

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO:024968/24

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED: YES/NO
DATE: 18/03/2025
SIGNATURE

In the matter between:

MANDLAKAYISE PRINCE NDAMASE

Applicant

and

FIRST RAND BANK LTD

First Respondent

CITY OF JOHANNESBURG

Second Applicant

METROPOLITAN MUNICIPALITY

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 18 March 2025

JUDGEMENT: APPLICATION FOR LEAVE TO APPEAL

LESUFI AJ

Introduction

- [1] This is an application for leave to appeal against my whole judgement and court order handed on the 12 November 2024(“Judgement”) in terms of Rule 49 of the Uniform Rules read with section 17 of the Superior Act. The notice for leave to appeal was filed with the Registrar of this court on the 12 December 2024.
- [2] The Applicant is Mandlakayise Prince Ndamase; the First Respondent is First National bank and the Second Respondent is the City of Johannesburg Metropolitan Municipality.

Background facts

- [3] The residential property situated at 4[...] A[...] Crescent Kyalami Estate, Kyalami (the property), the property was previously owned by Mr Frank Paul van Der Berg. The Applicant signed a lease agreement with Mr van Der Berg on the 1st of December 2021. The lease agreement was supposed to expire on the 30th of November 2022 however was extended up to 30th of July 2023. Following a court order dated the 23rd of August 2022, and warrant of execution of the property was attached on the 10th of October 2022. The Respondent bought the property from the Sherriff on the 28th of February 2023.
- [4] After the expiration of the lease agreement between the Applicant and the then owner Mr Van Den Berg, there was no written lease agreement between the Applicant and the First Respondent. There were several attempts by the Applicant to purchase the property from the First Respondent. The Applicant made offers to the First Respondent, offers which were rejected or not accepted by the First Respondent. At some stage the First Respondent demanded rental payment from the Applicant, the demand that the Applicant failed to meet.
- [5] Counsel for the First Respondent, in his submissions from the bar, relied heavily on the document marked Annexure FA3 bearing the title “Sale Subject to Existing Rights”. The document relates to the sale agreement between the Sheriff and the Applicant at the auction. That document does not constitute a lease contract

between the Applicant and the First Respondent.

- [6] Clause 10 of the FA3 Annexure referred to above in par [5] above bearing the heading “Confirmation of the Purchaser”, the Sheriff did not indicate whether the property is sold with lease or without any lease agreement. It is not in dispute that the lease agreement between Mr Van Den Berg and the Applicant expired on the 28th of February 2023 and that the Applicant is still occupying the property even though he is not in lawful occupation in terms of a valid contract of lease.

Applicant’s grounds of Appeal

- [7] The Applicant’s grounds for appeal are as follows:

- 7.1. The court erred by ignoring the fact that the property at issue was sold by the sheriff subject to lease agreement binding on the Applicant, an error by conclusion that there was never a lease agreement between the Applicant and the First Respondent.
- 7.2. By concluding that the lease agreement between the Applicant and the previous owner expired on the 28 February 2023 when the property was sold in execution.
- 7.3. The court grossly misdirected itself by stating that the Applicant’s Counsel stated that his reliance on the First Respondent’s demand for rental payment meant or suggested a conclusion of a lease agreement between the parties. On the contrary the Counsel’s argument was that the demand for rental payment was evidence that the Applicant was aware of the subsisting lease agreement with the previous owner which remained binding on the parties.
- 7.4. The court ignored the fact that the First Respondent had a duty to cancel the subsisting lease agreement, especially after non-payment of rental despite demand, before the First Respondent would seek the eviction of the Applicant.

- [8] In submission, Counsel for the Applicant indicated that the foundation of the court judgments is incorrect and flawed as it looked at the current position than the initial one. That the court failed to consider how the Applicant gained access to

the property initially as they had the right to occupy and consent of the previous owner. Secondly the court *a quo* failed to consider that the First Respondent demanded rental money, no letter of termination was sent to notify the Applicant. That the fact that rental money was demanded therefore there was ratification.

First Respondent's opposition to the Application for leave to appeal

- [9] The application for leave to appeal is vehemently and vigorously opposed by the First Respondent. The basis for opposing being that it is clear that there was no misdirection by the court. It is also clear that there was no lease agreement between the Applicant and the First Respondent. The demand for rental payment cannot be interpreted to be a lease agreement. In the absence of a valid lease agreement, there is no binding contract conditions of sale were very clear that the property was sold without lease agreement. The First Respondent contends that the Applicant did not also deal with the grounds for condonation in their papers for application for leave to appeal. Therefore, leave to appeal as well as condonation must be dismissed with costs.

Applicable principles/tests to the adjudication of an application for leave to appeal and analysis of the ground of appeal

- [10] Rule 49 of the Uniform Rules of Court dictates the form and process of an application for leave to appeal and the substantive law pertaining thereto is to be found in section 17 of the Superior Courts Act 10 of 2013. The latter Act raised the threshold for the granting of leave to appeal, so that leave may now only be granted if there is a reasonable prospect that the appeal will succeed. The possibility of another court holding a different view no longer forms part of the test. There must be a sound, rational basis for the conclusion that there are prospects of success on appeal. The interpretation of the Rules and the Law has evolved in case law since 2013. In numerous cases, the view is held that the threshold for the granting of leave to appeal was raised with the inauguration of the 2013 legislation (Superior Courts Act 10 of 2013). The former assessment that authorization for appeal should be granted if "there is a reasonable prospect that another court might come to a different conclusion" is no longer applicable.

- [11] The words in section 17(1) that: "Leave to appeal may only be given..." and

section 17(1)(a)(i) that: “The appeal would have a reasonable prospect of success” are peremptory. “If there is a reasonable prospect of success” is now that: “May only be given if there would be a reasonable prospect of success.” A possibility and discretion were therefore, in the words of the legislation and consciously so, amended to a mandatory obligatory requirement that leave may not be granted if there is no reasonable prospect that the appeal will succeed. It must be a reasonable prospect of success; not that another Court may hold another view.

[12] The Court *a quo* may not allow for one party to be unnecessarily put through the trauma and costs and delay of an appeal. In *Four Wheel Drive v Rattan N.O.*¹ the following was ruled by Schippers JA (Lewis JA, Zondi JA, Molemela JA and Mokgohloa AJA concurring):

“[34] There is a further principle that the court *a quo* seems to have overlooked — leave to appeal should be granted only when there is 'a sound, rational basis for the conclusion that there are prospects of success on appeal'. In the light of its findings that the Plaintiff failed to prove locus standi or the conclusion of the agreement, I do not think that there was a reasonable prospect of an appeal to this court succeeding that there was a compelling reason to hear an appeal. In the result, the parties were put through the inconvenience and expense of an appeal without any merit.”²

Issues for determination

[13] The following are issues for determination before the court:

- 13.1. Whether the Applicant has shown good cause in their application for the condonation of its non-compliance.
- 13.2. Whether this appeal has prospects of success.

Condonation application

[14] It should be noted that the judgement of the Court *a quo* was delivered on the 12 November 2024. Thereafter the Applicant only served notice of appeal to the Registrar on the 12 December 2024. Almost a month after the judgement was delivered.

¹ 2019 (3) SA 451 (SCA),

² *Id* at para 34.

[15] It is trite that where a party fails to comply with a prescribed time limitation, whether statutory or in terms of the rules of the High court, the Court may grant condonation in the interests of justice.

[16] In *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd & Others*³ the Supreme Court of Appeal held that:

"Factors which usually weigh with this court in considering an application for condonation include the degree of non-compliance, the explanation therefor, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice..."

[17] In *PAF v SCF*⁴ the court said that:

"The courts have consistently refrained from attempting to frame any comprehensive definition of what constitutes good cause for purpose of granting of condonation for procedural shortcomings in appeals. Condonation is granted at the discretion of the court, judicially exercised having regard to all the circumstances of the case."⁵

[18] In *Unitrans Fuel and Chemical (Pty) Ltd v Dove-Co Carriers CC*⁶ it was stated that High Courts should in future require that the entire period of the delay be thoroughly explained, regardless of the length of the delay. In this regard, the court observed:

"Firstly; it is often and undesirably so, in our Courts that the length of the delay in condonation applications, determines how detailed the explanation is.

To illustrate: if a delay of a few days has to be explained, then the failure to deal with a day or two may well prove fatal to the application. Likewise, if a delay of some 3 weeks has to be explained, then a failure to deal with 3-4 days, may

³ [2013] 2 All SA 251 (SCA) at para 11.

⁴ 2022 (6) SA 162 (SCA), also see *United Plant Hire (Pty) Ltd v Hills* 1976 (1) SA 717 (A) at 720E-G and *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC) at 477A-B.

⁵ *Id* at para 21.

⁶ 2010 (5) SA 340 (GSJ).

lead to the failure of the application.

In the case of much longer delays, such as the case in *casu*, (of some 3 years), applicants somehow, (but too often), regard the failure to explain 3-4 days as negligible. In fact, much longer, unexplained periods seem to pale into insignificance, simply due to the length of the total delay, seemingly under the impression that a few days or even weeks, here and there will not "*break the camel's back*".

This is unacceptable. The test does not change due to the length of the delay and the duty to fully explain the entire period of the delay, remains the same, quite irrespective of the period of the delay."⁷

Analysis

- [19] The Applicant's argument is that there was a valid lease agreement between the Applicant and the First Respondent. That the Applicant initially had the right to occupy and there was a ratification by the First Respondent. I have no intention to rehash my judgement save to comment as below.
- [20] The question to be answered is whether there was a valid lease agreement between the Applicant and the First Respondent and whether the Applicant would be entitled to occupy the house owned by the First Respondent in the absence of any valid lease agreement, whether the First Respondent would be entitled to seek a relief from this court if a tenant who has a valid contract of lease is in breach of that valid contract. If the court is precluded from issuing an eviction order if the lawful owner of the property that is allegedly occupied by the Applicant in terms of a valid contract is not receiving payment in terms of the contract or the defaulting party.
- [21] Evictions are a consequence of a breach of contract. It was never argued that the Applicant has fully complied with the terms and conditions of the alleged contract of lease. I cannot see why I should find that there are prospect of success in the circumstances of this case.

⁷ *Id* at para 14-17.

[22] The issue of rectification raised by the Applicant's Counsel does not even find application in this matter. The law is very clear that a party who applies for rectification should, as a rule, state the following in the declaration⁸ (a) if the party is the plaintiff

- 22.1. that the contract was entered into by the parties;
- 22.2. that the contract, because of a common error in good faith,⁹ does not reflect the true intention of the parties
- 22.3. what the real intention was¹⁰
- 22.4. that the plaintiff requests rectification of the contract according to (3) above
- 22.5. what relief the plaintiff is entitled to in accordance with the rectified contract; (b) if the party is the defendant
- 22.6. that the defendant admits that he or she entered into the contract ;
- 22.7. that the contract because of a common error in good faith, does not reflect the true intention of the parties
- 22.8. what the real intention was
- 22.9 that the defendant requests rectification of the contract in accordance with (3) above¹¹ and
- 22.10 that the duly rectified contract does not entitle the plaintiff to the relief sought and that the plaintiff 's claim must therefore be refused.

[23] Clearly there is no evidence suggesting that there was no compliance with the law regarding rectification process. Therefore, this submission cannot stand.

Prospects of success

[24] I have therefore reached the conclusion that the delay is not satisfactorily

⁸ *Strydom v Coach Motors (Edms) Bpk* 1975 1 All SA 599 (T); 1975 4 SA 838 (T) 840. It is not necessary to plead and prove these allegations in every case. In *Levin v Zoutendijk* 1979 3 SA 1145 (W) 1147–1148, the court pointed out held that the *Strydom* judgment merely sets out the conventional way of pleading rectification and does not purport to lay down any substantive principles in this regard.

⁹ *Offit Enterprises (Pty) Ltd v Knysna Development Co (Pty) Ltd* 1987 2 All SA 222 (C); 1987 4 SA 24 (C) 26–27. A common error is not always essential: rectification may be granted for a mistake in transcription which the other party knew about or deliberately caused

¹⁰ *Propfokus 49 (Pty) Ltd v Wenhandel 4 (Pty) Ltd* supra 21.

¹¹ The defendant need not go to the length of counterclaiming for an order of rectification. See eg *Van Aswegen v Fourie* 1964 3 All SA 20 (O); 1964 3 SA 94 (O) 101; *Gralio (Pty) Ltd v DE Claassen (Pty) Ltd* 1980 1 All SA 423 (A); 1980 1 SA 816 (A) 824; *Boundary Financing Ltd v Protea Property Holdings (Pty) Ltd* supra par 13. Nor need the defendant identify all the clauses in the contract which may be affected by the insertion of the new terms: *Standard Bank of SA Ltd v Cohen (2)* supra 862; *First Rand Bank of Southern Africa Ltd v Pretorius* 2002 1 All SA 275 (C); 2002 3 SA 489 (C) 498.

explained. Despite, this is not the only factor to be considered in order to determine whether or not condonation application should be granted. The prospects of success on appeal should also be considered. It is trite that good prospects of success compensate for a poor explanation for the delay in filing and prosecuting the appeal.

[25] My view is that the Applicant's intention is to frustrate the First Respondent and by this I mean his intention is to delay the process of finalising the matter.

[26] In conclusion, it is my considered view that the cumulative effect of lack of diligent on the part of Applicant, the inadequacy of the explanation for the delay and lack of prospects of success in the appeal mean that granting condonation would not serve the interests of justice. For these reasons, application for condonation stands to fail.

Costs

[27] It has frequently been emphasised that in awarding costs, the court has a discretion to be exercised judicially upon a consideration of the facts in each case, and that in essence the decision is a matter of fairness to both sides.¹² In giving the court a discretion, the law contemplate that it should take into consideration the circumstances of each case, carefully weighing the issues in the case, the conduct of the parties and any other circumstance which may have a bearing on the issue of costs and then make such order as to costs as would be fair and just between the parties.

[28] I therefore issue the following order:

- .28.1. Application for condonation is dismissed
- 28.2. Application for leave to appeal is dismissed
- 28 .3. Applicant to pay costs on scale C

¹² *Mashele v BMW Financial Services (Pty) Ltd* 2021 (2) SA 519 (GP) at para 39.

B LESUFI
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances

For the Applicant

Adv. Sepheka

Instructed by

Mahlakoane Attorneys

For the First Respondent

Adv. Peterson

Instructed by

Glover Kannierppan Attorney

Date of Hearing

11 March 2025

Date of Judgment

18 March 2025