

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2023-050639

(1)	REPORTABLE: <i>NO</i>
(2)	OF INTEREST TO OTHER JUDGES: <i>NO</i>
(3)	REVISED:
<i>6/12/2024</i>	
DATE	SIGNATURE

In the matter between:

First Applicant

THULANI MAKHOSI MAJOLA

LESEDI TECHNICAL ENGINEERING (PTY) LTD

Second Applicant

and

INVESTAGE 183 (PTY) LIMITED

First Respondent

SHERIFF, SANDTON NORTH

Second Respondent

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines/Court online and by release to SAFLII. The date and time for hand-down is deemed to be 14h00 on 6 December 2024.

JUDGMENT

TODD, AJ:

- [1] This is an application for leave to appeal against the judgment that I handed down on 13 August 2024. The Applicant in the application for leave to appeal was the First Applicant in the underlying application for rescission.
- [2] The application for leave to appeal was brought out of time. In the affidavit in support of a condonation application the Applicant explains that neither he nor his legal representatives were aware of or had received notification of the judgment prior to a warrant of execution being served on 30 September 2024. The explanation given for this is that the Applicant's attorneys of record were experiencing IT difficulties and were migrating between service providers and as a result experienced disruptions to their email service in consequence of which the email attaching the judgment "*may have been bounced or lost*". Confirmatory affidavits were provided by an IT specialist who oversaw the migration and the Applicant's attorney of record.
- [3] Although the explanation given is not entirely convincing, I accept that the Applicant acted expeditiously once the judgment in fact came to his attention. The explanation is adequate, and the prospects of success warrant me dealing with the application on its merits. The late bringing of the application for leave to appeal is therefore condoned.
- [4] On the merits, Mr Roux, who appeared for the Applicant, submitted that the reasons given by the Applicant for his absence from the underlying proceedings, when default judgment was granted, was a combination of a lack of funds to pay his attorneys of record and a misunderstanding on the Applicant's part about the consequence of not opposing the application for default judgment and focussing instead on his attempt to bring the Second Applicant in the underlying proceedings out of liquidation. These explanations, Mr Roux submitted, take the

matter outside the ambit of the decision of the Constitutional Court in *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture* referred to in paragraph [23] of my judgment dated 13 August 2024.

- [5] Elaborating on this, Mr Roux submitted that a distinction should be drawn between situations where a party (such as Mr Zuma) deliberately elected to be absent and where a party (such as the present Applicant) mistakenly understood his legal position and for that reason, despite having been given notice of proceedings and a sufficient opportunity to participate, elected not to do so under the influence of his misunderstanding of the likely or potential consequences of this.
- [6] I have carefully considered this submission. I do not agree that the distinction which Mr Roux sought to draw can properly be made and I can find no reasonable grounds to treat the present facts differently or to conclude that the matter falls outside the ambit of what is stated in paragraph [61] of the Constitutional Court's decision in *Zuma*.
- [7] As a matter of fact the Applicant's contention that he did not have funds to pay his attorneys to enter a plea is surprising in circumstances in which, on his own explanation, he was nevertheless able to bring and pursue proceedings to set aside the liquidation of the Second Applicant. His attorneys of record remained on record. I do not think a distinction can properly be drawn between an Applicant who in these circumstances, according to him, misunderstood the consequences of not opposing the application for default judgment and Mr Zuma, who either misunderstood or objected to the consequences of not making an appearance when he had been given an opportunity to do so. As a matter of law the absence in both instances is clearly a consequence of an election having been made.
- [8] For that reason it seems to me that the Applicant has little or no prospect of overcoming the first hurdle that faces him, which is to show that his application for rescission fell within the ambit of rule 42(1)(a). In my view he does not have a reasonable prospect of persuading a court of appeal on that point. That conclusion is by itself fatal to the application for leave to appeal.

- [9] Even if that were not so, I do not consider the Applicant to have reasonable prospects of success on the further points in the rescission application either. In this regard Mr Roux submitted that on a proper construction of the underlying lease the only damages remedy available to the First Respondent (the landlord) following a breach by the tenant of its obligations under the lease was a claim for a reasonable cancellation penalty, and that the First Respondent had not been entitled to claim damages calculated on the basis of the rental payable for the outstanding period of the lease. Damages of that kind were available, under the terms of the contract (the lease), Mr Roux submitted, only in circumstances of holding over.
- [10] *Highprop Investments Limited* (referred to in paragraph [32] of my judgment dated 13 August 2024), Mr Roux submitted, in fact involved a claim for damages of this kind, for holding over. That is indeed so, but the Court in *Highprop* nevertheless described in clear terms the approach to be adopted in a claim for contractual damages following a breach of lease as well, with a view to explaining the relationship between such a claim and one for damages for holding over. It did so with reference to well established authority, and in terms that were subsequently approved by the Supreme Court of Appeal in *Monyella Property v IMM*¹ (at paragraphs [16] and [17]). I find no support for a contrary view in the other authorities to which Mr Roux referred me.
- [11] I do not agree that there are reasonable prospects that a court of appeal will conclude that the terms of the lease, specifically its paragraph 27, preclude or exclude a claim for common law damages, or preclude those damages from being calculated by reference to the rentals that would have been payable for the outstanding period of the lease. In this regard I agree with Mr Stockwell, who appeared for the First Respondent, that the First Respondent was entitled to seek default judgment on the basis that it had a liquidated claim for damages in an amount equivalent to the rental payable during the outstanding period of the lease.

¹ 2017 (2) SA 42 (SCA)

[12] For these reasons I am not satisfied that the Applicant in the application for leave to appeal has reasonable prospects of success. As a result the application for leave to appeal must fail.

[13] Regarding costs, the parties agreed that the employment of two counsel was warranted and that the appropriate scale for an order of costs, if one were to be made, was scale C.

[14] In the circumstances I make the following order:

1. The Applicant is granted condonation for the late delivery of the application for leave to appeal.
2. The application for leave to appeal is dismissed with costs, including the costs of two counsel, on the High Court scale C.



C TODD
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

Date of Hearing: 5 December 2024

Date of Judgment: 6 December 2024

APPEARANCES

Counsel for Applicant: B Roux SC
D Combrink

Instructed by: Yakopi Attorneys Inc

Counsel for the First Respondent: R Stockwell SC
S McTurk

Instructed by: Uys Matyeka Schwartz Attorneys