THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 399/2018

In the matter between:

SAMUEL DEMOCRACY ZWANE N.O. **First Applicant**

SAMUEL DEMOCRACY ZWANE **Second Applicant**

and

ANDRE PRETORIUS **Respondent**

Neutral citation: *Samuel Democracy Zwane N.O. v Andre Pretorius* (399/2018) [2019] ZASCA 171(29 November 2019)

Coram: Cachalia, Swain and Mokgohloa JJA

Heard: 21 November 2019

Delivered: 29 November 2019

Summary: Condonation: application for condonation for late filing of appeal application not granted – no prospects of success - appeal struck from the roll.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Prinsloo J sitting as court of first instance):

1 The application for condonation is dismissed with costs.
2 The appeal is struck from the roll.

JUDGMENT

Mokgohloa JA (Cachalia and Swain JJA concurring):

[1] This is an application for condonation of the late filing of an appeal. The first applicant, Samuel Democracy Zwane N.O, is cited herein in his official capacity as the sole trustee of the Democracy Zwane Family Trust, the owner of a farm known as Portion 11 farm Uitgevallen 134 IT, Ermelo, previously owned by the late Ms Lesley Megan Pretorius. The trust bought the farm on 6 February 2015 from Mr Pretorius who was the executor to Ms Pretorius' estate. It was registered into the trust's name on 4 May 2015.

[2] The farm was initially advertised to be sold on auction on 29 November 2014. During October 2014, the second applicant representing the trust, approached Mr Pretorius and informed him that he was interested in buying the farm. On 23 October 2014, Mr Pretorius and the trust entered into a sale agreement (the first agreement). The agreement was subject to the condition that the trust had to obtain a loan of R7.5 million (the purchase price) within 30 days, failing which the agreement would lapse. Possession and occupation of the farm was to be given to the applicants on the date of registration of the bond.

[3] The first sale agreement lapsed because the trust failed to secure a loan to pay the purchase price as per the agreement. In the meantime, the auction sale proceeded on 29 November 2014 and the respondent, Mr Andre Pretorius, only bought 67 head of cattle, farm equipment and other loose items. The farm itself was not sold because the reserved price could not be reached.

[4] Soon after the auction, the respondent and Mr Pretorius entered into an oral agreement in terms of which the respondent would maintain the farm and the grass until the farm is purchased and transferred to the new purchaser. In return, the respondent would keep the cattle he bought on auction on the farm, fertilize, cut the grass and make bales which would become his property to use as he pleased.

[5] On 4 December 2014, Mr Pretorius and the trust entered into another sale agreement in terms of which the first agreement was revived. This agreement lapsed as well for the same reasons that the trust had failed to obtain the necessary loan.

[6] The respondent continued to maintain the farm as per the oral agreement he had with Mr Pretorius. During December 2014 he fertilised the grass. A month later he cut the grass and made 400 bales which were packed behind the barn on the farm. And again during January 2015, he fertilized the grass and in March 2015 he cut and made another 292 bales.

[7] On 6 February 2015, a third sale agreement was entered between Mr Pretorius and the trust on the same terms as the first agreement except for the purchase price having been reduced to R7.2 million. This time the trust managed to obtain the loan from the bank and the farm was subsequently transferred and registered in its name on 4 May 2015.

[8] A day or two after the transfer, the second applicant visited the farm and allowed the respondent to remove the cattle but refused him to remove the 692 bales of grass. The respondent instituted an action claiming ownership of the bales.

[9] The trial proceeded before Prinsloo J in the Gauteng Division of the High Court, Pretoria. On 24 February 2017, he handed down his judgment having found in favour of the respondent, and ordered the applicants to deliver the bales to the respondent. Application for leave to appeal this judgment was dismissed on 25 April 2017. The applicants applied to this court for leave to appeal. On 11 June 2018, this court referred the application for leave to appeal for the hearing of oral argument.

[10] Before considering the merits of the appeal, it is necessary to decide whether we should condone the failure by the applicants to pursue the appeal timeously and properly. And if so, whether to reinstate the appeal.

[11] The application for leave to appeal was filed in this court on 19 April 2018. The rules of this court required the record to have been filed on 25 May 2017. The explanation proffered by the second applicant for the delay of almost eleven months to file the appeal record was an alleged negligence on the part of his attorneys. In that regard he states:

'53. I did not do nothing in this regard. I instructed attorneys TMN Kgomo & Associates Incorporated ("TMN Kgomo") who instructed Adv A P Laka SC to represent me as far (as I am aware) to draw petition. I accepted the advice of the legal representatives, especially since Adv A P Laka is a senior counsel.

54. On 25 July 2017 an application for leave to appeal purporting to be a petition was served and filed on my behalf petitioning to the High Court in Pretoria instead of the above Honourable Court. I attach hereto the Filling Notice, together with the defective Notice of Application for Leave to Appeal collectively as ANNEXURES "A6".

55. I, on advice of TMN Kgomo attorneys and entrusted them and therefore waited for the appeal to be adjudicated upon. However, nothing happened and I was not informed on the status of the appeal. I am advised that the procedure adopted is flawed and my attorney TMN Kgomo should have known better.

56. Only on 5 February 2018 did I consult my current attorneys of record to attempt for them to assist me in finalising the already pending petition. I was then informed of the flawed procedure followed by TMN Kgomo attorneys. My attorney then advised me that a petition should be launched to the above Honourable Court.'

[12] As regards the delay in filing the application of leave to appeal between 5 February 2018 and 19 April 2018, the second applicant explained that it took him time to obtain the relevant documents, such as transcripts and court orders. He explained further that he had to obtain funds to pay his new attorneys and once that was secured, his bank made a

mistake by depositing the funds into a wrong account.

[13] It is apparent that there are significant gaps in the second applicant's explanation. There is a substantial amount of time unaccounted for. This is from 25 April 2017 when leave to appeal was refused until 25 July 2017 when his attorney allegedly filed the petition in a wrong court. Again from 25 July 2017 to 5 February 2018 when he became aware that his attorney had filed a petition in a wrong court. He does not give an explanation of the steps he took to follow up with his attorney with regards to the progress of the petition. As stated in *Saloojee & another NO v Minister of Community Development*,[1]

'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. Consideration *ad misericordiam* should not be allowed to become an invitation to laxity. . . 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.'

[14] In *Darries v Sheriff, Magistrate's Court, Wynberg & another*,[2] the court pointed out that condonation is not a mere formality and will not necessarily be granted even where the failure to comply with the rules of court is entirely attributable to a party's attorney. The court stated:

'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 negligent of the appellant's attorney, condonation will be granted. In applications of this sort the appellant's prospects of success are in general an important though not decisive consideration. When application

[1] *Saloojee & another NO v Minister of Community Development* 1965 (2) SA 135 (A) 141 C-E.
[2] *Darries v Sheriff, Magistrate's Court, Wynberg & another* 1998 (3) SA 34 (SCA) 40I-41E.

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] In my view, little more need be said. The failure on the part of the second applicant to comply with the rules of this court has been flagrant and inexplicable. He did nothing after his application for leave to appeal was refused by the trial court. He sat back and allowed the respondent to think that he had abandoned his intention to appeal. And the lack of any explanation for failing to comply with time limits given by this court on 11 June 2018 when this court referred the application for leave to appeal to the hearing of oral evidence, is astonishing. Condonation is not to be had merely for the asking but a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that if the non-compliance is time related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out[3]. The applicants failed to give attention to matters that called for an explanation. I therefore find it impossible to hold that the delay in bringing this application has been explained in a manner that is satisfactorily.

[16] The circumstances of this case are such that we may well have been entitled to refuse the application for condonation without going into the

[3] *Uitenhagen Transitional Local Council v South African Revenue Service* 2004 (1) SA 292 (SCA); [2003] 4 All SA 37; [2003] ZASCA 76 para 6.

question of prospects of success in the appeal. As pointed out in *Tshivhase Royal Council & another v Tshivhase & another*[4] that this court 'has often said that in cases of flagrant breaches of the Rules, especially where there is no acceptable explanation thereof, the indulgence of condonation may be refused whatever the merits of the appeal are; this applies even where the blame lies solely with the attorney.' The delay in this matter is so unreasonable and the explanation offered is unacceptable and wanting that we may well have been justified in adopting that course, I shall however briefly deal with the applicants' prospects of success.

[17] The respondent's claim is that he had an oral agreement with Mr Pretorius in terms of which he would maintain the farm, fertilize the grass, cut it, prepare bales and keep them as his own. The applicants contended that the respondent failed to prove his case of ownership of the bales as he had based his action on being a bona fide possessor rather than him being the owner of the bales by virtue of the oral agreement. This contention was based on what the applicants allege was the submission made by the respondent's counsel in his opening address. According to the applicants, the respondent's counsel disavowed reliance on the oral agreement and persisted that the respondent's claim was based on him being a bona fide possessor of the bales.

[18] Relying on *Saayman v Road Accident Fund,*[5] applicants' counsel argued that the submission by the respondent's counsel amounted to a concession which was never withdrawn. Such concession, the argument continued, prejudiced the applicants in that they were under the impression that they had to defend a claim of ownership of a bona fide possessor and

[4] *Tshivhase Royal Council & another v Tshivhase & another; Tshihvase & another v Tshivhase & another* 1992 (4) SA 852 (A) at 859E-F.
[5] *Saayman v Road Accident Fund* 2011 (1) SA 106 SCA; [2010] ZASCA 123.

not ownership based on the oral agreement.

[19] I find it necessary to refer to the opening address by the respondent's counsel. This is what he said:

'Die saak van die eiser opsommender gewys, U Edele, is dat daardie oulandsgras is vrugte van die grond, en die mees natuurlikse vorm van waarop eiendomsreg bekom kan word is afsnyding en in besitname. En toe ons as 'n bona fide besitter van daardie grond in terme van 'n ooreenkoms dit afgesny het en in besit geneem het deur dit te gaan pak in daardie, met die kampies, het ons die eienaar daarvan geword.' (my emphasis).

[20] The submission by the respondent's counsel does not amount to an admission that the claim is based on the respondent being a bona fide possessor. Such submission is described in Saayman as follows:

'[12] To my mind this was not an unequivocal admission but a mere concession made by counsel in the course of his address. Such a concession may be withdrawn at any time, particularly where such a withdrawal will not cause the other party any prejudice.

. . .

[29] Concessions are made by counsel in the course of a trial for a variety of reasons without a contemplation that he is thereby committing his client and without any intention to limit issues. The statement in question may, for example, be used as an assumption on which to found argument, or be made in a bona fide spirit of fairness, intending to convey to the court counsel's candid view of the way the court should proceed.'[6]

It is clear from counsel's submission that he did not disavow the respondent's reliance on the oral agreement.

[21] Accepting that counsel, in his opening address, referred to the respondent as a bona fide possessor, that does not change the respondent's

[6] Ibid.

claim as pleaded in his particulars of claim. Neither does it alter the evidence of Mr Pretorius which is supported by that of the respondent that they entered into an oral agreement in terms of which the respondent acquired ownership of the bales. Moreover, the trial court, after referring to the definition of a bona fide possessor, noted that:

'In hierdie geval het die eiser regtens aanspraak op die vrugte, na my mening, in terme van die kontrak met Theunis. Dit mag dus wees dat die posisie van 'n bona fide possessor nie eers ter sprake kom nie, maar, as hierdie gevolgtrekking verkeerd is, blyk dit uit die gesag, soos dit aangehaal is, dat die eiser in elke geval in alle opsigte kwalifiseer vir eiendomsreg van die bale as hy 'n bona fide possessor is.'

[22] The court found that the respondent succeeded in proving that he became the owner of the bales in terms of the oral agreement concluded with Mr Pretorius. It found further that this agreement granted the respondent the right to claim the bales from the applicants.

[23] The question is whether the applicants were prejudiced as a result of that submission. It has to be noted that notwithstanding the submission by counsel, the evidence of both Mr Pretorius and the respondent during the trial was that the respondent acquired ownership of the bales through an oral agreement entered between them. This evidence was not disputed. Counsel for the applicants failed to show us how the applicants could have conducted their defence differently had the submission not been made.

[24] Having stated the above, I find that the applicants failed to show that they have prospects of success in the appeal.

[25] In the result:

1 The application for condonation is dismissed with costs.

2 The appeal is struck from the roll.

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FE Mokgohloa

Judge of Appeal

APPEARANCES

For Appellant: W Sibuyi
Instructed by: Morne Coetzee Attorneys, Pretoria
Lovius Block: Bloemfontein

For Respondent: P L Uys
M Van der Westhuizen
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