



**IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA (MAIN SEAT)**

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED.
<u>12.01.2022</u> DATE	 SIGNATURE

CASE NUMBER: 1092/2020

In the application for leave to appeal between:

VR CARGO (PTY) LTD	First Applicant
HEYMANS KOLE GROUP (PTY) LTD	Second Applicant
REINHARDT TRANSPORT GROUP (PTY) LTD	Third Applicant
RS REGAL CC	Fourth Applicant
SIYASIMTHA SERVICES (PTY) LTD T/A SNN TRANSPORT	Fifth Applicant
SHOSHOLOZA PLANT HIRE CC	Sixth Applicant
BHD PLANT RENTALS (PTY) LTD	Seventh Applicant

4PL FLEET (PTY) LTD

Eighth Applicant

and

THABA CHWEU LOCAL MUNICIPALITY

First Respondent

MINISTER OF POLICE

Second Respondent

**THE MEC OF PUBLIC WORKS, ROADS
AND TRANSPORT, MPUMALANGA**

Third Respondent

**THE SOUTH AFRICAN NATIONAL ROADS
AGENCY SOC LIMITED**

Fourth Respondent

JUDGMENT – LEAVE TO APPEAL

GREYLING-COETZER AJ

NOTA: IS IT REALY INTERPETATION ISSUE

INTRODUCTION

- [1] The applicants were unsuccessful in obtaining a final interdict against the first- and second respondents interdicting them from preventing the applicants heavy motor vehicles from using the R36 and R37 roads through Lydenburg, Mpumalanga.
- [2] It was held that the applicants failed to show that they have a clear right to utilize the R36 and R37 roads thereby justifying the granting of a final interdict. The application with accordingly dismissed with costs.

- [3] The applicants now apply for leave to appeal to the Full Court of the Mpumalanga Division of the High Court against the whole of the judgment so granted on 29 May 2020. The application for leave to appeal is accompanied by an application for condonation for the late filing of the application. The condonation application is being opposed by the first respondent.
- [4] The facts of this case are set out in the main *ex tempore* judgment and need not be repeated herein. Although all the applicants initially sought leave to appeal, at the date of the hearing, the second-, third- and eight applicants had since withdrawn their application for leave to appeal. Therefore, any reference herein to the “applicants”, shall mean the first-, fourth-, fifth-; sixth- and seventh applicants.
- [5] The application for leave to appeal was filed approximately one month late. The said application for leave to appeal was also delayed by what appears to be a lack of appreciation of the process applicable in circumstances where leave to appeal is sought against a judgment which was granted *ex tempore*. On aforesaid being addressed, the application was further delayed by the unavailability of the parties’ legal representatives, and later the extended attempts to settle the matter between the parties. After several postponements for the purpose of settlement, which at the time appeared to be not only in the interest of both parties but justice, settlement could not be reached. A hearing date was agreed upon and the parties filed their heads of argument.

CONDONATION APPLICATION

- [6] Condonation is not a mere formality. An applicant for condonation must fully explain the delay and show that the time frames provided for in the rules of court were not wilfully disregarded.
- [7] The applicants are obliged to satisfy the court that there is sufficient or good cause for excusing them from compliance. Condonation may be refused where there has been a flagrant breach of the rules, especially where no

explanation is professed. The applicants should convince the court to exercise its discretion in their favour.

- [8] An application for condonation should be brought without delay and as soon as possible once an applicant realises that he or she had not complied with the rules of court. It is not to say where non-compliance was due entirely to the neglect by an applicant's attorneys of record, that condonation will be granted.
- [9] From authorities such as **Mulaudzi v Old Mutual Life Insurance Company (South Africa) Ltd and Others; National Director of Public Prosecution and Another v Mulaudzi¹ and Melane v Santam Insurance Co Ltd²** it can be distilled that a court has a discretion in respect of condonation applications which should be exercised judicially. There ought to be fairness to both sides.
- [10] Relevant facts to consider include *inter alia* the degree of lateness and non-compliance; the explanation offered by the applicant; the prospect of success; the interest of the respondent in the finality of the judgment and unnecessary delay in the administration of justice as well as the importance of the case.
- [11] Factors should not be considered individually but as part of an objective conspectus of all the facts. If there are no prospects of success, there would be no point in granting condonation. A slight delay and a good explanation may assist to compensate for prospects of success which are not strong. The importance of the issue and the strong prospects of success tend to compensate for a long delay.
- [12] The *ex tempore* judgment in this matter was delivered on 29 May 2020. The application for leave to appeal was due by 22 June 2020. The notice of application for leave to appeal is dated 21 July 2020. The delay is therefore

¹ 2017 (6) SA 90 (SCA)
² 1962 (4) SA 537 (A)

approximately one month. The condonation application was launched simultaneously.

[13] The reason for the delay was explained to be that notwithstanding the fact that the judgment was granted *ex tempore* with reasons on 29 May 2020, the applicants' legal representative deemed it prudent to obtain what he termed to be a "written judgment". This the applicants did on the basis that the typed order which the applicants received from the Registrar on 5 June 2020 was, according to the applicants, a judgment without reasons.

[14] It goes without saying that this approach is misguided. Based on this erroneous understanding what ensued was a multitude of e-mail correspondences between the Registrar and/or judge's secretary and the applicants' legal representatives. The applicants' legal representative on the one hand attempted to persuade the Registrar and/or judge's secretary that the applicants are entitled to a written judgment, placing reliance on Rule 49, supported with what purported to be a Rule 49(1)(c) notice requesting reasons but couched in terms provided for in the Magistrate Court Rules and the Registrar or judge's secretary on the other explained that the *ex tempore* judgment was handed down with reasons in the presence of the legal representative. And further that as a compact disc containing the recording of the *ex tempore* judgment had already been made available to the applicants, it is the latter's responsibility to have same typed and to present the typed judgment to the court for signature. This would constitute the "written judgment" they seek.

[15] The Rule 49(1)(c) notice was similarly filed in error as it was not only reflective of the position the Magistrates Court rules but the matter was not finalised in terms of Rule 49(1)(c), nor were the reasons outstanding as the reasons were provided on 29 May 2020 in the format of an *ex tempore* judgment.

[16] It was explained that this back-and-forth resulted in the delay, and after consultation with counsel during July 2020, it was decided to file the application for leave to appeal. Pursuant thereto and ostensibly founded on

the earlier advices by the Registrar and/or judge's secretary, the *ex tempore* judgment was typed and presented to the court for signature.

- [17] In the answering affidavit the first respondent submitted that the applicants enjoy no good prospects of success and dismally failed to deal with the jurisdictional requirements in their condonation application.
- [18] Against the facts, applicable principles and authorities set out herein above, I am of the view that condonation ought to be granted.
- [19] Turning to the application or leave to appeal. Section 17 of the Superior Courts Act 10 of 2013 regulates an application for leave to appeal from a Division of the High Court, and reads as follows:-

"17 LEAVE TO APPEAL

(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that

(a)(i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.

(b) The decisions sought on appeal does not fall within the ambit of Section 16(2)(a) and

(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties."

- [20] The standard of reasonable prospects of success have been developed by our courts over time. It is now specifically set out as per above. Previously applications for leave to appeal were governed by Section 20(4)(b) of the

Superior Courts Act 10 of 2013 and Rule 49, both of which dealt exclusively with the practical aspects of leave to appeal applications.

[21] In the current form Section 17 provides that leave to appeal may be granted only where the judge is of the opinion that the appeal would have a reasonable prospect of success, or if there is some other compelling reason why the appeal should be heard. This is a more stringent approach than before, and so the bar to qualify for leave to appeal has been raised. The word “only” means that leave to appeal may be granted in the stated circumstances only. What this means practically is that a greater measure of certainty that a different outcome would be reached, is required.

[22] The essence of the applicants grounds relied on for leave is founded thereon that this court misdirected itself in finding that the applicants did not enjoy a clear right to utilise the R36 and R37 through-roads.

[23] Clause 48 of the applicable bylaw specifically prohibits the operation of a heavy vehicle on any street except:

(a) upon the streets set out in a register kept by the Director: Technical Services whereby certain streets are established as heavy vehicle routes;

(b) while such heavy vehicle is making collections or deliveries, provided that the driver or operator proceeds by the most direct route to or from the point of collection or delivery as the case may be, to or from the nearest heavy vehicle route;

(c) while such heavy vehicle is proceeding to or from the business premises of the owner, driver or operator of the heavy vehicle, provided that the driver or operator proceeds by the most direct route to or from the business premises, to or from the nearest heavy vehicle route;

(d) while such heavy vehicle is proceeding to or from a garage for the purpose of repairs, servicing or refuelling, provided that the driver or operator proceeds

by the most direct route to or from the garage as the case may be, to or from the nearest heavy vehicle route;

(e) while such heavy vehicle is engaged in work and in service of the municipality,

[24] It was contended that another court could reasonably interpret clause 48 of the bylaw differently and in a more sensible business-like manner.³ In doing so, the argument when, another court might find that clause 48, in conjunction with clauses 4.2 and 50 of the bylaws, and against the backdrop of the National Roads Traffic Act 93 of 1996, placed an obligation on the first respondent to allocate certain streets as heavy vehicle roads; to keep a register of such roads and to display signs indicating the heavy vehicle roads through the municipality, and that a failure by the first respondent to do so does not equate to no streets inside the municipal boundaries to be used by heavy vehicles.

[25] But that the bylaws are open to the interpretation that absent a street register indicating routes on which heavy vehicles may operate, all roads qualify. Therefore the applicants have established a clear right to use and drive their heavy vehicles on the R36 and R37. Differently put, the applicants contend that clause 48, which provides for the circumstances under which heavy vehicles can use the R36 and R37 through-roads through Lydenburg, can also be interpreted to mean that where no heavy vehicle routes have been established in light of the obligation placed on the first respondent in terms of clause 4 of the bylaw, all roads can be used by heavy vehicles. Therefore the applicants have established a clear right to use the municipal roads through Lydenburg.

[26] It was argued that the former is the only sensible interpretation. I don't agree. The interpretation argued for suggests that all roads are to be regarded heavy vehicles routes until the respondents established that only certain are heavy

³ In this respect the applicants relied on the matter of **Natal Joint Municipal Pension Fund v Endumeni Municipality** 2012 (4) SA 593 (SCA).

vehicles routes. This seems to inter alia ignore the common cause fact that the R36 and R37 are class 4 and 5 roads, whereas heavy vehicles normally require class 1 roads. Further and as correctly conceded by the applicants in their heads of argument, clause 48 is clearly intended to prevent heavy vehicles from using routes through Lydenburg and to direct heavy vehicle traffic along roads or routes designed for said purpose. The R36 and R37 are not such roads.

[27] In opposition it was argued on behalf of the first respondent that the applicants have no right, let alone a clear right, to use the municipal roads without compliance with the applicable laws and permissions from the municipality.

[28] On the applicants own contentions another court could interpret the bylaws differently. It needs to be established that another court would. After careful consideration of the applicants' stated grounds for leave to appeal and the submissions and arguments made in support thereof, I am not persuaded that another court would employ a different interpretation and as such that the appeal would have a reasonable prospect of success.

CONCLUSION

[29] Having concluded as aforesaid, the following order is made: -

1. The applicants' failure to timeously file this application for leave to appeal is condoned.
2. The application for leave to appeal is dismissed with costs.


GREYLING-COETZER AJ

DATE OF HEARING:
DATE OF JUDGMENT:

4 November 2021
12 January 2022

FOR THE APPLICANTS:

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