

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 16/08014

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED: YES / NO
25/3/2024	[REDACTED]
DATE	SIGNATURE

In the matter between:

LIONEL NEWBY

First Applicant

NEWBY DESIGNER HOMES CC

Second Applicant

and

THE STANDARD BANK OF SOUTH AFRICA LIMITED

Respondent

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand down is deemed to be **25 March 2024**.

APPLICATION FOR LEAVE TO APPEAL RULING & REASONS

CARRIM AJ

Introduction

- [1] The application for leave was filed on 22 March 2023, almost five months after the order was granted. The applicants are not in compliance with the provisions

of rule 49(1)(b) which provides that leave to appeal must be furnished within fifteen (15) days of the order appealed against.¹ The respondent has raised this non-compliance as a *point in limine*.

- [2] The applicants have not brought an application for condonation for non-compliance with the rule. Mr Shaw attempted to bring such an application from the Bar in reply by requesting that the applicants be allowed to bring such an application after this hearing which request was denied.
- [3] The applicants have been aware of their own non-compliance since 22 March 2023. They have also been aware of the respondent's *point in limine* and had every opportunity to file a condonation application prior to the hearing setting out all the facts for the delay. They failed to do so and to now attempt to bring an application after the hearing which would be unfair to the respondents and not in the interests of justice.
- [4] Given that no application for condonation has been brought the application must fail for non-compliance with rule 49(1).
- [5] But even if for argument's sake there was application before me, it is now settled law that in considering an application for condonation the court has a discretion that must be exercised judicially upon consideration of all the facts.
- [6] Good cause for the non-compliance must be shown by the applicants. In this enquiry relevant considerations may include the degree of non-compliance with the rules, the explanation therefor and the prospects of success on appeal, the convenience of the court and the avoidance of unnecessary delay in the administration of justice. (***United Plant Hire (Pty) Ltd v Hills.***²)
- [7] In my view the applicants have failed to explain the inordinate delay of almost 5months. Moreover, the applicants' prospects of success on appeal are weak because as I stated in my *ex tempore* reasons, the contract of sale regarding the property was between the applicant and the seller ("the seller"). The seller had not been joined to the proceedings. The applicants at that time had 'offered' to

¹ Rule 49(1)(b). Harms *Civil Procedure in the Superior Courts* B-346

² 1976 (1) SA 717 (A).

join the seller. The seller had opposed the joinder. The applicants insisted on proceeding with the main application despite non-joinder of the seller.

[8] During the main application it was clear that –

- a. The contract of sale was subject to a suspensive condition that the applicants would obtain a loan of R12m from the respondent;
- b. The applicants were aware before proceeding with signing the transfer documents that the respondent had only granted them a loan of R4m.
- c. Despite this, the applicants proceeded with the contract of sale and accepted transfer of the property by signing all the relevant documents.
- d. The respondent was not a party to contract of sale.
- e. The applicants accepted the amount of R4m from the respondent and made monthly repayments to the respondent without demure, protest or allegations of fraud. They fell behind with the repayments and were in breach of the loan agreement.
- f. The main application was launched by the applicants when the respondent sought to enforce the provisions of the loan agreement. It was only then that the applicants alleged there was fraud on the part of the respondent and instituted the main application.
- g. The respondent had raised material non-joinder of the seller as a point in *limine*.
- h. The applicant nevertheless conceded that the seller was opposed to the joinder and did not want to resile from the contract of sale. In the applicants' view as expressed in its practice note it was not necessary to join the seller because the issues were between the applicant and the respondent.

[9] The application for a purported unlawful transfer of the property could not be granted in the absence of the seller, who has a material and direct interest in the matter, being joined and the main application was accordingly dismissed.

[10] As to the counterapplication, the applicants were not able to show on a balance of probabilities that they were not liable to the respondents. The counterapplication was accordingly granted.

[11] During argument, it was not clear whether the applicants sought to persist with the grounds of appeal in their notice. The applicants wished to be given an opportunity to join the seller. But the applicants had already been afforded that opportunity in the main application and failed to act accordingly. As to the remaining grounds of appeal listed in the notice, these lacked particularity, and none were persisted with during argument.

[12] Considering the above, I find that the application must fail for non-compliance with rule 49(1)(b). Nonetheless, even if there was a condonation application before me, I am of the view that the inordinate delay has not been adequately explained by the applicants and there would be no reasonable prospect of success on appeal. Furthermore there are no compelling reasons why the application should be granted.

[13] In my view the application for leave to appeal has been brought merely for purposes of delaying the administration of justice.

[14] The application is accordingly dismissed with costs.



Y CARRIM

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

JOHANNESBURG

APPEARANCES

COUNSEL FOR APPLICANT:	Adv D Shaw
INSTRUCTED BY:	Mr L Newby
COUNSEL FOR RESPONDENT:	Adv PR Long
INSTRUCTED BY:	Van Hulsteyns Attorneys

DATE OF THE HEARING:	25 March 2024
DATE OF JUDGMENT:	25 March 2024
DATE OF REASONS:	25 March 2024