IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

Case no.: 1233/21

Date heard: 25 November 2021
Date delivered: 25 November 2021

In the matter between:

SHELLVILLE TRADERS CC **Applicant**

and

CENTENNIAL TRADING COMPANY 46 (PTY) LTD **Respondent**

JUDGMENT

BENEKE, A.J.:

1 This is an opposed application for condonation for the late filing of a notice of appeal in accordance with Rule 51(3) of the Magistrates' Court Rules of Court.

2 The chronology of events is not in dispute, although the effect thereof is. On or about 19 August 2020, Magistrate Reddy handed down a written judgment, which judgment failed to make an order. On 13 November 2020, Magistrate Reddy handed down an order in favour of the respondent herein. On 24 November 2020, a copy of the written judgment and the order was delivered to the applicant's attorneys. The *dies* for noting an appeal would have expired on 23 December 2020, at the latest. The notice of appeal was filed with the application for condonation, in early April 2021. The notice was therefore either three

and a half months late, on the applicant's version, or six months late, on the respondent's version. The respondent contends that this delay is unreasonable.

3 The reason for the delay is similarly not in dispute, although the effect thereof is. The applicant sets out in great detail how its counsel of choice was unavailable to attend to the matter for the entire period of the delay, and therefore attended to the matter as soon as it was practicable for that counsel. The respondent contends that the explanation for the delay is not sufficient, given the reasons set out.

4 The prospects of success on appeal are in dispute.

4.1 The matter relates to the interpretation of:

4.1.1 clause 14 of the contract between the parties:

> *"14. Liquor License*
> *a. Balizza and Zest currently trade as a single venue, and as such there is only 1 liquor license.*
> *b. The parties agree that they will consult with an attorney to establish the necessary procedure for obtaining an additional liquor license.*
> *c. The cost for obtaining such license is for the account of the buyer.*
> *d. Until such time as the additional liquor license can be obtained the 2 x venues will continue to operate as a single venue with a single liquor license."*

4.1.2 sections 19, 34(1), 59(1)(a) and 61 (1)(b) of the Eastern Cape Liquor Act 10 of 2003 (EC). Should the interpretation favour the applicant, the agreement between the parties would be illegal and void, as would a subsequent acknowledgment of debt. Should the interpretation favour the respondent, the agreement and acknowledgment of debt would both be valid and enforceable. The Magistrate does not appear to have dealt in any way, whatsoever, with the interpretation of the sections relevant to the dispute. All that she says is that *"the defendant pleads that the sale agreement is illegal and void for want of compliance with ... section*

34(1) of the Eastern Cape Liquor Act 10 of 2003 (EC)" and from the liquor licence clause in the contracts "*it is apparent that the parties dealt adequately with the issue relating to the liquor license*".

4.2 Section 34(1) of the Eastern Cape Liquor Act provides that:

> "*A registered person must not permit any other person to procure a controlling interest in the business to which the registration relates, unless the chairperson of the board has, on application, by the registered person, granted consent that the other person may procure that interest in that business.*"

4.3 It is common cause that the parties never made the application called for in section 34(1).

4.4 The applicant contends that, whilst the Eastern Cape Liquor Act does not define a "*controlling interest*", the definition of that term in the Liquor Act 27 of 1989 is on all fours with the present matter and the Magistrate ought to have had regard thereto. The applicant contends that it is evident from *Klokow v Sullivan* 2006 (1) SA 259 (SCA), that section 34(1), which mirrors section 38(1) of Act 27 of 1989, is applicable to the agreement in the instant matter and that the agreement is, consequently, illegal. Given that selling liquor without a licence is created an offence in terms of sections 19, 59(1) and 61(1)(b) of the Eastern Cape Liquor Act, the contract cannot be enforced. The applicant contends that the facts in the matter of *Coad v Malan*, upon which judgment the respondent relies, are distinguishable from the facts in the instant matter.

4.5 The respondent contends that, on an interpretation of the contract, the agreement between the parties does not contemplate the transfer of a controlling interest in the business to which the liquor registration relates – what was sold was a business and assets, not shares in the holder of the licence. In this regard, the respondent relies on *Coad v Malan* (16423/08) [2013] ZAWCHC 32 (28 February 2013), in which the court distinguished the judgment of *Klokow*. The agreement therefore does not offend against section 34(1) of the Eastern Cape Liquor Act.

5 If an appeal against a decision in the Magistrates' Court has not been noted timeously the court of appeal may in its discretion extend the period for noting.[1]

6 The question arises as to what a "court of appeal" is, and whether I, sitting as single judge, have jurisdiction to hear this matter. The matter of *MK v NK* 2014 JDR 0246 (ECG) is instructive:

> *"[4] During argument, Mr. Beyleveld SC, who appeared for the respondent, referred to a practice that applications of this kind are not heard by a single judge, but by as many judges as would constitute a court of appeal. In the present instance, two judges would constitute a court of appeal. I have spoken to senior colleagues who are not aware of any such practice in this division. In De Sousa v Cappy's Stall 1975 (4) SA 959 (TPD) a similar application was before Trengove J (as he then was). It was contended on behalf of the respondent that a single judge sitting in chambers had no jurisdiction to hear such an application, and that the "court of appeal" referred to in s 84 of Act 32 of 1944 was a court as constituted in terms of the provisions of s 13 (2) (a) of the Supreme Court Act 59 of 1959, in that case, as in the present case, a court constituted of not less than two judges. At 960C-G Trengove J said the following:*
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> > "However, it seems to me to be clear that, in the context of sec. 84, the expression "the court of appeal" simply means the Provincial Division of the Supreme Court to which the appeal lies from the particular magistrate's court. (See sec. 1, sub-note "court of appeal", and sec. 83 of Act 32 of 1944). Thus, the application for condonation was properly brought before this Division. The only issue is whether it can be brought before a single Judge sitting in Chambers. An application of this nature is usually brought by w ay of notice of motion as has been done in this instance. As the applicant failed to comply with the provisions of Rule 51 (3) and (4) there is in effect no appeal before this Court at this stage. An appeal has not yet been noted. That being so the Court which hears the application for condonation of the applicant's failure to note an appeal would, in my view, be sitting as a Court of first instance for the purpose of hearing of a civil matter. If this view is correct, a single Judge would have jurisdiction to hear the application because sec. 13 (1) (a) of Act 59 of 1959 provides that
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> > *"Save as provided in this Act or any other law, the court of a provincial or local division shall, when sitting as a court of first instance for the hearing of any civil matter, be constituted before a single judge of the division concerned."*
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> > See also Cloete Bros. (Pty.) Ltd. v Harding, 1954 (3) SA 565 (O); Motsamai v Read and Another, 1961 (1) SA 173 (O) at p. 174.
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> > I have, therefore, come to the conclusion that a single Judge sitting in Chambers has jurisdiction in terms of sec. 13 (1) (a) of the Supreme Court Act to hear an application for condonation for failure to comply with the provisions of Rule 51 (3) of the Magistrates' Courts Rules."
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> *[5] Trengove J further found that the rule of practice in the Transvaal Provincial Division had not abolished the jurisdiction conferred by the Legislature. He concluded that he had jurisdiction to deal with the application but nevertheless decided to follow the established*

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[1] Magistrates' Court Act 32 of 1944, section 84; *Suid-Westelike Transvaalse Landbou Koöperasie v Kotze* [2000] 1 All SA 170 (NC) at 173*g*–174*c*.

practice and refer the application to the full court which would hear the appeal if the application for condonation was granted. See also Lipschitz NO v Saambou-Nasionale Bouvereniging 1979 (1) SA 527 (TPD) at 529A-C.

[6] I am therefore satisfied that I had jurisdiction to hear the application, sitting as a single judge."

7 Given the abovementioned authority and my reasoning regarding the merits of the appeal, as set out below, I am of the view that I have jurisdiction to hear the application, sitting as a single judge.

8 The court of appeal has an unfettered discretion to grant an extension of time for the noting of an appeal,[2] and the discretion of the court is not in any way restricted by Uniform Rule of Court 27(1) which empowers the court, upon application and on good cause shown, to make an order extending any time prescribed by the Uniform Rules of Court.[3]

9 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 upon the facts and circumstances of each case.[4] The overriding consideration is that the matter rests in the judicial discretion of the court, to be exercised with regard to all the circumstances of the case.[5]

10 The principles upon which the court exercises its discretion have been stated as follows:[6]

"It is well settled that, in considering applications for condonation, the court has a discretion, to be exercised judicially upon a consideration of all 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 therefor, 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

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2 *Belo v Commissioner of Child Welfare, Johannesburg* [2002] 3 All SA 286 (W) at 290c–*d*.
3 *Mintz v Bloemhof Village Council* 1922 TPD 430.
4 *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC) at 477A–B.
5 *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A).
6 *United Plant Hire (Pty) Ltd v Hills* 1976 (1) SA 717 (A) at 720E–G.

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."

11 Of all of the factors usually considered,[7] I consider the following to be the most relevant in this matter:

12 An applicant for condonation must give a full explanation for the delay which must not only cover the entire period of the delay but must also be reasonable.[8]

13 Condonation of the non-observance of the rules is by no means a mere formality; it is for the applicant to satisfy the court that there are sufficient grounds for relief.[9] The reason why the indulgence is sought should be set out,[10] and if the cause of the delay has been the mistake or default of a third party (*e.g.*, the applicant's attorney) there should be an affidavit by such party.[11]

14 The deponent should set out sufficient information to enable the court to assess the appellant's prospects of success on appeal.[12]

15 The fullest disclosure should be made of all the facts relevant to the matter.[13]

16 An application for condonation should be lodged without delay as soon as it is realized that there has not been compliance with a rule of court.[14]

17 The court is loath to penalize a blameless litigant on account of his attorney's negligence.[15] Negligence on the part of the attorney is also not an individually decisive

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7 For a detailed explanation of which, see *Erasmus Superior Court Practice* D1-672/8.
8 *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC) at 477E.
9 *Uitenhage Transitional Local Council v South African Revenue Service* 2004 (1) SA 292 (SCA) at 297H–J.
10 *Reed v Freer* 1920 CPD 250.
11 *Rashavka v Van Rensburg* 2004 (2) SA 421 (SCA) at 427G–I.
12 *Rustenburg Gearbox Centre v Geldmaak Motors CC t/a MEJ Motors* 2003 (5) SA 468 (T) at 471B–C.
13 *Uitenhage Transitional Local Council v South African Revenue Service* 2004 (1) SA 292 (SCA) at 297H–J.
14 *Darries v Sheriff, Magistrate's Court, Wynberg* 1998 (3) SA 34 (SCA) at 40J–41A.
15 *Shaik v Pillay* 2008 (3) SA 59 (N) at 61I.

factor but must be weighed against all the other factors operative in a particular case.[16] Pressure of work is no ground for relief.[17]

18 Reasonable prospects of success on the merits is an important consideration, but it is not necessarily decisive.[18] Reasonable prospect of success on appeal is not a *sine qua non* for condonation;[19] it is sufficient if the appeal is prima facie arguable.[20]

19 The general importance of the issue may incline the court toward leniency in considering the applicant's explanation of the delay.[21]

20 If an applicant claims the indulgence of condonation, it is for him to show that the respondent will not be adversely affected thereby to any substantial degree, and that, even if he were to be so affected, other considerations apply which would persuade the court to grant the indulgence sought.[22] The court will also take into consideration the degree of hardship which will be caused to the applicant if condonation is refused.[23]

21 It may be a compelling reason why the appeal should be heard that there are conflicting judgments on the matter under consideration.[24]

22 An extension of time or condonation is an indulgence, and the general rule is that the applicant must pay the costs of the application.[25] In addition, the applicant may be ordered to pay the respondent's costs of opposition. In general, the question as to whether the applicant should be ordered to pay the respondent's costs of opposition depends upon whether the respondent was reasonable in opposing the application.[26]

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16 *United Plant Hire (Pty) Ltd v Hills* 1976 (1) SA 717 (A) at 720F–H.
17 *Mbutuma v Xhosa Development Corporation Ltd* 1978 (1) SA 681 (A) at 685.
18 *Immelman v Loubser* 1974 (3) SA 816 (A) at 824B–C.
19 *Meintjies v H D Combrinck (Edms) Bpk* 1961 (1) SA 262 (A) at 265A–C.
20 *Mofokeng v Prokureur-Generaal, OVS* 1958 (4) SA 519 (O) at 521E–F.
21 *Glazer v Glazer NO* 1963 (4) SA 694 (A) at 702H.
22 *L F Boshoff Investments (Pty) Ltd v Cape Town Municipality (2)* 1971 (4) SA 532 (C) at 536C–G.
23 *Palmer v Goldberg* 1961 (3) SA 692 (N) at 699E–700A.
24 Cf s 17(1)*(a)*(i) of the Superior Courts Act 10 of 2013 in *Erasmus Superior Court Practice* Volume 1, Part A2.
25 *Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein* 1985 (4) SA 773 (A) at 809C.
26 *Regal v African Superslate (Pty) Ltd* 1962 (3) SA 18 (A) at 25E.

23 Applying the abovementioned principles to the matter at hand, has the following result:

23.1 Without making a finding on the fact, it appears that the notice of appeal was, at the most, six months late. This, in itself, is not an inordinate delay.[27]

23.2 The applicant has provided a full and detailed explanation of the delay. The delay appears to have been occasioned solely by the applicant's counsel's inability to attend to the matter timeously and the applicant's attorney's unwillingness to brief alternative counsel. The applicant does not appear to have played any role in the delay. Here, however, I find that I must point out that there does not appear to have been any reason at all why the applicant's attorney did not draft the notice of appeal himself. If the argument is to be that the matter was sufficiently complex to warrant counsel or senior counsel, as it appears perhaps to be suggested by the applicant latterly in his affidavit, there are numerous counsel available in this division, and there is no evidence that any attempts were made timeously to secure alternative assistance from counsel of appropriate seniority or ability. I appreciate that it is preferable that a single counsel is retained for the entirety of a matter, as it prevents the duplication of works and the associated increase in costs. However, attorneys must appreciate that the Rules of Court are there for a reason, and all attempts should be made to comply with them to ensure the speedy, efficient and effective administration of justice.

23.3 The matter before the court appears to be of some moment, relating as it does to the interpretation of a statute, which interpretation will have far-reaching effects. It is also apparent that there are extant judgments with different interpretation of wording similar to the relevant section. This appears to have created legal uncertainty. Despite this, the magistrate did not see fit to provide

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[27] See, for example, *H B Farming Estate (Pty) Ltd v Legal & General Assurance Society Ltd* 1981 (3) SA 129 (T) at 134F/G – H, where the court held that 7 months' delay was not inordinately long.

a reasoned judgment on the critical aspect. In this regard, the following passage from *RAF v Marunga* 2003 (5) SA 164 (SCA) is apposite:

> *"[31] As a general rule a court which delivers a final judgment is obliged to give reasons for its decisions. In an article in* The South African Law Journal *(Volume 115 – 1998 at 116–128) entitled "*Writing a Judgment*", the former Chief Justice, MM Corbett, pointed out that this general rule applies to both civil and criminal cases. In civil cases this is not a statutory rule but one of practice. The learned author referred to* Botes and another v Nedbank Ltd *1983 (3) SA 27 (A) where this Court held that in an opposed matter where the issues have been argued litigants are entitled to be informed of the reasons for the judge's decision. It was pointed out that a reasoned judgment may well discourage an appeal by the loser and that the failure to supply reasons may have the opposite effect, that is, to encourage an ill-founded appeal. The learned author stated the following at 117:*
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> > "In addition, should the matter be taken on appeal, the court of appeal has a similar interest in knowing why the judge who heard the matter made the order which he did. But there are broader considerations as well. In my view, it is in the interests of the open and proper administration of justice that the courts state publicly the reasons for their decisions. Whether or not members of the general public are interested in a particular case – and quite often they are – a statement of reasons gives some assurance that the court gave due consideration to the matter and did not act arbitrarily. This is important in the maintenance of public confidence in the administration of justice."
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> *[32] Writing on the same subject in* The Australian Law Journal *(Volume 67 A 1993) at 494–502 the former Chief Justice of the High Court of Australia, The Rt Hon Sir Harry Gibbs, considering the same rule of practice in common-law countries, stated the following at 494:*
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> > "The citizens of a modern democracy – at any rate in Australia – are not prepared to accept a decision simply because it has been pronounced, but rather are inclined to question and criticise any exercise of authority, judicial or otherwise. In such a society it is of particular importance that the parties to litigation – and the public – should be convinced that justice has been done, or at least that an honest, careful and conscientious effort has been made to do justice, in any particular case, and the delivery of reasons is part of the process which has that end in view.""

In *Strategic Liquor Services v Mvumbi NO and Others* 2010 (2) SA 92 (CC), the Constitutional Court also came out strongly in favour of reasoned judgments:

> *"[17] In Mphahlele* [Mphahlele v First National Bank of South Africa Ltd 1999 (2) SA 667 (CC) (1999 (3) BCLR 253; [1999] ZACC 1)] *this court noted that there is no*

express constitutional provision requiring judges to furnish reasons for their decisions (and on this basis upheld the long-standing practice of the Supreme Court of Appeal not to furnish reasons when determining applications for leave to appeal). We add that there is likewise no express statutory provision requiring judges who have given judgment ex tempore to furnish written reasons when later required. Nonetheless, as this court pointed out in Mphahlele, a reasoned judgment is indispensable to the appeal process. Judges ordinarily account for their decision by giving reasons - and the rule of law requires that they should not act arbitrarily and that they be accountable. Furnishing reasons –

> 'explains to the parties, and to the public at large which has an interest in courts being open and transparent, why a case is decided as it is. It is a discipline which curbs arbitrary judicial decisions. Then, too, it is essential for the appeal process, enabling the losing party to take an informed decision as to whether or not to appeal or, where necessary, seek leave to appeal. It assists the appeal Court to decide whether or not the order of the lower court is correct. And finally, it provides guidance to the public in respect of similar matters.' [*Mphahlele* par [12]]

[18] The court in Mphahlele added that it may well be that where a decision is subject to appeal it would ordinarily be a violation of the constitutional right of access to courts, if reasons were to be withheld by a judicial officer. Although that opinion was tentatively expressed, there is much to support it. It is not necessary to decide the point generally, since we have not had the benefit of hearing oral argument in this matter. However, the failure by Nel AJ to furnish his reasons, when requested for the appeal process, cuts right across the employer's right of access to courts."

23.4 I associate myself with the sentiments expressed by the two uppermost courts. It is, frankly, astonishing that the magistrate failed to deal in her reasoning with the very issue upon which the matter turned.

23.5 Given the importance of the issue, the existence of disparate judgments, and the absence of any reasoning by the magistrate, I am of the view that the appeal is not only *prima facie* arguable, but is also, and in any event, deserving of further attention by a higher court.

23.6 Given the general importance of the issue, I am inclined towards leniency in considering the applicant's explanation of the delay.

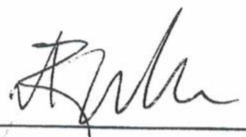
23.7 It is apparent from the evidence that, should I grant condonation, the respondent will be prejudiced in not being able to execute upon the judgment of the magistrate. This prejudice, however, is neither more unusual nor more substantial than that faced by most other respondents who face appeals. If, I am to refuse condonation, however, the doors of court will be shut to the applicant. This prejudice outweighs that suffered by the respondent.

23.8 I am of the view that the respondent's opposition was not unreasonable. Accordingly, I am of the view that the applicant should pay the costs of the application, including the respondent's costs of opposition.

24 I, accordingly, make the following order:

1. The applicant's late filing of its Notice of Appeal in terms of Rule 51(3) of the Magistrates' Court Rules of Court, against the judgment and order of Magistrate Reddy handed down on 24 November 2020 under case number ECPERC 1053/2017, issued out of the Regional Court for the Regional Division of the Eastern Cape, held at Port Elizabeth, is condoned.

2. The applicant shall pay the costs of the application for condonation, including the respondent's costs of opposition.



M. BENEKE
JUDGE OF THE HIGH COURT (ACTING)

Appearances:

For the Applicant
Adv P Jooste
On the instructions of Nolands Law Inc, c/o Nettletons Attorneys

For the Respondent
Adv ML Beard
On the instructions of Pagdens Attorneys, c/o Cloete & Co Attorneys