

**IN THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY (SADC)
TRIBUNAL, WINDHOEK, NAMIBIA**

CASE NO. SADC (T) 04/2009

IN THE MATTER BETWEEN

**SWISSBOURGH DIAMOND MINES (PTY) LTD
JOSIAS VAN ZYL
THE JOSIAS VAN ZYL FAMILY TRUST
THE BURMILLA TRUST
MATSOKU DIAMONDS (PTY) LTD
MOTETE DIAMONDS (PTY) LTD
ORANGE DIAMONDS (PTY) LTD
PATISENG DIAMONDS (PTY) LTD
RAMPAI DIAMONDS (PTY) LTD**

**1ST APPLICANT
2ND APPLICANT
3RD APPLICANT
4TH APPLICANT
5TH APPLICANT
6TH APPLICANT
7TH APPLICANT
8TH APPLICANT
9TH APPLICANT**

AND

THE KINGDOM OF LESOTHO

RESPONDENT

CORAM

H.E. JUSTICE A.G. PILLAY	President
H.E. JUSTICE I.J. MTAMBO, SC	Member
H.E. JUSTICE DR. L.A. MONDLANE	Member
H.E. JUSTICE DR. R. KAMBOVO	Member
H.E. JUSTICE DR. O.B. TSHOSA	Member

**D. N. Unterhalter, SC
Assisted by M. Du Plessis
H.P. Viljoen, SC
Assisted by P.B.J. Farlam**

**Applicant's Agents
Respondent's Agents**

Hon. Justice M.C.C. Mkandawire

Registrar

D. Shivangulula

Court Clerk

RULING

Delivered by H.E. Justice Isaac J. Mtambo, SC

The application initiating proceedings was issued on June 15, 2009. It was served on the Respondent on June 22, 2009. In terms of Rule 36(1) of the Rules of Procedure of the Southern African Development Community (SADC) Tribunal, hereinafter referred to as the Rules, the period within which the Respondent was required to have filed a defence is thirty (30) days, which expired on or about July 22, 2009. On July 13, 2009, the Respondent applied for an extension of the period. The application was granted. The Respondent was allowed a further period of sixty (60) days within which to file a defence. This period was to expire on or about September 21, 2009, in terms of Rule 84 of the Rules. On September 7, 2009 the Respondent brought an application for a further extension of the period. On the basis that the circumstances had not changed warranting further extension, the application was, on September 30, 2009, refused. Despite this, the Respondent still filed the first part of a purported defence; this was October 16, and the second part thereof on November 24, 2009. The Respondent also, on November 24, filed the present application for condonation of the late filing of the defence.

We think this is a convenient stage at which to refer to the applicable principles in an application for condonation. In the case of **Kodzwa v Secretary for Health and Another** 1991 (1) ZLR 313 (SC), the Supreme Court of Zimbabwe quoted, with approval, from a textbook on practice and procedure: Herbstein and Van Winsen's ***The Civil Practice of the Supreme Court of South Africa***, the following passage:

“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 is sufficient cause to excuse him from compliance.”

The court's power to grant relief should not be exercised arbitrarily and upon the mere asking, but with proper judicial discretion and upon sufficient and satisfactory grounds being shown by the applicant. In the determination whether sufficient cause has been shown, the basic principle is that the court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides in which the court will endeavour to reach a conclusion that will be in the best interests of justice. The facts usually weighed by the court in considering applications for condonation include the degree of non-compliance, the explanation for it, the importance of the case, the prospects of success, 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.

It is, therefore, well established that the court has a discretion to grant condonation when the principles of justice and fair play demand it, and when the reasons for non-compliance with the rules have been explained by the applicant/appellant to the satisfaction of the court."

This passage was also quoted, with approval, in the case of **Willowcreek Farm (PVT) Limited v Devon Engineering** (HC) 289/03 [2004] (25 February 2004), among others.

We have found this passage very instructive. It contains the correct principles governing the requirement for the grant or refusal of condonation. A court has a discretion which it has to exercise judicially and according to established principles of law, not the caprice of an individual judge; a court has to take into account all the facts which are before it. It has to consider: (a) the degree of lateness or non-compliance with the prescribed time frame; (b) the explanation

for the lateness or non-compliance with time frame; (c) the prospects of success or *bona fide* defence in the main case; (d) the importance of the case; (e) the Respondent's interest in the finality of the judgment; (f) the convenience of the court, and (g) the avoidance of unnecessary delay in the administration of justice – see **Forster v Stewart Scott Inc** (1997) 18 ILJ 367 (LAC).

In deciding this application, we will bear in mind that these factors are not individually decisive; they are interrelated and must be weighed against each other. We will also take into account that a good explanation for lateness or failure to comply with the time frame is shown by giving a reasonable explanation that shows how and why the default occurred, and that if it appears to us that the default was willful or was due to gross negligence on the part of the Respondent, we should decline the granting of condonation. Regarding the prospects of success or *bona fide* defence, we will bear in mind that all that needs to be shown is the likelihood or chance of success when the main case is heard – see **Sareiva Construction (Pty) Ltd v Zulu Electrical Engineering Wholesalers (Pty) Ltd** 1975 (1) SA 612 (D) and **Chetty v Law Society** (1985) (2) SA at page 765 A-C.

We must now apply the above principles to the circumstances of the present application regarding the length or any negligence attached to the delay, and the public importance of the case.

The Respondent has informed us that a period of nearly nine years had elapsed, after the matter was concluded in the Court of Appeal (the highest court) of the Respondent, before the filing of the application in the main case; that the trial itself, in the High Court, lasted some sixty-four court days spreading over nearly three years, i.e. from May 1996 to April 1999; that the Respondent is faced with a very lengthy application in the main case with prayers taking some 12 pages, the

statement of claim stretching over 541 pages (based on 2030 pages of evidentiary material annexed thereto), and referring also to approximately 35,000 pages of additional documents, with an indication that copies of the entire record of proceedings in the municipal courts as well as the bundle of documents exceeding 20 000 pages would be placed before the Tribunal, if it should become necessary. The Respondent, therefore, submitted that the briefest consideration of only those papers filed makes it clear that an adequate defence could not be formulated within the 30 days prescribed by the Rules of the Tribunal. Faced with such a time limit, the Respondent approached the Tribunal for an extension of the time in which to file its defence; sixty days were granted, as we have mentioned above.

When, towards the expiry of the extended period, it became apparent to the Respondent that it was impossible to file an adequate defence within the time allowed, an application for a further extension was immediately made. The application was refused, as we have said above, whereupon the Respondent filed the part of the defence which had already been formulated, albeit outside the period allowed. The remaining part of the defence was filed on November 24, as we have already indicated.

The Respondent has also submitted that the matter is of considerable public importance in that the amount of money involved is very substantial in relation to the size of the economy of the Respondent; the claim amounts to more than ZAR 1324 million. The Respondent has, therefore, argued that it would be wrong not to allow it to be heard, having shown the desire to be heard, notwithstanding that it has not acted within the time limits.

The Applicants oppose the application. They contend mainly that the Respondent's failure to meet the extended deadline was caused by the same circumstances that had already been earlier considered, namely, the length and nature of the applicant's case, and that the events spanned many years

We bear in mind that the standard for considering an application for condonation is the interest of justice and that whether it is in the interest of justice to grant condonation depends on the facts and circumstances of each case. The circumstances that are relevant in this application are the extent and cause of the delay, the nature of the relief sought and the importance of the matters raised in the main case. In this connection, we have had to consider the length of the interval (nine years) between the time of the conclusion of the matter in the municipal court and its resuscitation in the Tribunal, which meant that the Respondent was faced with having to answer factual allegations stretching back that long period in some ninety days. We have also had to consider the size of the record. We have had to consider the manner in which the Respondent has approached the whole matter; it has shown the desire to be heard and the wish to comply with the prescribed time limits, it has promptly taken steps whenever it appeared that it would not be possible to do so. In the circumstances, we are of the view that the Respondent's explanation for late filing of the defence is reasonable and excusable, and that it is without any negligence on its part.

We have also examined the Respondent's defence and have considered the public importance of the matter from the point of view of the large amounts of money involved. We are of the opinion that it would only be fair and proper that the Respondent be accorded the opportunity to be heard on the allegations upon which the Applicants rely in the main case.

In the result, we hold that the Respondent has shown sufficient cause to be excused from compliance and that it is, in the circumstances, in the best interest of justice that the application to condone the late filing of the defence be allowed, and it is, therefore, hereby granted.

We make no order at this stage as to costs.

Delivered in open court this 11th day of June 2010, at Windhoek in the Republic of Namibia.

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H.E. Justice Ariranga Govindasamy Pillay
PRESIDENT

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H. E. Justice Isaac Jamu Mtambo, SC
MEMBER

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H.E. Justice Dr Luis Antonio Mondlane
MEMBER

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H.E. Justice Dr Rigoberto Kambovo
MEMBER

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H.E. Justice Dr. Onkemetse Tshosa
MEMBER