



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 60899/2021

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER
JUDGES: No
(3) REVISED.
DATE: 6th September 2024

SIGNATURE

In the matter between:

NEO HARRISON MASITHELA N.O.
MMAPHEFO ELIZABETH MABE N.O.
TEBOHO VICTOR MONGOATO N.O.
BUTANA BADI MAAKE N.O.
MMADINEO MARY MNISI N.O.
ANDREW WILLIE BARTLETT N.O.
THE WINTER CEREAL TRUST (IT 11410/97)

and

THE MASTER OF THE HIGH COURT, PRETORIA
JOHANNES FRANCOIS DE VILLIERS N.O.
GEOFF ROY PENNY N.O.

First Applicant
Second Applicant
Third Applicant
Fourth Applicant
Fifth Applicant
Sixth Applicant
Seventh Applicant

First Respondent
Second Respondent
Third Respondent

MARIANA PURNELL N.O.
BOIKANYO MOKGADLI N.O.
ANDRIES PRETORIUS THERON N.O.

Fourth Respondent
Fifth Respondent
Sixth Respondent

J U D G M E N T

The judgment and order are published and distributed electronically.

VERMEULEN AJ

Introduction:

- [1] For the ease of reference I will refer to the parties as they are cited within the main application referred to in paragraph 4 below.
- [2] The First Respondent is the Master of The High Court of this division who did not oppose the main application. I will refer to the First Respondent as *“the Master”*.
- [3] I will refer to the Second to Sixth Respondents in the main application as *“the Respondents”* respectively.
- [4] On or about the 1st of December 2021 the Applicants launched, under the above case number, an urgent application against the Respondents, which urgent application was set down for the 15th of December 2021 (*the main application*).
- [5] In essence the relief requested relates to the Winter Cereal Trust (*the Trust*), who has been cited in name as the Seventh Applicant.
- [6] For reasons that are not relevant the main application has not yet been finalised.
- [7] In the interim the Respondents launched two interlocutory applications.
- [8] The first application is an application in terms of Rule 30A(2). This application relates to a challenge in terms of Rule 7(1) of the Uniform Rules of Court, where the authority of the Applicants' attorneys to act on behalf of the Applicants in the main application is challenged (*the Rule 30A(2) application*).

[9] The second application is an application in terms of Rule 15(4) wherein the Respondents request that a Notice of Substitution which was served by the Applicants to substitute some of the Applicants be set aside (the *Rule 15(4) application*).

[10] Both interlocutory applications came before me as opposed applications and on the 18th March 2024 I found in favour of the Respondents and made the following order:

"In respect of Rule 30A(2) application:

1.1 *Condonation is granted for the late filing of the Rule 30A(2) application;*

1.2 *It is declared that the First to Sixth Applicants have failed to satisfy the Court that they and their attorney, Bokwa Law Incorporated, are authorised to act on behalf of the Winter Cereal Trust in the main application under the abovementioned case number;*

1.3 *It is declared that the First to Sixth Applicants and their attorney, Messrs Bokwa Law Incorporated were prohibited to act on behalf of the Winter Cereal Trust in the bringing of the main application under the abovementioned case number;*

1.4 *The First to Sixth Applicants are ordered, jointly and severally, to disclose to the Second to Sixth Respondents the exact amount that were paid over from the Winter Cereal Trust Fund to their attorney, Messrs Bokwa Law Incorporated. in connection with the litigation under the abovementioned case number from the commencement of the proceedings to date;*

1.5 *The First to Sixth Applicants are ordered to pay the costs of the Rule 30A(2) application in their personal capacities, jointly and severally, the one to pay the other to be absolved.*

2. *Rule 15(4) application:*

2.1 *Condonation is granted to the Respondents for the bringing of the application in terms of Rule 15(4);*

2.2 *The Notice of substitution of a party dated 28th of July 2023 whereby the First, Second and Third to Sixth Applicants in the main application are substituted is herewith set aside;*

2.3 *The First to Sixth Applicants are ordered to pay the costs of the Rule 15(4) application in their personal capacities, jointly and severally the one paying the other to be absolved. “*

[11] In both interlocutory applications the Respondents were represented by Adv. Strydom SC and the Applicants were represented by Adv. Shakoane SC together with Adv. Mabena.

[12] The Applicants have filed an application for leave to appeal to the Supreme Court of Appeal alternatively the Full Bench of the North Gauteng Division of the High Court of South Africa, held in Pretoria, in terms of Section 17(1)(a) of the Superior Court Act, Act no. 10 of 2013 against the whole of the judgment and order handed down by myself on the 18th of March 2024.

[13] In the application for leave to appeal, the parties were similarly represented as during the arguing of the *Rule 30A(2) and Rule 15(4)* applications.

[14] The test whether to grant leave to appeal is provided by the provisions of Section 17(1)(a) of the Superior Court Act 10 of 2013 (the Act). The section provides as follows:

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

(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 judgment on the matter under consideration ...”

[15] Mr Strydom argued on behalf of the Respondents that in view thereof that the Applicants did not in their Notice of Application for Leave to appeal rely on the

provisions of section 17(1)(a)(ii) of the Act, that they were restricted to argue that the appeal will have reasonable prospect of success. I do not agree.

- [16] In ***Ramakatsa & Others v African National Congress & Another***¹ the Supreme Court of Appeal referred with approval to the matter of ***Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd***² and reiterated that concerning the provisions of Section 17(1)(a)(ii) of the Act, if the court is unpersuaded that there are prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal. Compelling reasons would of cause include an important question of law or a discreet issue of public importance that will have an effect on future disputes. The Supreme Court of Appeal, however, reiterated that “*but here to the merits remain vitally important and are often decisive*”.³
- [17] In the premises even where it is thus apparent that the Applicants do not specifically rely on the provisions of Section 17(1)(a)(ii) in their Notice of application for leave to appeal, this Court still has a duty to investigate this aspect as well. The reasoning is sound. If a compelling reason exists it would be in the interests of justice to provide leave to appeal to a party and a court should not be restricted to whether the Applicant/s rely on the provisions of section 17(1)(a)(ii) or not.
- [18] In respect of the second portion of the test in section 17(1)(a)(ii), it has been held that each application for leave to appeal must be decided on its own facts and that there is not an exhaustive list of criteria.⁴
- [19] I am, however, of the opinion that the duty impose upon the court to investigate whether a compelling reason exists does not mean that there is a duty upon the Court to scrutinise and investigate each and every fact and or legal ground that may possibly provide a ground of appeal in that specific matter. In doing so the court will add to and provide grounds of appeal to an Applicant who never intended to rely upon such

¹ [724/2019]/[2021] ZASCA 31 (31 March 2021) par 10

² [2020] ZASCA 17; 2020 (5) SA 35 (SCA)

³ See: par. 2 of Caratco judgment

⁴ Transnet Durban (Pty) Ltd v eThekweni Municipality, unreported KZD case no. D4178/2020 dated 8 February 2021 at par. [13];

grounds in the first place and where no mention are made of those grounds in the Notice of application for leave to appeal. It is not the duty of the court to build a case for the Applicant/s and it does not open the doors to the Applicant/s to have a free roam to canvass every finding of fact and every ruling of the law made by the Court *quo* not canvassed in the Notice of Application for leave to appeal. Such a scenario would not only be unfair to the Court but be unfair to the Respondents as well as they would not know what case to meet.

[20] It is within the grounds set out in the Notice of application for leave to appeal that the Court must investigate and determine whether the Applicants have succeeded to obtain leave to appeal in accordance with the tests enunciated in Section 17(1)(a) of the Superior Courts Act. In this respect it is trite law that the grounds of appeal must be clearly and succinctly set out in clear and unambiguous terms to enable the Court and the Respondents to be fully informed of the case the Applicants seek to make out and which the Respondents are to meet in opposing the application for leave to appeal.⁵ Rule 49(1) is peremptory in this regard.⁶

[21] In the Songano ⁷judgment Leach J. *inter alia* held as follows:

"It seems to me that, by parity of reasoning, the grounds of appeal required under rule 49(1)(b) must similarly be clearly and succinctly set out in clear and unambiguous terms so as to enable the court and the respondent to be fully and properly informed of the case which the applicant seeks to make out and which the respondent is to meet in opposing the application for leave to appeal. Just as rule 49(3) is peremptory in that regard, rule 49(1)(b) must also be regarded as being peremptory ...".

[22] It is further trite that with the coming into operation of the Act, the relevant test has been amended in that the word "would" is used in determining the conclusion to which

⁵ *Songano v Minister of Law & Order* 1996 (4) SA 384 E at 385 I – J; *Hing v Road Accident Fund* 2014(3) SA 350 WCC

⁶ *Songano v Minister of Law & Order* 1996 (4) SA 384 E at 395 J – 386 A

⁷ *Songano v Minister of Law & Order* 1996 (4) SA 384 E at 395 J – 386 A

the Judge or Judges must come before leave to appeal can be granted. Mr Strydom submitted⁸ that the amended wording of this sub-section raised the bar of the test that now has to be applied to the merits of the proposed appeal before leave should be granted.⁹

[23] Although there was authority supporting the submission of Mr Strydom¹⁰, the position has now been clarified by the SCA in **Ramakatsa** *supra*¹¹ where the Supreme Court of Appeal summarised the test to be applied as follows

"[10] I am mindful of the decisions at high court level debating whether the use of the word 'would' as opposed to 'could' possibly means that the threshold for granting the appeal has been raised. If a reasonable prospect of success is established, leave to appeal should be granted. Similarly, if there are some other compelling reasons why the appeal should be heard, leave to appeal should be granted. 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. In other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist."

(My emphasis and footnotes omitted)

[24] Further, in the matter of **TWK Agriculture Holdings (Pty) Ltd v Hoogveld Boerderybeleggings (Pty) Ltd and Others**¹² the Supreme Court of Appeal went to

⁸ Par 3 Heads of Argument page 052-2 and authority referred to in footnote.

⁹ The Mont Chevaux Trust (IT 2012/28) v Tina Goosen, unreported, LCC Case No. LCC14R/2014 dated 3 November 2014, cited with approval by the Full Court in "The Acting National Director of Public Prosecution v Democratic Alliance (unreported) GP Case no. 19577/09 dated 24 June 2016) at par. 25;

¹⁰ Mont Chevaux Trust v Tina Goosen LCC 14R/2014

¹¹ (724/2019) [2021] ZASCA 31 (31 March 2021)

¹² (2023) ZASCA 63 (5 May 2023)

strike the appeal from the roll even though special leave to appeal was granted by the same Court. It did so on the basis that:

“The fact that leave to appeal has been granted upon application to the President of this Court is not decisive of whether a case meets the criteria for special leave. It still remains for us to consider whether we should entertain the appeal at all”.

and that:

“ the orders made by the Full Court do not meet the requirements of appealability to this court. As a result despite special leave having been granted by two judges of this court the appeal is not properly before this court and the appeal must be struck from the roll.”

- [25] The consequence of the latter judgment is that the presiding Judge hearing an application for leave to appeal has a duty to ensure that the application for leave to appeal complies with the requirements of Section 17(1)(a) of the Superior Courts Act prior to granting leave. A presiding Judge must therefore be diligent in analysing whether the applicants applications for leave to appeal comply with the requirements of Section 17(1)(a) before granting leave, to prevent burdening another court to hear an appeal that does not comply with the relevant tests.

CORRECTION OF ORDER IN TERMS OF RULE 42(1)(b):

- [26] There is an **‘an ambiguity or a patent error’** in my judgement and court order that the Court needs to vary and rectify mero motu in terms of Rule 42(1)(b). In paragraphs 30 to 46 of my judgement I dealt comprehensively with the late filing of the Respondents' second Rule 7 notice and concluded and held in paragraph 46 that insofar as may be necessary leave is granted to the Respondents to proceed with the second Rule 7 challenge that formed the basis of the Rule 30A(2) application.
- [27] Notwithstanding this finding, in paragraph 1.1 of my order dealing with the Rule 30A(2) application held that condonation be granted for the late filing of the Rule 30A(2) application. This order does not relate to nor correspond with the court's investigation

and finding forestated. This is an apparent bona fide patent error or ambiguity that must be rectified.

- [28] An ambiguity or a patent error or omission has been described as an ambiguity or an error or omission as a result of which the judgment granted does not reflect the real intention of the judicial officer pronouncing it; in other words, the ambiguous language or the patent error or the omission must be attributable to the court itself.¹³
- [29] The rectified order will not only correspond with my finding in paragraph 46 of my judgement but will also accord with the debate and submissions made by counsel during the hearing of the Rule 30A(2) application by the parties. It was never in issue that the Rule 30A(2) application was late. The issue raised was in respect of the belated second Rule 7 notice.
- [30] Accordingly the order in paragraph 1.1 of my judgement relating to the Rule 30A(2) application is herewith amended to read

"1.1 Leave is granted for the late filing of the second notice in terms of Rule 7 dated 8th August 2022.;"

GROUNDS FOR LEAVE TO APPEAL:

First Ground:

- [31] In their first ground for leave to appeal, the complaint is that the Court misdirected itself in granting the Respondents condonation for the late lodging of the Rule 30A(2) application, particularly that on the facts and law, the Respondents have failed to show good cause for the granting of the condonation.
- [32] It is evident that premised upon the forestated patent error, that has now been rectified, the Applicants followed the wording of the incorrect order in their first ground of appeal. In view thereof that it was never in issue that the Rule 30A(2) was filed out of time, I will interpret their first ground of appeal to refer to the finding in respect of the leave

¹³ See Erasmus, *Superior Court Practice in its discussion of Rule 42(1)(b) on page RS 23, 2024, D1 Rule 42-23 and authorities referred to.*

granted for the late filing of the second Rule 7 notice, which corresponds with the submissions made to the court during argument for leave to appeal.

- [33] As I have indicated in paragraph 39 of my judgement, whilst there was no substantive application for condonation before me from the Respondents to request the leave of the Court to challenge the Applicants' lack of authority as contemplated within the provisions of Rule 7(1), there was also no objection ever raised by the Applicants against the late filing of the second Rule 7 notice within any of the papers filed before this Court. Not even in the Heads of Argument that were filed for purposes of arguing the Rule 30A(2) application before me was any issue taken in respect of the late filing of the second Rule 7 notice. The first time that the later filing of the second Rule 7 notice was mentioned was during argument by Counsel who represented the Applicants before me. It was also only raised in the sense that the Respondents' belated notice is again indicative of their actions to employ delaying tactics to avoid argument in the main application. It was never argued that the second Rule 7 was filed out of time and that the notice was defective or should be ignored.
- [34] As comprehensively dealt with in paragraphs 39.6 to 39.11 of my judgement, at all times the Applicants adopted the point of view that they had duly complied with the challenge in terms of the second Rule 7 notice in response to the second Rule 7 notice that was filed by the Respondents. In this regard the Applicants proceeded on the 29th of August 2022 and attempted to comply with the notice with the filing of a Special Power of Attorney accompanied by what was called a "mandate for legal representation" that gave rise to the Rule 30A(2) application.¹⁴
- [35] The court raised the issue about the late filing of the second Rule 7 notice *mero motu*.

¹⁴ See: *Special Power of Attorney, CaseLines*, p. 022-1 and *mandate for legal representation on CaseLines*, p. 022-2

- [36] The rule in respect of the filing of a Rule 7 notice is a procedural rule and the court can therefor raise the compliance with Rule 7 *mero motu*. In ***Mkhwanazi v Minister of Agriculture and Forestry, KwaZulu Natal***¹⁵ where the court dealt with the “delay rule” in circumstances where the issue was raised *mero motu* by the court the court held:

“Here the position is different, the delays, or the most serious of them occurred after the affidavits were all in. It is true that respondent could have given some form of notice that it considered the delays to be excessive. But I do not consider this to be imperative.

The rule against undue delay is a procedural rule (Wolgroeiers case at 41G - H) and can therefore be enforced by the Courts mero motu.

The failure by the respondent to raise the issue is, however, a factor which will weigh in favour of granting condonation.”

- [37] Similarly in ***Thulani Patrick Sithelo and other v Premier of the Eastern Cape Province***¹⁶ where the court again dealt with the delay principle in the absence of any application for condonation the court held:

“[10] The rule against undue delay is procedural and can therefore be enforced by the Courts mero motu.¹⁷ Consequently, Notyesi AJ was entitled to deal with unreasonable delay mero motu even if it was not raised by the respondents. There was no application for condonation. “

- [38] In any event, although rules governing the court process cannot be merely disregarded and although it is acknowledged that they serve an undeniably important purpose, it does not mean that courts should be detained by the rules to a point where they are hamstrung in the performance of the core function of dispensing justice. It is trite law that rules should not be observed for their own sake. Where the interests of justice so dictate, courts may depart from a strict observance of the rules. That, even where one of the litigants is insistent that there be adherence to the rules, which was not the

¹⁵ 1990 (4) SA 763 (D)

¹⁶ Case no.: 2607/2022 in the High Court of South Africa (Eastern Cape Division, Mthatha)

¹⁷ *Mkhwanazi v Minister of Agriculture & Forestry, KwaZulu* 1990 (4) SA 763 (D) at 767

position in the present matter. Rule are made for the court and not the court for the rules.

[39] The position was aptly summarised in the matter of **Mr Ernest Ketcha Ngassam v MTN Group Management Services (Pty) Ltd**¹⁸ by Meiring AJ as follows:

“The role of the Uniform Rules

[19] *This necessitates a consideration of the object of the Uniform Rules of Court and how they should be applied.*

[20] *The starting point of this enquiry is section 34 of the Constitution. It confers upon everyone the right of access to the courts. That includes the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court.*

[21] *In Mukaddam v Pioneer Foods (Pty) Ltd and Others the Constitutional Court observed:*

“Access to courts is fundamentally important to our democratic order. It is not only a cornerstone of the democratic architecture but also a vehicle through which the protection of the Constitution itself may be achieved. It also facilitates an orderly resolution of disputes so as to do justice between individuals and between private parties and the State.”

[22] *The Mukkadam court went on to draw upon the reasoning of the Constitutional Court in Chief Lesapo v North West Agricultural Bank and Another:*

“The right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated, and institutionalised mechanisms to resolve disputes, without resorting to self-help. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule

¹⁸ Decided in the High Court of South Africa, Gauteng Division, Johannesburg, CASE NO.: 4337/2022 on 15 March 24 by Meiring AJ

of law and the principle against self-help in particular, access to court is indeed of cardinal importance. As a result, very powerful considerations would be required for its limitation to be reasonable and justifiable.”

[23] *To realise this right of access to the courts, empowered by section 173 of the Constitution, the High Court uses the Uniform Rules of Court to regulate its process and to determine how disputes that it hears are both to be readied for hearing and to be heard.*

[24] *In **Mukaddam**, after the above statements about the fundamental principle of access to the courts, the Constitutional Court said this:*

“However, a litigant who wishes to exercise the right of access to courts is required to follow certain defined procedures to enable the court to adjudicate a dispute. In the main these procedures are contained in the rules of each court. The Uniform Rules regulate form and process of the High Courts. The Supreme Court of Appeal and this Court have their own rules. These rules confer procedural rights on litigants and also help in creating certainty in procedures to be followed if relief of a particular kind is sought.

It is important that the rules of courts are used as tools to facilitate access to courts rather than hindering it. Hence rules are made for courts and not that the courts are established for rules. Therefore, the primary function of the rules of courts is the attainment of justice. But sometimes circumstances arise which are not provided for in the rules. The proper course in those circumstances is to approach the court itself for guidance. After all, in terms of section 173 each superior court is the master of its process.”

[emphasis added]

[25] *The Uniform Rules regulate the practice and procedure of the courts. Their object is to ensure the inexpensive and expeditious completion of litigation before the courts, without their being an end in and of themselves.*

[26] *In **Arendsnies Sweefspoor CC v Botha**, the SCA observed.*

"It is trite that the rules exist for the courts, and not the courts for the rules (see Republikeinse Publikasie (Edms) Beperk v Afrikaanse Pers Publikasie (Edms) Bpk 1972 (1) SA 773 (A) 783 A-B; Mynhardt v Mynhardt [1986] 3 All SA 197; 1986 (1) 456 (T) also Ncoweni v Bezuidenhout, 1927 CPD 130), where it was pertinently observed that:

'The rules of procedure of this court are devised for the purpose of administering justice and not of hampering it, and where the Rules are deficient, I shall go as far as I can in granting orders which would help to further the administration of justice. Of course, if one is absolutely prohibited by the Rule one is bound to follow this Rule, but if there is a construction which can assist the administration of justice, I shall be disposed to adopt that construction.'

Courts should not be bound inflexibly by rules of procedure unless the language clearly necessitates this – see Simons v Gibert Harner & Co Ltd 1963 (1) SA 897 (N) at 906. Courts have a discretion, which must be exercised judicially on a consideration of the facts of each case, in essence it is a matter of fairness to both parties (see Federated Employers Fire & General Insurance Co Ltd v McKenzie [1969] 3 ALL SA 424; 1969 (3) SA 360 (A) at 363 G–H).

With the advent of the constitutional dispensation, it has become a constitutional imperative to view the object of the rules as ensuring a fair trial or hearing. 'Rules of court are delegated legislation, having statutory force, and are binding on the court, subject to the court's power to prevent abuse of its process.' And rules are provided to secure the inexpensive and expeditious completion of litigation and are devised to further the administration of justice (see LAWSA, third Edition Volume 4 – paragraph 8–10 page 10 et seq) (see also Kgobane & another v Minister of Justice & another [1969] 3 ALL SA 379 or 1969 (3) SA 365 (A) at 369 F–H). Considerations of justice and fairness are of prime importance in the interpretation of procedural rules (see Highfield Milling Co (Pty) Ltd v A E Wormald & Sons [1966] 3 ALL SA 27; 1966 (2) SA 463 (E) at 465 F–G)."

[27] *In sum, in the light of the excerpts from the locus classici collected above, and the earlier authorities upon which they rest, it is fair to say that, while the Uniform Rules serve to impose a form of discipline on the steps that litigants take to have their disputes resolved, their ultimate object in our constitutional democracy is to promote access to the courts and to ensure that the right is realised to have disputes resolved by the application of the law in a fair public hearing before a court."*

[40] Even the Constitutional Court has recognised the need of a court to depart from strict observance of the Rules if in the interests of justice. In **Eke v Parsons** ¹⁹ the Constitutional Court stated as follows:

"[39]..Without doubt, rules governing the court process cannot be disregarded. They serve an undeniably important purpose. That, however, does not mean that courts should be detained by the rules to a point where they are hamstrung in the performance of the core function of dispensing justice. Put differently, rules should not be observed for their own sake. Where the interests of justice so dictate, courts may depart from a strict observance of the rules. That, even where one of the litigants is insistent that there be adherence to the rules.²⁰ Not surprisingly, courts have often said '(i)t is trite that the rules exist for the courts, and not the courts for the rules'.²¹

[40] Under our constitutional dispensation the object of court rules is twofold. The first is to ensure a fair trial or hearing.²² The second is to 'secure the inexpensive and expeditious completion of litigation and . . . to further the administration of justice'.²³ I have already touched on the inherent jurisdiction vested in the superior courts in South Africa.²⁴ In terms of this power the High Court has always been able to regulate its own proceedings for a number of reasons,²⁵ including catering for circumstances not adequately covered by the Uniform Rules,²⁶ and generally ensuring the efficient administration of the courts' judicial functions.^{27"}

¹⁹ 2016 (3) SA 37 (CC) par 39 page 53 Madlanga J (Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Molemela AJ and Tshiqi AJ concurring)

²⁰ See, for example, *Leibowitz and Others v Schwartz and Others* 1974 (2) SA 661 (T); and *Mostert NO v Sable Group Holdings (Pty) Ltd* [2013] ZAGPJHC 143 (Mostert).

²¹ *Arendsnes Sweefspoor CC v Botha* 2013 (5) SA 399 (SCA) (Arendsnes) para 18, citing *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 (A) at 783A – B; *Mynhardt v Mynhardt* 1986 (1) SA 456 (T); and *Ncoweni v Bezuidenhout* 1927 CPD 130 (Ncoweni).

²² *Arendsnes id* para 19.

²³ *Id*, relying on *Kgobane and Another v Minister of Justice and Another* 1969 (3) SA 365 (A), which dealt with this concept in the context of the number of condonation applications that were being received by the Appellate Division at the time, which Rumpff JA decried at 369H as a 'tendency [which] must be reduced in order to ensure that the administration of justice is maintained on a proper level'.

²⁴ At [28].

²⁵ See generally *Taitz The Inherent Jurisdiction of the Supreme Court* (Juta and Co Ltd, Cape Town 1985) at 14-8.

²⁶ See, for example, *De Wet and Others v Western Bank Ltd* 1977 (2) SA 1033 (W), which identified the ability of courts in the then Natal Province to order rescission of judgments even though no relevant rule allowing for such an order existed at the time.

²⁷ *Taitz* above n62 at 14. This principle appears to date to *Ncoweni* above n58, where *Gardiner JP* remarked at 130 that '(t)he Rules of procedure of this Court are devised for the purpose of administering justice and not of hampering it, and where the Rules are deficient I

- [41] In the present matter I was satisfied that it was in the interests of justice to raise the issue in respect of the late filing of the second Rule 7 notice *mero motu* and to grant leave to the Respondents to proceed with the second Rule 7 challenge, as provided in paragraphs 39 to 45 of my judgement, even absent a substantive application for condonation.
- [42] I was utterly surprised that 90% of the time spent in arguing the present application for leave to appeal, was attributed to this ground, having regard that no specific challenge was ever made prior to or during the hearing of the Rule 30A(2), to argue that as a consequence of the late filing of the second Rule 7 notice, the second Rule 7 notice became defective or void or should not be adhered to. In this respect, when I enquired from Mr Shakoane during argument of the application for leave to appeal, where in the Opposing Affidavit filed in opposition to the Rule 30A(2) application do I find any grounds raised in opposition to the late filing of the second Rule 7 notice he could not point me to any such opposition.
- [43] In the submissions made by the Applicants in the application for leave to appeal great reliance was placed on the matters of ***Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining & Development Company Ltd & Others***²⁸ and ***Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust***²⁹ in respect of the approach a Court should take to an application for condonation.
- [44] Before I apply the tests as enunciated in those matters to the present facts, I briefly want to emphasize the following principles enunciated in these two judgements:
- [45] In the ***D & F Wevell Trust*** matter:

shall go so far as I can in granting orders which would help to further the administration of justice'. It was referred to recently in, amongst others, *Arendsnes* above n58 para 19; *Absa Bank Ltd v Lekuku* [2014] ZAGPJHC 274 para 22; and *Mostert* above n57 para 13.

²⁸ (2013) 2 ALL SA 251 SCA at par. [12] et sequelae;

²⁹ (2007) ZASCA 153; (2007) SCA 153 (RSA); 2008 (2) SA 184 (SCA).

- [i] The Court had to adjudicate upon the refusal of an application for condonation for a delay in bringing an application for leave to appeal.
- [ii] Since the period for the filing of the application for leave to appeal lapsed, the Respondents believed the judgement became final and acted thereon and inter alia proceeded with the transfer of certain properties.
- [iii] In this matter the Cloete JA with reference to the judgment of Holmes JA in ***Federated Employers Fire & General Insurance Company Ltd & Another v Mckenzie***³⁰ again emphasised that the late filing of a Notice of Appeal affects the Respondents' interest in the finality of his judgment. Cloete JA quoted with approval the following passage from the *Federated Employers* matter:

"The late filing of a notice of appeal particularly affects the respondent's interest in the finality of his judgment – the time for noting an appeal having elapsed, he is prima facie entitled to adjust his affairs on the footing that his judgment is safe; see: Cairns' Executors v Gaarn 1912 AD 181 at P193, in which Solomon JA said:

'After all the object of the rule is to put an end to litigation and to let parties know where they stand'.

- [iv] In all those circumstances the Court held that demonstrably good cause had to be shown on the merits before condonation could be considered. The Court then proceeded and evaluated the prospects of success on appeal having regard to the merits.³¹ After having considered the merits the Court then held that it was far from satisfied that the Court on appeal would find that there are reasonable grounds to find in favour of the Applicants.³²

[46] In the ***Dengetenge*** matter:

³⁰ 1969 (3) SA 360 (A) at 363A

³¹ See: para. 41 and 42 of judgment on p. 199

³² See: para. 60 and 61 of judgment on p. 207

- [i] the Supreme Court of Appeal was again confronted with an application for condonation following the late filing of the Appellants' Heads of Argument that caused the appeal to lapse.
- [ii] In this specific matter, an application for leave to appeal was only filed six months after the appeal had already lapsed.
- [iii] The merits of the matter related to prospecting rights. In the six months since the appeal had lapsed, the Respondents already acted on the belief that their rights were finalised, commenced with prospecting in terms of those rights and spent millions of rands as a consequence thereof. In addition they also sold shares in their companies to raise funds to pursue the prospecting activities.
- [iv] It is against this background that the Court then proceeded in paragraph 11 of its judgment and listed the factors which usually weigh with a Court in considering an application for condonation namely:
 - [a] The degree of non-compliance;
 - [b] The explanation therefore;
 - [c] The importance of the case;
 - [d] A respondent's interest in the finality of the judgment of the court below;
 - [e] The convenience of this court;
 - [f] The avoidance of unnecessary delay in the administration of justice.³³
- [v] In this matter great emphasis was placed by the Court on the finality that was reached in respect of the judgment of the Court below.³⁴ The Court concludes in this respect stating as follows:

"It must accordingly be accepted that both respondents have been severely prejudiced by Dengetenge's delay in prosecuting the appeal."
- [vi] The Court then proceeds and premised upon the lack of a proper explanation and the severe prejudice to be suffered by the respondents as a consequence

³³ See: par 11 of judgment

³⁴ See: par. 14 of judgment

of the lapsing of the appeal the Court states that it may well have been entitled to refuse the indulgence of condonation irrespective of the merits of the appeal. In this regard reference was made to the matter of **Blumenthal & Another v Thompson NO & Another**³⁵. Notwithstanding, the Court in any event then proceeded and considered the merits of the appeal to enable the Court to assess the applicants' prospects of success and to weigh that together with the others factors.³⁶

[vii] The Court then proceeded and held that the applicants have no reasonable prospects of success even on the merits.³⁷

[viii] The Court in paragraph 18 of its judgment *inter alia* stated as follows:

"Individually weighed – on each of the three factors, the scales are tipped against condoning the default and reviving the appeal. Cumulatively, they are decisive against it."

[47] Having regard to the forestated, I am of the opinion that reference to the **Dengetenge** matter and the **D & F Wevell Trust** matter in the present circumstances do not assist the Applicants at all.

[i] In the first place, both the **Dengetenge** and the **D & F Wevell Trust** matters are clearly distinguishable in that in those matters the Court was confronted with applications for condonation in circumstances where an appeal had already lapsed and there was finality of rights in respect of the finality of the judgements in the court a quo that endured for a substantial period of time. That is not the case in the present matter.

[ii] In both of those matters, the respondents were able to show good cause why the respondents had a substantial interest in the finality of the judgments and why the appeals should not be revived. This was not done in the present application at all.

³⁵ 1994 (2) SA 118 (A) at 1211

³⁶ See: par. 15 of judgment

³⁷ See: par 17 of judgment

On the contrary as I have indicated in the judgment above, no objection to the late filing of the Rule 7 notice was ever raised by the Applicants in any of the papers save for the time when it was raised during argument before me as an indication of delaying tactics employed by the Respondents.

- [ii] In addition, in the present matter before me, the Respondents already on the 3rd of December 2021 filed a Notice in terms in terms of Rule 7 wherein they similarly challenged the authority of Messrs Bokwa Law Inc. to act as attorneys on behalf of the Applicants. At no time did the Applicants ever complied with this challenge at all. Further on the 7th of December 2021, when the Respondents filed their Answering Affidavit, the Respondents in paragraphs 4.6 again raised the issue in respect of the Rule 7 challenge in respect of which no compliance was forthcoming from the Applicants. Strictly in accordance with Rule 7 the Applicants attorney could no longer prior to compliance.
- [iv] Further, subsequent to the filing of the second Rule 7 challenge on the 11th of August 2022, no objection was taken to a late filing of the Rule 7 notice, but the Applicants took steps to comply with such challenge. In reaction to this challenge the Applicants filed the aforementioned two documents namely the Special Power of Attorney and a document under the letterhead of the "Winter Cereal Trust" wherein they attempted to comply with the challenge.
- [v] Furthermore, in opposition to the Rule 30A(2) application that was launched by the Respondents, the Applicants again adopted in their opposing papers the attitude that there was due compliance with the Rule 7(1) challenge. And again did not raise the late filing as an issue.
- [vi] As I have elaborately dealt with in my judgement, from the commencement of the main application, the Respondents challenged the authority of Bokwa Law Inc. to act on behalf of the Applicants. The Applicants chose not to comply at that stage and throughout until after the second Rule 7 notice was served. The challenge,

however, to the authority remained the same throughout. It will be sad day if litigants are allowed to benefit from their own wrongdoing particularly where they have not objected to any of the steps complained about until now, at leave to appeal stage, at any time prior thereto.

- [vii] Evaluating the “degree of non-compliance” by the Respondents having regard to the abovementioned facts, the degree was minimal.
 - [vii] In respect of the merits, with which I have elaborately dealt with from paragraph 47 of my judgment, I am satisfied that the merits were so definitively against the Applicants that it was in the interests of justice to grant leave to proceed with the Rule 7 challenge and that there is no reasonable possibility that another Court would come to another finding. In all those circumstances I was and still am satisfied that demonstrably good cause was shown on the merits to grant leave..
 - [vii] It was further convenient for the court to deal with the leave aspect at the hearing, particularly where no issue was taken by the Applicants to the late filing of the second Rule 7 notice and where the court was of the opinion that it was in the interests of justice to prohibit any further unlawful and unauthorised actions of the Applicants.
- [48] In respect of the test to be applied it is evident that in awarding condonation to the Respondents the court exercised a discretion that is regarded as a Narrow discretion that is invariably called a discretion in the true sense.³⁸ . In the premises the decision is accordingly only open to attack on limited grounds. I am not satisfied that there is a

³⁸ *Minister of International Relations and Co-operation and Others v Simeka Group (Pty) Ltd and Others* (610/2021) [2023] ZASCA 98; [2023] 3 All SA 323 (SCA) (14 June 2023) par 78; *Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd* [1992] ZASCA 149; [1992] 2 All SA 453 (A); [1992] 4 SA 791 (A) at 800G-H; In the Supreme Court of Appeal of South Africa in the matter of South African Chemical Workers union and Other v African Commerce Developing Company (Pty) Ltd t/a Buffalo Tapes handed down on 26 May 2000 the SCA held: “[16] In granting condonation to the appellants the IC was required to exercise a judicial discretion. Its decision was accordingly only open to attack on limited grounds (see *Ex parte Neethling and Others* 1951(4) SA 331 (A) at 335 D-F)”; In the Labour Court of South Africa held at Johannesburg ,Case no: JS 1971/10 in the matter between: Horatious Seatlolo, Individual Applicants Listed in Schedule „A” and Entertainment Logistics Service (a division of Gallo Africa Ltd) it was further held that; “The question of whether a decision on condonation is a final decision and therefore subject to appeal is now settled: see *Motloi v SA Local Government Association* [2006] 3 BLLR 264 (LAC). However, the nature of the interference of an appeal court in the context of judicial discretion is limited. In making this submission Mr. Pretorius relied upon the authority of *NUMSA & Others v Fibre Flair cc t/a Kango Canopies* [2000] 6 BLLR 631 (LAC), which was approved in *SA Chemical Workers Union & Another v African Commerce Developing Co (Pty) Ltd t/a Buffalo Tapes* (2000) 21 ILJ 1735 (SCA).”

reasonable prospects of success on appeal on these limited grounds or at all. In the premises I find that there is no reasonable prospect of success on appeal on this ground.

SECOND GROUND OF APPEAL:

[49] In its second ground of appeal the Applicants is of the opinion that the Court misdirected itself in granting condonation for the late lodging of the Rule 15(4) application.

[50] During argument Mr Shakoane argued that the Applicants never provided a concession that the Rule 15(4) application to be launched by the Respondents could be held over until after the meeting with the Deputy Judge President.

[51] With respect I do not agree. I have dealt with this aspect comprehensively from paragraph 133 of my judgment.

[52] I wish to summarise the facts underlying the application for condonation briefly as follows:

- [i] On the 1st of August 2023, a Notice of substitution was filed by the Applicants;
- [ii] In response to this Notice of substitution the Respondents' attorneys directed a letter to the Applicants' attorneys on the 17th of August 2023. In this letter the Respondents' attorneys pointed out various irregularities in respect of the Notice of substitution but the Applicants' attorneys was requested to formally withdraw the defective notice failing which an application in terms of Rule 15(4) would be launched. I wish to emphasise that at the time when this letter was directed, it was still within the period allowed by Rule 15 for the launching of such an application. This period would only lapse on the 29th August 2023.
- [iii] In reply to this letter the Applicants' attorneys on the 22nd of August 2023 sent an email to the Respondents' attorneys wherein they advised that they have communicated the content of the Respondents' attorneys' letter to their client and they have been instructed to confer with senior counsel regarding the

averments therein. An indulgence was sought to respond to the letter of the Respondents' attorneys by no later than Friday, the 25th of August 2023. Again this letter was directed at a time when it was still within the period allowed in terms of Rule 15 to bring the required application;

[iv] On the 28th of August 2023 the Applicants' attorneys directed a further email.³⁹ In this communication the Applicants' attorneys advised that the issues raised in the letter of the Respondents' attorneys can be dealt with on the 10th of October 2023 at the meeting that was scheduled with the Honourable Deputy Judge President. The Applicants' attorneys further noted that should such a proposal not be acceptable that the Applicants in the application would be entitled to exercise their rights;

[v] As the letter of the Respondents' attorneys, dealt with above, directly addressed the irregularities in respect of the Applicants' Rule 15(1) notice and the Respondents' intention to launch an application in terms of Rule 15(4) should the Applicants refuse to withdraw the said Rule 15(1) notice, I cannot understand how it can be argued by the Applicants at this stage that their email of the 28th of August 2023 does not provide an invitation to the Respondents to discuss those aspects at the meeting with the Deputy Judge President on the 10th of October 2023 and whether directly or indirectly provides permission to hold all the steps in abeyance until after the said meeting.

[53] Rule 27(1) providing for condonation clearly stipulates that condonation is only necessary "in the absence of agreement between the parties". It is clear that through the exchange of correspondence between the parties there was an agreement that the Respondents only needed to proceed with a Rule 15(4) application subsequent to the meeting of the 10th of October 2023. But even if I am wrong in this respect I am

³⁹ Annexure "AB8" to the Rule 15(4) application.

satisfied that a proper explanation was provided why the application was only filed on the 4th of October 2023.

- [54] Further if I have regard to the merits of the Rule 15(4) application I am also satisfied the reasons as duly set out in my judgement, the Applicants' Notice of substitution in terms of Rule 15(1) was completely defective and should be set aside.
- [55] In the premises I find that there is no reasonable prospect of success on appeal on this ground.

THIRD AND FOURTH GROUNDS OF APPEAL:

- [56] The Third and Fourth grounds of appeal relates to the merits of the Rule 7 challenge. They are linked.
- [57] I am satisfied that there is no reasonable possibility that another Court would come to another finding on the merits of the second Rule 7 challenge. I have elaborately dealt with the merits from paragraph 47 of my judgment.
- [58] In summary I wish to reiterate that:
- [i] the Applicants cannot dispute that the true party who they attempt to bring before the Court is the Winter Cereal Trust.
 - [ii] That Clause 5.1 read with Clause 5.2 of the Trust Deed provide that there shall at no stage be less than 12 trustees and that at present the number of trustees is below the sub-minimum and that the Trust suffers from an incapacity that preclude action on its behalf.
 - [iii] In accordance with the established Law of Trusts and in particular the judgment of Cameron JA in the matter of the **Land & Agricultural Bank of South Africa v Parker & Others**⁴⁰ case the Trust suffers from incapacity to act.
 - [iv] That it is a fundamental rule of Trust Law that in the absence of a contrary provision in a Trust Deed, the trustees of a Trust must act jointly if the Trust is

⁴⁰ 2005 (2) SA 77 SCA at par. 11

to be bound by their acts. That there is no provision in the present Trust Deed to contradict this established legal position.

[v] It is common cause that in the present matters the applicants could not at any stage form a quorum of trustees to make any resolutions on behalf of the Trust and it is further common cause that the decisions taken by the applicants were not taken at properly constituted trust meetings.

[v] In the present matter on every possible interpretation there is no room to conclude that the Applicants could validly act on behalf of the Trust, either to appoint their attorneys or to represent the Trust in the launching of the Application.

[vi] That there is no merit in any of the defences raised by the Applicants in opposition to the Rule 7 challenge.

[59] In the premises I find that there is no reasonable prospect of success on appeal on these grounds.

FIFTH GROUND:

[60] If the Applicants never had the required authority to act on behalf of the Trust, it could not bind the Trust and it could also not during this period deal with the Trust's assets. If during this period they dealt with the trust's assets without the required authority it follows that the other Trustees are entitled to be advised of what actions were taken that could be prejudicial to the other Trustees of the Trust as joint owners and custodians of the assets of the Trust.

[61] As I have duly dealt with in my judgement, joint trustees must act jointly. In the ***Land and Agricultural Bank of South Africa v Parker and Others***⁴¹ the SCA stated as follows:

⁴¹ 2005 (2) SA 77 (SCA) par 15

"[15] For the Parkers to purport to bind the trust estate after the son's appointment, without (according to his evidence) consulting him, constituted a further usurpation and a further breach of their obligations under the trust deed. It is a fundamental rule of trust law, which this Court recently restated in Nieuwoudt and Another NNO v Vrystaat Mielies (Edms) Bpk, that in the absence of contrary provision in the trust deed the trustees must act jointly if the trust estate is to be bound by their acts. The rule derives from the nature of the trustees' joint ownership of the trust property. Since co-owners must act jointly, trustees must also act jointly. Professor Tony Honoré's authoritative historical exposition has shown that the joint action requirement was already being enforced as early as 1848. It has thus formed the basis of trust law in this country for well over a century and half."

[62] I am also satisfied that there is no contradiction to any other provision in my order made as alleged.

[63] In the premises I find that there is no reasonable prospect of success on appeal on this ground.

SIXTH GROUND

[64] I have dealt with the Applicants' reference to Rule 28(1) in the Notice of substitution from paragraph 170 of my judgement.

[65] As I have indicated, save for the reference to Rule 28 in the Notice of substitution⁴², none of the prescribed procedures as provided in Rule 28 was followed as mentioned in my judgement.

⁴² on *CaseLines*, p. – 038 – 18

- [66] Further, either there must have been an objection to the amendment by the Respondents, in which event the Applicants should have launched an application to amend, or there was no objection and the amendment had to be affected by the delivery of the amended pages. None of these steps were taken by the Applicants at any stage.
- [67] As indicated in my judgement, Rule 28 that relates to amendment to pleadings and documents is an independent procedure having its own terms and provisions, which clearly were not employed in the present matter and not by the notice to substitute.
- [68] It is thus evident that the Applicants referral to the provisions of Rule 28(1) in their Notice of substitution bears no relevance at all.
- [69] In the premises I find that there is no reasonable prospect of success on appeal on this ground.

SEVENTH GROUND:

- [70] This ground is extremely vague and has no reference to which sections of the Trust Property Control Act or provisions of the Constitution there was no compliance with. Notwithstanding, as discussed in the previous grounds of appeal raised, I am satisfied that my findings accord with the prevailing law on trusts and are not in conflict with any provision of the Constitution.
- [71] In the premises I find that there is no reasonable prospect of success on appeal on this ground.

EIGHTH GROUND:

- [72] If a trustee litigates without having legal standing to do so, he is not before the court as trustee.⁴³ In the premises, when he is successful with the litigation he cannot claim to be paid costs from the Trust⁴⁴ and hence when he loses cannot claim that costs be

⁴³ Honore's South Africa Law of Trusts, Fourth Edition by Honore and Cameron, page 351

⁴⁴ *Blou v Lampert & Chipkin NNO 1973(1) SA 1 A* at page 14

awarded against the trust fund. This is exactly the position of the Applicants in the present matter.

- [73] Although the Applicants attempted to bring the Trust before the court it is not before the court and never was.
- [74] By common law the court has a very wide discretion in regard to the question whether it should order a trustee who loses his case to pay the costs *de bonis propriis*.⁴⁵
- [75] In the present matter it is evident that the Applicants attempted to act on behalf of a trust that did not have the capacity to act, nor were they able to act as trustees jointly. Notwithstanding that their attorney's authority was already challenged on this basis from the 3rd December 2022, when the application was initially launched, they persisted with their unauthorised actions.
- [76] There is no reason why the Trust's funds should be mulcted with a cost order for the unlawful and unauthorised actions of the Applicants.
- [78] Where more than one trustee has costs awarded against him the award usually specifies joint and several liability.⁴⁶
- [79] In the premises I find that there is no reasonable prospect of success on appeal on this ground.

REMAINING GROUNDS:

- [80] The remaining grounds are not grounds of appeal in substance but rather legal contentions. I need not deal with it save to state that I am not satisfied that anything mention therein constitutes grounds that will provide a reasonable prospect of success on appeal.
- [81] After having considered the application of the Applicants I am satisfied that there is no reasonable prospect of success on appeal on any of the grounds raised. I have also considered whether there is any other compelling reason to entertain the appeal. I could not find any important question of law or a discreet issue of public importance

⁴⁵ *Blou v Lampert & Chipkin NNO 1972(2) SA 501 T at 502 confirmed in 1973 (1)SA 1 A*

⁴⁶ *Honore's South Africa Law of Trusts, Fourth Edition by Honore and Cameron, page 355*

or any other matter that would justify that it be in the interests of Justice to grant leave to appeal to the Applicants.

[82] In dismissing the Applicants application for leave to appeal the sale reasoning in respect of costs apply as stated in paragraphs 72 to 79 above.

In the premises I make the following order:

1. Prayer 1.1 of the order of Court dated 19th March 2024 is amended to read "1.1 Leave is granted for the late filing of the second notice in terms of Rule 7 dated 8th August 2022."
2. The Application for Leave to Appeal is dismissed.
3. The First to Sixth Applicants are ordered to pay the costs, *de bonis propriis*, jointly and severally the one to pay the other to absolved.



P.J. VERMEULEN

Acting Judge of the Court, Gauteng Division
Pretoria

Appearances:

Counsel appearing on behalf of First to Seventh Applicants

Adv G Shakoane SC

Cell: 0834739402

Adv. M Mabena

Cell: 0828767547

Attorneys for the First to the Sixth Applicants:

Bokwa Inc.

Tel no. (012) 4242900

Counsel appearing on behalf of the Second to Sixth Respondents: Adv T Strydom SC

Cell: 0834547771

Attorneys acting on behalf of the Second to Sixth Respondents:

Prinsloo Bekker Attorneys

Tel no: (012) 3483906/7

Ref: SS27/30A Bekker

Date of Hearing: 23rd July 2024

Judgment delivered: 6th September 2024