their Notice of Appeal within 20 days, i.e., on or before 24 August 2006, or within such longer period as may upon good cause be permitted. The appellants filed a condonation application for the late filing of the Notice of Appeal which occurred on 10 October 2006, thus some 12 days late.
24. Apart from the aforesaid and in order to successfully prosecute the appeal, the appellants were compelled, in terms of Rule 49(6), to apply in writing for a date for the hearing of the appeal within a period of 60 days from the delivery of the Notice of Appeal. This means that the appellants should have applied for a trial date by the first week of January 2007. Failure to make application for a date for the hearing of the appeal as required by Rule 49(6), results, in terms of the same sub-rule, in the appeal being deemed to have lapsed.
25. Rule 49(7) also applies and requires copies of the record of proceedings to be filed at the same time that the application for a trial date is made. There are exceptions to this rule as appears from Rule 49(7)(a) itself which provides that the Registrar may accept an application for a date for the hearing without the necessary copies of the record if:

"(i) the application is accompanied by a written agreement between the parties that the copies of the record may be handed in late; or

(ii) failing such agreement, the Appellant delivers 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."

26. The appellants never attempted to reach an agreement with any of the respondents as envisaged in Rule 49(7)(a)(i) and also failed to deliver an application and affidavit as envisaged in Rule 49(7)(a)(ii).

27. The Record was delivered on 25 January 2007 and an application for a date for the hearing of the appeal was delivered on 1 February 2008. These actions thus occurred approximately one year and four months after the Notice of Appeal was filed and almost one year and one month late. The appeal is thus deemed to have lapsed. This resulted in the second application for condonation filed by the appellants asking for this court to reinstate the appeal.

The Condonation Applications

28. It is necessary to consider the two condonation applications. In the first application, which is for the condonation of the late filing of the Notice of Appeal, the founding affidavit was made by the appellants' attorney. He stated that on receipt of the order from the Supreme Court of Appeal granting leave to appeal, he instructed counsel and his Pretoria correspondent to take all necessary steps to prosecute the appeal. The next thing that happened was the first respondent's attorney advising on 29 September 2006 that since the time for filing the Notice of Appeal had lapsed, and since the appeal had therefore lapsed, his client would proceed to recover its costs. On 2 October 2006 a similar notice was received from second respondent's attorney.

29. The appellants' attorney responded in a letter of 4 October 2006 saying that the appellants had every intention to proceed with the appeal but that there had been some difficulty in obtaining documents from Bloemfontein which were required by counsel to draft the Notice of Appeal. It was confirmed that the documents had by then been obtained and that the Notice of Appeal and a condonation application would be filed by the end of the following week.

30. The reasons for the delay were stated to be the following: That the record is lengthy; that the legal and factual questions were complex; that the clients had experienced great difficulty paying counsel's and correspondent's fees incurred; in light of the financial constraints, only junior counsel had been briefed; due to prior commitments counsel was not able to meet with the attorney until 19 September 2006; counsel requested that a copy of the pleadings filed in the Supreme Court of Appeal be provided to him; due to the financial constraints the attorney did not keep a complete set of the pleadings; the Pretoria correspondents were instructed to request a full set of pleadings from the Bloemfontein correspondents; this set of pleadings was only received on 3 October 2006; consultation with counsel was only on 5 October 2006.

31. Since the delay is not long and in view of my findings in respect of the second condonation application, no more than a few remarks need to be made in respect of this application. As pointed out on behalf of the respondents, the Application for Appeal mirrors the Application for Leave to Appeal which had earlier been submitted to the Supreme Court of Appeal. Two counsel had been briefed earlier and one would have expected that the new Notice of Appeal

would not read any different from the original Notice for Leave to Appeal. I cannot find any reason why the full set of papers thus had to be

considered again. But even if it was a fair request, I fail to understand why the Bloemfontein attorneys had to be contacted to supply a record. The attorney of record may not have had a copy of the record but what happened to the two copies, or at least one, which the two counsel appearing for the appellants originally had as part of their briefs, was not explained. Lastly I may note that no details were given regarding the alleged financial constraints. It was also rather glaring that none of the appellants confirmed these allegations made on their behalf by their attorney in his affidavit.

32. The second condonation application relates to the failure to prosecute the appeal by timeously applying for a date for the hearing

of the appeal and by timeously filing a record of appeal. As stated before, the appellants were approximately one year and one month late in this regard..

33. Again, the founding affidavit supporting the application was deposed to by the appellants' attorney of record. None of the appellants filed an affidavit. It was only at the replying stage, and after this lacuna had been identified by the second respondent in his answering affidavit, that a confirmatory affidavit by the first appellant was attached to the replying affidavit which was deposed to by the attorney. The other appellants filed no affidavits.

34. In the founding affidavit, which I must add was deposed to on 20 August 2007, the appellants' attorney said that his Pretoria

correspondent held instructions to see to it that the further steps in the prosecution of the appeal were attended to. It would be recalled that the appellants had to take the required steps by the first week of January 2007. He said that the correspondent sought confirmation from him that he may instruct a local transcription service to prepare the record of proceedings. On 31 October 2006 the correspondent was instructed to proceed.

35. The attorney then stated that his clients had difficulty in raising the necessary funds to pay for the litigation thus far and at that stage they were not in a position to place him in funds to pay the correspondent's accounts. He knew that the record would require a substantial amount and thus decided to first refer the matter to his clients. The clients wanted an estimate of the costs for the prosecution of the appeal. He then asked his correspondent to obtain a quotation from the subscription service.

36. On 15 November 2006 the correspondent informed him that he required R7500,00 in respect of his own fees and disbursements. On 17 and 22 November 2006 the attorneys again had contact and it was confirmed that the transcribers had been instructed to prepare a record.

37. On 14 December 2006 the correspondent advised that the transcribers required a full set of documents in order to prepare the record. The attorney said that his offices closed for the holiday and he only attended to the matter on 12 January 2007. It should be noted that by this time the appeal had already lapsed.
38. On 27 February 2007 the correspondent informed the attorney that the transcribers had informed him that certain documents were missing from the bundle handed to them. It is not known when the bundle was handed to them but accordina to a letter from the transcribers it appears that they required only 9 pages which they did not have and that they required coloured copies of another 10 pages.
- 39.The attorney then said that in May 2007 he was placed in funds to pay the Pretoria and Bloemfontein correspondents.
40. Then the attorney says that on 30 July 2007 the second respondent's attorneys notified him that the appeal was deemed to have lapsed and that they intended to proceed with their bill of costs. Also on 30 July 2007 a letter was received from the transcribers saying, inter alia, that the full amount for the preparation of the record and the required number of copies was R27000.00 and that a deposit of R18 000,00 was required before they would proceed with the preparation of the record.
- 41.On 3 August 2007 the attorney informed the second respondent's attorney that every effort was being made to prosecute the appeal and that condonation would be applied for.
42. Then the attorney stated in his affidavit that his clients were not able to pay the transcribers immediately and that he was thus forced to prepare the record himself. He said that he instructed counsel 10 assist him in this regard.
43. The attorney then stated that the appellants would suffer prejudice if condonation was not granted whilst the respondents would suffer no prejudice should the appeal proceed.
- 44.The respondents opposed the application and filed answering affidavits. A replying and confirmatory affidavit was then filed. In the replying affidavit the appellants' attorney stated that the first respondent was driving the appeal and took it upon himself to obtain funding from the other appellants. He stated that the first appellant had enormous difficulties to persuade the other appellants to contribute to the costs of the matter. He emphasised the great costs of the appeal and the preparation of the record and that it was a major issue which the appellants had to consider. He also blamed the transcribers for not being able to prepare the record as was expected of them in terms of the Rules of Court.
45. The attorney then stated that the first applicant is a professional photographer and struggles to make a living. He also had substantial medical costs due to a heart condition which had twice required surgery in the previous 18 months.

46. The attorney then submitted that the second respondent was not prejudiced by the appeal procedures because he was carrying on

business from the premises as before. He submitted that the first respondent also suffered no prejudice and that any prejudice suffered was greatly outweighed by the prejudice which the first respondent may suffer if the condonation is not granted. He also submitted that the matter was of great importance to the appellants.

47. It was common cause that the appellants' appeal had lapsed as a result of the failure to timeously comply with the provisions of Rule 49(6), i.e., to make application for a date for the hearing of the appeal. In terms of Rule 49(6)(b) this court can reinstate the appeal if the appellants have shown good cause for such reinstatement.

48. Our courts have many times in the past considered what constitutes "good cause" for the granting of condonation for procedural shortcomings in appeals. There can be no comprehensive definition of this concept for to do so would tend to hamper the exercise of the court's wide discretion in this regard. It is for the court to exercise a judicial discretion in every case with regard to all the circumstances of the particular case.

49. In *United Plant Hire (Pty) Ltd v Hills And Others* 1976 (1) SA 717 (A) at

p720 E-G, Holmes JA stated the principles upon which the court exercises its discretion as follows:

"It is well settled that, in considering applications for condonation, the Court has a discretion, to be exercised judicially upon a consideration of all of the facts; and that in essence it is a question of fairness to both sides. In this enquiry, relevant considerations may include the degree of non-compliance with the Rules, the explanation therefore, the prospects of success on appeal,

the importance of the case,, the respondent's interest in the finality of his judgment, the convenience of the Court, and the avoidance of unnecessary delay in the administration of justice. The list is not exhaustive.

These factors are not individually decisive but are interrelated and must be weighed one against the other; thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong."

50. In *Van Wyk v Unitas Hospital And Another* (Open Democratic Advice Centre as Amicus Curiae) [2007] ZACC 24; 2008 (2) SA 472 (CC) the court stated the following on p477 A-B in regard to the approach of a court exercising its discretion: "[20] This 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 not 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."

51. At p 477E the court held that an applicant for condonation must give a full explanation for the delay and that in addition the explanation must cover the entire period of delay. Furthermore, that the explanation given must be reasonable. At p480 A the court referred to the principle that and inordinate delay may induce a reasonable belief that the order had become unassailable. Furthermore that a litigant is entitled to have closure on litigation and that the principle of finality in litigation is intended to allow parties to get on with their lives. Then the following was stated:

"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."

52. In Unitrans Fuel And Chemical (Pty) Ltd v Dove-Co Carriers CC 2010

- (5) SA 340 (GSJ) the full bench of that division found per Halgryn AJ, as follows at 344 F-G:

"[28] Applicants for condonation in our High Courts must take note of two fundamentally important issues which arise from this judgment, ie:

[28.1] The entire period of the delay has to be explained thoroughly and the longer the period of delay, does not detract from this fact, and;

[28.2] if the reason for the delay is the non-cooperation by the contracted transcribers, then substantial delays, such as the one herein, will not constitute a sufficient reason/explanation for the delay without proof of attempts to compel the transcribers to provide the transcripts."

53. At p344 I to 345 A the following was added regarding the preparation of the record and difficulties experienced in obtaining records from transcribers:

"[30] Litigants in our civil courts have no choice but to utilise the transcribers contracted to the Minister of Justice, and, although not party to that contract, they undoubtedly have the necessary locus standi to bring an application to compel them and/or the Minister of Justice to provide the transcripts in the event of their defaulting on their contractual obligations.

- [31] It is indeed a sad day that it has come to this, but to burden judges of appeal with condonation applications in which the delays are of this magnitude is simply unacceptable. In future applicants for condonation in matters such as the present will have to show their attempts at compelling the transcribers to provide the record, including, but not limited to the bringing of an application to court to compel compliance, as part of their explanation for the delay and to show that they are not at fault."

54. From the aforesaid it is clear that condonation for non-observance of the Rules is by no means a mere formality. See generally the discussion in Erasmus, Superior Court Practice, at B1-361 and further and the authorities there referred to. See also Oudekraal Estates (Pty) Ltd v City of Cape Town and others 2010(1) SA 333 (SCA) at 343 C.
55. In the present matter Adv Bester, who appeared with Adv Balmelli for the appellants, conceded that the delay was indeed substantial.

During argument he quite properly conceded that he cannot submit that the delay had been adequately explained and also conceded that periods, and sometimes long periods, where nothing happened, had not been dealt with at all in the appellants' affidavits. He submitted, however, that the attorney did what he could with the available funds and that the respondents were not entitled to assume that the appeal had been abandoned. He asked the court to accept that it is very costly for an individual to conduct an appeal.

56. In my view the appellants failed dismally to give an adequate explanation for the long delay. Long periods of total inaction were simply not addressed at all and many questions which begged for an explanation were not answered at all or inadequately addressed. I shall merely refer to a few salient features in this regard.
57. Firstly, the appellants' attorney's affidavit is replete with hearsay allegations which were so bald and without the detail one would have expected, that the mere confirmation thereof by one of the appellants simply did not suffice. One example relates to the issue of financial constraints. In the answering affidavit of the first respondent it was submitted that the founding affidavit failed to place facts before the court to enable the court to exercise its discretion in favour of the appellants in regard to the alleged financial difficulties of the appellants. It was further stated that the first appellant is a professional photographer by trade and had been in business for many years. The second appellant is a medical practitioner. The third appellant is the owner of the Photo First Store in the Riverside Mall, the largest commercial and retail mall in Neispruit and had been in business for twenty years. Also that the third appellant recently sold a stand in the Shandon Estate outside Neispruit for

R1,8 million. The fourth appellant is a long-term insurance Broker and has been involved in that business for his own account for many years. These allegations were not denied except for the first appellant who said that he struggled financially.

58. Coupled with the above is the fact that it appears that the transcribers required R27 000,00 for the full record and the required

copies and that a deposit of a mere R18 000,00 was required at that point. I cannot accept, without more, that the appellants would not have been able to easily raise this relatively small amount in order to prosecute the appeal. Their complete silence to explain their alleged financial difficulties is so glaring that I cannot find the allegations to be credible.

59. The main difficulty with the application is, however, the complete failure to thoroughly explain the entire period of the delay. From the attorney's affidavit it appears that sometimes months went past without anything happening, or for which there was no simply no explanation. The suggestion that some fault may lie with the transcribers, is also not supported by the meagre facts placed before the court. It was not stated when instructions were given to the transcribers and there is a complete silence regarding any follow-ups with them. In fact, it appears that there was very little contact with the transcribers and that there were long unexplained periods of delay during the whole process.

60. It was not explained, for example, why the attorney and the advocate had to become involved in the preparation of the record. Only a few pages were

required by the transcribers and the deposit of R18 000,00 could hardly have been the reason for any delay. It is also not known what the attorney and advocate did in respect of the record and when they did it. There is also no allegation whatsoever of any of the appellants making enquiries about the prosecution of the appeal and in respect of the long delay in the matter.

61. The delay was an inordinate delay of more than a year. The attempts to explain it were so inadequate, vague and flimsy that the impression is gained that it was probably all a ruse. I say this because it was never absolutely necessary for the appellants to file a record within the first sixty days. As stated before, Rule 49(7)(a) allows for the Registrar to accept an application for a date for the hearing without the necessary 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 or if the Appellant delivers 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 it is indicated that an application for condonation of the omission will be made at the hearing of the appeal. These factors were not addressed by the appellants at all.

62. Having come to the aforesaid findings that the delay was inordinate and was not adequately explained, it is necessary to consider the other aspects mentioned above which have to be considered in applications of this nature in order to decide whether condonation

should nevertheless be granted.

63. I accept that the case is important for the appellants but it is of even more importance to the second respondent. The appellants have indicated that

they do not oppose the idea of the establishment of a township but have it against the noise and the traffic which accompanied the second respondent's sports bar operations. They have alternative remedies to address those complaints if the second respondent does not comply with the zoning requirements and a setting aside of the township establishment is unnecessary. On the other hand, the second respondent has a huge financial interest in the matter and he has an interest in the finality of the judgment. After all, as things stand at present, the township had been established more than a decade ago and the second respondent has been conducting his restaurant for almost the same period.

53. The prospects of success also play a role in the exercise of the discretion by this court. In this regard I am of the view that the appellants' prospects of success should the appeal be reinstated, is so slender that condonation would not be justified. I say that for, inter alia, the following reasons:
54. The court a quo dismissed the review application for the reason that an unreasonable time had passed and that condonation could in those circumstances not be granted. The court was clearly correct in finding that the initial decision to establish the township on 27 June 2002 was the administrative decision which stood to be reviewed and not the later administrative acts, such as the Notices in terms of the Township Planning Ordinance. Consequently that the time from which a reasonable period or the period of 180 days in terms of PAJA had to be calculated, was the 27th June 2002.
66. Against this background the reasons of the court a quo for refusing condonation cannot be faulted. Even if the abortive appeal process to the Townships Board is brought into consideration, the remaining period still constitutes such a long delay, for which no adequate explanation had been presented, that the finding of the court a quo cannot be faulted. In the result, the appellants' prospects of success on appeal against the judgment and order of the court a quo are so weak that it could not make up for the inadequate explanations for the delay in the prosecution of the appeal to this court.
67. But even if one looks beyond the reasons of the court a quo for dismissing the review application and considers the merits of that application, I find the prospects of succeeding on those grounds also rather weak. I have referred to the fact that the appellants' main concern was the consequences which allegedly resulted from the fact that the second respondent operated a bar on the property. However, the second respondent does not have the authority to operate a bar and he said that he does not do so. If he does, or if he transgresses what the operation of a restaurant allows him, or if he does anything else which is unlawful, the appellants have judicial remedies to address such problems. A review application to set aside the establishment of the township was not necessary at all. In fact, township establishment relates to the subdivision of land and is done by following the procedure set out in the Town Planning Ordinance to change the use of land. Zoning, on the other hand, may be described as the creation of districts within a city where different things are permitted and within which different use activities are permitted or prohibited. Zoning, therefore, is an aspect of town planning which is primarily concerned with certain restrictions or limitations of ownership and use of land. The appellants' displeasure with the zoning of the one erf to allow for the operation of a restaurant is accordingly irrelevant when considering the establishment of the township in accordance with the requirements and

procedures set out in the Town Planning Ordinance, I consequently agree with the court a quo that the application was misconceived.

68. The second line of attack was based on the alleged non-compliance of the conditions set by the first respondent for the establishment of the township. Those conditions were numerous and related, inter alia, to the road, water reticulation, service agreements that have to be entered into, the appointment of a sound engineer, et cetera. The appellants submitted that these conditions had to be complied with before the township could be established and that the second respondent's decision should be set aside for that reason as well.
69. Regarding the road it appears that it was initially thought that the road was a so-called private road and that a right of way had to be registered in favour of the second respondent. The respondents investigated the issue and obtained legal opinion from senior counsel and came to the conclusion that the road was in fact a public road and that the registration of a right of way was not necessary. It was not necessary to adjudicate this dispute, i.e., whether a servitude of right of way should be registered or not, in the review application.

It is a separate and formal dispute which may be adjudicated in separate

proceedings. If the registration of a right of way is eventually found to be necessary, so be it, but it could hardly, in the circumstances, have resulted in the review and setting aside of the decision to establish the township.

70. Regarding the other conditions the respondents submitted that they were pre-development conditions, i.e., conditions that have to be met prior to the physical development of the township and not pre-proclamation conditions which have to be met prior to the proclamation of the township. It was submitted that these conditions will have to be complied with before any erven could be transferred to future purchasers and before any building operations on the erven can commence. Having regard to the original resolution and the nature of the conditions, these submissions appear to be correct. Firstly, the first respondent referred to the restrictions and conditions as "development restrictions and conditions". Secondly, the conditions mostly refer to the standard type of conditions in matters of this nature, such as those relating to necessary services to be provided in a sustainable manner, the amendment of layout plans to reflect the proposed sewerage system, the conclusion of service agreements with the first respondent regarding the provision of services, the erection of road traffic signs, and other such matters. Those are aspects which have to be in place before development can take place but are not requirements for the initial establishment of the township.
71. The other conditions relate to the one erf and more particularly the business of a restaurant which was envisaged by the zoning of erf 8 as a place of refreshment. So, for example, it was required that plans for the existing structure be submitted to the first respondent, that sufficient parking be provided, that kitchen facilities should comply with certain criteria, that a servitude of right of way be registered, and that a sound engineer be appointed to ensure that the noise from the restaurant does not cause a disturbance to adjacent property owners.

72. Clearly, the many conditions and restrictions relating to the existing building on erf 8 and the restaurant business to be conducted on that erf, can have nothing to do with the establishment of the township. As stated, the other conditions also do not relate to the establishment of the township itself. For example, the approval of the relevant department of water affairs will only become relevant once the water is being supplied to the township. Full service agreements are also something for the future and would relate to the services which the developer of the township will have to put in place during the development phase and when it is finally connected to the bulk services rendered to the township by the first respondent. These aspects will also probably be done in conjunction with the development of, and bulk supply by the first respondent to, neighbouring areas which are also at this time being developed.

73. Apart from the aforesaid the compliance or failure to comply with the aforesaid conditions is hardly an issue which can concern the appellants very much, especially if regard is had to the fact that the appellants opposed the establishment of the township because they wanted to prevent the second respondent from operating a bar in the area. The appellants had the

opportunity to state their case prior to the decision to establish the township and the decision regarding the zoning of the erven. There was no suggestion that the first respondent made an error in law to establish the township or to zone erf 8 as special for refreshment. A case was not made out that the reasonable decision-maker would not have reached the same conclusions. In fact, it is clear that much of what the appellants wanted, had been acceded to. So, for example, the zoning granted would prevent the operation of a bar. Also, only one of the erven was zoned for this purpose and not two as applied for by the second respondent. Other restrictive conditions were also set, most notably those relating to the issue of noise which may result from the business to be conducted from erf 8. The issue of parking was addressed and also the issue of the use of the access road, although the formal registration of a servitude might have fallen away.

74. It is not necessary to say more about this aspect of the case. I regard the appellants' prospects of success on the grounds

relating to the conditions referred to by the first respondent, as weak.

75. The last aspect which was submitted on behalf of the appellants related to the costs order made by the court a quo. It was submitted

that the order was wrong and that it should be rectified on appeal. As such, so it was submitted, the prospects of success in this regard should convince this court to grant the required condonation and to reinstate the appeal.

76. The court a quo exercised a discretion when it made the costs order. The court regarded the merits of the case and regarded it as hopeless. I have already indicated that in that regard I do not hold a different opinion. But the court went further. It found that the appellants persisted despite being made aware that their application was misconceived. For this and other considerations the court made the costs order. I cannot find that the court a quo

misdirected itself or exercised its discretion wrongly, having regard to all the circumstances of the case.

77. In the result I find that the prospects of success in this regard can by no means move this court to grant the required condonation and to reinstate the appeal.
78. Regarding the costs of the appeal it was submitted on behalf of the appellants that the costs relating to the application for leave to appeal should be paid by the first and second respondents. There is no merit in this submission. There is no reason why all the costs should not follow the event. The second respondent submitted that the costs of senior counsel should be awarded as well. In my view the matter was of sufficient difficulty and importance to merit the employment of senior counsel where applicable. It was a prudent precaution and not a luxury.
79. In the result the following order is made:
1. The application to have the appeal reinstated is dismissed.
 2. The appellants are ordered to pay the first respondent's and second respondent's costs of the appeal which costs shall include the following:
 - a. The costs of the application for leave to appeal to the Supreme Court of Appeal;
 - b. The costs of both the condonation applications before this court;
 - c. The costs of senior counsel, where so appointed, in respect of the appeal, the application for leave to appeal to the Supreme Court of Appeal and the condonation applications before this court.

C.P. RABIE

JUDGE OF THE HIGH COURT I agree

R.G. TOLMAY

JUDGE OF THE HIGH COURT

I agree

H.J; DE VOS

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Prepared on 12 October 2026 · Esheria