



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case no: 090/2021

In the matter between:

NATIONAL DEPARTMENT OF PUBLIC WORKS

APPELLANT

and

SIMPHIWE FANI & 77 OTHERS
[COLLECTIVELY REFERRED TO AS “RESIDENTS
OF FARM GREYDEL (AIRPORT PARK)”]

FIRST RESPONDENT

VATHISWA JACK

SECOND RESPONDENT

Neutral citation: *National Department of Public Works v Fani and 77 Others*
[Collectively referred to as “Residents of Farm Greydel (Airport Park)”] and *Another*
(090/2021) [2024] ZASCA 43 (8 April 2024)

Coram: SCHIPPERS, GOOSEN and KGOELE JJA and BAARTMAN and
BLOEM AJJA

Heard: 18 March 2024

Delivered: This judgment was handed down electronically by circulation to the parties’ representatives by email; publication on the Supreme Court of Appeal website; and release to SAFLII. The time and date for hand-down is deemed to be 11h00 on the 8th day of April 2024.

Summary: Condonation – lapsed appeal – late filing of record and heads of argument – delay not fully explained and prospects of success remote – condonation refused.

ORDER

On appeal from: Eastern Cape Division of the High Court, East London Circuit Court, (Hartle J sitting as court of first instance):

The application for condonation is refused with costs.

JUDGMENT

Baartman AJA (Schippers, Goosen and Kgoele JJA and Bloem AJA concurring):

[1] The appellant was granted leave to appeal an order of the Eastern Cape Division of the High Court, East London Circuit (the high court), per Hartle J, issued on 29 October 2020. In terms of that order, the high court declared unlawful the appellant's demolition of the respondents' homes on the Remainder of Portion 1 of the Farm Greydel 871, East London (the property), and directed the appellant to restore their homes. The appeal, however, has lapsed due to the appellant's failure to file the appeal record and heads of argument timeously. The appellant seeks condonation of this failure and reinstatement of the appeal.

[2] The matter arises from an *ex parte* order granted by the high court (Stretch J) on 14 March 2017, against unidentified 'persons whose identities are . . . unknown and who have attempted, are threatening or may even try to occupy' the property. These unidentified persons were 'interdicted and restrained from demarcating any sites for whatever purpose and/or commencing or continuing to erect and/or occupy and/or permit to be occupied on their behalf any structure on the property'. In terms of this order, the sheriff, with the assistance of the South African Police Service, was authorised to take any steps to dismantle or demolish any structure erected on the property in contravention of the order.

[3] On 27 July 2020 the appellant, assisted by the sheriff and the police, demolished the respondents' homes pursuant to the order issued by Stretch J. It alleged that only unoccupied and incomplete structures had been demolished. The

court *a quo* found that the appellant's reliance on the 14 March 2017 order was misplaced and that it should have launched eviction proceedings in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE Act).

[4] On 4 January 2021, the court *a quo* granted leave to appeal to this Court against its order of 29 October 2020. The record had to be filed by 18 May 2021. It was eventually filed on 1 November 2022 – some one and a half years later, together with the application for condonation of its late filing and reinstatement of the appeal.

[5] The explanation by Ms Tyani of the State Attorney's office for this gross non-compliance with the Rules of this Court, in summary, is this:

(a) On 4 May 2021, the record was filed but was incomplete. The State Attorney, Bloemfontein, advised that photographs were not in colour and handwritten notes had not been typed. The registrar granted the appellant an extension until 18 May 2021 to correct and file the record.

(b) The appellant did not file the record by 18 May 2021 because the transcribers could not attend to its rectification timeously. On 19 May 2021, the appellant sought an extension from the respondents until 25 June 2021. The respondents refused on the basis that any further delay was prejudicial to them as some of them had been rendered homeless and the appellant had apparently refused to assist them by providing temporary accommodation.

(c) On 20 May 2021, the appellant again filed the record but on 26 May 2021, the correspondent attorney informed Ms Tyani that the registrar had returned the record as the cross-referencing had not been done properly.

(d) On 28 May 2021, Ms Tyani sent the record to the transcribers to correct the cross-referencing. On 7 June 2021, she followed this up with the transcribers; on 12 July 2021 and again on 21 July 2021, she further enquired of the transcribers when the record would be completed.

(e) The record was not forthcoming. Ms Tyani directed enquiries to the transcribers. The record was still outstanding at the end of July 2021 at which stage Ms Tyani again reminded the transcribers of her previous correspondence in that regard.

(f) On 11 August 2021, Ms Tyani went into self-isolation as her husband and child had tested positive for Covid -19. She only returned to work at the end of August 2021.

(g) On 8 September 2021, the transcribers furnished the corrected record. On 10 September 2021, Ms Tyani forwarded a copy of the corrected record to her correspondent for filing.

(h) Ms Tyani, under the impression that she had to wait for the registrar to indicate that the latter was satisfied with the record, delayed preparing the application for condonation and reinstatement of the appeal. She was still waiting for her correspondent to indicate whether the registrar was satisfied with the record when, on 2 December 2021, the respondents served an urgent application on her in which they sought to hold the appellant in contempt of court for its failure to comply with the 29 October 2020 order.

(i) Ms Tyani claimed that the contempt application had caused her to divert attention from this matter, so only on 8 December 2021 did she enquire from her correspondent as to whether the registrar was satisfied with the record. The correspondent promised to revert.

(j) On 15 December 2021, Ms Tyani went on annual leave and returned to work on 18 January 2022. On 10 February 2022, Ms Tyani learnt that her correspondent had on 17 December 2021 informed her that further corrections to the record were necessary.

(k) On 11 February 2022, the correspondent sent an email to Ms Tyani explaining what needed to be done to get the record compliant. She said that she immediately consulted the transcribers and the registrar of the court *a quo* to attend to the queries.

(l) The founding affidavit, deposed to on 12 July 2022, simply states that the record was not filed timeously because of the 'difficulty experienced with the transcribers', with is no explanation of what had happened between 11 February 2022 and 1 November 2022 – some nine months – when the record was eventually filed.

[6] It is a settled principle that the standard for considering an application for condonation is the interests of justice, which, as the Constitutional Court explained in *Van Wyk*,¹

¹ *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)* 2007 ZACC; 2008 (2) SA 472 para 20.

‘ . . . 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.’

[7] Condonation applications are not a matter of formality. There is an onus on the applicant to provide a full and satisfactory explanation for its failure to comply with the Rules of this Court.² This court has recently confirmed the following requirements for reinstatement of a lapsed appeal:³

‘(a) The applicant must provide a proper explanation of the causes of the delay and explain each of the periods of delay.

(b) It is not sufficient for an applicant to set out a number of generalised causes without an attempt to relate them to the time-frame of its default or to enlighten the court as to the materiality and effectiveness of any steps taken . . . to achieve compliance with the Rules at the earliest reasonable opportunity.

(c) The court has a discretion which the applicant must show should be exercised in its favour.’
(footnotes omitted)

[8] As stated, the state attorney’s explanation does not cover the entire period of delay. What steps were taken, if any, between 11 February and 1 November 2022 to ensure that the record was filed is unexplained. This was not a difficult task – the record consists of affidavits and court orders, and comprises merely three volumes. Despite this, it took Ms Tyani one and a half years to file it.

[9] Moreover, Ms Tyani’s explanation is unreasonable.⁴ She made no attempt to engage with her correspondent to establish precisely what needed to be done to complete the record. She simply handed it to the transcribers to attend to the deficiencies, and allowed months to go by without ensuring that it was filed. Her explanation that her attention was diverted from this case and that she had taken

² Rule 12 provides the mechanism for condonation application in the event of non-compliance with the Rules.

³ *The Chairperson of the North West Gambling Board and Another v Sun International (SA) Limited* (1214/2019) [2021] ZASCA 176 (14 December 2021).

⁴ *Van Wyk* para 22.

vacation leave in December 2021 and then attended to this case only on 10 February 2022, is unacceptable.

[10] The effects of the delay in filing the record on the administration of justice and the respondents are self-evident. Worse, this happened during the national lockdown imposed in response to the COVID-19 pandemic. The respondents say that most of them are in desperate need of reconstruction of their homes.

[11] The appeal, in any event, has no prospects of success. It is founded on an *ex parte* order granted against nameless respondents. It is trite that any order issued by a court must be capable of enforcement, particularly because wilful non-compliance will result in an application for contempt of that order. In this case the order granted by Stretch J was unenforceable at the time it was issued, let alone 2 years after it was issued.

[12] The delay is inordinate and not properly explained. The opposition to the application for condonation is justified. It is prejudicial to the administration of justice to condone the appellant's inexplicable dilatory conduct, while the respondents have been rendered homeless since the demolition of their structures in July 2020. In the circumstances, it is not in the interests of justice to grant condonation.

[13] The conduct of Ms Tyani and the respondents' counsel in this case is to be deprecated. Concerning the conduct of Ms Tyani, recently this Court decried the flagrant disregard of its Rules and warned that punitive personal costs orders may be appropriate in conduct of this kind.⁵ In light of the warnings previously issued by this Court, it is hoped that the Solicitor General⁶ will take heed and address the problem.

[14] Counsel for the respondents disregarded the Rules of Court. There is no explanation why heads of argument were not filed at all. Counsel also arrived late for the hearing. He explained that he had to rely on public transport and that it was his

⁵ *The Member of the Executive Council for Health, Eastern Cape Province v Y N obo EN* (056/2021) [2023] ZASCA 32 (30 March 2023).

⁶ *Section 3A of the State Attorney Act, No.56 of 1957* '(1) The Solicitor-General shall – (a) be the executive officer of all offices of State Attorney;(b) exercise control, direction and supervision over all offices of State Attorney;...'

first appearance in this Court. This conduct, however, was not wilfully disruptive of the proceedings so as to justify an order denying the respondents the costs of the application.

[15] For the above reasons, the application for condonation for the late filing of the record and the heads of argument, is dismissed with costs.

ED BAARTMAN
ACTING JUDGE OF APPEAL

APPEARANCES:

For appellant: TM Ntsaluba SC (with him N Nabela)

Instructed by: State Attorney, East London

State Attorney, Bloemfontein

For respondent: Z Madukuda

Instructed by: Tshingana & Associates, East London

Duba Attorneys, Bloemfontein