

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 095370/23

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

27/01/2025

Date

Signature

In the matter between:

THE TRUSTEES FOR THE TIME BEING OF THE

MLANDULI RESIDENCE TRUST, IT409/2013

Applicant

AND

OTTILE ANTON NOORDMAN N.O.

First Respondent

DONOVAN THEODORE MAJIEDT N.O

Second Respondent

JUDGMENT

**THIS JUDGEMENT HAS BEEN HANDED DOWN REMOTELY/ELECTRONICALLY
AND SHALL BE CIRCULATED TO THE PARTIES BY WAY OF E- MAIL/
UPLOADING ON CASELINES AND/OR COURT ONLINE. ITS DATE OF HAND
DOWN SHALL BE DEEMED TO BE JANUARY 27, 2025**

Introduction

1. This matter appeared before me on January 14, 2025 as an application for Leave to Appeal against judgment dismissing application for postponement.
2. On November 26, 2024, Applicant applied for postponement of the hearing, and this was opposed by the Respondents. I then issued an order *ex tempore* dismissing the postponement application and granted the order in terms of draft order marked "X" as prayed for in the notice of motion. Reasons for the decision were delivered on December 18, 2024.
3. Applicant's grounds of appeal are as follows:
 - 3.1 The court erred in failing to take notice of the applicant's notice of intention to oppose delivered in the application for eviction, which notice was duly delivered on 12 January 2024. This is in circumstances where:
 - 3.1.1 Counsel for the applicant appeared in the unopposed motion court to address the court and inform that there is a pending application

to compel discovery in terms of Rule 35(7) of the Uniform Rules of Court ("the Rules").

3.1.2 The learned judge erred in not having regard to the factual submission made and erred in granting the order stating that there is no application for postponement before the court by the applicant.

3.2 In concluding that there is no application for postponement by the applicant before the court, the court misdirected itself as there is no need for such application in the High Court. It, however, appears that the court mistakenly had regard to Rule 31 of the Magistrate's Court Rules.

3.3 The court erred in failing to have regard to the applicant's notice in terms of Rule 35(14), followed by an application to compel discovery in terms of Rule 35(7). This is in circumstances where:

3.3.1 The applicant duly delivered a notice in terms of Rule 35(14) on 26 January 2024.

3.3.2 Failing to make discovery, the respondent delivered a notice in terms of Rule 30, on 4 April 2024, alleging that the provisions of Rule 35(14) do not apply to application proceedings.

3.4 On 2 September 2024, the applicant duly delivered its application to compel discovery in terms of Rule 35(7) of the Rules.

3.5 Without having regard to the applicant's application to compel discovery and with no notice of intention to oppose, the respondent simply ignored the steps taken in these proceedings by the applicant and enrolled the main application for hearing in the unopposed court.

- 3.6 It is trite that the time for the delivery of an answering affidavit is suspended if a notice in terms of Rule 35(14) is delivered, followed by an application to compel compliance with the notice.
- 3.7 The Court to have regard to the notice in terms of Rule 35(14), followed by an application to compel discovery in terms of the notice, and in doing so, encroached on the applicant's right to a fair hearing. The applicant was further prejudiced in that the court, by granting the order on an unopposed basis, took away the applicant's right to deliver an answering affidavit.
- 3.8 The applicant is prejudiced in that the applicant is prevented from launching a counter application. The applicant's counter application is of paramount importance insofar as the Court could have cancelled the sale agreement as the applicant expended no less than R4 000 000.00 in respect of the property in question.
- 3.9 The court erred in finding that it could proceed to grant an order on an unopposed basis, having regard that the respondent delivered a notice in terms of Rule 30 of the Rules, alleging that the applicant took an irregular step. This notice in itself should have informed the court that there are pending interlocutory steps taken by the respondent which have not been brought to finality.
- 3.10 It is trite that the respondent's proper course where any proceeding in a cause is irregular is not to proceed as if there had been no such proceeding at all but to apply to the court under the subrule for an order setting aside the irregularity.

Legal Principles on Leave to Appeal

4. The Supreme Court of Appeal in *Goosen and Others v Mont Chevaux Trust*¹ stated that:

¹ *Goosen and Others v Mont Chevaux Trust* (148/2015) [2017] ZASCA 89 (6 June 2017).

*"The appeal to this court, however, is subject to all the limitations applicable to appeals. The appeal is, for instance, limited to the grounds that were raised in the notice of appeal, must be decided only on the appeal record..."*²

5. Regarding Leave to Appeal, section 17(1) of the Superior Courts Act No. 10 of 2013 provides that:

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

- (a) (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 judgments on the matter under consideration;*
- (b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and*
- (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.*

... .

6. In *Acting National Director of Public Prosecutions and Others v Democratic Alliance and Others*³ the court followed the Land Claims Court judgment in *Mont Chevaux Trust (IT2012/28) v Tina Goosen & 18 Others*⁴ and stated that:

"The Superior Courts Act has raised the bar for granting leave to leave in The Mont Chevaux Trust (IT2012/28) v Tina Goosen & 18 Others, Bertelsmann J held as follows:

² See note 1 supra at para 17.

³ *Acting National Director of Public Prosecutions and Others v Democratic Alliance and Others* (19577/09) [2016] ZAGPPHC 489 (24 June 2016).

⁴ *The Mont Chevaux Trust (IT 2012/28) v Tina Goosen & 18 Others* (LCC14R/2014).

*‘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 & 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 against’...’.*⁵

7. The court in *Acting National Director of Public Prosecutions and Others v Democratic Alliance and Others*⁶ further stated that:

*“When the Court deals with an application for leave to appeal, leave may only be given if we are of the opinion that the appeal would have reasonable prospects of success or if there are some other compelling reasons”.*⁷

8. In *Cook v Morrison*⁸ the Supreme Court of Appeal stated that:

*“The existence of reasonable prospects of success is a necessary but insufficient precondition for the granting of special leave. Something more, by way of special circumstances, is needed. These may include that the appeal raises a substantial point of law; or that the prospects of success are so strong that a refusal of leave would result in a manifest denial of justice; or that the matter is of very great importance to the parties or to the public. This is not a closed list”.*⁹

9. In *MEC for Health, Eastern Cape v Mkhitha and Others*¹⁰, the Supreme Court of Appeal followed the decision of *S v Smith*¹¹ and stated that:

⁵ Also see note 4 supra at para 6.

⁶ See note 3 supra.

⁷ See note 3 supra at para 29.

⁸ *Cook v Morrison* 2019 (5) SA 51 SCA.

⁹ See note 8 supra at para 8.

¹⁰ *MEC for Health, Eastern Cape v Mkhitha and Others*.

¹¹ *S v Smith* 2012 (1) SACR 567 (SCA).

“Once again it is necessary to say that leave to appeal, especially to this court, must not be granted unless there is a reasonable prospect of success. Section 17(1)(a) of the Superior Courts Act 10 of 2013 makes it clear 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; or there is some other compelling reason why it should be heard.

An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal”.¹²

10. Also, in *Ramakatsa and Others v African National Congress and Another*¹³ the Supreme Court of Appeal stated that:

*“Turning the focus to the relevant provisions of the Superior Courts Act..., leave to appeal may only be granted where the judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there are compelling reasons which exist why the appeal should be heard such as the interests of justice. This court in *Caratco*¹⁴, concerning the provisions of s 17(1)(a)(ii) of the SCA Act pointed out that 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 reason would of course include an important question of law or a discreet issue of public importance that will have an effect on future disputes. However, this court correctly added that ‘but here too the merits remain vitally important and are often decisive’ ...*

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

¹² See note 10 supra at paras 16-17.

¹³ *Ramakatsa and Others v African National Congress and Another* (Case No. 724/2019) [2021] ZASCA 31 (31 March 2021) at para 10.

¹⁴ See *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* [2020] 2020 (5) SA 35 (SCA).

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".¹⁵

11. I align with how De Beer AJ summed up the test for prospects of success in *Modingwana v Body Corporate Amber Hill*¹⁶ as follows:

"Considering the statutory and regulatory matrix, three questions for consideration arise in the application for leave to appeal. These questions are not distinct but interrelated. The first question is whether the applicant filed a proper notice of application for leave to appeal which concisely and succinctly set out the grounds upon which leave to appeal is sought. The second question is whether the appeal would have a reasonable prospect of success or whether there are compelling reasons that exist why the appeal should be heard such as the interests of justice. The third question is whether the application for leave to appeal sets out expressly why the default position of an appeal to a full court of the division should not prevail, as well as the questions of law or fact or other considerations involved that dictate that the matter should be decided by the SCA".¹⁷

¹⁵ See note 14 supra.

¹⁶ *Modingwana v Body Corporate Amber Hill (Leave to Appeal)* (23514/202) [2024] ZAGPPHC (11 September 2024).

¹⁷ See note 16 supra at para 8.

Submissions

12. Applicant argued that the court erroneously did not have due regard to the applicant's Rule 35(14) Notice. The Court merely had regard to paragraphs 1 to 3 of the Notice and omitted to have regard to paragraph 4 thereof.
13. During proceedings, the Court was directed to the Notice in terms of Rule 35(14) in its entirety. The Court considered the entire Notice in terms of Rule 35(14) during the proceedings. The issue to be determined was whether Rule 35(14) Notice together with application to compel suspended timelines for filing answering affidavit.
14. I have made a finding in the main judgment that Rule 35(14) Notice does not suspend timelines for filing of the answering affidavit. This finding was made after having considered the entire Rule 35 (14) Notice as well as the interlocutory application to compel. This was supported by authorities referred to in the main judgment.
15. Applicant further argued that the Court should have had regard to the fact that once an irregularity was raised by Respondent in terms of Rule 30, the Applicant was prohibited in terms of the Rules to take any further step as delivery of an answering affidavit would have constituted a further irregularity. Respondent argued that in the absence of a withdrawal of Rule 30 notice, it stands notwithstanding a subsequent reply by the Respondent to the Rule 35(14) notice.
16. In the main judgment I indicated that after Rule 30 notice, Respondent filed a reply to Rule 35(14) notice.¹⁸ I do not agree with Applicant's submission, whilst Rule 30 Notice has not been withdrawn, it was overtaken by events.
17. Applicant further argued that the authorities relied on in the main judgment are distinguishable from Rule 35(12) and that the notice to compel compliance with Rule 35(14) suspended the timelines for filing answering affidavit. When invited

¹⁸ See para 9 of the main judgment.

by the Court to refer to caselaw that support this argument, Applicant could not refer the Court to any caselaw.

18. The Applicant made an election to file a Notice in terms of Rule 35(14) and I do not agree with a submission that provisions relating to Rule 35(12) automatically applied when Applicant filed a notice to compel. I made a finding in the main judgment that based on authorities referred therein, Applicant's Notice in terms of Rule 35(14) did not suspend the timelines for filing an answering affidavit. In my view the argument that the application to compel compliance with Rule 35(14) is not sustained.
19. Applicant further argued that Respondent failed to comply with the provisions of section 21 and 22 of the Alienation of Land Act No.68 of 1981.¹⁹ Applicant argued that sections 21 and 22 of the Alienation of Land Act deal with imposed statutory requirements when an immovable property has been sold in instalments and the seller of the property is declared insolvent.
20. Sections 21 and 22 of the Alienation of Land Act provide that:

"21 (1) ...

(2) When the owner of land sold under a contract becomes an insolvent, or a judgment creditor of that owner attaches such land by virtue of a writ in execution –

(a) (i) the owner shall, within 14 days of the appointment of a trustee or liquidator or the attachment, inform the trustee or liquidator or judgment creditor, as the case may be, of the name and address of any person of whose name and address he was notified in terms of the provisions of subsection (1); and

(ii) a mortgagee shall, within ten days after he receives notice of the insolvency or attachment, inform the trustee, executor, liquidator or judgment creditor, as the case may be, of the

¹⁹ Alienation of Land Act No.68 of 1981.

name and address of any purchaser who gave notice to him that he had purchased the land in terms of a contract; and

- (b) the trustee, executor, liquidator or judgment creditor of the owner shall, if that land is registrable, as soon as may be practicable notify every person who he has reason to believe purchased the land in terms of a contract or is an intermediary in relation to the contract, of his right, subject to the provisions of section 22 (3), to take transfer of the land concerned.*
- (3) The notification contemplated in subsection (2) (b) shall be effected by notice in writing handed to the person concerned or sent to him by registered post.*
- (4) Any trustee, executor, liquidator or judgment creditor contemplated in subsection (2) (b) –*
 - (a) Who fails without fault on his part to hand or send a notice referred to in subsection (3) to a purchaser or an intermediary in accordance with that subsection, shall not merely by reason of such failure incur any liability towards the purchaser or intermediary concerned; and*
 - (b) Shall, unless the contrary is proved, be deemed so to have failed through his fault if –*
 - (i) due notice in accordance with the provisions of subsection (2) (a) was given to him in respect of the purchaser concerned; or*
 - (ii) he did not take all reasonable steps appropriate to the circumstances of the case to obtain the name and address of the purchaser or intermediary concerned, unless he is a mortgagee to whom notice was required to be given in*

terms of section 9(1), and no such was given to him by the purchaser concerned.

(5) Any owner or mortgagee who willfully or negligently fails to comply with the provisions of subsection (2)(a), shall be guilty of an offence and upon conviction liable to a fine not exceeding R1000 or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

22. (1) When the owner of land alienated under a contract becomes an insolvent, or a judgment creditor of the owner attaches such land by virtue of a writ in execution, that land shall be transferred to any person who purchased that land in terms of a contract or who is an intermediary in relation to that contract and who, in accordance with the provisions of subsection (2), makes arrangements for the payment of all costs in connection with the transfer and of an amount equal to –

(a) all amounts owing under the deed of alienation in terms of which that owner alienated the land; or

(b) the sum of –

(i) the costs of attachment or, in the case of an insolvent, such sequestration and administration costs contemplated in section 89(1) of the Insolvency Act, 1936 (Act No. 24 of 1936), as relate to the land;

(ii) any amount payable in respect of any endowment, improvement or any other matter in terms of any law in relation to the land; and

(iii) if the land is encumbered by a mortgage bond and, in the case of an insolvent, subject to the provisions of the insolvency Act, 1936, the amounts required by the mortgagee in accordance with the provisions of section 9 (3) of this Act, including interest to date of transfer,

whichever of the two amounts contemplated in paragraph (a) or (b) may be the larger, and also makes arrangements for the signing of all documents required in connection with transfer.

(2) (a) The arrangements contemplated in subsection (1), shall be made by the person concerned –

(i) if the land was attached, before the land is sold in execution, to the satisfaction of the deputy sheriff or messenger of the court concerned, as the case may be; and

(ii) if the owner of the land is insolvent and, subject to the provisions of paragraph (b), within such period as his trustee, executor or liquidator, as the case may be, may allow, which period shall not be less than 30 days, to the satisfaction of such trustee, executor or liquidator, as the case may be.

...

(7) If no satisfactory arrangements are made in terms of subsection (i), the land and its proceeds shall be dealt with in accordance with the rules of law relating to sales in execution or insolvency, as the case may be".²⁰

21. On March 31, 2023 the sheriff of this Court served a letter of demand from Respondents issued in terms of section 19(1) & 19(2) of the Alienation of Land Act.²¹ In the foregoing letter of demand, Respondents confirmed that the sellers of the property (Mr Matle Richard Tsokodibane and Mrs Mosisi Julia Tsokodibane) have been finally sequestrated in terms of the court order granted by the High Court of South Africa, Free State Division. A demand was made for Applicant to pay the outstanding amounts as indicated in paragraph 12 of the letter of demand. The appeal court may have to consider whether in the absence notice in terms of sections 21 and 22 of the Alienation of Land Act and non-recordal of the agreement, section 19 notice suffices for termination of the sale agreement. This issue was not canvassed during postponement application.

²⁰ Sections 21 and 22 of Alienation of Land Act No.68 of 1981.

²¹ Caselines 04-57 to 04-73.

22. Applicant relied on the decision of *Sarrahwitz v Maritz NO*²² and argued that based on this decision, the Court should have regard to the exceptional circumstances of the main application and the detrimental consequences to the Applicant if leave to appeal is not granted. Applicants argued that there are strenuous facts that the Respondents did not fully ventilate to the Court. Applicant further argued that in terms of the protection afforded in terms of sections 21 and 22 of the Alienation of Land Act it could not have demanded transfer of the property.

23. In dealing with the objective of the matter the Constitutional Court stated in *Sarrahwitz v Maritz NO* that:

*“... And this matter affects the rights of vulnerable purchasers who are exposed to the risk of losing their residential properties and the extremely limited resources poured out to secure them. It is about the need to protect the poor and vulnerable from homelessness. It seeks not to protect the well-resourced purchasers who have access to enough money to pay off a property immediately. Homelessness and vulnerability are therefore central to the determination of the issues in this matter”.*²³

24. The Constitutional Court clearly emphasised significance of protection of right to have access to adequate housing as enshrined in section 26 of the Constitution.²⁴ Particularly protection of the vulnerable and the poor purchasers from being rendered homeless as a result of eviction. The Constitutional Court went further to state that the affected rights include the right to dignity and the right to equality in so far as this relates to differential treatment of vulnerable purchasers of residential property.²⁵

²² *Sarrahwitz v Maritz NO* 2015 (4) SA 491 (CC).

²³ See note 22 supra at para 16.

²⁴ Section 26 of The Constitution of the Republic of South Africa, 1996.

²⁵ See note 22 supra at para 17.

25. Applicant argued that had Respondents complied with provisions of sections 21 and 22 of the Alienation of Land Act they could not have objected to the discovery of the relevant and important documents sought by the Applicant.
26. The issues relating to the provisions of Alienation of Land Act were not raised at the hearing of the matter when application for postponement was made. This was raised during argument in the application for Leave to Appeal. In *Sarrahwitz v Maritz NO* the Constitutional Court stated that:

*"In any event this court has acknowledged that 'the mere fact that a point of law is raised for the first time on appeal is not in itself sufficient reason for refusing to consider it'. To resolve that, a court should be guided by three conditions: the point sought to be raised must be a point of law; it must be covered by the pleadings; and there should be no prejudice to the other party".*²⁶

27. The Constitutional Court in *Sarrahwitz v Maritz NO* followed the decision in *CUSA v TAO YING Metal Industries* where the court stated that:

*"...Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, mero motu, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law. That would infringe the principle of legality".*²⁷

28. Applicant further argued that Respondents failed to comply with the provisions of section 20(1) as the deed of sale between the parties was never recorded with the Registrar of Deeds. This point was again raised for the first time during hearing of the application for Leave to Appeal, it was never raised during postponement application. Applicant argued that this is a point of law, and the Court is entitled to consider points of law on appeal.

²⁶ See note 22 supra at para 30. See also *Barkhuizen v Napier* 2007 (5) SA 323 (CC). See also *CUSA v Tao Ying Metal Industries and Others* 2009 (2) SA 204 (CC)

²⁷ *CUSA v TAO YING Metal Industries* 2009 (2) SA 204 (CC) at para 68.

29. Section 20 of the Alienation of Land Act provides that:

“20 (1) (a) A seller, whether he is the owner of the land concerned or not, shall cause the contract to be recorded by the registrar concerned in the prescribed manner, within three months from the date –

(i) of the contract, if the land is registrable, or

(ii) upon which the land becomes registrable,

provided a prior contract in respect of the land has not been recorded or is not required to be recorded against the title deed in question in terms of this section.

(b) If a contract recorded against the title deed in terms of this section is terminated for whatever reason, such recording shall be cancelled and the next succeeding relevant contract shall be recorded against the title deed in question in terms of this section.

(c) If a period referred to in paragraph (a) has expired without the seller having caused the contract to be recorded in terms of that paragraph, the purchaser may -

(i) within 14 days after such expiry cancel the contract, in which case the parties shall be entitled to the relief provided for in section 28 (1): Provided that nothing contained in this subparagraph shall detract from any additional claim for damages which the purchaser may have; or

(ii) at any time thereafter, if he elects not to cancel the contract under subparagraph (i) of this paragraph, apply to the registrar concerned to record the contract in the prescribed manner.

...”

30. Applicant referred to the decision of *Amardien and Others v Registrar of Deeds and Others*²⁸ and argued that in the absence of registration of the contract, there was no debt due and payable by the Applicant, therefore the Respondents were not entitled to cancel the agreement.

31. The Constitutional Court in *Amardien v Registrar of Deeds* stated that:

²⁸ *Amardien and Others v Registrar of Deeds and Others* 2019 (3) SA 341 CC.

“As the fifth respondent was statutorily barred from accepting payment, applicants could not have been in breach of the agreements at the time of receipt of s 129 NCA notice, as they had not been aware of the recordal of the instalment sale agreements before that date. The fifth respondent should have alerted the purchasers of this fact before issuing the s 129 NCA notices and claiming cancellation of the agreements. In the proper course of action, the fifth respondent should have advised the applicants of the recordal, therefore signalling that the debt would then be due and payable, and given them a reasonable opportunity to pay, before moving to enforce the agreement and subsequently cancel the agreement.

... Having regard to both the plain meaning of s 20 read with s 26 of the ALA and the case law referred to, the effect of the late recordal is clear. The payments under the instalment sale agreements were not due and payable and therefore the applicants were not in arrears as contended by the fifth respondent. For the period that the agreements remained unrecorded, no fault can be imputed to the purchasers for not paying the instalments. It follows that the recordal is not a contractual suspensive condition as contended by the fifth respondent and obligations do not become due retroactively. The interpretation of these sections, in my view, will not have unfair consequences on the seller. It is consistent with the text and fairly balances the rights and responsibilities of the seller and purchaser.

It follows that the s 129 NCA notices were premature and invalid in so far as it was relied upon as a basis for the cancellation of the instalment sale agreements. The effect of this is that the subsequent cancellation of the instalment sale agreements and the cancellation of the recording of these agreements are invalid”.²⁹

32. Respondents argued that Applicant's argument should have been submitted during application for postponement. Respondents further argued that fifty-nine court days elapsed from the day that the matter was set down on the unopposed

²⁹ See note 28 supra at para 46 to 48.

motion roll. There was never application for extension of time to file answering affidavit. Nothing stopped the Applicant from filing answering affidavit, raise the issues argued in the application for Leave to Appeal as points *in limine* in the answering affidavit and non-compliance with statutory requirements. Applicants would have an opportunity to supplement their answering affidavit should the documents requested in terms of Rule 35(14) be provided. The issues relating to non-compliance with statutory requirements were not raised during argument for postponement. Respondents did not have opportunity to reply to the issues which are raised for the first time during hearing of application for Leave to Appeal.

33. Regarding section 21 of the Alienation of Land Act, Respondents argued that the land was not registrable when the seller was declared insolvent because there was still outstanding amount of the purchase price. Applicant had ample time to file a substantive application to stay or suspend the proceedings. Respondents argued that it was never the intention of the Legislature that a purchaser in default should be entitled to transfer of the property. Respondents further argued that Applicant was advised on March 30, 2023, that the seller had been declared insolvent, and that the property is the alter ego of the insolvent estate.
34. Respondents further argued that the fact that Respondents have been declared insolvent does not leave Applicant without remedy as it is entitled to make a claim in the insolvent estate as a preferent creditor in respect of the instalments already paid. There is nothing in the Leave to Appeal indicating that the decision refusing postponement was not judicially made.
35. Respondents argued that there are no special circumstances advanced by Applicant as to why the Leave to Appeal should be granted.

Conclusion

36. I have set out the legal principles applicable to Leave to Appeal, there must be prospects of success and compelling reasons for the appeal to be heard.

37. In the main judgment I set out applicable law on whether Rule 35(14) notice suspends the timelines for filing answering affidavit. I need not repeat same in this judgment.
38. In trying to persuade the Court, Applicant pointed out that the authorities referred to in the main judgment are limited to Rule 35(14) and argued that in instances where application to compel has been delivered, the timelines for filing answering affidavit are suspended. This argument was not supported by case law other than reference to Rule 35 (12) and Rule 6(11). This argument seems to ignore the decisions of *Caxton CTP Publishers and Printers Limited v Novus Holdings Limited*³⁰ and *Distell Limited v Chris Naidoo and Others*³¹.
39. I am not persuaded that Applicant has prospects of success in so far as the main judgment relate to suspension of time period after filing of Rule 35(14) notice and subsequent application to compel.
40. However, during the hearing of application for Leave to Appeal, Applicant raised the issue of non-compliance with Alienation of Land Act. I have indicated that this issue was not raised during application for postponement. The Court did not deal with this issue when delivering the main judgment.
41. Applicant argued that the issue of non-compliance with Alienation of Land Act is a point of law which can be considered at appeal hearing. I have referred to the decision of the Constitutional Court in the matter of *Sarrahwitz v Maritz NO*³² which sets out the law when a point of law is raised for the first time during appeal. I find this decision to be compelling and I cannot ignore the legal principles enunciated in that decision.
42. I have already stated that the issues relating to non-compliance with the Alienation of Land Act were raised for the first time during argument of Leave to Appeal. These issues were never raised during application for postponement.

³⁰ *Caxton CTP Publishers and Printers Limited v Novus Holdings Limited v Novus Holdings Limited* (2019/2021) [2022] ZASCA 24; [2022] 2 All SA 299 (SCA) (9 March 2022).

³¹ *Distell Limited v Chris Naidoo and Others* [2019] ZAKZPHC 80.

³² See note 27 supra.

43. What is to be determined is whether the argument relating to non-compliance with the Alienation of Land Act is a point of law that should be considered in the appeal to ensure fair administration of justice. As the Constitutional Court pointed out, failure by the Court to ensure that the point of law is addressed may result in incorrect application of the law which would infringe on the principle of legality.
44. Notwithstanding that the issue relating to non-compliance with Alienation of Land Act was not raised during application for postponement. My view is that this is a point of law which should be considered by the Court.
45. The issue regarding non-compliance with Alienation of Land Act constitute compelling reasons for the appeal to be heard. I am satisfied that the Applicant has met the threshold for the Leave to Appeal to be granted. I am persuaded that another court upon consideration of the issue of non-compliance with Alienation of Land Act may come to a different conclusion.
46. It would be in the interests of justice to afford Applicant an opportunity to argue the issue relating to non-compliance with Alienation of Land Act which was raised during argument for Leave to Appeal.
47. Having considered the arguments from both the Applicant and Respondents as well as authorities, I am persuaded that the application for Leave to Appeal should be successful.

Costs

48. Given the manner in which this matter was handled, particularly the issue relating to non-compliance with Alienation of Land Act which was only raised during argument for Leave to Appeal. I am not persuaded that a costs order should be granted at this stage.

49. In *Gubhelabm (Pty) Ltd v R.A.W. Truck Trading CC* (B3217/2023) [2024] ZAGPPHC 460 (26 April 2024)³³, the court stated that:

"Costs orders, including the assessment of the appropriate Rule 69 scale, remain a matter for the exercise of judicial discretion".³⁴

Order

50. In the result I make the following order:

1. Application for Leave to Appeal is granted to the Full Court of Gauteng Local Division, Johannesburg.
2. Costs of the application for Leave to Appeal to be costs in the Appeal.



M NTANGA
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of Hearing: 14 January 2025

Date of Judgement: 27 January 2025

Appearances:

Applicants' Counsel: Adv Scheepers

Instructed by: Riko De Klerk Attorneys

Respondents' Counsel: Adv Prinsloo

Instructed by: Mills & Groenewald Attorneys

³³ *Gubhelabm (Pty) Ltd v R.A.W. Truck Trading CC* (B3217/2023) [2024] ZAGPPHC 460 (26 April 2024).

³⁴ See note 33 supra at para 27.