THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 20430/2014

In the matter between:

MILES PLANT HIRE (PTY) LTD **APPELLANT**

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE **RESPONDENT**

Neutral Citation: *Miles Plant Hire v Commissioner SARS* (20430/2014) [2015] ZASCA 98 (1 June 2015)

Coram: Ponnan, Maya and Petse JJA and Van der Merwe and Meyer AJJA

Heard: 8 May 2015

Delivered: 1 June 2015

Summary: Lapsed appeal (against final order of winding-up) – application for condonation - cumulative effect of flagrant breaches of the rules of the SCA without any acceptable explanation, respondent's interest in the finality of the judgment and the evident prejudice to respondent and body of creditors such that condonation should be refused irrespective of the prospects of success on appeal – condonation refused.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Van Niekerk AJ sitting as court of first instance):

(a) The application for condonation is dismissed.

(b) Ms Melanie Pandaram is ordered to pay the respondent's costs of the application for condonation and its costs incurred in opposing the lapsed appeal *de bonis propriis* on the attorney and client scale, which costs in both instances shall include those of two counsel.

JUDGMENT

Meyer AJA (Ponnan, Maya and Petse JJA and Van der Merwe AJA concurring)

[1] The respondent, the Commissioner for the South African Revenue Service (SARS), was granted leave to institute winding-up proceedings against the appellant, Miles Plant Hire (Pty) Ltd (Miles), and Miles was placed under final winding-up by an order of the Gauteng Division of the High Court, Pretoria (Van Niekerk AJ) on 3 October 2013. Leave to appeal to this court was granted by the court a quo on 12 February 2014. Miles lodged its notice of appeal with the registrar of this court on 11 March 2014. The appeal thereafter lapsed for failure on the part of Miles to timeously prosecute it further. Therefore, the preliminary question that is before us is whether the non-compliance with the rules of this court should be condoned and the appeal reinstated. I propose first to deal with the factual background against which the appeal arose and lapsed.

[2] Miles commenced trading in the year 2000. It conducted a plant hiring business and performed 'contracting services in the construction and road surfacing

industry'. Its sole director before it was finally wound up had been Ms Melanie Pandaram (Ms Pandaram).

[3] Miles applied for and was granted tax amnesty under the provisions of the Small Business Tax Amnesty and Amendment of Taxation Laws Act 9 of 2006 in respect of the years preceding the 2006 year of assessment. By her own admission Ms Pandaram on behalf of Miles submitted to SARS an income tax return for the 2008 year of assessment as well as a VAT return for the March 2008 tax period and supporting documents that were to her knowledge false. Her fraudulent conduct caused Miles' tax liability to be reduced by R1 740 508.77 and resulted in Miles ostensibly being entitled to a refund of input tax in the sum of R840 245.61. Following the conclusion of a plea and sentence agreement in terms of s 105A of the Criminal Procedure Act 51 of 1977, Ms Pandaram representing Miles was convicted by the Durban Regional Court of income tax evasion (contravening s 104(1)(a) of the Income Tax Act 58 of 1962) and VAT evasion (contravening s 59(1) of the Value Added Tax Act 89 of 1991) and she in her representative capacity was sentenced on each count to a fine of R100 000.00, which was wholly suspended for five years on certain conditions.

[4] It is also undisputed that Miles had a history of failing to pay taxes when they became due and it failed to submit income tax returns for the 2010, 2011 and 2012 tax years. On 1 October 2012 Miles requested SARS to provide it with an opportunity to apply to SARS for a compromise of its outstanding tax debt in terms of Chapter 14 of the Tax Administration Act 28 of 2011 (the TAA), which debt at that stage amounted to R59 million.

[5] On 25 October 2012 when SARS was still awaiting Miles' request for its tax debt to be compromised, Miles obtained an order of the North Gauteng High Court, Pretoria sanctioning a compromise of its financial obligations. The compromise proposed by Ms Pandaram did not contain all the information required in terms of s 155(3) of the 2008 Companies Act nor were the requirements prescribed by s 155(2) met. SARS accordingly launched an urgent application for the setting aside of the s 155 sanctioned compromise. Miles did not oppose the application and such order was granted on 4 December 2012.

[6] SARS served on Miles a demand dated 19 February 2013 in terms of s 345(1) of the Companies Act 61 of 1973 (the 1973 Companies Act) wherein Miles' outstanding tax debt was recorded to be the sum of R37 209 060.51 (inclusive of penalties and interest). In terms of s 172(1) of the TAA, SARS also filed with the Registrar of the Kwazulu-Natal High Court, Durban a certified statement in which the amount of tax due and payable by Miles was certified to be the sum of R37 441 091.55. Section 174 of the TAA provides that '[a] certified statement filed under section 172 must be treated as a civil judgment lawfully given in the relevant court in favour of SARS for a liquid debt for the amount specified in the statement.'

[7] In response to the statutory demand, SARS was requested to afford Miles a period of three weeks to finalise and present to SARS a request for its tax debt to be compromised in accordance with the provisions of the TAA and not to proceed with the winding-up of Miles pending the outcome of the request. It is also stated that Miles-

'. . . was in the position to offer SARS an amount of R12 million rand to be paid over a period of 18 months with interest calculated on the outstanding balance . . . .'

and

'[s]hould the offer of compromise be declined, then the company will invariably face financial ruin . . . .'

[8] A Chapter 14 TAA compromise of Miles' tax debt, however, did not materialise. Ms Pandaram, who deposed to Miles' answering affidavit in the winding-up application, stated that:

'As the Respondent [Miles] was literally with its back against the wall and the liquidation not being an option that the Respondent could consider, the only viable avenue in terms of which the Respondent could still attempt to negotiate with the Applicant [SARS], were to place the Respondent in Business Rescue.'

On 28 March 2013 Miles' board (Ms Pandaram) passed a resolution in terms of s 129(1) of the Companies Act 71 of 2008 voluntarily beginning business rescue proceedings and placing it under supervision. The resolution took effect when it was filed with the Companies and Intellectual Property Commission (CIPC) on 2 April 2013. A business rescue practitioner, Mr George Nell, was appointed on 4 April 2013.

[9] SARS instituted the application for the winding-up of Miles in the court a quo on 22 April 2013. In terms of the notice of motion it also sought the setting aside of Miles' board resolution of 28 March 2013 to begin business rescue proceedings and place the company under supervision. The business rescue proceedings, however, ended before the application was finally heard in the court a quo. The business rescue practitioner concluded that there was no reasonable prospect for rescuing Miles and he accordingly filed a notice of the termination of the business rescue proceedings with the CIPC in terms of s 132(2)(b) on 4 June 2013.

[10] One of the issues raised by Miles in resisting its winding-up was that SARS had failed to comply with the provisions of s 177 of the TAA, which section reads as follows:

'(1) SARS may institute proceedings for the sequestration, liquidation or winding-up of a person for an outstanding tax debt;

(2) SARS may institute the proceedings whether or not the person-

(a) is present in the Republic; or

(b) has assets in the Republic.

(3) If the tax debt is subject to an objection or appeal under Chapter 9 or a further appeal against a decision by the tax court under section 129, the proceedings may only be instituted with leave of the court before which the proceedings are brought.'

Miles' tax debt was subject to a pending appeal to the tax court at the time when the winding-up proceedings were instituted.

[11] The parties agreed that the proper interpretation of s 177(3) of the TAA was the only issue that the court a quo needed to decide and that the fate of the winding-up application depended solely on the determination of that question of law. Miles contended that if the tax debt was subject to an objection or appeal as contemplated in s 177(3), an application for the winding-up of a company may only be instituted by SARS after it had been granted prior leave by the court before which the winding-up proceedings are ultimately brought. SARS, on the other hand, contended that the required leave and the winding-up of a company could legally be sought in the same application proceedings. From this it is clear, therefore, that Miles had abandoned its opposition to the winding-up application and confined its argument to the question of law. (See *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd & others* [2013] All SA 251 (SCA); [2013] ZASCA 5 para

17). The interpretation of s 177(3) contended for by SARS found favour with the court a quo. On 3 October 2013 it granted SARS leave to institute the winding-up proceedings and it placed Miles under a final order of winding-up.

[12] Against that backdrop I turn to consider Miles' condonation application. The principles relating to condonation are well established. They were thus stated by this court in *Dengetenge*:

'[11] Factors which usually weigh with this court in considering an application for condonation 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 (per Holmes JA in *Federated Employers Fire & General Insurance Company Limited & another v McKenzie* 1969 (3) SA 360 (A) at 362F-G). . .

[12] In *Uitenhage Transitional Local Council v South African Revenue Service* 2004 (1) SA 292 (SCA) at paragraph 6 this Court stated:

"One would have hoped that the many admonitions concerning what is required of an applicant in a condonation application would be trite knowledge among practitioners who are entrusted with the preparation of appeals to this Court: condonation is not to be had 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-compliance is time-related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out."

[13] What calls for some acceptable explanation is not only the delay in the filing of the heads of argument, but also the delay in seeking condonation. An appellant should, whenever it realises that it has not complied with a rule of court, apply for condonation without delay (*Commissioner for Inland Revenue v Burger* 1956 (4) SA 446 (A) at 449G-H).'

[13] The notice of appeal in this matter was lodged with the registrar of this court on 11 March 2014, which was within the one month period of the granting of leave to appeal as required in terms of SCA rule 7(1)(b). Miles failed to lodge the record of the proceedings in the court a quo with the registrar of this court within three months of the lodging of its notice of appeal as required in terms of SCA rule 8(1) and the time limit for lodging the record had not been extended in terms of SCA rule 8(2). SCA rule 8(3) provides that '[i]f the appellant fails to lodge the record within the prescribed period or within the extended period, the appeal shall lapse'. Miles only

lodged the record, its heads of argument and an application for reinstatement of the appeal and condonation with the registrar of this court on 18 August 2014. The record should have been lodged on or before 10 June 2014 and Miles' heads of argument, according to SCA rule 10(1)(a), within six weeks of the lodging of the record. SCA rule 10(2A)*(a)* provides that if an 'appellant fails to lodge heads of argument within the prescribed period or within the extended period, the appeal shall lapse'. Furthermore, a decision on appeal in this matter hinges exclusively on a matter of law. Yet, Miles lodged a voluminous record with the registrar without first seeking the consent of SARS to limit the record and to omit the unnecessary parts from it as is required in terms of SCA rule 8(9) or, at the very least, to prepare a core bundle of documents as is required in terms of SCA rule 8(7), which would have been appropriate to the appeal.

[14] There are several unsatisfactory features about this matter. Miles did not file a replying affidavit in the condonation application and left various matters raised in SARS' answering affidavit that obviously called for an answer unchallenged, such as that:

- Miles 'attempted to defraud the fiscus by fraudulently obtaining' the compromise in terms of s 155 of the 2008 Companies Act, that the court when sanctioning the compromise was 'misled', that the true facts were 'fraudulently misrepresented' or 'not disclosed', and that 'the ex parte order was obtained on a *mala fide* basis;
- the grounds of objection against certain assessments raised by SARS 'do not disclose a defence';
- it was inappropriate to commence the business rescue proceedings taking into account the insolvency of Miles;
- 'the only reason why [Miles] applied for leave to appeal was in an attempt to delay the winding-up' and it 'is utilizing the pending appeal as a means to avoid [Miles] being liquidated in circumstances wherein it is hopelessly insolvent';
- the 'appeal like the compromise and the business rescue proceedings were only instituted as a mechanism to bring about delay and/or avoid the winding up of [Miles]';
- 'the reason why Mrs Pandaram failed to prosecute this appeal timeously is because the pending appeal was merely used as a stratagem to attempt to prevent

the liquidation process proceeding, specifically insofar as the sale of assets is concerned';

- and that 'the only reason why the appeal has been reinstated is to frustrate the winding-up process'.

[15] Miles seeks to attribute the causes of delay to: (a) the fact that its attorneys of record (Symington & De Kok, Bloemfontein and Leahy & Van Niekerk Inc, Pretoria (Miles' erstwhile attorneys)) withdrew on or about 9 May 2014; (b) Ms Pandaram's belief that the liquidators attended to the prosecution of the appeal and that she only became aware on 5 June 2014 that they were not; and (c) that her present attorneys of record, Yugan Naidu Attorneys (Miles' present attorneys) 'were trying to reconstruct the record', but were notified on 25 July 2014 that the court file could not be located whereafter they obtained the record from the liquidators' attorneys, Tintingers Inc (the liquidators' attorneys), on 1 August 2014.

[16] Miles was neither represented by its liquidators in the appeal nor in the application for condonation, but by Ms Pandaram. She instructed Miles' erstwhile attorneys of record. On 11 April 2014 they withdrew as its attorneys of record. On 12 June 2014, which is two months after their withdrawal, the registrar of this court was advised by Mr Yugan Naidu that he had been appointed as the attorney of record for Miles. Ms Pandaram attempts to explain the failure to properly prosecute the appeal since the withdrawal of Miles' erstwhile attorneys by stating that she, until 5 June 2014, believed that the 'liquidators would be attending' to the prosecution of the appeal. In this regard she states:

> 'It appears from an email dated the 4th June 2014 that the liquidators unequivocally had no intent of having anything to do with the prosecution of the appeal, despite their initial indications to the contrary. In this email my present attorneys were advised that the liquidators were not parties to the appeal, and were advised further that the liquidators were appointed by the Master of the High Court to attend to the administration of the estate, which they intended to do, save for the realisation of assets until the appeal has either been finalised or lapsed. Be that as it may, I accordingly became aware on the 5th June 2014 that I would be required to prosecute the appeal if I so deemed appropriate.'

[17] Ms Pandaram, however, fails to disclose what the 'initial indications' from the liquidators were that allegedly led her to believe that they would be prosecuting the

appeal nor does she disclose any other basis for her alleged belief. SARS pertinently took issue with this aspect of her explanation in its answering affidavit but she did not reply. Ms Pandaram could, on the facts presented, hardly have believed that the liquidators would be attending to the prosecution of the appeal.

[18] Furthermore, with reference to an exchange of correspondence and a previous inconsistent statement made by Ms Pandaram under oath, SARS has demonstrated the falsity of Ms Pandaram's allegation that she only became aware on 5 June 2014 that she would be required to prosecute the appeal. Two weeks earlier, on 21 May 2014, Miles' present attorneys wrote to the liquidators:

'We are instructed by the director and creditors to prosecute the appeal and in so doing, have secured fees to proceed with the appeal.

We are instructed that our clients shall indemnify the estate for any liability for fees and which in essence will not expose or prejudice the estate for costs at all.

Please revert with a consent for us to proceed with the Appeal on the aforementioned terms.'

Ms Pandaram deposed to the founding affidavit in an urgent application that was launched in the Gauteng Division, Pretoria on 1 July 2014 in which an order was unsuccessfully sought against Miles' liquidators and the magistrate presiding at an enquiry in terms of s 415 of the 1973 Companies Act to interdict the continuation of the enquiry. In that affidavit Ms Pandaram stated that it had been her understanding that the liquidators-

'. . . would prosecute the appeal to finalisation thereof, but they have declined to do so and have advised those representing [her] of their intentions only on or about the 21st May 2014.'

[19] Ms Pandaram also states that her present attorneys, who 'were trying to reconstruct the record', were advised on 25 July 2014 (presumably by their correspondent attorneys in Pretoria) that they-

'. . . have been unable to obtain the Court File under case number 23533/2013, and wish to advise that the only other possible way of obtaining the required copies of the papers, will be to enquire from the Applicant's Attorneys to make copies available.'

Miles' present attorneys then obtained the record from the liquidators' attorneys on 1 August 2014. Miles failed to proffer any explanation for the delay in obtaining the record from the time of the appointment of its present attorneys until 25 July 2014. And there is yet another gap in the chronological sequence advanced by Miles: no explanation is given for the delay from 1 August 2014 when the record was obtained

until 18 August 2014 when it was lodged with the registrar of this court. The same holds true for the late filing of its heads of argument.

[20] No acceptable explanation is given why condonation was not applied for without delay. Furthermore, no attempt is even made to explain Miles' failure to seek the consent of SARS to limit the record before the voluminous record was lodged with the registrar of this court or for its failure to have prepared a core bundle of documents. Matters that called for an explanation have simply not been explained and the explanation that is proffered lacks credence and is sorely wanting.

[21] I now turn to SARS' interest in the finality of the judgment of the court a quo. The process of Miles' liquidation commenced once the winding-up order had been granted on 3 October 2013. The operation of the order remained in force despite the court a quo having granted Miles leave to appeal on 12 February 2014; it was wound-up on the ground that it was unable to pay its debts. (See: *Express Model Trading 289 CC v Dolphin Ridge Body Corporate* [2014] 2 All SA 513 (SCA); [2014] ZASCA 17 para 18). In this case the finding that Miles was unable to pay its debts has not been assailed. The liquidators of Miles took control of its affairs and have taken steps in its winding-up, including the enquiry in terms of s 415 of the 1973 Companies Act and the realisation of certain of its assets, movable and immovable, once the appeal had lapsed. It is undisputed that the winding-up is presently at an advanced stage.

[22] Faced with similar circumstances in *Dolphin Ridge*, para 18, where the winding-up had progressed apace, Ponnan JA expressed the view that it may indeed prove impossible to turn back the clock and that it may thus be arguable that the appeal has become academic, but he considered it not necessary 'to go that far'. There is no need for me to go that far either. No information was placed before us to show that Miles' dire financial position has improved since the winding-up order had been issued. On the contrary, the uncontradicted statement of SARS in its answering affidavit is that should Miles succeed-

'. . . the result would be that [SARS] would have to bring another application which will lead to [Miles] being liquidated as it is hopelessly insolvent. The result will merely serve to further prejudice the creditors, of which [SARS] is the biggest creditor.'

Business rescue proceedings, on Ms Pandaram's own version, were the 'only viable avenue' for Miles when faced with the threat of liquidation, but that too failed.

[23] I need not deal with Miles' prospects of success on appeal in relation to the interpretation of s 177 of the TAA. The facts of this case show flagrant breaches of the rules of this court without any acceptable explanation therefor. The cumulative effect of these factors coupled with SARS' interest in the finality of the court a quo's judgment and the evident prejudice to SARS and the body of creditors, is such that condonation should be refused irrespective of the prospects of success on appeal. In *The Commissioner for the South African Revenue Service v Candice-Jean van der Merwe* [2015] ZASCA 86 para 19 this court stated:

'In applications of this sort the prospects of success are in general an important, although not decisive, consideration. It has been pointed out *(Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein* [1985] ZASCA 71; 1985 (4) SA 773 (A) at 789C) that the court is bound to make an assessment of an applicant's prospects of success as one of the factors relevant to the exercise of its 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. . . . 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. This applies even where the blame lies solely with the attorney.'

(Footnotes omitted)

[24] Finally the matter of costs. SARS seeks a punitive costs order *de bonis propriis* against Ms Pandaram. I am of the view that an award of costs against her personally on the scale as between attorney and client is warranted and appropriate in the circumstances of this case. Ms Pandaram is the person who represented Miles in the appeal and in the application for condonation. The liquidators were given the assurance that Miles' estate would not be exposed to any costs. Ms Pandaram has shown a general lack of candour and has played loose and fast with the rules of our courts. There is no justifiable reason why the body of creditors should financially be prejudiced as a result of this litigation. Moreover, SARS has been put through the unnecessary trouble from defending a judgment from the high court in its favour. There seems to be no reason for compliant taxpayers to be saddled with those costs.

[25] In the result:

(a) The application for condonation is dismissed.

(b) Ms Melanie Pandaram is ordered to pay the respondent's costs of the application for condonation and its costs incurred in opposing the lapsed appeal *de bonis propriis* on the attorney and client scale, which costs in both instances shall include those of two counsel.

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PA Meyer

Acting Judge of Appeal

APPEARANCES

For Appellant:	GD Wickins
Instructed by:	Yugan Naidu Attorneys, Durban C/o Honey Attorneys Bloemfontein
For Respondent:	E Coetzee SC with L Sigogo
Instructed by:	Edelstein-Bosman Inc., Pretoria C/o McIntyre & Van der Post Attorneys Bloemfontein