

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1)	NOT REPORTABLE
(2)	NOT OF INTEREST TO OTHER JUDGES

CASE NO: 2019-35574

DATE: 13th June 2024

In the matter between:

SB GUARANTEE COMPANY (RF) (PTY) LIMITED

Plaintiff

and

EMMANUEL TEBOGO LEKOMA

First Defendant

MAKHANANE JOHANNA LEKOMA

Second Defendant

Neutral Citation: *SB Guarantee Co (RF) v Lekoma and Another (35574/2019)*
[2024] ZAGPJHC --- (13 June 2024)

Coram: Adams J

Heard: 12 June 2024 – ‘virtually’ as a videoconference on *Microsoft Teams*.

Delivered: 13 June 2024 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 10:00 on 13 June 2024.

Summary: Application for leave to appeal – s 17(1)(a)(i) of the Superior Courts Act 10 of 2013 – an applicant now faces a higher and a more stringent threshold – leave to appeal refused.

ORDER

- (1) The first and the second defendants' application for condonation of the late filing of their application for leave to appeal is dismissed with costs.
 - (2) The first and the second defendants' application for leave to appeal is dismissed with costs.
 - (3) The first and the second defendants, jointly and severally, the one paying the other to be absolved, shall pay the plaintiff's costs of these two applications on the scale as between attorney and client.
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JUDGMENT [APPLICATION FOR LEAVE TO APPEAL]

Adams J:

[1]. I shall refer to the parties as referred to in the original trial action by the plaintiff (SB Guarantee) in which it claims against the first and the second defendants (Mr and Mrs Lekoma) a default monetary judgment and foreclosure in respect of the defendants' immovable property situated at Wilgeheuwel. On 11 May 2021, this Court (per Wright J) granted judgment by default in favour of the plaintiff against the defendants for payment of R1 108 091.72, together with interest thereon and costs of suit, and the defendants' property was also declared specially executable. On 28 February 2023, I dismissed, with costs, an application by the defendants for a rescission of the aforementioned default judgment.

[2]. The first and the second defendants apply for leave to appeal my *ex tempore* judgment, as well as the reasons therefor, in terms of which I had dismissed their rescission application with costs. Because this application for

leave to appeal was delivered way outside of the time limit within which the said application ought to have been instituted – as prescribed by the Uniform Rules of Court –, the defendants also apply for condonation of such late filing of the application. In terms of Uniform Rule of Court 49(1)(b) the application for leave to appeal ought to have been made within fifteen days after the date of the order appealed against – therefore, on or before 22 March 2023. The defendants only made their application for leave to appeal and furnished the grounds therefor on 14 September 2023 – way outside of the prescribed time period, some seven months too late.

[3]. The application for leave to appeal is mainly against my factual findings and legal conclusion that the defendants are not entitled to a rescission of the judgment as they did not make out a case for the said relief. In their notice of application for leave to appeal, the defendants furnished nine grounds for the said application. Importantly, they contend that the court *a quo* erred in not considering or considering adequately that they were never given an opportunity to present their case before the court which granted the default judgment. It is also contended by the defendants that the court erred in not considering or considering adequately the seriousness of the matter at hand, the fact that the matter relates to the defendants' primary residence and that the effect of the granting of the default judgment in favour of the plaintiff has the potential of rendering the defendants homeless. Closely related to the foregoing is the defendants' contention that I ought to have given consideration or more consideration to the defendants' right to adequate housing as enshrined in chapter 2 of the constitution of the Republic of South Africa.

[4]. The defendants also argue that the court *a quo* misdirected itself in not accepting their contention that the plaintiff failed to comply with the peremptory requirements of section 129 of the National Credit Act. The plaintiff did not comply with the aforesaid provision, so the argument goes, in that the notice in terms of section 129 was factually never served on the defendants. And lastly, the defendants criticise my factual findings as I had 'erred in believing everything said by the [plaintiff]'.

[5]. There are other grounds raised by the defendants, which, in my view, are clearly without merit. So, for example, the defendants make the bald averment that I should have considered the fact that they never refused to make payment to the plaintiff pursuant to the loan agreement. This is belied by the fact that, by the time the application for rescission was heard before me on 28 February 2023, the defendants were hopelessly in arrears with their bond repayments and the last payment received from them was as far back as 26 November 2021. The arrears at present amount, according to the bank, to a sum in excess of R850 000.

[6]. I interpose here to mention that the application for leave to appeal was initially set down for hearing before me on Thursday, 23 May 2024. The defendants were apparently not available to attend the hearing on the said date and it was agreed between the parties that the matter would be postponed to a later date to be arranged with my office. Wednesday, 12 June 2024, was indicated to the parties as the date on which the matter would be accommodated. The plaintiff's attorneys accordingly served by email a notice of set down for the said date and followed this up on 11 June 2024 by transmitting to Mr Lekoma the *Microsoft Teams* link for the 'virtual' hearing of the application at 09:30, being the time allocated for the said hearing. On the same day at 18:24, Mr Lekoma acknowledged, by return email, receipt of the link. There can accordingly be little doubt that he was well aware of the hearing date and time as well as the fact that the hearing was to proceed on the aforesaid digital platform.

[7]. On the morning of Wednesday, 12 June 2024, when the hearing commenced, there was no appearance for the defendants. The matter was stood down to enable plaintiff's attorney to advise the defendants that the matter was proceeding. Mr Lekoma did not answer his phone and did not respond to an email sent to him by the plaintiff's attorney and the hearing therefore proceeded in his absence.

[8]. Nothing new has been raised by the defendants in this application for leave to appeal. In my original *ex tempore* judgment, I have dealt with most, if

not all of the issues raised by the defendants in this application for leave to appeal and it is not necessary for me to repeat those in full. Suffice to restate what I say in the paragraphs which follow.

[9]. As regards the section 129 point, it is, as was submitted by Ms Latib, Counsel for the plaintiff, that delivery of the s 129 notice through the postal service and confirmation of such delivery, suffice to comply with the said provision. This entails the s 129 notice being sent through registered mail to the correct postal branch and nominated address by the consumer. A track and trace may be used to verify this information, as well as the Post Office issuing a notification to the consumer that a registered item was available for her collection. All of the foregoing was fully complied with by the plaintiff and confirmed by it in its founding papers.

[10]. The traditional test in deciding whether leave to appeal should be granted was whether there is a reasonable prospect that another court may come to a different conclusion to that reached by me in my judgment. This approach has now been codified in s 17(1)(a)(i) of the Superior Courts Act 10 of 2013, which came into operation on the 23rd of August 2013, and which provides that leave to appeal may only be given where the judge concerned is of the opinion that ‘the appeal would have a reasonable prospect of success’.

[11]. In *Ramakatsa and Others v African National Congress and Another*¹, the SCA held that the test of reasonable prospects of success postulates 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 the trial court. These prospects of success must not be remote, but there must exist a reasonable chance of succeeding. An applicant who applies for leave to appeal must show that there is a sound and rational basis for the conclusion that there are prospects of success.

¹ *Ramakatsa and Others v African National Congress and Another* (724/2019) [2021] ZASCA 31 (31 March 2021);

[12]. The ratio in *Ramakatsa* simply followed *S v Smith* 2012 (1) SACR 567 (SCA), [2011] ZASCA 15, in which Plasket AJA (Cloete JA and Maya JA concurring), held as follows at para 7:

‘What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that the Court of Appeal could reasonably arrive at a conclusion different to that of the 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.’

[13]. In *Mont Chevaux Trust v Tina Goosen*², the Land Claims Court held (in an *obiter dictum*) that the wording of this subsection raised the bar of the test that now has to be applied to the merits of the proposed appeal before leave should be granted. I agree with that view, which has also now been endorsed by the SCA in an unreported judgment in *Notshokovu v S*³. In that matter the SCA remarked that an appellant now faces a higher and a more stringent threshold, in terms of the Superior Court Act 10 of 2013 compared to that under the provisions of the repealed Supreme Court Act 59 of 1959. The applicable legal principle as enunciated in *Mont Chevaux* has also now been endorsed by the Full Court of the Gauteng Division of the High Court in Pretoria in *Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others*⁴.

[14]. I am not persuaded that the issues raised by the defendants in their application for leave to appeal are issues in respect of which another court is likely to reach conclusions different to those reached by me. I am therefore of the view that there are no reasonable prospects of another court making factual

² *Mont Chevaux Trust v Tina Goosen*, LCC 14R/2014 (unreported).

³ *Notshokovu v S*, case no: 157/2015 [2016] ZASCA 112 (7 September 2016).

⁴ *Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others* (19577/09) [2016] ZAGPPHC 489 (24 June 2016).

findings and coming to legal conclusions at variance with my factual findings and legal conclusions. The appeal, therefore, in my view, does not have a reasonable prospect of success.

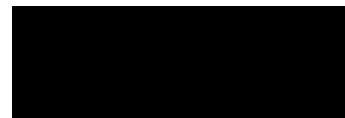
[15]. On the basis of the foregoing, as well as the fact that the defendants do not even begin to give an acceptable explanation for their non-compliance with the rules of this court, it follows that the application for condonation should be refused. The simple point being that the defendants failed to demonstrate good cause for the granting of condonation as they failed to reasonably explain the non-compliance. They also do not have reasonable prospects of success on the application for leave to appeal.

[16]. Leave to appeal, as well as the application for condonation, should therefore be refused.

Order

[17]. In the circumstances, the following order is made:

- (1) The first and the second defendants' application for condonation of the late filing of their application for leave to appeal is dismissed with costs.
- (2) The first and the second defendants' application for leave to appeal is dismissed with costs.
- (3) The first and the second defendants, jointly and severally, the one paying the other to be absolved, shall pay the plaintiff's costs of these two applications on the scale as between attorney and client.



L R ADAMS
Judge of the High Court
Gauteng Division, Johannesburg

HEARD ON:	12 th June 2024
JUDGMENT DATE:	13 th June 2024 – Judgment handed down electronically
FOR THE PLAINTIFF:	N Latib
INSTRUCTED BY:	Pagdens Incorporated, Gqeberha
FOR THE FIRST AND THE SECOND DEFENDANTS:	No appearance
INSTRUCTED BY:	No appearance