

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 19474/2019

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

E van der Schyff
Date: 15 February 2023 E van der Schyff

In the matter between:

MINISTER OF POLICE

APPLICANT

and

JOHN KUTIYA

RESPONDENT

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

Van der Schyff J

- [1] On 18 July 2022, I handed down an order and judgment in the action instituted by Mr. Kutiya (the respondent) against the Minister of Police (the Minister/applicant). An application for leave to appeal was belatedly filed, and the applicant seeks condonation for the late filing of the application for leave to appeal.
- [2] Mr. Kutiya proceeded to enforce the judgment since the application for leave to appeal was filed out of time, when the appeal had lapsed and before an application was issued for its reinstatement. A subsequent urgent court application by the Minister to set aside, or suspend, the warrant of execution was dismissed. As a result, the amount of damages awarded to Mr. Kutiya was paid out to his attorney by the Sheriff of the Court who was instructed to hold the money in trust pending the finalisation of the urgent court application.
- [3] The question now arises whether the principle of peremption applies. Can it be said that the Minister acquiesced to the judgment? The undertaking provided on behalf of the Minister, as set out in the urgent court papers, read as follows:
- ‘The writer undertake (*sic.*) to insure that payment of the Judgment debt will be made Friday 27 January 2023 into the account of the Sheriff Pretoria. The payment will be subject to any possible court order to stay the Warrant of Execution.’
- [4] Payment received as a result of enforcing a judgment debt, cannot be equated with payment voluntarily made. The applicant did not approbate and reprobate. The appeal is, however, moot since the judgment debt was paid subsequent to the urgent court application being dismissed. In the event that I am wrong in this regard, the condonation application stands to be considered.
- [5] The applicant states that the application for leave to appeal was late because the matter is complex and intricate and involved numerous role players. Unfortunately, the applicant’s condonation application is drafted in broad, vague general terms. It is stated that the applicant had to consult with ‘as many role players as possible’ without identifying such role players. It is stated that the ‘process consisted of

consultations with various officials across the Department of police as well as inputs from various decision makers involved', without identifying the officials, the importance of their contribution, and the efforts made to secure their input. The 'unforeseen administrative factors' which further delayed the process of considering the impact of the judgment are also not defined or delineated. The state attorney attributed her inability to deal timeously with the matter to her being on maternity leave 'up to and just before the hearing of the trial', and an ensuing health condition. It is difficult to understand how the attorney's health condition before the judgment was handed down, contributed to the late filing of the application for leave to appeal after the judgment was handed down.

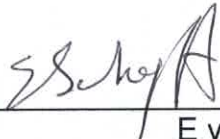
- [6] It is trite, that a party applying for condonation must set out in detail the reasons for lateness. The applicant failed to provide the required detail for this court to find that the delay was reasonable. However, when an application for leave to appeal is considered, the reasonableness of the delay is but one of the aspects that must be considered. Strong prospects of success might vitiate an unreasonable delay.¹
- [7] If the prospects of success of the proposed appeal are to be considered, I am of the view that the applicant failed to make out a case that there is a reasonable prospect of success on appeal. I set out the reasons for the order in the judgment, and it will serve no purpose to regurgitate the reasons underpinning the order. In the result, the condonation application stands to be dismissed.
- [8] As for costs, I am of the view that the facts of this application for leave to appeal do not necessitate the granting of a punitive costs order, although the principle that costs follow success applies.

ORDER

In the result, the following order is granted:

¹ *Nair v Telkom SOC Ltd and Others* (JR59/2020) [2021] ZALCJHB 449 (7 December 2021).

1. The condonation application, and accordingly the application for leave to appeal, are dismissed with costs.



E van der Schyff
Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

For the applicant:	Adv. T. Raikane
Instructed by:	The State Attorney, Pretoria
For the respondent:	Adv. C. Matoli
Instructed by:	Chabeli Matoli Attorneys Inc.
Date of the hearing:	6 February 2023
Date of judgment:	15 February 2023