

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.:489/2012

In the matter between:

NONHLUPHEKO SINA NOPHALE

Applicant

and

ABSA BANK LIMITED
KELETSO PETRUS KHUTLANE
MASEBOLAI LYDIA KHUTLANE
SHERIFF, BLOEMFONTEIN EAST
REGISTRAR OF DEEDS

1st Respondent
2nd Respondent
3rd Respondent
4th Respondent
5th Respondent

JUDGMENT BY: LEKALE, J

HEARD ON: IN CHAMBERS

DELIVERED ON: 16 May 2013

[1] The applicant applied unsuccessfully for, *inter alia*, rescission of default judgment entered against her by the Registrar of this court in terms of rule 31(5)(b) of Uniform Rules of Court ("the Rules") with the application being dismissed with costs on the 21 June 2012 by Snellenburg, AJ. She feels aggrieved by the Judgment and now seeks leave to approach the full bench of this court on appeal against the same.

[2] The application for leave to appeal was filed with the Registrar

on the 28 September 2012 and is, as such, late in so far as it should have been lodged on or before the 12 July 2012 in accordance with the provisions of Rule 49 of the Rules which limit the period for applying for leave to appeal to 15 days from the date of judgment. The applicant, therefore, applies, *ante omnia*, for condonation of the late application on the grounds that the delay is attributable to inability on her part to secure an earlier appointment with her erstwhile attorney who, in any event, notified her of the judgment in July 2012. The application for leave to appeal is, thus, not properly before the court until and unless condonation is granted. (See generally **Aymac CC v Widgerow** 2009 (6) SA 433 (Witwatersrand) at 441A.)

- [3] On the 20 March 2013 I caused a letter to be directed to the parties inviting them to file brief heads of arguments dealing with prospects of success of the proposed appeal on or before specified dates. The letter, further, invited the parties to notify me in writing within 5 days of the letter if any of them had a problem with the procedure in question which is desirable in the light of the decision in **Law Society of the Northern Provinces v Mogami and Others** 2010 (1) SA 186 (SCA) at para [3]. No objection was received and the applicant had until the 10 April 2013 to file her heads. No submissions were, however, received from the applicant in this regard.

- [4] An applicant for condonation is required to show good cause

and the court may exercise its discretion in favour of granting the same where principles of justice and fair play demand it and where the reasons for non-compliance with the time limits have been explained to the satisfaction of the court. Good cause depends on the circumstances of each case and is impossible to define. The degree of lateness, the reason for the delay, prospects of success in the application, importance of the matter to the applicant and prejudice to the respondent who desires and is entitled, in the ordinary course, to enjoy the benefits of judgment in his favour are some of the factors that the court takes together into consideration in the application of the present nature without over-emphasising any of the factors. (See Shawzin v Laufer 1968 (4) SA 657 (A) at 663B and Melane v Santam Insurance Company Ltd 1962 (4) SA 531 (A).)

- [5] The delay involved is excessive and the applicant attributes the same to his erstwhile attorney who was not available for consultation until August 2012 and her present attorney who needed to go through the file to qualify himself to handle the matter further. The date on which the applicant acquired knowledge of the judgment she seeks to assail on appeal is the determining factor in this application. The exact date is, however, not apparent *ex facie* the supporting affidavit. Although the applicant's case is that she was notified of the same per letter in July 2012, such a letter is not annexed to the affidavit and no explanation is proffered for the omission.

In the light of the fact that the 15 day period prescribed for applying for leave to appeal expired on the 12 July 2012, it was necessary for the date of such a letter to be disclosed for the court to determine whether or not, at the time of notification, the prescribed period had not already expired so as to limit the enquiry, with regard to good cause, to the period after acquisition of knowledge of the judgment by the applicant. No confirmatory affidavit by the applicant's erstwhile attorney is before the court although he remains applicant's correspondent attorney in this matter.

- [6] The tardiness of a party's legal representative does not generally constitute good cause for condonation and may, in appropriate circumstances, saddle the relevant party with the consequences of the attorney's lack of diligence or the insufficiency of the explanation tendered where there has been a flagrant disregard for the rules without any acceptable explanation for the same being furnished. The date on which the applicant's present attorney received the file contents from her erstwhile attorney is also not apparent from the papers before the court. Neither is the reason for failure to lodge the application at any time after the 21 September 2012, when she consulted with her current attorney, and before the 28 September 2012 disclosed. No adequate and acceptable explanation has been furnished for the excessive delay involved. (See **Soloojee and Another NNO v Minister of Community Development** 1965 (2) SA 135 (A) at 141C and

Blumenthal and Another v Thompson NO and Another
1994 (2) SA 118 (A) at 121I – 122B.)

- [7] In her contention that her matter enjoys reasonable prospects of success on appeal, the applicant refers to the application for leave to appeal and concludes that the matter relates to her constitutional right to adequate housing and that it is of paramount importance to her and other people similarly situated. The first, second and third respondents, on their part, oppose the application and effectively support the dismissal order on *inter alia* the basis that the applicant enjoys no reasonable prospects of success on appeal. A perusal of the notice of application for leave to appeal the relevant judgment shows that the applicant does not raise any new matters other than the issues specifically addressed by Snellenburg AJ in his elaborate judgment. I am satisfied that the judgment in question not only deals with the relevant issues raised but also adequately and painstakingly addresses the constitutional rights implicated in the matter. The fact that the applicant's constitutional right is affected does not *per se* mean that the matter enjoys good prospects of success on appeal. As Snellenburg, AJ correctly pointed out in the judgment, the applicant had to show, *inter alia*, that a court, with full knowledge of all relevant facts existing at the time of granting default judgment, would have refused leave to execute against the applicant's specially hypothecated property. The test in an application for leave to appeal is

whether or not the matter enjoys reasonable prospects of success on appeal and not whether or not the matter is arguable. (See **Gundwana v Steko Development and Others** 2011(3) SA 608 (CC) and **Smith v S** 2012 (1) SACR 567 (SCA) at 570b-c.)

- [8] I am not persuaded that the matter enjoys any reasonable prospects of success. It is, thus, not necessary, for the purposes of condonation, to deal with other factors raised by the present matter. To grant condonation *in casu*, when no prospects exist, would be an exercise in futility. (See **Rashavha v Van Rensburg** 2004 (2) SA 421 (SCA).)

ORDER

- [9] The application for condonation is dismissed with costs inclusive of costs of application for leave to appeal.

L. J. LEKALE, J

On behalf of applicant:

Majola Attorneys
BLOEMFONTEIN

On behalf of first respondent:

Adv. C. D. Pienaar
Instructed by:
Phatshoane Henney
BLOEMFONTEIN

On behalf of second and
third respondent:

Adv. S. J. Reinders
Instructed by:
Webber Attorneys
BLOEMFONTEIN

/eb