

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1)	REPORTABLE: No
(2)	OF INTEREST TO OTHER JUDGES: No
_____	_____
DATE	SIGNATURE

Case No: 2022-034996

In the matter between:

ENGEN PETROLEUM LIMITED

Applicant

and

JAI HIND EMCC t/a
EMMARENTIA CONVENIENCE CENTRE

First Respondent

DUKHI, AVISHKAR HARILALL

Second Respondent

JUDGMENT

This judgment is deemed to be handed down upon uploading by the Registrar to the electronic court files.

Gilbert AJ:

1. The second respondent applies for leave to appeal to the full court of this Division against the judgment and order that I handed down on 25 October 2024.
2. The application for leave to appeal was launched on 19 March 2025, which is outside the period provided for in Uniform Rule 49(1)(b). Alive to this, the second respondent by way of a separate application applied for condonation for the late filing of his application for leave to appeal. On 25 April 2025, the applicant delivered an answering affidavit opposing the application for condonation.
3. In the meanwhile, on 23 April 2025, the applicant launched an application in terms of section 18(3) of the Superior Courts Act, 2013 seeking *inter alia* leave to execute on my decision notwithstanding the present application for leave to appeal and any subsequent applications for leave to appeal and/or appeals initiated by the second respondent. On 5 May 2025, the second respondent filed a notice in terms of Rule 30 contending for an irregularity in that the applicant's notice of motion in the section 18(3) application did not stipulate a period in which he was to deliver an answering affidavit.
4. At the request of the parties through the Office of the Judge President, dates were agreed for the hearing of the application for leave to appeal.
5. On 19 May 2025, the day before the hearing of the application for leave to appeal, the second respondent launched an application for a postponement of both his application for leave to appeal and the applicant's application in terms of section 18(3), with a tender of costs.

6. I afforded the parties' counsel an opportunity to address me on the application for postponement and whether it should be granted. I refused the application for a postponement of the application for leave to appeal with costs, including the costs of counsel on scale C and gave my *ex tempore* reasons.
7. In refusing the postponement, I rejected the second respondent's central proposition as advanced both in his supporting affidavit and by his counsel that because the application for leave to appeal and the section 18(3) application are to be heard simultaneously, it follows that both must be postponed as the section 18(3) application was not ripe for hearing. That the section 18(3) application was not be ripe for hearing did not necessarily mean the application for leave to appeal cannot proceed.
8. The second respondent's counsel also advanced from the bar that the second respondent preferred that his counsel previously briefed in the matter argue the applications but who was unavailable (no reasons were given for this unavailability) and so that the applications also be postponed for that reason. This is not an acceptable basis for a postponement. The date for the hearing of the application for leave to appeal on 20 May 2025 was by way of agreement.
9. When agreeing dates for the application for leave to appeal through the registrar, the section 18(3) application was not ripe for hearing. When informing the parties through the registrar that the hearing would be on 20 May 2025, I stated that it was the application for leave to appeal that would be heard. The applicant's application in terms of section 18(3) was therefore not

before me. There was no need for me to make a decision in relation to the postponement of an application that was not before me, and I did not do so.

10. Ms Ngidi who appeared for the second respondent informed the court that she had no instructions to argue the application for leave to appeal and the related condonation application. Having taken instructions from her attorney, she requested that the application for leave to appeal and condonation application stand down until the afternoon so that alternate counsel could be briefed to argue the matter. I declined the request. The second respondent was aware that the application for leave to appeal had been set down for hearing before me at 09h00 that day, and this was by agreement. The second respondent had instructed counsel to appear on his behalf that morning. The second respondent's decision not to furnish that counsel with instructions to argue the application for leave to appeal (and to deliberately curtail counsel's instructions) and instead seek to delay the hearing of his application for leave to appeal (in which he is the *dominus*) upon his postponement application being refused was one made at his peril. Ms Ngidi then excused herself.
11. The application for leave to appeal together with condonation then proceeded without any appearance on behalf of the second respondent as the applicant in those matters.
12. Mr Aucamp, who appeared for Engen as the respondent in the application for leave to appeal and the related condonation application stated that the applicant would not persist with opposing condonation for the late filing of the

application for leave to appeal but would instead proceed to argue on the merits why the application for leave to appeal should be refused.

13. Mr Aucamp then proceeded to do so.
14. The primary reason why the second respondent asserts in his application for leave to appeal that I erred is because there were foreseeable factual disputes and this precluded me from granting relief in favour of the applicant by way of the usual principles, such as set out in *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA). The second respondent reasons that because there were factual disputes in relation to the amounts that he contended had been set off against the indebtedness owing by the principal debtor, and accordingly by him a surety, I was precluded from granting relief, and should dismissed the application, or referred the matter to trial. This is especially so, the second respondent reasons, because I had found in my judgment that such factual disputes exist.
15. As I have explained in my judgment in some detail, the second respondent elected to defend the matter on the basis of set off. Accordingly, it was for him to demonstrate that the debts he contended had been set off satisfied the requirements of set off, including that they were liquidated and were legally cognisable. The approach that recommended itself to me is set out and reasoned in paragraphs 49 to 59 of my judgment.
16. Other than in relation to the amounts of R500 000 and R7 629.43, I adopted the position that having regard only to the second respondent's factual version (i.e. without regard to the applicant's countervailing factual version in its

replying affidavit), whether the amounts that the second respondent contended had been set off were sufficiently capable of prompt ascertainment so as to be liquidated and otherwise sustainable on the second respondent's own version.

17. I found on the stand-alone factual version of the second respondent the requirements of set off had not been established in relation to those amounts. It therefore mattered not that upon consideration of the applicant's countervailing factual version there were factual disputes in relation to those amounts.
18. In relation to the amounts of R500 000 and R7 629.43, I did have regard to the applicant's countervailing evidence, as appears from paragraphs 82 to 86 of my judgment, which evidence proves that these amounts had already been deducted from the indebtedness. Such dispute in relation thereto raised by the second respondent was far-fetched and fanciful, and rejected.
19. The second respondent also contends that I erred in granting what he describes as a punitive costs order in that I granted costs on an attorney and client scale. But I did so not because those costs were punitive but because the applicant was entitled to costs by way of agreement, the parties having agreed to the scale of attorney and own client and the applicant seeking a lesser scale of attorney and client.
20. I have dealt comprehensively in my judgment with such other grounds as may be raised in the application for leave to appeal.

21. The second respondent has not established “*a sound rational basis for the conclusion that there are prospects of success*”¹ on appeal.
22. The second respondent does not assert that there is some or other compelling reason why the appeal should be heard.
23. The applicant’s costs in relation to the second respondent’s application for leave to appeal on an attorney and client scale are to be granted for the reasons set out in paragraph 19 above.
24. An order is made that:
 - 24.1. The second respondent’s application for condonation for the late filing of his application for leave to appeal is granted, with no order as to costs.
 - 24.2. The second respondent’s application for leave to appeal is dismissed.

¹ *Ramakatsa v African National Congress* 2021 ZASCA 31 at para 10.

24.3. The second respondent is to pay the applicant's costs in the application for leave to appeal on an attorney and client scale, including the costs of counsel.

[REDACTED]

B M GILBERT

Acting Judge of the High Court

Gauteng Division, Johannesburg

Date of hearing: 20 May 2025

Date of judgment: 21 May 2025

Counsel for the applicant: S Aucamp

Instructed by: DM5 Incorporated
Sandton

Counsel for the second respondent: Initially Ms Ngidi, then no appearance.

Instructed by: Des Naidoo & Associates
Sandton