

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 40359/2016

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED: YES/NO
14 June 2024	
DATE	SIGNATURE

In the matter between:

MF RAMAPHAKELA

APPLICANT

and

MUNICIPAL EMPLOYEES PENSION FUND

FIRST RESPONDENT

AKANI RETIREMENT PENSION FUND

SECOND RESPONDENT

JUDGMENT

MIA, J:

[1] The applicant seeks leave to appeal against an order handed down on 6 August 2020, the order stated:

- “1. the appeal is declared to have lapsed;
2. the heads of argument and their delivery are not in compliance with the Uniform Rules;
3. the heads of argument and their delivery are set aside;
4. the applicant should pay the respondents' wasted costs occasioned by the appeal, which costs are to include the costs of two counsel”

The application for leave to appeal is opposed by the respondent.

[2] The applicant raised eleven grounds on which it averred the court erred. The grounds are in summary set out as follows:

- 2.1 The applicant contends that the court erred in declaring that the appeal had lapsed while there was a condonation application (relating to non-compliance) pending before the same Court and this court.
- 2.2 The applicant further complains that the rule 30 reasons indicate that condonation was considered, when the court had previously indicated that condonation was not before the court.
- 2.3 The applicant takes issue with the court finding that no condonation application was before me, where it was apparently common cause that the condonation application was before this court and pending before the Court and papers had been filed.
- 2.4 The applicant contends that this court erred in not affording any court which was going to hear the condonation application an opportunity to hear such condonation.
- 2.5 The applicant furthermore also contends that the I erred in not finding that granting the rule 30 application would have final effect and the court hearing the condonation application cannot grant condonation if the rule 30 order is not set aside.
- 2.6 The applicant also contends that the court erred in going against the Constitutional Court judgment in *PFE international Inc (BVI) and others vs Industrial Development corporation of South Africa Ltd*¹ relating to the interests of justice and the court having the ability to regulate its own process. This relates to condonation.

¹ 2013 (1) SA 1 (CC)

- 2.7 The applicant contends that the court erred in granting the costs award against the applicant in relation to the appeal in circumstances where the outcome of the condonation application was still pending.
- 2.8 The applicant contends that the court erred in finding that the delivery of the heads was an irregular step while the condonation application was still before the Court and to be heard.
- 2.9 Finally, the applicant contends that the court erred in dismissing the applicants' points *in limine*.

[3] In essence the applicant's chief complaint relates to the condonation being determined and the leave to appeal being declared having lapsed which brings to finality the applicant's recourse in this court if leave to appeal is not granted to the full bench of this Division.

[4] When the matter was argued before me there was no consensus relating to the condonation application being before me. The applicant had however raised issues that were in the condonation application to persuade the court that the rule 30 application could not be granted whilst there was no determination made on the condonation application. It is so that the only application that can be determined is the application before the court. The respondent relied on this position then as it does now 'that relief cannot be sought or granted other than the relief pleaded'.²

[5] The condonation application could not be determined as it was not before me. The only application before the court was the application in terms of rule 30. Counsel for the applicant sought to rely on the existence of the condonation application to stay the rule 30 application. There was no application to stay the application in terms of rule 30. Thus the application proceeded on the paper before me and an order was granted immediately with reasons to follow.

[6] The reasons followed considerably later. A transcript had been requested by the applicant which was not available. A meeting was thus convened with both

² *Fischer and Another v Ramahlele and Others* 2014 (4) SA 614 (SCA), para [13], affirmed by the Constitutional Court in *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC) para [210] and *Molusi & Others v Voges NO and Others* 2016 (3) SA 370 (CC) para [28]

counsel and legal representatives to reconstruct the proceedings. The proceedings were brief. The applicant had not requested reasons and the parties had agreed that the applicant would do so and the respondent would receive notice of such request. No request was received, and the reasons were furnished on 25 May 2023. The applicant filed an amended leave to appeal application which was also late and without an application for condonation.

[7] Counsel for the respondent submitted that the amended application for leave to appeal has lapsed and without an application for condonation it no longer exists and stands to be struck from the roll with costs on scale A.

[8] The Supreme Court of Appeal said in *TWK Agriculture Holdings (Pty) Ltd v Hoogveld Boerderybeleggings (Pty) Ltd and Others*³ (273/2022) [2023] ZASCA 63 (5 May 2023) the considered whether a decision of the high court is appealable on the principle of the interests of justice, noting that the principle featured prominently in determinations in the Constitutional Court. To do so in the Supreme Court of Appeal the court held would:

"lend coherence to the basis upon which a litigant may ascend the judicial hierarchy. Second, there are decisions of this Court, to which I have referred, that have adopted the interests of justice as the ultimate norm that determines whether a decision is appealable to this Court"

Thus at paragraph 27⁴ the Court continues:

"To adopt the interests of justice as the foundational basis upon which this Court decides whether to entertain an appeal would put in place a regime that is both unpredictable and open-ended. It would encourage litigants to persuade the high courts to grant leave, when they still have work to do, failing which, to invite this Court to hear an appeal under the guidance of a standard of commanding imprecision. That would diminish certainty and enhance dysfunction. It would also compromise the freedom with which the Constitutional Court selects the matters it hears from this Court."

[9] In considering the applicant's contentions and its submissions in relation to the interests of justice, and despite the reinstatement application not being before

³ 2023(5) SA 163 SCA at [19]

⁴ Id para [27]

me, I considered the submissions made by counsel for the applicant who argued that they were relevant in determining the matter before the court. Having given thought to the submissions made the applicant complains that its own contentions ought not to be considered. It is ingenious to suggest that the interests of justice were then not considered. The applicant cannot have it both ways. On a clear considered view of the applicant's grounds for leave to appeal I am unable to find that another court would reasonably come to a different view where the application in terms of rule 30 was the only application that served before me. There was no application to stay the rule 30 application in order to pursue the condonation application. There was on the merits of the rule 30 application, clearly non-compliance and the delivery of the heads was an irregular step. The respondents were thus entitled to the relief granted, including the costs orders granted.

On the points *in limine* there is also no basis on which the applicant can succeed. There was no delay as contended by the applicant that the application was brought outside of the 15-day rule. The applicant was afforded 10 days from 18 December 2019 to remove the causes of complaint and that period expired on 6 January 2020. The application was launched on 24 January 2020, three days before the 15 day period expired on 27 January 2020.⁵ Regarding the second point *in limine* that the Judge President had not determined which court ought to deal with the matter, the applicant fails too, as the order of the court per Bhoola AJ indicated that leave to appeal was granted to the Full Bench of this Division. The remaining points *in limine* similarly have no merit. The third point *in limine*, cannot succeed, the transcript of the record was not obtained, and the applicant proceeded without the relevant documents. The final point that the Registrar be joined is simply misplaced.

- [10] The applicant has not satisfied me that there are grounds for leave to be granted where there are reasonable prospects of success or some other compelling reasons that an appeal should be granted. The suggestion that there is a discrete issue or a matter of public importance can only be relevant where the proper factual matrix is before the court. On the narrow issue of the determination of the

⁵ Record Caselines 001-51 RA [8]

application in terms of rule 30 I am not persuaded that another court will grant leave to appeal where the application related to trite principals of law.

[11] Counsel for the applicant submitted that the application be granted with costs on scale B as the matter involved a matter that was of importance. In the event the court found against the applicant counsel submitted that cost be granted on scale A. In rebuttal the respondent replied that the application be dismissed with costs on scale A, taking into account senior counsel had appeared alone.

[12] In view of the above I make the following order:

The application is dismissed with costs on scale A with senior counsel.


SC, MIA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

APPEARANCES

Counsel for the Applicant: Adv. F Matika
Instructed by: Kaleka Mahapa Attorneys

Counsel for the Respondent: Adv. JPV McNally SC
Instructed by: Webber Wentzel Attorneys

Date of Hearing: 10 June 2024

Date of Judgment: June 2024