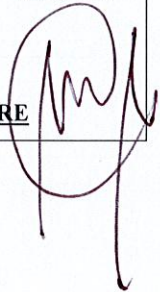




IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO	
(2) OF INTEREST TO OTHER JUDGES: YES / NO	
(3) REVISED	
DATE 19 July 2021	SIGNATURE 

Case no: 42987/2019

In the matter between: -

ORTHOTOUCH (PTY) LTD

Applicant

And

DELTA PROPERTY FUND LIMITED

Respondent

JUDGMENT

N.E NKOSI (AJ):

INTRODUCTION

- [1] The applicant seeks leave to appeal against the whole judgment and order of this Court handed down on the 19th of April 2021. The application is in terms of section 17 (1)(a)(i) of the Superior Courts Act.
- [2] There are three grounds¹ of appeal raised by the applicant. These are stated under the following headings:
- (i) the finding pertaining to the period of delay, and the explanation thereof;
 - (ii) the test pertaining to prospects of success; and
 - (iii) the evaluation of prejudice allegedly suffered by the respondent.
- [3] The respondent is disputing the merits of this application and in addition has introduced two grounds challenging the application. These grounds concern the doctrine of preemption and the mootness of the appeal.
- [4] In light of the number of issues raised by the respondent in its opposition of the application for leave to appeal and by consent, the respondent undertook the duty to begin and argue against the application.

LEGAL PRINCIPLE

- [5] The test for granting leave to appeal is stated in section 17 (1)(a)(i) of the Superior Courts Act² as follows:

¹ Caselines 012 – 2.

² Superior Courts Act No. 10 of 2013.

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

(a)(i) the appeal would have a reasonable prospect of success”.

- [6] The effect of section 17 (1) was explained in the decision of *The Mont Chevaux Trust (IT2012/28) v Tina Goosen and 18 Others*³ case, where Bertelsmann J said:

*“It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see *Van Heerden v Cronwright and Others* 1985 (2) SA 342 (T) at 343H. The use of the word “would” in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against⁴”.*

- [7] The phrase “reasonable prospects” was considered in *Smith v S*⁵ and Plasket AJA held that:

“What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of a trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal”.

³ *The Mont Chevaux Trust (IT2012/28) v Tina Goosen and 18 others* (LCC14R/2014) at para 6.

⁴ *The Mont Chevaux Trust* (supra) at para 6.

⁵ *Smith v S* (475/10) [2011] ZASCA 15; 2012 (1) SACR 567 (SCA) (15 March 2011) at para 7.

- [8] In its application for leave to appeal, and in particular in its conclusion, the applicant submits that:

“Based on the above grounds, the applicant submits that an appeal would have reasonable prospects of success, and there is a reasonable prospect that another court may (my emphasis) uphold the appeal and grant an order in the following terms:

- “(1) The bar, imposed on the applicant through the notice of bar served on 27 August 2020, is uplifted.*
- (2) The applicant’s delivery of its notice of intention to amend on 4 September 2020 is condoned.*
- (3) The respondent shall pay the costs of this application⁶”.*

- [9] This submission does not meet the test laid by section 17 (1) of the Superior Courts Act. This fact was brought to the attention of applicant’s Counsel, who conceded and explained that it was not what the applicant intended to mention in its papers since the applicable test is well established and known. That being said, the notice of application for leave to appeal remained unamended.

- [10] This application emanates from the Court’s refusal to uplift the bar. Rule 27(1)⁷ regulates the procedure of uplifting a bar and provides that:

“27(1) In the absence of agreement between the parties, the court may upon application on notice and on good cause shown, make an order extending or abridging any time prescribed by these Rules or by an order of court or fixed by order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet”.

⁶ Caselines 012 – 7 at para 11 “conclusion”.

⁷ Uniform Rules of Court Rules regarding the conduct of the proceedings of the several provincial & local divisions of the High Court of South Africa.

[11] In *Standard General Insurance CO Ltd v Eversafe Pty Ltd*⁸ the court said:

“It is well-established that an applicant for any relief in terms of Rule 27 has the burden of actually proving, as opposed to merely alleging, the good cause that is stated in Rule 27 (1) as a jurisdictional prerequisite to the exercise of the court’s discretion. Silber v Ozen Wholesalers (Pty)Ltd 1954 (2) SA 345 (A) at 352G. The applicant for any such relief must, at least, furnish an explanation of his default sufficiently full to enable the Court to understand how it really came about and to assess his conduct and motives (Silber v Ozen Wholesalers (supra at 353A)). Where there has been a long delay, the court should require the party in default to satisfy the Court that the relief sought should be granted. Gool v Policansky 1939 CPD 386 at 390. This is, in my view, particularly so when the applicant for the relief is dominis litis plaintiff”.

[12] The Court has a discretion to condone any non-compliance with the Rules. In order for the applicant to succeed with its application, it must show good cause why the bar should be uplifted and condonation should be granted for its failure to deliver its notice to amend its particulars of claim in time. In *Nedcor Investment Bank Ltd v Visser NO*⁹, Patel AJ (as he then was) said:

“Rule 27(3) requires “good cause” to be shown by the plaintiff. This gives the Court wide discretion. C Du Plooy v Anwes Motors (Edms) Bpk 1983 (4) SA 212 (0) at 216H – 217A). The requirements are, first, that the plaintiff should at least tender an explanation for its default to enable the Court to understand how it occurred. (Silber v Ozen Wholesalers (Pty)Ltd 1954 (2) SA 345 at 353A. Secondly, it is for the plaintiff to satisfy the Court that its explanation is bona fide and not patently unfounded”.

⁸Standard General Insurance Co Ltd v Eversafe (Pty) Ltd 2002 (3) SA 87 (w) at 93. See also *Sanford v Haley NO* 2004 (3) SA 296 (c) at 302.

⁹ *Nedcor Investment Bank Ltd v Visser NO* 2002 (4) SA 588 (T) at 591. Also see *Herbstein & Van Winsen*, *The Civil Practice of the High Court of South Africa* Fifth edition Vol 1 at pp 723. Also see *Ingosstrakh v Global Aviation Investments (Pty) Ltd and Others* (934/2019) [2021] ZASCA 69 (4 June 2021) at para 21, *Van Wyk v Unitas Hospital (CCT12/07)* [2007] ZACC 24, 2008 (2) SA 472 (cc) at para 22.

GROUND OF APPEAL

The finding pertaining to the period of delay, and the explanation thereof

[13] The applicant's notice of intention to amend was due on 3 September 2020 but was only delivered on 4 September 2020. The applicant missed the bar deadline by approximately a day. The applicant submits that the Court should confine itself to this one-day lateness when deciding whether to uplift the bar. In my judgment which I handed down on 19 April 2021, I indicated that the period of delay before and after the bar must be explained by the applicant. I hold this view because in the history of this matter, the applicant failed on several occasions to comply with the time limits, set by the Rules, by itself and by the court order. The explanation furnished by the applicant is limited to the one-day lateness only.

[14] The material periods of delay to be explained by the applicant are the period before the bar, during the bar and after the bar. The applicant explained that the reason it failed to meet the deadline set by the notice of bar was load shedding. This explanation only accounts for the events of the day before the expiry of the bar and the one day after the applicant is effectively bared from delivering its notice to amend. It is common cause that the applicant received a schedule for load shedding, warning of possible electricity outage during the period of the bar. There is no indication that some precautionary measures were taken to avoid any foreseen inconveniences likely to be occasioned by electricity supply interruptions. The period before the notice of bar and some periods during the bar were not explained. In my view the delay was inadequately explained and consequently I remain not inclined to uplift the bar.

[15] Mr Iles, appearing for the respondent, brought to my attention, a recent decision of the Supreme Court of Appeal in *Ingosstrakh v Global*

*Aviation Investments (Pty) Ltd and Others*¹⁰ which was handed down on 4 June 2021, about a month and a half after I delivered my judgment and a few days before this appeal was heard. In that case, Makgoka JA held that:

“With regard to the explanation for the default, there are two periods of default which Ingosstrakh must explain for its failure to deliver a plea. The first is before the notice of bar was served on it, and the second relates to the period after the bar was served. This is because the notice of bar was served as a consequence of Ingosstrakh’s failure to file its plea. With regard to the former, Ingosstrakh served its notice of intention to defend the action on 30 September 2015. It therefore had up to 28 October 2015 to file its plea. There is simply no explanation whatsoever why a plea was not filed during the period”.

- [16] As it was in the *Ingosstrakh* decision, the applicant herein, in order to succeed, needed to give an explanation accounting for the period of delay before and after the bar was served. The period after the bar would include the period when the applicant is under bar and when it is effectively barred in order for the Court to consider the request for the upliftment of the bar and condone the late filing of the notice to amend. The explanation given did not cover the full period of delay and was inadequate.

PROSPECTS OF SUCCESS

- [17] In my judgment I made the following finding -

“In the circumstances of this case, I am not persuaded by the magnitude of the claim to find in applicant’s favour regarding the prospects of success. Instead, the effect of a poorly explained delay impacts negatively on the prospects of success of the action”.

¹⁰ *Ingosstrakh v Global Aviation Investments (Pty) Ltd and Others* (934/2019)[2021] ZASCA 69 (4 June 2021) at para 21.

[18] Mr Bekker, arguing for the applicant, submitted that the Court should have made such finding having regard to the applicant's claim contained in its notice of intention to amend its particulars of claim. I do not agree with Mr Bekker's submission. The applicant was before court applying for the upliftment of the bar and condonation of the late delivery of the notice to amend. Its failure to meet the test in Rule 27(1) indeed affects the prospects of success of its action because it has failed to break through the hurdle set by Rule 27 (1).

[19] In relation to the prospects of success of the appeal referred to in Section 17 (1), In *Van Wyk v Unitas Hospital and Another*¹¹ the court said:

"Prospects of success pale into insignificance where, as here, there is inordinate delay coupled with the absence of a reasonable explanation for the delay".

[20] In light of the inordinate and poorly explained delay as well as the fact that the applicant failed to satisfy the test in Rule 27(1), I remain not persuaded as I was, that the upliftment of the bar would enable the applicant to deal diligently with the deficiencies in its action and propel the matter to finality.

THE EVALUATION OF PREJUDICE

[21] The respondent filed an answering affidavit in response to the applicant's application for the upliftment of the bar and condonation. Mr Ndlovu, the deponent, states at paragraph 5¹²

¹¹ *Van Wyk v Unitas Hospital and Another* (Open Democratic Advice Centre as Amicus Curiae) [2007] ZACC 24, 2008 (2) SA 472 at [33]; see also *Standard Bank of South Africa Ltd v Erasmus* (56672/2013) [2016] ZAGPPHC 126 (23 March 2016) at para 14.

¹² Caselines 001 – 63 at para 5.

"I point out, at the outset, that the respondent suffers prejudice whilst this litigation persists. Whilst I do not have personal knowledge of the prejudice which the respondent suffers by virtue of delay. I rely on Marelise de Lange's advices to me in this regard, who is a current director of the respondent whose confirmatory affidavit is attached hereto with regards to the prejudice aspect referred to herein below".

Ms De Lange filed a confirmatory affidavit¹³. Firstly, the prejudice refers to the delay and secondly, to the respondent's share price. Objectively, there is no doubt that the respondent suffers prejudice as a result of the applicant's failure to honour the time frames set by the Rules, court order and by itself.

[22] Concerning the respondent's share price, I was referred to the respondent's integrated annual report for 2020, wherein a contingency liability anticipated from the applicant's claim was disclosed to the shareholders. The contingency liability is a substantial amount which normally would cause volatility in the value of a share which could be good for investors and bad for other investors.

[23] In denying the existence of prejudice the applicant states in paragraph 6 and 7 of its replying affidavit that:

"6. It is evident that the basis upon which the respondent alleges prejudice, and based on which the respondent seeks the dismissal of the condonation application, is the fact that the respondent is a public company and that as a result of the action, there is litigation pending against the respondent.

*7. Self-evidently this does not constitute actual prejudice, and it most definitely does not constitute prejudice as would justify the dismissal of the condonation application, or the striking out of the applicant's claim."*¹⁴

¹³ Caselines 001 – 84.

¹⁴ Caselines 001 – 145.

- [24] The applicant's submissions fail to acknowledge that the prejudice claimed by the respondent is as a result of the delay caused by the applicant in finalising the matter and that the ongoing litigation has affected the share price. The prejudice is not based merely on the fact that the respondent is a public company.
- [25] The parties respectively referred to media articles in support or denial of the existence of prejudice. What is abundantly clear from the article referred to by the respondent, is the fact that it is alleged that the respondent owes the applicant an amount of R165 million whereas the applicant is in the process of business rescue. My conclusion that "*the possibility that the share price may have gone down in December 2019 as a result of litigation and to the prejudice of the respondent can't be ruled out*"¹⁵ is not speculative but based on the fact that the applicant caused delay in its litigation and the shareholders were aware of the litigation. The prejudice was not artificial. It manifests itself through applicant's various failures to adhere to the time limits and failure to show good cause for the delay.

PEREMPTION OF APPEAL

- [26] I now turn to deal with the respondent's two grounds challenging this application and shall deal with both simultaneously.
- [27] A party acquiescence in a judgment when its conduct after judgment is delivered, is inconsistent with the intention to appeal. The onus of proof rests on the party alleging acquiescence and in doubtful cases it must be held not to be proven. Although peremption has its origin in policy considerations similar to those of waiver and estoppel, the question of acquiescence does not involve an enquiry into the subject of state of

¹⁵ Caselines 024- 10 at para 25.

mind of the person alleged to have acquiescence in the judgment. Rather it involves a consideration of the objective conduct of such person and the conclusion to be drawn therefrom¹⁶.

- [28] The applicant's application to uplift the bar was dismissed when the judgment was handed down on 19 April 2021. At that stage, the course available to the applicant was to seek leave of the Court to appeal the Court's decision, if it intended to challenge the Court's decision. Instead, on 22 April 2021, the applicant issued and served a new action identical to its proposed intention to amend which is the subject matter of this appeal.
- [29] The message communicated by the applicant when issuing and serving the new action is objectively clear. It simply means that the applicant has waived its right to appeal, it is not what the applicant intended to do but what objectively is communicated.
- [30] The application for leave to appeal was filed seven days after the new action was instituted. Even then it was not clear what the applicant intended to do. It was only the applicant who had the subjective knowledge of the course it intends to follow. The applicant's intention was made known only on 12 May 2021, after the respondent had warned the applicant that the right to appeal had been waived. The new action has not been withdrawn whilst on the other hand the applicant pursues the appeal.
- [31] In making its intention known, the applicant replied to the respondent's letter and in essence argued that if the appeal is successful, a portion of its claim would be saved from prescription and therefore to protect

¹⁶ South African Railways and Harbours 1920 AD 583 at 594; Standard Bank v Estate Van Rhyn 1925 AD 266 at 268; Gentiruco AG v Firestone SA (Pty) Ltd 1972 (1) SA 589 (A) at 600 A – D; Natal Rugby Union v Gould [1998] ZSCA 62, 1999 (1) SA 432 (SCA) at 443 F – D; Samancor Groups Pension Fund v Samancor Chrome and Others 2010 (4) SA 540 (SCA) at 546 para 25 and Qoboshiyane NO and Others v Arusa Publishing Eastern Cape (Pty) Ltd and Others 2013 (3) SA 315 (SCA) at 318.

its interest, it is pursuing both the appeal and the action. This submission would have carried weight if the applicant had prior to the institution of the new action advised the respondent and made its intention clear that the new action was purely for convenience in the event that the appeal fails. In that instance the intention of the applicant would have been clear and the subsequent course adopted by the applicant would have been understood objectively to mean a non-waiver of its right to pursue the appeal.

- [32] Counsel for the applicant referred to me the decision in *Road Accident Fund v Hansa*¹⁷ where Nienaber JA dismissed the respondents peremption argument. At paragraph 25 of the judgment, he said:

“In its answering affidavit the RAF explained that it followed that procedure at the time ‘as a precautionary measure’ should its current appeal prove to be unsuccessful. Far from an unequivocal election not to proceed with its appeal (Natal Ruby Union v Gould 1999 (1) SA 432 (SCA) at 443E – G), it exemplified a determination to persist in it. In this Court counsel for the plaintiff readily conceded that he could not usefully pursue the point and no more need be said about it”.

In that case the Road Accident Fund clearly demonstrated its intention to challenge the Courts decision and objectively pursued its intention, unlike in the present case, where the applicant opted for a procedure inconsistent with the intention to prosecute the application for leave to appeal.

- [33] In its letter dated 6 May 2021, the respondent proposed to the applicant to withdraw either the application for leave to appeal or the new action, failing which, it would argue that the applicant had waived its right to appeal. It further suggested to the applicant that insofar as the applicant is unwilling to withdraw either the appeal or the new

¹⁷ Road Accident Fund v Hansa 2001 (4) SA 1204 (SCA).

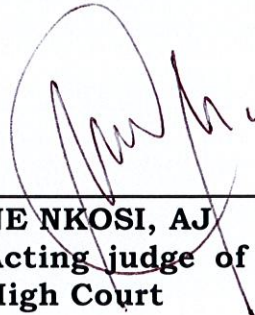
action, the filing of subsequent pleadings in the new action be suspended. In reply to the proposal the applicant, in its letter dated 12 May 2021, agreed to the stay of further pleadings pending the outcome of the application for leave to appeal.

- [34] I agree with the respondent's contention that the applicant's actions are inconsistent with a party that is dissatisfied with the judgment and intends to appeal. This therefore means that the application for leave to appeal is moot, particularly, in the circumstances of this case where a new action has been instituted before an appeal has been launched. In terms of section 16(2)(a) of the Superior Courts Act 10 of 2013 this application should be dismissed because it would have no practical effect or result.

CONCLUSION

- [35] It is my considered view that the appeal has no reasonable prospects of success and should be dismissed. In the circumstances, I make the following order:

1. The application for leave to appeal is dismissed with costs, including the costs occasioned by the employment of two Counsel.



NE NKOSI, AJ
Acting judge of the
High Court

Date of hearing : 23 June 2021

Date of Judgement : 19 July 2021

For the applicants : A Bester (SC);
M Mostert

Instructed by : Kyriacou Incorporated

For the Respondent : KD ILES (SC)
A Saldulker

Instructed by : Bowmans Gilfillan Inc