Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION - MAHIKENG

CASE NO.: M404/2020

In the matter between:

DEON MARIUS BOTHA N.O Applicant

DEDRE BASSON N.O Second Applicant
(In their capacity as joined liquidators
of Mymico Eiendomme CC, 'in liquidation')

And

DEODAT BOTES Respondent

JUDGMENT

MAKOTI AJ

INTRODUCTION

[1] There are two separate questions that the Court has to determine in this application. The first and the main question concerns the

declaration of proceedings before the Vryburg Regional Court ('the Regional Court') under case number NW/VRY/RC72/2018. The second issue relates to an application brought by the respondent to condone his late filing of the answering affidavit.

[2] Both applications are opposed. In light of the fact that the application for condonation is preliminary, I will deal with it first before I consider the merits of the main application. As I have foreshadowed the issue above, the application for condonation was precipitated by the delay in the respondent's filing of his answering affidavit. The answering affidavit was initially due for filing on **07 September 2020**, and the date was shifted to **14 September 2020** to accommodate the respondent.

CONDONATION APPLICATION

[3] The parties are in agreement that the respondent's answering affidavit was filed outside of time frames set out in the applicant's Notice of Motion. As indicated the initial date that the respondent was required to have filed the answering affidavit was **07 September 2020**. By agreement between the parties, the date for filing of the answering affidavit was extended to **14 September 2020**.

[4] On that date, **14 September 2020**, the respondent did not file the required answering affidavit. He has offered no explanation to the Court as to why the answering affidavit was not filed as agreed. The situation persisted until the respondent sent a letter dated **18 December 2020** to the applicant's legal representatives, in which

he gave an undertaking that the answering affidavit will be delivered on **11 January 2021**.

[5] The letter proffered an explanation to the applicants' representatives to the effect that the respondent had acquired the services of an advocate, but who was at that time already on holiday, hence the undertaking to deliver answering affidavit only on **11 January 2021**. Despite the undertaking, the respondent did not deliver his answering affidavit on **11 January 2021**. He, instead, caused to be delivered a notice in terms of rule 35(12) on the applicants, asking to be provided with certain information. The information was provided and the respondent filed his long awaited affidavit still outside of the required timeframes.

[6] The requirements that have to be satisfied by a party seeking condonation for non-compliance with the rules or timeframes were elaborately explained by Heher JA in the case of **Uitenhage Transitional Local Council v South African Revenue Services.**[1] In that particular case the Court held as follows:

> *"One would have hoped that the many admonitions concerning what is required of an applicant in a condonation application would be tried knowledge amongst practitioners who are entrusted with the preparation of appeals to this Court:*
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> > *Condonation is not to be heard merely for the asking; 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-*

[1] 2004(1) SA 292 (SCA) para [6].

compliance is time related then the date, duration and extend of any obstacle on which reliance is placed must be spelled out." (Emphasis added)

[7] From the above exposition it is clear that a superficial explanation is not sufficient. Thus, what is needed from the Court in an application of this nature is an objective consideration of the explanation provided, together with the prevailing circumstances. Where there was a delay, it for the Court to assess the effects caused by the late delivery of the papers. A slight delay and a good explanation may help to compensate where the prospects of success are not strong. Also, the importance of the issue and the strong prospects of success may also tend to compensate for what may be a lengthy delay. [2]

[8] The respondent expressed the view that its answering affidavit was late by a mere single day. He arrived at this conclusion after calculating the dies *induciae* from the date on which the information that he had requested in terms of rule 35(12) was provided. As stated, he made no attempt to explain what transpired between **07 September 2020** and **11 January 2021**. This cannot be correct, taking into account the unexplained dates in which the respondent was required to have filed the affidavit.

[9] Out of some desperation, the respondent tried the narrative that, because he had requested to be provided with some information or documents in terms of rule 35(12), logic dictated that he could only

[2] United plant hire Pty LTD v Hills and Others 1976 (1) SA 717 (A) at 720 E-F.

have been expected to file his answering affidavit after receiving the information he had asked for. During the hearing of the application his counsel persisted with the contention that the dies should be calculated from the date on which the requested information was provided, which, as I have indicated, is legally untenable.[3]

[10] It smacks of arrogance that the respondent made no attempt made to explain the entire period from **14 September** until **18 December 2020**. This, in my view, exemplifies the conduct of a litigant who is engaging in Court processes at his own leisure. He clearly expected the interests of other litigants to subservient to his.

[11] This is the type of conduct that must be frowned upon, and discouraged by all means possible. The conduct referred to above typifies what Bosielo AJ, writing for the Constitutional Court in **Grootboom v National prosecuting Authority and Another**[4] condemned when he said the following:

> *"I need to remind practitioners and litigants that the Rules and Courts' directions serve a necessary purpose. Their primary aim is to ensure that the business of our Courts is run effectively and efficiently. Invariably this will lead to the orderly management of our Court's rolls, which in turn will bring about the expeditious exposal of cases in the most cost effective manner. This is particularly important given the ever increasing ever/ increasing costs of litigation, which if left untagged will make access to justice too expensive."* (Emphasis added)

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3 Central Energy Fund SOC Ltd and Another v Venus Rays Trade (Pty) Ltd and Others (4305/18) [2020] ZAWCHC 164 (20 November 2020).

4 2014 (2) SA 68 (CC).

[12] The Constitutional Court when delivering the judgement in **Grootboom**, was 'anchoring on the heels' of one of its earlier judgments in the matter of **Ethekwini Municipality v Ingwenyama Trust**[5] where it was held that:

> *"The conduct of litigants in failing to observe Rules of the Court is unfortunate and should be brought to a halt. This term alone, in 8 of the 13 matters set down for hearing, litigants failed to comply with the time limits in the roles and directions issued by the Chief Justice. It is unacceptable that this is the position in spite of the warning issued by this Court in the past. In (Van Wyk), this Court want litigates to stop the trend. The Court said:*
>
> > *'The statistics referred to above illustrate that the caution was not hided. The Court cannot continue issuing warnings that are disregarded by litigants. It must find a way of bringing this unacceptable behaviour to a stop. One way that readily presents itself is for Court to require proper compliance with the Rules and refuse condonation where the requirements are not met. Compliance must be demanded even in relation to Rules regulating applications for condonation.'"*

[13] The common message from these two judgements of the Constitutional Court is simply that litigants and practitioners should refrain from taking indifferent approach to litigation and, where such conduct is shown, it is to be admonished by Courts. Importantly, it seems that it will not suffice for an applicant for condonation to simply address one of the requirements and leave out the rest. A full explanation of the default is required, along with a full discussion of all other requirements.

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5 2013(5) BCLR 497 (CC) at paras [26] – [27].

[14] I have already commented that the condonation application is completely silent with regard to the question why the answering affidavit was not filed on **14 September 2020**. No explanation was proffered as to what transpired between that date and **18 December 2020** when the letter was sent to the applicants. The result of this is that the respondent has failed to show good cause of the delay in the filing of the answering affidavit.

[15] From the contents of the condonation application it cannot be said that the legal representatives for the respondent acted reasonably or expeditiously. The explanation leaves a lot of gaps. Why did the respondent not ask for the information prior to **07 September 2020** when he asked to be given an extension to file a week later? That is, even if it were to be accepted that the respondent was in desperate need of the information that was requested in terms of rule 35(12). An explanation was still required as to why that information was not requested prior to **14 September 2020**.

[16] The facts of this matter reveal that the respondent used the provisions of rule 35(12) as a mechanism of buying for himself some additional time to file his answering affidavit. This is a serious indictment against his approach to this litigation. There is clearly no good cause shown for the delay in filing the answering affidavit. I now turn focus to the next important question of prospects of success.

PROSPECTS OF SUCCESS

[17] Because the Court when dealing with an application for

condonation for any non-compliance is also required to ponder the question of prospects of success, it is apposite that I delve into the merits of the application. I can only determine the prospects of success upon briefly peering into the facts.

[18] It not in dispute that Mymico is a close corporation that is presently under liquidation. Also, it was not contested that the first and second applicants are its appointed joint liquidators. On that account, their *locus standi* as legally empowered persons to institute this application cannot be gainsaid, even though the respondent elsewhere insinuates that the liquidation was embarked upon in bad faith.

[19] As joint liquidators, and in terms of the Close Corporations Act,[6] the applicants are obligated to recover and reduce into position all assets and property belonging to Mymico. It is on that basis that they have lodged this application to recover from the respondent or his legal representative's funds that belong to Mymico.

[20] How the funds belonging to Mymico got to be in possession of the respondent's legal representatives makes for an interesting tale. The facts have revealed that on **1 June 2018**, at an auction sale conducted by Andre Kok and Son, Mymico sold some of its livestock and raised an amount of **R672,863.97** as its proceeds. This money was then held in trust to the credit of Mymico by the aforementioned Andre Kok and Son.

6 Act No. 69 of 1984.

[21 Three days after the auction, on **04 June 2020**, the respondent instituted an urgent court application, *ex parte*, at the Vryburg Regional Court ('the Regional Court') to practically intercept the funds raised as auction proceeds. He sought an order directing the auctioneers, Andre Kok and Son, to pay over an amount equivalent to **R700,000.00** into the banking account of his legal representative, Van Huyssteen and Visser Incorporated.

[22] To elaborate on the issue, the application was intended to have the money held in trust and under the preserve of his own legal representatives. It was never intended that the money was to be paid over to him, except if that was done in terms of an order to that effect. In that even, one would expect that the funds are still held in trust by the respondent's legal representatives. This is because nothing else empowered the handing over of the funds to the respondent.

[23] It is common cause that on **04 June 2018** the Regional Court granted to the respondent interim relief which he had asked for. A *rule nisi* returnable on **12 July 2018** was then issued, effectively ordering that the auction proceeds be paid over into the respondent's legal representatives' trust banking account. Mymico was not cited as a party in the proceedings before the Regional Court on **04 June 2020**. Thus, the order was only applicable as against the cited respondents including Andre Kok and Son, who, in compliance with the interim court order, paid over the money to the respondent's legal representatives.

[24] Perhaps in anticipation of the challenges created by the non-citing

of the close corporation, the respondent on **05 June 2018**, instituted a fresh urgent ex parte application in the Regional Court for similar relief as the one that was granted on **04 June 2018**. In the second application the respondent had cited Mymico as the fourth respondent. On **05 June 2020**, the Regional Court issued another *rule nisi*, also returnable on **12 July 2020**, calling upon all the parties that were cited as respondents to show cause why the orders so granted should not be made final.

[25] I have already mentioned that the funds were transferred by Andre Kok and Son into the trust banking account belonging to the respondent's legal representatives. The main contention that was put forward by the respondent in the Regional Court was that the money actually belonged to a Mr Coetzee, who was the sole member of Mymico. This contention links directly with the argument that the liquidation of the close corporation was done in bad faith. The propriety of these contentions will be revisited.

[26] The application in the Regional Court was opposed, including by or on behalf of Mymico. Upon being served with the papers, Mymico and Coetzee opposed the urgent application and filed their answering papers on **10 July 2018**. After the filing of the answering papers, the respondent's legal representative indicated to their legal representatives that the *rule nisi* would be extended on **12 July 2018**. On the return date before the Regional Court, and in this Court, the parties are in agreement that the *rule nisi* was never extended on **12 July 2018**. The legal effect is that the non-extension led to the automatic demise of the interim orders that were granted on both **04** and/or **05** of **June 2018**.

[27] The effect of the orders falling away is that the status *quo ante* had to be restored. This implies that the funds that were kept in safe custody of the respondent's legal representatives have to be returned, at least to Andre Kok and Son. The alternative is that the funds could be paid directly to Mymico on the basis that they were merely held by the auctioneers to the credit of the close corporation.

[28] That the *rule nisi* that was issued on **05 June 2020** was also confirmed by the Regional Magistrate of Rangoako on **10 December 2019**. On that date he indicated that the *rule nisi* automatically lapsed on **12 July 2018**, in that it was not extended, and released or set aside the garnishee order that was granted in terms of that order. Upon confirmation of the lapse of the *rule nisi*, and the setting aside of the garnishee that was issued in relation thereto, the respondent's legal representatives continued to be in possession of the funds. It is ion that basis that this application was then instituted.

[29] Instead of returning the money to Andre Kok and sons' account, the respondent's legal representative took to technicalities and addressed a letter to the applicants in which he indicated that the money was not going to be returned to that auction company. In this letter dated **10 March 2020**, the respondent indicated that because the Regional Magistrate did not make any specific order of the repayment of the money, it followed that the respondent continued to be in lawful possession of the funds.

[30] The Attorneys then informed the applicant's legal representatives

that to obtain possession of the money, a new application will have to be instituted for the funds recovery. At this point I pose to indicate that this is exactly how not to interpret legal instruments. This is because once the *ex parte* order lapsed and the garnishee was cancelled, the *status quo ante* had to be restored. On the simple application of logic and reasonableness, the respondent's legal representatives should have found no reason to continue being in possession of the funds.

[31] It is on the basis of the foregoing that the applicants were forced to take this drastic step of instituting this application, which, in my view, was completely unnecessary. Not only does it costs litigant's funds or fees to litigate, but it is also an avoidable burden for the already clocked Court rolls. Nonetheless, this matter is to be adjudicated on the same legal footing as all other applications that come before this Court.

[32] In opposition of this matter, the respondent raised four distinct grounds which may be summarised as follows:

[32.1] Firstly, the respondent contended that the cattle that were sold on action on **01 June 2018** belonged to Kotze and not to Mymico. As a result, the respondent contents that the funds which he garnisheed from Andre Kok and Son belonged to Kotze and not Mymico. On that basis, the respondent continues to be of the contention that he is entitled to possession or ownership of the proceeds of the sale of cattle.

[32.2] This contention is with respect unacceptable because the

records show that the money was held to the credit of Mymico and not Kotze. Even if the respondent is indebted by Kotze, it has no legal entitlement to take possession of funds which belonged to somebody else.

[32.3] Secondly, the defence of *res judicata* that was raised by the respondent is equally untenable. In this regard the respondent alleges that this matter has become *res judicata*, which is to this Court not understandable. This is because the point of *res judicata* is raised on the basis that the Regional Magistrate did not order or direct the Attorneys of the respondent to restore or repay the funds held in trust back to Andre Kok and Son.

[32.4] If this was to be accepted, it would mean that the respondent has suddenly obtained possession of the funds by using back door mechanisms, something which is inimical to the jurisprudence in this country where self-help is not permissible.

[32.5] Thirdly, the point raised by the respondent was in relation to whether the Court could exercise its discretion in considering the declaratory order in light of what transpired in Vryburg Regional Court. It is not explained what this contention really is about. What the respondent instead refers to is what section 21(1)(c) of the Superior Court's Act 59 of 1959 states in terms of which the Court has discretion to inquire and to determine any existing future or contingent right or obligation.

[32.6] No factual or legal basis was made as to why the Court

should engage in this enquiry, and this contention can be put paid to without further consideration.

[32.7] The last contention raised by the respondent was that the liquidation of Mymico was not *bona fide*, and therefore that the legal consequences of a liquidation should not follow. It is inconceivable how this Court can, without an application to that effect supported by facts, make a finding that Mymico's liquidation was not *bona fide*.

[32.8] In light of the fact that this Court does not have any application to the effect that the liquidation was not *bona fide*, this matter can be closed summarily at this stage.

[33] The contentions raised by the respondent against the application for the return of the funds belonging to Mymico, are found to be seriously wanting. There are simply no factual grounds upon which this Court should decline to order the legal representatives of the respondent to release the money held in trust, with all interest that has accrued to the money, back to Andre Kok and Son for the credit of Mymico.

[34] This Court is entitled in my view to direct that the money be paid in to the liquidation account presently managed by the liquidators of Mymico. This will avoid the long transactions in relation to the money, especially in light of the fact that it is not in dispute that the money was held in trust for the credit of Mymico.

RES JUDICATA

[35] The defence of *res judica,* as I understand it, refers to a matter that has already been finally determined by a Court. As a defence, it prevents a party from raising an issue that has already been determined finally by the Court. The general rule is that a plaintiff or applicant who prosecute a case against a defendant or respondent and obtained a final judgement is not able to initiate another action or application against the same defendant where:

[35.1] The claim is based on the same transaction that was at issue in the first matter;

[35.2] The plaintiff or applicant seeks a different remedy, or further remedy, that was obtained in the first case; and

[35.3] The claim is of such a nature as could have been joined in the first case.

[36] In this case, not even the interim orders that were granted *ex parte* by the Regional Court were made final. If anything, the *rule nisi* that was granted by the Regional Court got automatically discharged or lapsed on **12 July 2018** when it was not extended or made final by the Court. On that basis it not understandable how the defence of *res judicata* can be helpful to the respondent.

[37] As I have indicated, the logical step to follow is that the respondent's legal representative ought to return the money to the entity from where it was taken, or to the person that is legally entitled to such money. Under those circumstances, the respondent's legal representatives who have been holding the

money temporarily should simply return it to whom it belong. For those reasons, the defence of *res judicata* is found to be bad both on the facts established in this matter and in law and is hereby rejected outright.

OWNERSHIP OF THE CATTLE SOLD AT AUCTION ON 01 JUNE 2018

[38] The next ground of defence raised by the respondent was that the cattle that were sold on auction on **01 June 2018** belonged to Kotze. This, purportedly grants the respondent some legitimacy to with-hold the funds. What he does not tell this Court is whether he is entitled to retain the money with a Court order to that effect.

[39] The fact that the livestock that was sold at an auction belonged to Mr Kotze, is in my view irrelevant. If it was, the respondent ought to have approached Court for an order declaring that the funds belonged to Kotze. What he has done now, acting with the help of legal representatives, amounts to nothing other than self-help. In a matter that originated from this division, of **Chief Lesapo v the Agricultural Bank of Bophuthatswana**,[7] the Constitutional Court dealt with the question of self-help and found that it was not acceptable part of our law. On that basis, I see no reason why this contention should not be dismissed and it is accordingly rejected by this Court.

[40] The legislation that the respondent sought to rely on in this matter is simply unhelpful to his case.

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[7] Lesapo v North West Agricultural Bank and Another (CCT23/99) [1999] ZACC 16; 2000 (1) SA 409; 1999 (12) BCLR 1420 (16 November 1999).

MYMICO EIENDOMME CC NOT LIQUIDATED IN GOOD FAITH

[41] The respondent put forward a contention, also, that Mymico was liquidated in bad faith. It is not quiet understandable what the intended purpose of this contention is. To the extent that the Respondent may be suggesting that the liquidation was done in contravention of the law, there may be legal remedies available for the respondent. An attempt to ignore the liquidation status or to undermine its effect is untenable. What stands before this Court is an undeniable fact that Mymico has been liquidated and that the two applicants are the joint liquidators for its estate.

[42] In the event that the respondent was aggrieved by the liquidation of Mymico, he has or had remedies in law to set aside the liquidation. He would have been required to show cause why he alleges that the liquidation of Mymico was not in good faith. In this matter, the respondent has set out no facts supporting the allegation that Mymico was liquidated in bad faith.

[43] Accordingly, I find the allegation that Mymico was liquidated in bad faith to be unsubstantiated and rejected.

[44] On the basis of the findings that I have made above, it is apparent that the respondent has no factual or legal basis for refusing to retain the money that was taken from Andre Kok and Sons. The facts point to the only conclusion that the funds belonged to Mymico and were held by Andre Kok and Son to its credit. Under those circumstances, there is no reason to refuse to grand the orders sought by the applicants in this matter for the recovery of

the monies held in trust by the respondent's legal representatives.

[45] What then remains is a consideration of the costs occasioned by this application. This matter also came before Court on **04 March 2021**, on which occasion it could not proceed at the instance of the respondent. On that date the respondent appeared before Court without any opposing papers, and was ordered by the Court to file the papers on or before **09 March 2021**. The costs of occasioned by the postponement were reserved.

[46] The general rule in relation to costs is that costs are awarded at the discretion of the Court,[8] which is to be exercised judiciously. In many cases, also, the default position has been accepted on the principle that costs follow the result.[9] In this case the applicants have been successful and they are entitled to the costs occasioned by this application. This costs will include the costs occasioned by the postponement of the matter on **04 March 2021**.

ORDER

[47] The Court hereby makes the following order:

[47.1] On the basis that there exist no prospects of success in the opposition of the main application, the application for condonation for the late delivery of the respondent's answering affidavit is dismissed with costs.

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8 Kruger Bros & Wasserman v Ruskin 1918 AD 63 69; Also Grahm v Odendaal 1972 2 SA 611 (A) at 616.

9 Levben Products (Pvt) Ltd v Alexander Films (SA) (Pty) Ltd 1957 4 SA 225 (SR) 227.

[47.2] The attachment of an amount of **R672,863.97** ('Six Hundred and Seventy-Two Thousand Eight Hundred and Sixty-Three Rand and Ninety-Seven Cent)' none pursuant to the *ex parte* orders granted in the form of a *rule nisi* by the Vryburg Regional Court under case number: NW/VRY/RC72/2018 on **05 June 2018** in respect of the amount held to the credit of Mymico Eiendomme CC by Andre Kok and Son, lapsed on **12 July 2018**.

[47.3] The respondent is hereby ordered to refund the amount of **R672,863.97** ('Six Hundred and Seventy-Two Thousand Eight Hundred and Sixty-Three Rand and Ninety-Seven Cent) together with mora interest calculated at the rate of ten percent per annum (10% pa) from **05 June 2018** to the date of final payment.

[47.4] The payment referred to above shall be made into the trust banking account of Scheepers & Aucamp Attorneys bearing the following account Numbers: Scheepers & Aucamp Attorneys Trust:
First National Bank
Account NO: 6202 1321 162
Ref: A J De Villiers

[47.5] The respondent is ordered to pay the costs of this application including the reserved costs of **04 March 2021**, which costs are to be payed on the scale as between party and party.

M. Z. MAKOTI

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION

REPRESENTATIVES:

PLAINTIFF:	**ADV DU PLESSIS SC**
	ENVER SWARTZ ATTORNEYS
	C/O MAPONYA ATTORNEYS INC
	MAHIKENG
DEFEDANT:	**ADV G GOEDHART SC**
	ADV I MONNAHELA
	OFFICE OF THE STATE ATTORNEYS
	1ST FLOOR, EAST WING
	MEGA CITY, MMABATHO

DATE OF HEARING : 19 MARCH 2021

DATE OF JUDGMENT : 08 JUNE 2021