

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

CASE NO. 4112/2023

In the matter between:

THE ROAD ACCIDENT FUND

APPLICANT

and

ZILWA ATTORNEYS INCORPORATED

FIRST RESPONDENT

HYMIE ZILWA

SECOND RESPONDENT

THE SHERIFF: EAST LONDON

THIRD RESPONDENT

JUDGMENT

Rugunanan J

[1] The key issue raised in this matter is whether a belated application for leave to appeal a high court decision may be regarded as lapsed with the consequence that the decision against which leave to appeal is sought is excluded from the operative effect of section 18(1) of the Superior Courts Act¹ (the Act).

[2] The issue arises with regard to an order made against the applicant by Mjali J on 6 November 2023 (the order). The order is the subject of an application for leave to appeal which has been postponed *sine die* by her on 22 February 2024.

[3] The following narrative of events gives context.

[4] This present is an application brought on urgency by the applicant to restrain the first and second respondents from pursuing with execution of various writs previously obtained by several judgment creditors (being clients of the respondents)

¹ Superior Courts Act 10 of 2013.

pursuant to which the applicant instituted proceedings for a stay of execution which Mjali J dismissed in the order of 6 November 2023. Along with a simultaneous counter-application by the respondents, the order included a declaration that certain clauses of the applicant's Board Notice 271 of 2022 published on 6 May 2022 in Government Gazette number 46322 are unlawful. The notice sets out the applicant's terms and conditions upon which claims for compensation shall be administered, compliance with which the applicant asserts is mandatory.

[5] Pertinent to these proceedings is that on 8 December 2023, a period of nine days after the order, the applicant belatedly filed a notice of application for leave to appeal. The application served before Mjali J on 22 February 2024. I was informed from the bar it was postponed *sine die* together with an application for condonation.

[6] Prior to that date and due to the fact that the respondents persisted with execution, the applicant applied for an order preventing them from doing so. The application, formulated on an essentially similar cause of action as the present, was moved before Ntsepe AJ on 6 February 2024 and was dismissed by her on 9 February 2024 pursuant to which the applicant delivered a notice of application for leave to appeal on 19 February 2024. Given the conclusion reached in this judgment it is considered unnecessary to deal with the first respondent's *res iudicata* argument in respect of the application that served before Ntsepe AJ. In argument it was properly conceded that the point taken would be rendered unsustainable in the event of a finding that there is an existing application for leave to appeal pending before Mjali J which has not lapsed.

[7] Although cited in the papers, neither the second respondent nor the third respondent participated in these proceedings. The answering affidavit on behalf of the first respondent has been deposed in the name of an attorney who practices under the auspices of the first respondent. From what follows hereafter the first respondent will simply be referred to as 'the respondent'.

[8] Notwithstanding the pending leave to appeal application, the respondent persists with execution of the writs in favour of the judgment creditors by seeking the attachment *inter alia* of the applicant's operational bank account from which public funds are expended.

[9] Urgency, being self-evident, was properly uncontested at the hearing of the matter.

[10] The present application is made pending the finalisation of an application for leave to appeal (against the order in which the main application was dismissed and the counter application granted) and the appeal process if leave to appeal is granted. The relief sought by the applicant is directed at the order in its entirety. If granted, it would effectively suspend the operation of the order that set aside the applicant's board notice.

[11] The determination of the main issue raised in this matter centres on whether there is an existing application for leave to appeal that suspends the operation and execution of the order by Mjali J.

[12] The applicant contends that the application is extant and that section 18(1) of the Act applies.

[13] Maintaining that the application has not been lodged in accordance with the prescripts of rule 49(1)(b) the respondent argues that it is non-existent in law and until condoned, section 18(1) is inapplicable and the relief sought by the applicant is not competent.

[14] Section 18 of the Act deals with the suspension of decisions pending appeal. Quoted in relevant part the section reads as follows:

'Suspension of decision pending appeal

18. (1) Subject to subsections (2) and (3) unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.

(2) ...

(3) ...

(4) ...

(5) For the purposes of subsections (1) and (2), a decision becomes the subject of an application for leave to appeal or of an appeal, as soon as an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules.'

[15] Under section 18(1) it is both the operation and execution of a decision which is subject to an application for leave to appeal or an appeal that is automatically suspended pending the decision of the application or appeal². It is the entirety of the

² *Ntlemeza v Helen Suzman Foundation* 2017 (5) SA 402 (SCA) at 413B.

judgment or order which is suspended from operation and execution³. Inferred from the composition of the section is that in the absence of an application for leave to appeal or an appeal, the judgment and order in question are not suspended and are in fact deemed final. The fact that the noting of an appeal suspends the execution of a judgment appealed against logically means that in the absence of such an appeal, the judgment is not suspended and is in fact deemed executable and thus, final.

[16] Rule 49 of the uniform rules regulates the procedure for appeals from the high court. Subrule (1)(b), in summary, proffers two scenarios in which application for leave to appeal may be made: (i) when leave to appeal is required and has not been requested at the time of the judgment or order; and (ii) in the event that the reasons for the court's order are given on a date later than the date of the order. In either instance the subrule lays down a period of fifteen days in which application for leave to appeal may be made with a specific proviso that the court may upon good cause shown extend such period.

[17] The rule deals with civil appeals from a court constituted before a single judge of a division of the high court, sitting as a court of first instance, to a full court of that division.⁴ It bears noting that the Act does not regulate the appeal procedure from a single judge to a full court of a division of the high court.

[18] The rule does.

[19] This is evident from a reading of rule 49(17) which is dealt with later in this judgment.

[20] To begin with, the respondent's argument is advanced with the proposition that a valid application for leave to appeal compliant with rule 49(1)(b) is a condition precedent for the operation of section 18(1) of the Act to suspend the operation and execution of a court order which is the subject of an application for leave to appeal or of an appeal.

[21] The argument stems from a *dictum* by Harms JA of the Supreme Court of Appeal in *Modderfontein Squatters, Greater Benoni City Council v Modderklip*

³ *Standard Bank of South Africa Ltd v Stama (Pty) Ltd* 1975 (1) SA 730 (A) at 746A; also *Sirioupoulos v Tzerefos* 1979 (3) SA 1197 (O) at 1201D-H.

⁴ Erasmus, *Superior Court Practice*, D1-662 [Service 21, 2023].

*Boerdery (Pty) Ltd*⁵, where, (in the context of the repealed rule 49(11)⁶ now regulated by section 18 of the Act) the following is stated:

‘[T]he ‘Modder East Squatters’ lodged their application for leave to appeal together with an application for condonation some 18 months after the order had issued. The right to apply for leave to appeal, by then, had lapsed. Rule 49(11) presupposes a valid application for leave to appeal to effect the suspension of an order. In this case there was none.’

[22] There is point of distinction between the present matter and *Modderfontein* to which the applicant correctly referred in argument. In *Modderfontein* the appellants did not lodge an application for leave to appeal before execution commenced – they only did so eighteen months later after execution had already commenced. In the present matter, notwithstanding the late lodgement of the application for leave to appeal, the respondent clearly communicated in writing that it intended to persist with execution of the order in question.

[23] *Modderklip* resonated persuasively in several other judgments to which the respondent made reference in argument. Following an exposition on the purpose served by section 18, the full court in *Myeni v Organisation Undoing Tax Abuse and another*⁷ stated:

‘Given that section 18 exists to regulate the position when an application for leave to appeal or an appeal against a judgment is pending, it stands to reason that where no application for leave to appeal or appeal is pending, the purpose of the section ceases to exist and as such the judgment and order are deemed final and executable for all intents and purposes.’⁸

[24] Elsewhere in *Myeni* the court expressed the following view:

‘... in light of the belated petition now filed by the appellant, the principal judgment’s order continues to remain operational for the mere fact that the service of an

⁵ Properly cited as *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae), President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2004 (6) SA 40 para 46.

⁶ By GN R472 of 12 July 2013. In its previous formulation the sub-rule read: ‘Where an appeal has been noted or an application for leave to appeal against or to rescind, correct, review or vary an order of a court has been made, the operation and execution of the order in question shall be suspended, pending the decision of such appeal or application, unless the court which gave such order, on the application of a party, otherwise directs.’

⁷ *Duduzile Cynthia Myeni v Organisation Undoing Tax Abuse NPC and another* [2021] ZAGPPHC 56.

⁸ *Duduzile Cynthia Myeni v Organisation Undoing Tax Abuse NPC and another* id para 18.

application to condone the late filing of the petition to the SCA does not suspend the operation and execution of any order.’⁹

[25] I digress briefly to point out that the abovementioned extract from *Myeni* ensued from events involving section 17(2)(b) of the Act¹⁰ which deals with the period in which leave to appeal must be sought from the Supreme Court of Appeal if refused by the high court. While section 17(2)(b) allows for a period of one month or such longer period as may on good cause be allowed, it stands apart and is distinct from rule 49. I will say no more about section 17(2)(b) for the reason that it is unrelated to the present enquiry.

[26] The respondent further relied on *Dancing Beauty and Hair (Pty) Ltd v Northern Shareblock (Pty) Ltd and Another*¹¹ in which *Modderklip* was applied. Albeit that an application for leave to appeal was served within the fifteen day period provided for in rule 49(1)(b) but not lodged within the prescribed period, the court held:

‘... the right to appeal lapsed when the filing date was missed (Rule 49(1)(b) of the Uniform rules of Court, read with section 18(5) of the Superior Courts Act 10 of 2013, *Modderfontein Squatters, Greater Benoni City Council ...*)’

[27] Adopting the approach in *Myeni*, the court in *Waste Partner Investments (Pty) Ltd v Toyota Financial Services and others*¹² had this to say:

‘[T]he late filing of the applicant’s application for leave to appeal is fatal, even if the applicant has filed an application to condone the late filing of the application. This position was confirmed in [Myeni].’

[28] When compared with the present matter there are obvious differences in the factual matrix of each of these cases and the substantive issues that required resolution. The applicant submitted however that the fundamental point of departure is that rule 49 was never subjected to a self-standing interpretative analysis in the material relied on by the respondent.

[29] It is to that aspect that I turn to in evaluating the applicant’s argument.

[30] Beginning with rule 49(1)(b) and rule 49(6), it is apparent from their wording that each exemplifies a distinct circumstance. The former stipulates a time frame of fifteen days in which an application for leave to appeal shall be made and provides

⁹ *Duduzile Cynthia Myeni v Organisation Undoing Tax Abuse NPC and another* id para 19.

¹⁰ See paragraph 6 of the judgment.

¹¹ [2022] ZAGPJHC 135 para 4.

¹² [2024] ZAGPJHC 1766 para 12.

for extending that period on good cause while the latter deems an appeal to have lapsed if not duly prosecuted. Although rule 49 is a standalone rule that uniformly deals with the procedure for appeals from the high court, the subrules are – as between themselves – distinguishable since they deal with discrete stages of the appeal process. On the premise that the legislature (in this instance, the rules board) chose its words carefully to make its intention clear, the applicant submits that it was never intended that the right of appeal would lapse despite late lodgement of an application for leave to appeal particularly where the subrule expressly endorses an extension on good cause being shown. As I understand the submission, the language of the subrule should be read in its ordinary sense and where it is clear, a court should not depart from what is contemplated by the natural and ordinary meaning of the words.¹³

[31] Referring by comparison to rule 8(3) of the rules of the Supreme Court of Appeal, the applicant submitted that its specific wording indicating that an appeal ‘shall be deemed to have lapsed’ in the event that an appeal record is not lodged ‘within the prescribed period or within the extended period’, was expressly manifest of the intended consequence contemplated by the rules board.

[32] The applicant’s argument is not without traction and it is indeed the feature that distinguishes the present matter from the material relied upon by the respondent. It is prudent to take note of the regulatory mechanism in rule 49(17). It provides that in the case of appeals to the full court in terms of the provisions of a statute in which the procedure to be followed is laid down, rule 49 is applicable in so far as provision is made for matters not regulated by the statute. It has been pointed out earlier that the Act does not regulate the appeal procedure from a single judge to a full court of a division of the high court. Rule 49 deals only with purely procedural aspects of civil appeals from the high court. The substantive law is located in the Act and is in respect of:

- (a) the system of appeals and appeals generally (section 16);
- (b) leave to appeal (section 17); and
- (c) suspension of a decision pending an application for leave to appeal or of an appeal (section 18).

¹³ E A Kellaway, *Principles of Legal Interpretation*, at p16.

[33] The upshot of the applicant's argument, plainly, is that the belated lodging of the application for leave to appeal did not result in the applicant's right of appeal having lapsed where rule 49(1)(b) makes no express reference to that consequence. Nor, if I might add, does the Act. It is precisely because Mjoli J recognised this, so the applicant submits, that she postponed the application (coupled with the condonation application), *sine die*.

[34] I accordingly hold the view that the applicant's right to appeal did not lapse due to the late lodgement of the application for leave to appeal and for that reason the order against which leave to appeal is sought is not excluded from the operative effect of section 18(1) of the Act.

[35] The applicant submitted that a finding to this effect dispenses with the necessity to consider its further contentions in support of the relief claimed.

[36] I agree.

[37] On reflection, it is perhaps feasible to comment very briefly on the applicant's reliance on rule 45A which essentially provides that the court may suspend the execution of any order for any such period as it may deem fit. There are general principles for the granting of a stay in execution¹⁴, but the relief under this rule is discretionary.

[38] In determining the factors to be taken into account in the exercise of its discretion the court could, in addition to the general principles, borrow from the requirements for the granting of an interlocutory interdict, namely, that the applicant is required to show (a) that the right which the applicant seeks to protect is either clear or is *prima facie* established; (b) if the right is *prima facie* established, there is a well-grounded apprehension of irreparable harm; (c) the balance of convenience favours the interim remedy; and (d) that the applicant has no other satisfactory remedy.¹⁵

[39] My conclusion on the main issue renders it unnecessary to proffer a detailed treatment of the facts which inform the applicant's further submissions on this leg of its approach. For that reason, it does not necessarily follow that because something has not been mentioned in detail it has not been considered.¹⁶ A compensating factor is that the heads of argument filed on behalf of the parties' respective counsel

¹⁴ Gois t/a Shakespeare's Pub v Van Zyl 2011 (1) SA 148 (LC) at 155H-156B.

¹⁵ Erasmus, *Superior Court Practice*, D1-604A [Service 21, 2023].

¹⁶ *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 678; *ICM v The State* [2022] ZASCA 108 para 40; *Van Heerden & Brummer Inc v Bath* [2021] ZASCA 80 para 23.

are detailed and well-researched; they provide fair-minded guidance for the parties' submissions supported by precedent and proffer a dutiful rendition of the material contained in the parties' affidavits and supporting annexures.

[40] That said, I am further satisfied that (a) I am at liberty to exercise my discretion in favour of the applicant, and (b) on the facts, the requisites for interim relief have been established.

[41] In the circumstances the following order issues:

1. The applicant's non-compliance with the rules of court relating to the service and the periods for the institution and hearing of applications is condoned.
2. Pending the finalisation of the application for leave to appeal and subsequent appeal against the order of The Honourable Madam Justice Mjali given on 06 November 2023, the respondents are interdicted and restrained from executing the court orders granted against the applicant in the following case numbers: 1985/2019; 3790/2020; 4293/2018; 2575/2018; 2186/2021; 3638/2020; 1352/2022; and 2424/2020.
3. The operation and execution of the orders in each of the abovementioned case numbers is suspended.
4. The first respondent shall pay the costs of the application.

M. S. RUGUNANAN
JUDGE OF THE HIGH COURT

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Date heard: 06 March 2024.

Date delivered: 27 March 2024 (electronically *via* email at 09h30)