THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 160/2019

In the matter between:

SOUTH AFRICAN EXPRESS LIMITED **APPELLANT**

and

BAGPORT (PTY) LTD **RESPONDENT**

Neutral citation: *SA Express Ltd v Bagport (Pty) Ltd* (160/2019) [2020] ZASCA 13 (19 March 2020)

Coram: SWAIN, MOKGOHLOA and PLASKET JJA and KOEN and GORVEN AJJA

Heard: 17 February 2020

Delivered: 19 March 2020

Summary: Appeal – lapsing of appeal – condonation – negligence of appellant's attorney no excuse – no basis for condonation – matter struck off roll.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Van Oosten J sitting as court of first instance):

1 The application for condonation and for the re-instatement of the appeal is dismissed.

2 The matter is struck off the roll with costs.

JUDGMENT

Plasket JA (Swain and Mokgohloa JJA and Koen and Gorven AJJA concurring)

[1] One could be forgiven for thinking that the conclusion of a settlement agreement by parties to a dispute would bring that dispute to an end. In this appeal, however, the conclusion of a settlement agreement, proposed by the appellant, drafted by its attorney and signed by its chief executive officer (CEO), spawned a repudiation of the settlement agreement and a continuation of the dispute for a further three years.

Background

[2] The respondent, Bagport (Pty) Ltd (Bagport) provided a baggage wrapping service at various airports to the appellant, South African Express Limited (SA Express), a state-owned enterprise that operates an airline. SA Express did not, according to Bagport, pay what was due for the provision of the service. Bagport issued summons on 13 December 2016 in which it claimed R4 748 373.60 from SA Express.

[3] SA Express filed a notice of intention to defend the action, which was met by Bagport applying for summary judgment. In response to the application for summary

judgment, and instead of opposing it, SA Express proposed a settlement of the dispute.

[4] SA Express' attorney, on the instructions of SA Express' legal department, drafted an agreement in which it undertook to pay Bagport R4 748 373.60, the amount claimed in the summons. It was forwarded to Bagport by SA Express' chief procurement officer, before being signed on behalf of Bagport on 28 February 2017 by its Payroll/Human Resources Manager and on behalf of SA Express on 1 March 2017 by its CEO. From the papers, it is clear that apart from SA Express' CEO, its chief procurement officer and its chief financial officer were also aware of it. Indeed, the chief procurement officer, apart from forwarding the document to Bagport for signature, had co-signed an expense authorization form together with the CEO; and the chief financial officer wrote to Bagport and undertook to pay it in terms of the settlement agreement.

[5] Despite this, SA Express still did not pay. As a result, Bagport applied in terms of rule 41(4) of the Uniform Rules for the settlement agreement to be made a court order. It did so in a notice of motion dated 26 June 2017. The parties had agreed to this in clause 4.6 of the settlement agreement in the event of SA Express reneging on its obligation to pay. SA Express not only opposed the application but it also brought a counter-application for an order declaring the settlement agreement to be invalid and unenforceable.

[6] In the Gauteng Division of the High Court, Johannesburg, Van Oosten J, on 9 May 2018, made the settlement agreement an order, directed SA Express to pay Bagport R4 748 373.60, together with interest and costs on an attorney and client scale and dismissed the counter-application with costs on an attorney and client scale. (Clause 4.9 of the settlement agreement provided that if SA Express failed to pay on due date, it would be liable for any costs in respect of the enforcement of the settlement agreement on an attorney and client scale.)

[7] Still SA Express did not pay. Instead, it applied belatedly, in an application dated 11 July 2018, for leave to appeal. It only did so after Bagport had, as a result of

SA Express failing to pay it, attached one of its aircraft. On 20 August 2018, Van Oosten J granted leave to appeal to this court.

[8] A few weeks before this appeal was to be heard, SA Express was placed under business rescue. We were informed from the bar by counsel for SA Express that its business rescue practitioners were aware of the appeal and had expressly mandated its legal representatives to proceed with the appeal.

[9] At the hearing of the appeal, the issues for decision were narrowed to two. They are whether, SA Express' appeal having lapsed, condonation ought to be granted to it for its delay in prosecuting the appeal and its appeal should be reinstated; and whether SA Express has established that the settlement agreement is unenforceable.

Condonation for the lapsing of the appeal

The legal principles

[10] In terms of rule 7 of this court's rules, an appellant is required to lodge a notice of appeal within a month of the date on which leave to appeal was granted. SA Express filed its notice of appeal timeously.

[11] In terms of rule 8(1), an appellant is required to lodge with this court's Registrar, six copies of the record of the proceedings in the court below within three months of the lodging of the notice of appeal. This period may, in terms of rule 8(2), be extended either by the written agreement of the parties or by the Registrar following a request by the appellant, with notice of the request being given to the other parties. Rule 8(3) provides that if the record is not lodged within the period prescribed by rule 8(1) or an extended period in terms of rule 8(2), the appeal shall lapse.

[12] Rule 12 makes provision for applications for condonation in the event of non-compliance with the rules. It is trite that condonation is not simply available for the asking: the party applying for condonation seeks an indulgence and must make out a case for the court's discretion to be exercised in its favour.

[13] In *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and Others*[1] Ponnan JA outlined the factors relevant to the exercise of that discretion. They 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'.

[14] In *Darries v Sheriff, Magistrate's Court, Wynberg and Another*[2] these general considerations were fleshed out by Plewman JA when he stated:

'Condonation of the non-observance of the Rules of this Court is not a mere formality. In all cases, some acceptable explanation, not only of, for example, the delay in noting an appeal, but also, where this is the case, any delay in seeking condonation, must be given. An appellant should whenever he realises that he has not complied with a Rule of Court apply for condonation as soon as possible. Nor should it simply be assumed that, where non-compliance was due entirely to the neglect of the appellant's attorney, condonation will be granted. In applications of this sort the applicant's prospects of success are in general an important though not decisive consideration. When application is made for condonation it is advisable that the petition should set forth briefly and succinctly such essential information as may enable the Court to assess the appellant's prospects of success. But appellant's prospect of success is but one of the factors relevant to the exercise of the Court's discretion, unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation obviously unworthy of consideration. Where non-observance of the Rules has been flagrant and gross an application for condonation should not be granted, whatever the prospects of success might be.'

[15] Reference was made in *Darries* to an erroneous assumption that is sometimes made that if the cause of a delay can be laid at the door of an applicant's attorney, condonation will be granted. That issue has been dealt with by this court on a number of occasions.

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[1] *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and Others* [2015] ZASCA 5 para 11.

[2] *Darries v Sheriff, Magistrate's Court, Wynberg and Another* 1998 (3) SA 34 (SCA) at 40I-41E. (References omitted.)

[16] In *Saloojee and Another NNO v Minister of Community Development*,[3] the notice of appeal, the record and the condonation application were filed some eight months late. After considering the explanation given for the delay and concluding that it was not even 'remotely satisfactory'[4] Steyn CJ proceeded to hold:[5]

'I should point out, however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity. In fact this Court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the Rules of this Court was due to neglect on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are.'

[17] In *Mbutuma v Xhosa Development Corporation Ltd*,[6] the delay in prosecuting an appeal was due to the inexperience of the appellant's attorney, that matter having been his first appeal to this court. Trengove AJA held that the attorney's lack of experience was no excuse at all: he had a duty to acquaint himself properly with the procedure prescribed by this court's rules.[7]

[18] While, generally speaking, the various factors that have been listed in the cases, including the appellant's prospects of success, should be weighed against each other, there are instances where condonation ought not to be granted even if there are reasonable prospects of success. This was alluded to in the *Darries* matter.[8] In *Tshivhase Royal Council and Another v Tshivhase and Another; Tshivhase and*

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[3] *Saloojee and Another NNO v Minister of Community Development* 1965 (2) SA 135 (A).
[4] At 140H.
[5] At 141B-E.
[6] *Mbutuma v Xhosa Development Corporation Ltd* 1978 (1) SA 681 (A).
[7] At 684H-685A. See too *Moaki v Reckitt and Colman (Africa) (Pty) Ltd and Another* 1968 (3) SA 98 (A) at 101G-H.
[8] Note 2 at 40I-41E.

Another v Tshivhase and Another[9] Nestadt JA said that this court 'has often said that in cases of flagrant breaches of the Rules, especially where there is no acceptable explanation therefor, the indulgence of condonation may be refused whatever the merits of the appeal are' and that this applies 'even where the blame lies solely with the attorney'.[10]

The facts and the explanation for the delay

[19] SA Express' attorney deposed to an affidavit in support of the application for condonation and for the re-instatement of the appeal. In it, he candidly admitted that the 'main reason for the delay is because neither I nor my correspondent attorney understood initially what a record of this Honourable Court comprised'; and that their efforts fell short of what was required because of their 'limited understanding of the Rules, given that this matter is our first appeal in the Supreme Court of Appeal'. He also blamed his Bloemfontein correspondent for having been negligent in the advice that he had given.[11]

[20] On 19 September 2018, the attorney instructed his correspondent to file the notice of appeal. He did so. The Registrar of this court informed him that the record was due on 21 January 2019.

[21] It then became necessary to prepare the record. The correspondent advised the attorney that the record was 'the transcript of proceedings in the court *a quo*'. The attorney appointed a transcribing service to transcribe 'the court proceedings'.

[22] On 16 January 2019, this 'record' was delivered to SA Express' senior counsel. Two days later, he advised the attorney's candidate attorney that what had been provided to him was not a record for purposes of an appeal to this court. As the

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[9] *Tshivhase Royal Council and Another v Tshivhase and Another; Tshivhase and Another v Tshivhase and Another* 1992 (4) SA 852 (A) at 859E-F.

[10] See by way of example, *PE Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A) at 799D-E. See too *Blumenthal and Another v Thomson NO and Another* 1994 (2) SA 118 (A) at 121I-122B.

[11] I shall refer to SA Express' attorney as 'the attorney' and I shall refer to his Bloemfontein correspondent as the 'correspondent'.

proceedings in the court below were application proceedings, the 'record' that had been transcribed was no more than a transcript of the argument.

[23] When SA Express' senior counsel was asked by the candidate attorney what 'the record looked like', he was advised to read rule 8 of this court's rules, and counsel also gave him the name of a transcription service. Had the attorney read rule 8 before ordering the transcript of the argument, he would have discovered that rule 8(6)*(j)* provides that '[u]nless it is essential for the determination of the appeal and the parties agree thereto in writing, the record shall not contain', inter alia, 'the argument and opening address'. While rule 8 does not define 'the record', one gets a clear idea of what is required from a reading of the rule. For instance, rule 8(6)*(i)* provides that the record 'shall contain a correct and complete index of the evidence, documents and exhibits in the case'. Rule 8(6)*(h)* provides that if the record is longer than one volume, the judgment appealed against, the judgment and order giving leave to appeal and the notice of appeal must be contained in a separate volume. From this, the attorney would have gleaned that the record comprised all of the evidence, documents and exhibits – in other words, in this context, the notice of motion, affidavits and annexures – and the judgments and notice of appeal in respect of the proceedings in the court below.

[24] The attorney contacted the transcription service suggested by counsel. He was told that it would take three weeks to prepare the record. It was then three days before the appeal was due to lapse. He decided that it was best for him to prepare the record himself. He obtained a short extension of time from Bagport's attorneys – until 23 January 2019. His correspondent failed, however, to notify the Registrar of this.

[25] An attempt was made to file the record on 24 January 2019. In the answering affidavit it was said that this record consisted of an unbound bundle of the affidavits in the proceedings in the court below. It was thus not surprising that the Registrar refused to accept this as a proper record. Despite this, the correspondent had told the attorney that he had filed the record.

[26] On 30 January 2019, the Registrar wrote to the correspondent to inform him that the appeal had lapsed. The correspondent chose to keep this information to

himself. The attorney only found out that the appeal had lapsed when, on 5 February 2019, he received a letter from Bagport's attorneys informing him of this fact and threatening to execute on Van Oosten J's judgment.

[27] When the attorney communicated with the Registrar, he was informed that no record had been filed by the correspondent as alleged by him. When proof of the filing of the record was sought from the correspondent, he said that he had attempted to file the record on 24 January 2019 but the Registrar had refused to accept the record because it was not properly bound. Even if the correspondent had informed the Registrar of the extension of time by agreement until 23 January 2019, the appeal would have lapsed by 24 January 2019.

[28] The correspondent informed the attorney that he had been advised to file a properly bound record and an application for condonation and for the reinstatement of the lapsed appeal. The attorney decided to fly to Bloemfontein to collect the record and 'prepare it correctly'. He said that his correspondent told him that getting the appeal back on track involved an 'administrative process' in which 'the application was decided in chambers and/or by the registrar'. All it required, said the correspondent, was an affidavit from him setting out the basis for the application, together with heads of argument. The matter was left in the hands of the correspondent and the result was that a 'wholly defective reinstatement application' and a defective record were filed.

[29] This vain attempt to file the record had not been simple or expeditious. A draft of the application had been sent to the attorney on 7 February 2019. He had made amendments to it and sent it back to the correspondent on 8 February 2019. The attorney flew to Bloemfontein on 9 February 2019 to collect the record and the application. It was served on Bagport's attorneys on 11 February 2019. On 12 February 2019, the attorney returned to Bloemfontein to file the 'corrected record', in which the corrections had been made by hand. When the attorney and his correspondent attempted to file this record, they were advised that while it appeared to be compliant, 'we would have to file heads of argument and a practice note for the condonation and reinstatement application together with the corrected record'.

[30] The correspondent undertook to draft the heads of argument. The attorney bought computer software to enable him to 'transpose references onto the record as is required by the rules of this Court (instead of transposing the same by hand as I had previously done)'. On his return to Johannesburg he attended to this task and returned to Bloemfontein on 15 February 2019. The record was bound and left with the correspondent for filing. Ten days later, on 25 February 2019, the record was filed together with an application for condonation and for the reinstatement of the appeal.

[31] On 12 March 2019, the attorney sought confirmation from the correspondent that condonation had been granted in terms of the 'administrative process' that the correspondent had spoken of. When the correspondent said that he did not have that confirmation, the attorney travelled once more to Bloemfontein with a view to obtaining confirmation that condonation had indeed been granted.

[32] At this stage, the correspondent went to ground. As a result, the attorney went to the court on his own. He was informed that the application for condonation and reinstatement of the appeal would only be heard in court on the day on which the appeal was to be heard. He also discovered to his surprise that Bagport's attorneys had filed a notice of opposition and answering papers.

[33] On 14 March 2019, the attorney learnt, while consulting with counsel, that the record filed on 25 February 2019 was defective in a number of material respects. He was advised by counsel that the record had to be withdrawn and that a transcriber should be appointed to produce a proper record. He withdrew the defective record and the application for condonation and reinstatement of the appeal on 19 March 2019. Another record was filed, together with an application for condonation and the reinstatement of the appeal on 12 April 2019.

Conclusion on condonation

[34] An applicant for condonation is required to give a full and reasonable explanation for the delay that has occurred, and that explanation must cover the entire

period of the delay.[12] I have set out the attorney's explanation for the delay and now turn to a consideration of its reasonableness.

[35] The proceedings in the court below were application proceedings. The attorney was, not surprisingly, in possession of copies of the papers, although he said that some documents were not signed and others were not stamped. Bagport's attorneys also made their papers from the application available to the attorney. The record, including the judgment, judgment granting leave to appeal and notice of appeal, consists of 252 pages. Yet it took from 20 August 2018 to 12 April 2019 – about a week short of eight months – to produce it in an acceptable form. During this period, one comedy of errors followed another.

[36] It was only on 12 November 2018, about two and a half months after leave to appeal had been granted, that the attorney instructed a transcriber to transcribe the argument. It is so that the product of the transcription was not a record for purposes of the appeal, but the delay from when leave to appeal was granted until 18 January 2019, when counsel informed the attorney that he had not produced a record, is indicative of the tardy and ill-directed approach of the attorney in general.

[37] When the attorney ordered a transcript of the argument, he was negligent: on his own admission, he did not know what was required and did not acquaint himself with the rules of this court. This he was required to do, and his lack of experience is no excuse.[13]

[38] Once the consequences of the attorney's lack of knowledge was brought to his attention by counsel, he must have realized that he was hopelessly out of his depth. At this stage, he ought to have sought the assistance of someone who knew what was required and was able to do it. He did not do so and gave no reasonable explanation for his failure. Instead, he decided to try again to compile a record. Not surprisingly,

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[12] *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as amicus curiae)* [2007] ZACC 24; 2008 (2) SA 472 (CC) para 22; *Laerskool Generaal Hendrik Schoeman v Bastian Financial Services (Pty) Ltd* [2009] ZACC 12; 2012 (2) SA 637 (CC) para 15.
[13] *Mbutuma v Xhosa Development Corporation Ltd* (note 6) at 684H-685A.

the result was a disaster. And yet again, that disaster is attributable to the attorney's negligence.

[39] To the extent that the attorney has tried to lay the blame at the door of his correspondent, there are three answers. First, he appointed the correspondent and cannot escape the consequences of his agent's negligence. Secondly, the primary obligation to produce a proper record and file it timeously lay with him. Thirdly, it must have been clear to him from an early stage that his correspondent was as out of his depth as he was: the attorney learnt in January 2019 that the correspondent's advice as to the nature of a record was incorrect, yet he continued to rely on the correspondent's advice.

[40] If the attorney had, due to his ignorance of what a record is, allowed the appeal to lapse, but had then filed a compliant record within a few weeks, a case for condonation may have had merit. But that is not what he did. Instead, his ineptitude and negligence continued. After having presented his counsel with a transcript of the argument, he attempted to file defective records on 24 January 2019 and 25 February 2019, before finally managing to file a compliant record on 12 April 2019.

[41] Throughout the period from leave to appeal being granted to the filing of a compliant record, there are unexplained delays. I mention but two. First, the record that was filed on 25 February 2019 had been ready for filing on 15 February 2019 but nothing appears to have been done during this ten day period. Secondly, after that record was withdrawn, the new, final and compliant record was given to the correspondent on 30 March 2019 but for reasons that are not explained, the record was only filed on 12 April 2019.

[42] In the foreword to the first edition of Herbstein and Van Winsen's book on civil procedure, reproduced in the fifth edition now titled *Herbstein and Van Winsen: The Civil Practice of the High Courts of South Africa*,[14] Mr Justice R P B Davis wrote:

[14] A C Cilliers, C Loots and H C Nel *Herbstein and Van Winsen: The Civil Practice of the High Courts of South Africa* (5 ed) (2009) Vol 1 at xvi.

‘But after all, industry is one of the attributes of an honourable character: no honourable and honest legal practitioner will accept a client’s money for doing his work to the best of his ability, and then not do it. And before he ever accepts it, he will have qualified himself to do the work properly, for, where skill is required, lack of it is equivalent to negligence. Indeed, to undertake to do something and then not to do it with reasonable efficiency, either because of unskillfulness or [because] of lack of diligence, is something very closely akin to obtaining money by false pretences.’

[43] In this case, the attorney’s negligence lay in the fact that he did not acquaint himself with the rules of this court, did not have even the most rudimentary understanding of what had to be done, relied on the correspondent who also proved himself, at an early stage, to be unqualified to do the work, and steadfastly failed or refused, until it was too late, to engage the services of people who knew what to do and could do the job. When the attorney’s conduct of the appeal, from when leave to appeal was granted until a compliant record was filed, is viewed holistically, the conclusion is inescapable that he was grossly negligent throughout. The attorney’s explanation is not reasonable. Indeed, all it does is establish his negligence.

[44] This is, in my view, the type of case in which condonation should be refused irrespective of the prospects of success, and irrespective of the fact that the blame lies solely with the attorney: the breaches of the rules have been flagrant and continual. Despite this finding, I believe it to be prudent nonetheless to deal briefly with the prospects of success.

The merits

[45] In the counter-application, it was alleged that the settlement agreement was invalid for two reasons. They were, first, that SA Express’ CEO at the time had shown a ‘flagrant disregard for internal processes’ by failing to obtain ‘the relevant authorizing signatures from relevant role players as envisaged in both the Contract Compliance and expense authorisation forms’; and secondly that there had been non-compliance with ss 38(2) and 68 of the Public Finance Management Act 1 of 1999 (the PFMA).

[46] Despite the argument in the court below being limited to these issues, an attempt was made to raise a third argument – that the settlement agreement should

not be enforced because SA Express disputed owing Bagport the amount it had claimed. [15] There are two principal problems with this argument.

[47] First, no attempt was made in the counter-application to impugn the settlement agreement. Nowhere in the papers was it even remotely suggested that the settlement agreement was induced by misrepresentation, fraud, duress, undue influence, mistake or anything similar. Secondly, the argument lacks a factual foundation. While SA Express made allegations about a dispute as to the amount that it owed Bagport, in the answering affidavit to the counter-application, that dispute, its resolution and SA Express' acceptance of the correctness of Bagport's claim was fully and convincingly explained. (SA Express' own reconciliation, which concluded that it owed Bagport the amount claimed by it was attached to the answering affidavit.) On the basis of the *Plascon-Evans* rule,[16] Bagport's version must prevail. There is consequently no merit in this belated attack on the settlement agreement, and it has no prospect of success.

[48] I turn now to the argument that the settlement agreement was invalid because it was concluded in breach of ss 38(2) and 68 of the PFMA. I accept that SA Express, as a state owned enterprise, is, in general, required to comply with the PFMA. Section 38(2) provides that an accounting officer may not commit a trading entity 'to any liability for which money has not been appropriated'. Section 68 provides:

'If a person, otherwise than in accordance with section 66, lends money to an institution to which this Act applies or purports to issue on behalf of such an institution a guarantee, indemnity or security, or enters into any other transaction which purports to bind such an institution to any future financial commitment, the state and that institution is not bound by the lending contract or the guarantee, indemnity, security or other transaction.'

Section 66(1) provides that a body to which the PFMA applies may not 'borrow money or issue a guarantee, indemnity or security, or enter into any other transaction that binds or may bind that institution . . . to any future financial commitment, unless such borrowing, guarantee, indemnity, security or other transaction' is authorised by the PFMA.

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[15] In the court below, Van Oosten J said of this issue that '[n]ot surprisingly, and in my view wisely so, counsel for SA Express did not rely on the history of the matter as a ground for attacking the validity of the settlement agreement' (para 6).

[16] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-I.

[49] If the PFMA applies, it applies to the conclusion of the baggage wrapping agreement – the underlying agreement – and not, as Van Oosten J said of the settlement agreement, to 'an acknowledgement of an already existing indebtedness'.[17] No factual assertions appear in SA Express' counter-application that could establish that the funds required to pay for the baggage wrapping service had not been appropriated. Similarly, no facts have been put up to establish that the agreement was entered into otherwise than in accordance with s 66.[18] In any event, ss 66 and 68 do not apply to the baggage wrapping agreement because it is not an agreement that is similar to a credit or security agreement – the types of agreement that the sections are confined to.[19] There is no merit, either factually or legally, in this argument, and it consequently has no prospect of success.

[50] Finally, it was argued that the settlement agreement was invalid for want of compliance by SA Express with its own internal procedures. The nub of this challenge is that two forms were not completed and signed prior to the settlement agreement being signed by the CEO. It was stated in the founding affidavit in the counter-application that it was SA Express' policy for a 'compliance contract form' to be filled in and signed, but this was not done at all. Secondly, SA Express' policy also required an 'expense authorization form' to be completed. While the CEO was authorised to approve payments of up to R10 million, the form required the recommendation of a divisional manager and the approval of a general manager and the chief financial officer. In this case, the recommendation was signed by the chief procurement officer and approved by the CEO. (There is evidence that the chief financial officer was aware of the settlement agreement and undertook to honour it.)

[51] As with the other arguments that I have dealt with above, once again, the factual basis for the conclusion that SA Express contends for is absent. The policy that it relied on was not attached to its papers and nothing was said as to its legal provenance. In

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[17] Para 10.
[18] A number of factual allegations were made in the heads of argument filed on behalf of SA Express. They can safely be ignored as they do not appear in any of the affidavits and are thus not evidence. To include them in the heads of argument was, in my view, improper.
[19] *Road Traffic Management Corporation v Waymark Infotech (Pty) Ltd* [2018] ZACC 12; 2019 (5) SA 29 (CC) para 45.

order for the finding contended for by SA Express to be made, it would be necessary to interpret the policy within the context of its legal pedigree and context. Only then could a finding be made on whether a failure to complete the two forms would lead to the invalidity of the settlement agreement.

[52] Without the policy having been proved, such a finding cannot be made. Instead, it would appear that SA Express, when the settlement agreement was signed, had merely failed to comply with its own internal procedures. In *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd*,[20] Ponnan JA drew a distinction, for purposes of the operation of estoppel against an organ of state, between non-compliance with internal procedures, on the one hand, and with empowering provisions, on the other. He explained the position thus:[21]

'[11] It is important at the outset to distinguish between two separate, often interwoven, yet distinctly different "categories" of cases. The distinction ought to be clear enough conceptually. And yet, as the present matter amply demonstrates, it is not always truly discerned. I am referring to the distinction between an act beyond or in excess of the legal powers of a public authority (the first category), on the one hand, and the irregular or informal exercise of power granted (the second category), on the other. That broad distinction lies at the heart of the present appeal, for the successful invocation of the doctrine of estoppel may depend upon it.

[12] In the second category, persons contracting in good faith with a statutory body or its agents are not bound, in the absence of knowledge to the contrary, to enquire whether the relevant internal arrangements or formalities have been satisfied, but are entitled to assume that all the necessary arrangements or formalities have indeed been complied with. Such persons may then rely on estoppel if the defence raised is that the relevant internal arrangements or formalities were not complied with.

[13] As to the first category: failure by a statutory body to comply with provisions which the legislature has prescribed for the validity of a specified transaction cannot be remedied by estoppel because that would give validity to a transaction which is unlawful and therefore ultra vires.'

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[20] *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd* [2007] ZASCA 28; 2008 (3) SA 1 (SCA).

[21] Paras 11-13. (References omitted.)

[53] SA Express is a public company.[22] It is subject to the Companies Act 71 of 2008. Section 20(7) of the Companies Act codifies the *Turquand* rule of the common law.[23] It provides:

'A person dealing with a company in good faith, other than a director, prescribed officer or shareholder of the company, is entitled to presume that the company, in making any decision in the exercise of its powers, has complied with all of the formal and procedural requirements in terms of this Act, its Memorandum of Incorporation and any rules of the company unless, in the circumstances, the person knew or reasonably ought to have known of any failure by the company to comply with any such requirement.'

Section 20(8) provides that s 20(7) 'must be construed concurrently with, and not in substitution for, any relevant common law principle relating to the presumed validity of the actions of a company in the exercise of its powers'.

[54] It has not been suggested that when Bagport concluded the settlement agreement it was not dealing in good faith with SA Express. There has likewise been no suggestion that it knew or ought reasonably to have known that the two forms had not been completed. In these circumstances, s 20(7) of the Companies Act applies to prevent SA Express from relying on its failure to comply with its own internal procedures. For this reason, SA Express's third argument on the invalidity of the settlement agreement has no merit, and no prospects of success.

[55] Having considered the merits, I am of the view that had it been necessary to consider SA Express' prospects of success as part of the condonation application, the answer would have been that its prospects of success are extremely poor and could not assist in relation to condonation.

Conclusion

[56] It is necessary to say something about the way in which SA Express has conducted itself in this matter. In a word, its conduct has been disgraceful. It has attempted to avoid its clear and admitted obligations in a most underhanded way. Better is expected of an organ of state, which should serve as a role model[24] and

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[22] South African Express Act 34 of 2007, s 6.
[23] See *Royal British Bank v Turquand* (1856) 6 E & B 327.
[24] *S v Makwanyane and Another* 1995 (3) SA 391 (CC) para 222.

display an acceptable level of commercial morality in its dealings with the public. As Cameron J said in *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute*,[25] albeit in a different context, organs of state have a duty 'to tread respectfully when dealing with rights' even, I would suggest, in their commercial dealings.

[57] In the result, I make the following order.

1 The application for condonation and for the re-instatement of the appeal is dismissed.

2 The matter is struck off the roll with costs.

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C Plasket

Judge of Appeal

[25] *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* [2014] ZACC 6; 2014 (3) SA 481 (CC) para 82.

APPEARANCES

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