



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

Case Number: 2025-061204

Appeal Case Number: A2023-063349

Consolidated Case Number: 2816/2017

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED: YES/NO

In the matter between:

MERCHANT COMMERCIAL FINANCE 1 (PTY) LTD t/a MERCHANT FACTORS

Plaintiff

and

HLANTINI MANAGEMENT AND FINANCE (PTY) LTD

First Defendant

BLUE CLOUD INVESTMENTS 79 (PTY) LTD

Second Defendant

CROSS ATLANTIC PROPERTIES 136 (PTY) LTD

Third Defendant

DALHOUSIE FORESTS CC

Fourth Defendant

GRANT HUGH RAMSAY

Fifth Defendant

HIGH LANDS SECURITIES (PTY) LTD

Sixth Defendant

HLATINI FARMING (PTY) LTD	Seventh Defendant
HLATINI FINANCE CORPORATION (PTY) LTD	Eighth Defendant
HLATINI INVESTMENT HOLDINGS LIMITED	Ninth Defendant
HLATINI MANAGEMENT AND FINANCE (PTY) LTD	Tenth Defendant
LAGOON HOMES (PTY) LTD	Eleventh Defendant
MOGWALA TRADING 154 (PTY) LTD	Twelfth Defendant
NCY TADE & INVEST (PTY) LTD	Thirteenth Defendant
STAND 827 MARLBORO PARK (PTY) LTD	Fourteenth Defendant
RST TRADE & INVEST (PTY) LTD	Fifteenth Defendant
TRIBAL PROPERTIES (PTY) LTD	Sixteenth Defendant
HORIZION INVESTMENT TRADING (PTY) LTD	Seventeenth Defendant

AND

Case Number: 2816/2017

In the matter between:

TRIBAL PROPERTIES (PTY) LTD	First Applicant
CROSS ATLANTIC PROPERTIES (PTY) LTD	Second Applicant
LAGOON HOMES (PTY) LTD	Third Applicant

STAND 827 MALBORO PARK (PTY) LTD

Fourth Applicant

HORIZION INVESTMENT TRADING (PTY) LTD

Fifth Applicant

and

MERCHANT COMMERCIAL FINANCE (PTY) LTD

First Respondent

GRANT HUGH RAMSAY

Second Respondent

HLATINI MANAGEMENT AND FINANCE (PTY) LTD

Third Respondent

BONATLA PROPERTIES (PTY) LTD

Fourth Respondent

NIKITAS GHIKAS VONTOS

Fifth Respondent

THE REGISTRAR OF DEEDS

Sixth Respondent

THE CIPC

Seventh Respondent

AND

Case No: 34887/2016

In the matter between:

MERCHANT COMMERCIAL FINANCE 1 (PTY) LTD t/a MERCHANT FACTORS Applicant

and

THE BEVTEC PARTNERSHIP

Respondent

JUDGMENT

CRUTCHFIELD J

[1] The applicants are the joint liquidators of Horizon Investment Trading PTY (Ltd) (in liquidation), seek urgent relief interdicting the respondent, Merchant Commercial Finance 1 (PTY) Ltd t/a Merchant Factors, from alienating, hypothecating, encumbering, executing and otherwise dealing with various identified immovable properties (“the properties”).

[2] The applicant seeks interim relief pending finalisation of an application in terms of rule 49(6) together with the applicant’s appeal.

[3] The respondent opposes the application on both urgency and the merits of the application.

[4] In order to find success in the application, the applicant must meet the peremptory requirements of rule 6(12). I deal with the alleged urgency of the application.

[5] The applicant alleges that on 9 April 2025, the applicant received correspondence from the respondent’s attorneys informing the applicant’s attorneys that the appeal had lapsed and that the respondent intended disposing of the properties.

[6] In terms of the procedures necessary to procure a date for the hearing of an appeal, the applicant was obliged to apply for such a date on or before 6 September 2023. The applicant failed to do so resulting in the alleged lapse of the appeal and the necessity for the applicant to launch an application for reinstatement of the appeal in terms of rule 49(6).

[7] Prior to 6 September 2023, the Supreme Court of Appeal granted the applicant leave to appeal on 16 May 2023, after which the applicant delivered its notice of appeal and heads of argument timeously.

[8] Thereafter, for some 20 months, the applicant did nothing to prosecute the appeal.

[9] The applicant's attorneys refer to an "oversight" in its offices, alleging that a succession of different staff members dealing with the matter overlooked the necessity to apply for a hearing date. Thus, as at 9 April 2025, the applicant had not yet applied for a date for the hearing of the appeal. The applicant's attorneys contend that the applicant should not be held responsible for an oversight in the office of the applicant's attorneys.

[10] The alleged oversight relates to an absence of steps taken by the attorneys for a period of approximately 20 months including, by way of example, a failure to consider the file, contact the Appeals Registrar's office, enquire at the court and update the client. An absence of any steps taken over a period of approximately 20 months does not amount to a mere oversight or an error. Similarly to the matter of *Colyn v Tiger Food industries Ltd t/a Meadow Feed Mills (Cape)*¹, it is not a simple matter of an error or an oversight when nothing happens on a matter for approximately 20 months. The explanation by the applicant's attorneys for their failure is lacking substantially.

[11] On 14 April 2025, the applicant launched an application for condonation and reinstatement of the lapsed appeal. The respondent's attorneys refused a request to for an undertaking that the respondent not dispose of the properties in the interim, pending the finalisation of the application in terms of the rule 46(9) and the appeal.

[12] Given the applicant's attorney's failure to take steps to procure a date for the hearing of the appeal for approximately 20 months, the respondent's attorneys refused the requested undertaking.

¹ *Colyn v Tiger Food industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at [9].

[13] The applicant's notice of motion is dated 30 April 2025 and the applicant delivered the application to the respondent's attorneys by email on Wednesday, 30 April 2025, at 18h13. The application was set down for hearing before me on 20 May 2025.

[14] The respondent referred to the requirements in respect of an explanation in condonation proceedings as set out in *Van Wyk v Unitas Hospital and Another*.² The applicant's explanation for its failure to apply for a date for the hearing falls far short of the requirements of a request for condonation.

[15] By way of example, there is no explanation whatsoever as to why the applicant's attorneys failed to enquire from the Appeals Registrar as to whether a date had been allocated or why a date had not yet been allocated or when the matter would be heard. The applicant's attorneys were content to sit supine for approximately 20 months and do nothing in respect of the appeal.

[16] As regards the applicant's attempt to find fault with the respondent's attorneys for not having applied for a date, the rules provide that the respondent "may" apply for a date but there is no obligation on the respondent to do so. The respondent is not *dominus litis* and is free to sit back and wait for the appeal to lapse, in the event that the applicant allows it to do so.

[17] In respect of the averment that the applicant should not be held responsible for the failure on the part of the applicant's attorneys to take the appropriate steps to prosecute the appeal, it is striking that in the approximately 20 month-period at issue before me, there is no mention of even a single enquiry from the applicant to their attorneys enquiring about the appeal.

[18] Whilst I accept that the applicant, prior to September 2023, intended to prosecute the appeal and took the necessary steps to do so, subsequently, the applicant's attorneys took no steps in respect of prosecuting the appeal. The

² *Van Wyk v Unitas Hospital and Another* 2008 (2) SA 472 (CC).

applicant and the applicant's attorneys did nothing in respect of the appeal for a significant duration.

[19] Furthermore, the applicant does not articulate why it will not achieve substantial redress in respect of this application, at a hearing in due course. Given recent changes to the setting down of matters on the opposed motion roll, dates on that roll are more easily and expeditiously available than they were previously. This factor must be considered together with the time necessary for the sale and transfer of immovable property to be effected, a notoriously lengthy procedure. The applicant does not set out why this application cannot be dealt with and the applicant receive substantial redress at a hearing on the opposed motion roll in the ordinary course.

[20] Furthermore, the orders of Fischer J in respect of which the applicant appeals relevant to this application, are the dismissal of the application for a postponement and the order entitling the respondent to execute against the properties. Fischer J granted the latter order, permitting the respondent to execute against the properties, by default of appearance of the applicant, counsel for the applicant having withdrawn subsequent to the dismissal of the postponement application.

[21] Accordingly, the respondent argued before me that the Supreme Court of Appeal's grant of leave to appeal could only relate to Fischer J's refusal to grant the request for a postponement and not to the order for execution against the properties, granted by default of appearance. An application for leave to appeal is not competent against an order granted by way of default as such an order is capable of being revisited by the court *a quo* and may sustain an application for rescission. Thus, the order for execution against the properties granted by way of default is not a final order and cannot sustain an appeal.³

[22] In *Pitelli*, the SCA found that orders that are susceptible to rescission are not appealable.⁴

³ *Francesco Pitelli v Everton Gardens Project* CC [2010] ZASCA 35 (29 March 2010) ("Pitelli").

⁴ *Pitelli id* [36].

[23] Moreover, I find that the applicant failed to meet the requirement in terms of rule 6(12)(b), being that it does not demonstrate that it cannot obtain substantial redress at a hearing in the ordinary course. This requirement is peremptory and absent the applicant meeting this requirement, the matter does not qualify to be enrolled and determined as a matter of urgency.

[24] In the circumstances the application stands to be struck from the roll for the absence of urgency.

[25] There is no reason why the costs of the application should not follow the order on the merits including the costs of counsel on scale C.

[26] By virtue of the abovementioned, I grant the following order:

1. The application is struck from the roll for a lack of urgency.
2. The applicant is ordered to pay the costs of the application including the costs of counsel on scale C.

CRUTCHFIELD J
JUDGE OF THE HIGH COURT
JOHANNESBURG

For the Applicant: Adv M Nowitz instructed by Hirschowitz Flionis Attorneys.

For the Respondent: Adv S McTurk instructed by Brink, De Beer & Potgieter Attorneys.

Date of the hearing: 22 May 2025.

Date of the judgment: 18 June 2025.