



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

Case No: 005540/2022

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
<u>31/10/2023</u>	
DATE	SIGNATURE

In the application for leave to appeal between

SELBY PANEL & PAINT PROPRIETARY LIMITED

Applicant

And

SANTAM LIMITED

Respondent

In the main application between

SANTAM LIMITED

Applicant

And

SELBY PANEL & PAINT PROPRIETARY LIMITED

Respondent

JUDGMENT IN APPLICATION FOR LEAVE TO APPEAL

PEARSE AJ:

1. This is an application for leave to appeal against a judgment and order in a main application, under the same case number, that I delivered on 15 June 2023.
2. The facts and disputed issues of relevance to the determination of both applications are detailed in that judgment.
3. The 15-day period afforded by rule 49(1)(b) for the initiation of this application lapsed on 07 July 2023 and it was only on 31 August 2023 that the respondent in the main application (**Selby**) delivered notices requesting reasons for my determination of the main application and seeking leave to appeal against that determination.
4. On 05 September 2023, through my registrar, I issued a directive in the following terms:
 - 4.1. It is confirmed that the judgment of 15 June 2023 contains the reasons for the order of that date. No further reasons will be forthcoming.
 - 4.2. If Selby persists with its application for leave to appeal, it must deliver any application for the extension of the 15-day period, including a founding affidavit addressing the issue of good cause for delay, within 5 days of issue of this directive.

- 4.3. If the applicant in the main application (**Santam**) opposes the extension application, it must deliver any answering affidavit within 5 days of delivery of the application.
- 4.4. If the extension application is opposed, Selby must deliver any replying affidavit within 5 days of delivery of the answering affidavit.
- 4.5. A date and time will thereafter be allocated by the registrar for the hearing of the extension and leave to appeal applications.
- 4.6. Any written submissions in either or both applications must be delivered not later than 48 hours before the allocated hearing date and time.
5. Selby delivered a condonation application on 13 September 2023¹ and the parties exchanged further papers more or less in accordance with my directive.
6. Thereafter, I directed that both applications be set down for hearing on 30 October 2023, on which date Selby was represented by Mr Ncongwane and Santam was represented by Mr Oosthuizen.

¹ On the same day (13 September 2023) Selby delivered a second notice of application for leave to appeal in similar terms to that of 31 August 2023. Any need for a second notice is not addressed in the condonation application.

7. In addition to reconsidering the papers delivered and the submissions advanced in the main application, I have considered the written and oral submissions made on behalf of the parties in the condonation and leave to appeal applications.
8. For reasons outlined below, I am of the view that leave to appeal should be refused.
9. I am not persuaded that an adequate case for condonation is made out by and on behalf of Selby. The founding affidavit in that application is deposed to by a manager of Selby. There is no confirmatory affidavit in the name of any member of Selby's legal team. There is consequently no explanation by anyone with personal knowledge of the facts as to why the judgment and order emailed to the parties' respective counsel and also uploaded on Caselines on 15 June 2023 came to Selby's attention only on 25 July 2023. Nor is there any explanation for the further 5-week delay that ensued before delivery of the notices referred to in paragraph 3 above. Such explanation as is offered in the founding affidavit was challenged in the answering affidavit as being of a hearsay nature – affairs of the legal team lying beyond the personal knowledge of the deponent – yet no attempt was made to remedy that position in reply.
10. In the circumstances, I consider Selby to have failed to demonstrate good cause for the relief sought in the condonation application, despite rule 49(1)(b), well-

known case law² and the directive paraphrased in paragraph 4.2 above. The application for leave to appeal should be dismissed for that reason alone.

11. Out of caution, I proceed to consider the merits of that application.
12. The grounds on which Selby seeks leave to appeal against my judgment and order are, in essence, that I erred in:

12.1. ordering the release of the vehicle to Santam against entrustment of cash security as opposed to *"concomitant payment to [Selby] for payment of the services rendered on the vehicle."* According to Selby, I *"should have gone ahead to finalise the matter by ruling that [Santam] must effect actual payment for all the costs to [Selby] as per [Selby's] defence in the application proceedings";*³

12.2. effectively and prejudicially requiring Selby to institute *"a fresh application [to recover payment for such services] would be an illogical step and unreasonably delay [Selby's] recovery of expenses in this regard"* because *"[i]t was thus common cause between the parties that [Santam] had to pay*

² *Saloojee and Another NNO v Minister of Community Development* 1965 (2) SA 135 (A) 141C-E; *Uitenhage Transitional Local Council v South African Revenue Service* 2004 (1) SA 292 (SCA) [6]-[7]; *eThekweni Municipality v Ingonyama Trust* 2014 (3) SA 240 (CC) [26]-[32]

³ Para 1 of notice of application for leave to appeal dated 31 August 2023

[Selby] for services done on the vehicle and [Selby] would thus be bound to release the said vehicle, accordingly";⁴ and

12.3. awarding a costs order against Selby in circumstances in which:

12.3.1. it had acted in good faith and reasonably in seeking payment of its costs in return for the release of the vehicle; and

12.3.2. Santam had not achieved substantial success in the main application.⁵

13. The first ground of appeal is to the effect that, in considering and deciding the main application, I ought to have determined the underlying money dispute between the parties because, as I understand the argument, failing to do so would effectively deprive Selby of a remedy inasmuch as it would make no commercial sense to initiate litigation aimed at recovering what it considers to be the outstanding storage charges.

14. The argument is without merit, in my view, because it misconceives the nature of the main application brought by Santam, which seeks an order substituting cash security for security previously provided by the vehicle retained by Selby. The

⁴ Para 2

⁵ Para 3

merits of Selby's claim for residual storage charges were not before me in the main application and are unpersuasive as a ground of appeal in this application. Before me in the main application was (only) the question whether the cash tendered by Santam would suffice to secure a successful outcome to litigation envisaged to be initiated by Selby in vindication of its asserted claim for storage charges.⁶ I was satisfied of that security's sufficiency and exercised my discretion accordingly.

15. In argument in this application, Mr Ncongwane acknowledged that Selby had not sought any such relief in the main application but submitted that I ought to have invoked the court's inherent jurisdiction to grant such relief *mero motu*. I am not satisfied that this court has that power or, in any event, that a money judgment could have been entered on the facts placed before court.
16. When pressed as to why the exercise of discretion referenced in paragraph 14 above was unjudicial or otherwise unsustainable, Mr Ncongwane could not take the matter beyond the submission that it would have been preferable to resolve the entire dispute then-and-there. As noted, however, 'the entire dispute' was not pleaded, prayed-for or even argued in the main application.

⁶ See para 36.2 of my judgment in the main application, which references the parties' consensus in this regard as recorded in para 10.1 of a joint practice note dated 25 April 2023: "[t]he crisp and sole issue in dispute for the exercise of a discretion by this honourable court is, whether the security that has been tended by [Santam] is sufficient for [Selby] to be ordered to release the vehicle to [Santam] and/or [its] nominated representative."

17. As regards the suggestion that the claim belatedly contended for by Selby was common cause between the parties in the main application, I disagree.
18. My reading of the papers is that Santam placed in issue whether, in the absence of any agreement between the parties, Selby enjoyed any entitlement to retain possession of the vehicle on account of an alleged indebtedness in respect of its storage as opposed to its repair. The merits of that dispute did not require determination in the main application and do not require determination in this application. In any event, Santam disputed any obligation to pay any amount in addition to the sum previously paid to Selby.
19. The third ground of appeal is outlined in paragraph 12.3 above.
20. In my view, besides the intrinsically discretionary nature of an award of costs, it was unreasonable of Selby not to accept Santam's tender of substituted security, for reasons traversed in my judgment in the main application. It is also plain that Santam was substantially successful in that matter.
21. Finally, in argument in this application, Mr Ncongwane belatedly submitted that section 22 of the Constitution should have tipped the discretionary scales in favour of Selby inasmuch as a large insurer's refusal to pay the storage charges of a small tower and repairer could bring about the latter's demise.⁷ The point was not raised

⁷ There was no pertinent attempt to locate that fear within the wording of the right to "[f]reedom of trade, occupation and profession."

in the main application or as a ground of appeal. It falls outside of what the parties agreed to place before court in the main application. It appeared to take Mr Oosthuizen by surprise and its lateness precluded any meaningful debate before me as to whether a substitution of security would or could implicate and potentially infringe such rights as section 22 may confer on Selby, a juristic person. It is unnecessary – and therefore unwise – for me to express any view on this question for purposes of deciding this application.

22. Ultimately, in the exercise of my discretion, having regard to all the facts and circumstances before me at the time of the main application, I determined that the substituted security would suffice for its purpose and I am unpersuaded that an appellate court would reasonably reach a different determination in accordance with section 17(1)(a)(i) of the Superior Courts Act 10 of 2013 and recent case law.⁸
23. Nor do I consider there to be any other compelling reason, within the meaning of section 17(1)(a)(ii) of the Act, why an appeal should be heard.
24. In the circumstances, the application for leave to appeal is dismissed with costs, including the costs of the condonation application.

⁸ *Ramakatsa and Others v African National Congress and Another* (724/2019) [2021] ZASCA 31 (31 March 2021) [10]



PEARSE AJ

This judgment is handed down electronically by uploading it to the file of this matter on CaseLines. It will also be emailed to the parties or their legal representatives. The date of delivery of this judgment is deemed to be 31 October 2023.

Counsel for Selby:	Macbeth Ncongwane
Instructed By:	Macbeth Incorporated
Counsel for Santam:	Pieter Oosthuizen
Instructed By:	Pierre Krynauw Attorneys
Date of Hearing:	30 October 2023
Date of Judgment:	31 October 2023