

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO. 871/2020

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

(4) Date: 03 October 2023

Signature:

In the matter between:

MAGADI BERNICE PHETLU

Applicant

And

JESSIE KEDISALETSE NTHUTANG

Respondent

JUDGMENT

NYATHI J

A. INTRODUCTION

[1] This matter is before me as an application for leave to appeal a judgment which I handed down on 9 June 2023.

- [2] It is common cause that the application for leave to appeal should have been made within 15 days after the judgment¹. It should therefore have been made on 4 July 2023.
- [3] At the commencement of the hearing of the application Mr. Mnisi who appeared for the applicant, made an application for condonation in terms of Rule 49(1)(b) for the late filing of the application for leave to appeal.
- [4] Mr. Mnisi submitted that the delay was not due to any wilful disregard of the court's procedures and the law. He implored the court to find that the applicant has made out a proper case for condonation.
- [5] In support of the condonation application the applicant has filed an affidavit. She states that she intended to appeal the Honourable Court's decision and orders immediately after receipt of the judgment but did not have the financial means to do it.²
- [6] Other pertinent submissions are that she is a retired member of the SANDF and a pensioner. She discussed the outcome of the trial and her final situation with her sister and that the latter agreed to assist her financially towards the appeal process.

B. THE RESPONDENT'S SUBMISSIONS AND THE APPLICABLE LEGAL PRINCIPLES

- [7] Adv. Tyatya, appearing for the respondent, opposed this application and made submissions that:

¹ Rule 49 (1) (b) of the Uniform Rules of Court.

² Para 7 of applicant's affidavit.

7.1 The application for leave to appeal the court's judgment should have been made within 15 days thereof.

7.2 Whilst the period of the delay is not too long, the law prescribes requirements for condonation of any delay. The application fails to meet the peremptory provisions of Rule 49(1)(b).

[8] Counsel referred the court to *Du Plessis v Wits Health Consortium (Pty) Ltd*³ where the court held as follows:

"It is clear from the above and other judgments that a claim of lack of funds on its own cannot constitute reasonable explanation for the delay. In other words, when pleading lack of funds as the cause of the delay, the applicant needs to provide more than a mere claim that the reason for the delay is lack of funds. In this respect, the applicant has to take the court into his or her confidence in seeking its indulgence by explaining when, not only that he or she finally raised funds to conduct the case, but also how and when did he or she raise those funds. The 'when' aspects of the explanation are important, as it provided the courts with information as to whether there was any further delay after raising the funds and whether an explanation has been provided for such a delay."

[9] The applicant thus raised lack of funds without substantiation. She did not bother to even state how much money was needed for her to initiate the application. It is an undeniable fact that she had received a lump sum from the second defendant in the trial, the outcome of which is the catalyst of this application for leave to appeal. This amount was half of the money paid out to the respondent.

³ *Du Plessis v Wits Health Consortium (Pty) Ltd* [2013] JOL 30060 (LC) at para 16.

[10] Mr. Tyatya further referred to the matter of *Bertie van Zyl (Pty) Ltd & another v Minister for Safety & Security & others*⁴ where the first applicant lodged its condonation application about one month late. The second applicant, who filed its application for leave to appeal even later, gives no reasons for the delay other than that it was “unfortunately impossible” for it to attend a consultation with the applicants’ counsel on 17 October 2008. Despite the second applicant’s submission that it had “always been unhappy with the finding of the High Court”, the court found that there was no explanation for why there was no attempt at an earlier filing of the application for leave to appeal. The limited justifications for late filing offered by the applicants were found to be inadequate. This would generally militate against the granting of condonation. The court held however, that in determining whether condonation may be granted, lateness is not the only consideration. The test for condonation is whether it is in the interests of justice to grant condonation. In that case condonation was granted based on the latter considerations.⁵

[11] In *Ferris and another v FirstRand Bank Ltd and another*⁶ the Constitutional Court referred with approval to the *Bertie van Zyl* matter (*supra*) and held that where a leave to appeal application was filed late, and the applicant sought condonation, condonation was not to be had for the asking. The degree of lateness was not the only consideration. The test was whether it is in the interests of justice to grant condonation. Counsel then elaborated and submitted that there should be an explanation for the delay and an explanation of the merits to enable the court to determine whether there are prospects for success.

⁴ *Bertie van Zyl (Pty) Ltd & another v Minister for Safety & Security & others* [2009] JOL 23540 (CC); [2009] ZACC 11 (CC); 2009 (10) BCLR 978 (CC).

⁵ Paragraphs [13] and [14].

⁶ *Ferris and another v FirstRand Bank Ltd and another* 2014 (3) BCLR 321 (CC)

[12] Reference was also made to *Mtshali N.O. and Others v Buffalo Conservation 97 (Pty) Ltd*⁷ where the Supreme Court of Appeal where an application for condonation for filing a lapsed appeal had been attended with extreme delay and supported by an unacceptable explanation was dismissed with costs. The SCA in *Mtshali* referred to its earlier decision in *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd & others*⁸ where Ponnar JA held that factors relevant to the discretion to grant or refuse condonation include ‘*the degree of non-compliance, the explanation therefor, the importance of the case, a respondent’s interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice*’.

[13] The final submission on behalf of the respondent was a reference to the findings by Jafta JA (as he then was) in *S v Mantsha*⁹ that the factors to be considered in a condonation application include the extent of non-compliance and the explanation given for it; the prospects of success on the merits; the importance of the case; the respondent’s interest in the finality of the judgment; the convenience of the court and the avoidance of unnecessary delay in the administration of justice. It was found that the court *a quo* could not be faulted for its decision on the condonation application, and the appeal was dismissed.

[14] In reply, Adv Mnisi reiterated his earlier submissions that the applicant did not have any money and that the application had prospects of success. He stated that the respondent would not suffer any demonstrable prejudice should condonation be granted.

⁷ *Mtshali NO and Others v Buffalo Conservation 97 (Pty) Ltd* (250/2017) [2017] ZASCA 127 (29 September 2017)

⁸ *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd & others* [2013] ZASCA 5; [2013] 2 All SA 251 (SCA) para 11.

⁹ *S v. Mantsha* 2008 JOL 22468 (SCA).

[15] This is woefully inadequate and seem to be suggestive of an entitlement without any effort at complying with the requirements for condonation, which are trite by now.

[16] I then reserved judgment; this is the outcome of the application.

[17] The submissions on behalf of the respondent are self-explanatory and set out the legal requirements for a condonation application. The above exposition is not capable of being gainsaid.

[18] What remains to be considered is the question of costs. The standard practice is to award the successful litigant their costs. Nothing of substance was argued on behalf of the applicant to depart from the norm.

[19] In the result, I make the following order:

The application for the condonation of the late filing of the application for leave to appeal is dismissed with costs.

J.S. NYATHI
Judge of the High Court
Gauteng Division, Pretoria

Date of hearing: 29 September 2023

Date of Judgment: 03 October 2023

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Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email and uploaded on the CaseLines electronic platform. The date for hand-down is deemed to be 03 September 2023.