

IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

(REPUBLIC OF SOUTH AFRICA)

CASE NUMBER: 20138/2011

In the matter between

MAGDELENA MARIA DE WET

First Applicant

UITBLINK OPVOEDINGKUNDIGE DIENSTE CC t/a

SKILLS SOLUTIONS SA

Second Applicant

JEREMIA JESAJA DE WET

Third Applicant

and

HEINRICK WILHELM KOEN

First Respondent

ALICIA KOEN

Second Respondent

ADP CC t/a HUMAN PROGRESS MANAGEMENT

Third Respondent

HUMAN PROGRESS MANAGEMENT CC

Fourth Respondent

JUDGMENT

EF Dippenaar AJ

[1] This is an application for leave to appeal by the First, Second and Third Applicants against the order granted in favour of the First to Fourth Respondents on 9 December 2011. The Applicants were the Respondents in that application.

- [2] The Applicants seek condonation for the late filing of their notice of leave to appeal. This application is opposed by the First to Fourth Respondents.
- [3] An affidavit was filed by the Third Applicant in support of the condonation application which explains the delays which occurred over the festive period and consequent upon the Applicants' changing their legal representatives.
- [4] In the exercise of my discretion and in the interests of fairness, I am of the view that the condonation sought should be granted.
- [5] In addition to the notice of application for leave to appeal dated 25 January 2012, a further document dated 16 April 2012 was filed. The latter document comprises some 16 pages and contains not only the grounds on which leave to appeal is sought, but also to an extent, the argument on which such grounds are based. Although not strictly in accordance with the normal format of an application for leave to appeal, the Applicants will not be penalised for the format utilised in the aforesaid notices.
- [6] The grounds upon which leave to appeal is sought, are much wider than the issues raised on the application papers by the current Applicants and in various instances raise issues which, on the application papers were either not disputed, or were common cause between the parties.
- [7] On the application papers, the application was mainly opposed by the Third Applicant and the First and Second Applicants did not object to an order being granted against them in the terms sought, save in respect of costs. In the

present application, all three Applicants seek leave to appeal against the judgment and order granted.

[8] A large portion of the Applicants' argument to obtain leave to appeal was directed at complaining about the poor legal advice and assistance they had received from their previous attorneys of record and counsel.

[9] The Applicants' argument was further mainly directed at raising new issues which had either been admitted on the application papers or had not been raised in argument during the original hearing of the application.

[10] Although in principle a legal concession can be withdrawn and an abandoned legal contention be revived on appeal, this can only be done where the contention is covered by the pleadings and evidence (as constituted by the application papers) and if its consideration involves no unfairness to the other party. No new factual issues can be raised.¹

[11] A party is bound by factual concessions made and may not present argument in conflict with facts which were common cause in the Court *a quo* or in conflict with the parties' common understanding as to what exactly the issues were in the Court *a quo*.²

[12] Although it may be open to a party to raise a point of law which involves no unfairness to the other party and raises new factual issues, a point raised for

¹ Alexcor Ltd v The Richtersveld Community, 2004 (5) SA 460CC at 477C

² AJ Shepherd Edms Bpk v Santam Versekeringsmaatskappy Bpk, 1985 (1) SA 399A at 413D-415G; F & I Advisors Edms Bpk v Eerste Nasionale Bank van Suiderlike Afrika Bpk, 1999 (1) SA 515; Filta-Matix Pty Ltd v Freudenberg & Others, 1998 (1) SA 606 SCA

the first time on appeal on factual considerations not fully explored in the Court *a quo*, should not be allowed, i.e. where an Appellant seeks to build a case on a foundation not laid in the Court *a quo*, he should be precluded from doing so.³

[13] Significantly absent in the application for leave to appeal and the condonation application, is any explanation why the issues which the Applicants now seek to raise were not raised on the application papers or when the matter was initially argued. A blanket allegation of “lack of performance” on the part of the Applicants’ former legal representatives is made, without any indication of the factual circumstances at the time or what instructions were furnished by the Applicants at the time to their legal representatives. Similarly no attempt has been made by the Applicants to meet any of the stringent requirements relevant to receiving further evidence on appeal, recently enunciated in *De Aguirar v Real People Housing (Pty) Ltd*⁴.

[14] The Respondents contend that various of the issues now raised were never part of the original attack of the Applicants in their answering papers and that the Applicants are attempting to make out an entirely new case, which is inconsistent with the case made out in the answering papers.

[15] The Respondents further contend that they are prejudiced by the introduction of such new issues in the current application.

³ Naude v Frazer, 1998 (4) SA 539 SCA at 558A-E; Ras NNO v Van der Meulen, 2011 (4) SA 17 SCA at 22B-C; Administrator Transvaal v Theletsane, 1991 (2) SA 192A at 195F-196E and 200G
⁴ 2011 (1) SA 16 SCA, paras 9-12, pp19D-20E

[16] The Respondents further contend that in restraint matters, applications are only referred to oral evidence in exceptional circumstances and that no such exceptional circumstances exist in the present matter. In light of the fact that many of the Respondents' contentions were left unchallenged in the answering papers, no basis existed for the referral of the matter to oral evidence on any of the issues raised. The Respondents further pointed out that the Applicants never sought leave to file a further affidavit dealing with alleged new matter raised by the Respondents in reply, nor did they seek to have such matter struck from the record.

[17] In the circumstances, based on the facts placed before me in the current application, I am not persuaded that the Applicants have demonstrated that another Court may reasonably come to a different finding on the matter. The application for leave to appeal must accordingly fail.

[18] IT IS ORDERED

- 1) That condonation is granted for the late filing of the notice of application for leave to appeal.
- 2) That the application for leave to appeal is refused with costs.

E F DIPPENAAR
ACTING JUDGE OF THE HIGH COURT

Date of hearing	:	8 June 2012
Date of judgement	:	29 June 2012
For Applicants	:	Adv GM Young
	:	Potgieter, Penzhorn & Taute Inc
For Respondents	:	Adv J Bauwer
	:	Van Gaalen Attorneys