

REPUBLIC OF SOUTH AFRICA



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

Case No.: 10029 / 2020

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

DATE

SIGNATURE

In the matter between:

IAN CRAIG ROSS

First Applicant

ANNELIE ROSS

Second Applicant

and

NEDBANK LIMITED

Respondent

DISCLAIMER: Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **20th of June 2025**

**JUDGMENT: APPLICATION FOR LEAVE TO APPEAL AND APPLICATION FOR
CONDONATION FOR LATE FILING OF THE APPLICATION FOR LEAVE TO APPEAL**

Moosajee AJ

1. I am dealing with an application for leave to appeal against the whole of a judgment (“**the leave to appeal application**”) and order that I handed down on 8 November 2024 together with an application for condonation for the late filing of the application for leave to appeal (“**the condonation application**”).
2. In light of my views about the merits of the application for leave to appeal, I will deal with that application first, as those views also have to be taken into account in determining the condonation application.
3. Mr and Mrs Ross rely on sections 17(1)(a)(i) and (ii) of the Superior Courts Act, Act 10 of 2013 in support of their application for leave to appeal. They argue that they have reasonable prospects of success and there are compelling reasons why their appeal should be heard.
4. Mr and Mrs Ross instituted an action against Nedbank claiming delictual damages of R1 663 400.00 together with interest at the rate of 8.75% per annum from the date of summons to date of payment and costs from Nedbank. The claim is a claim for pure economic loss.
5. I am not going to repeat the facts relevant to this matter as they are comprehensively set out in my 8 November 2024 judgment.
6. Mr and Mrs Ross were not clients of Nedbank. Despite this, they contend that Nedbank owed them a legal duty, which was breached. It is trite that a bank can have a duty of care towards third parties such as Mr and Mrs Ross¹, but their counsel conceded during the hearing in the court *a quo* that if a duty of care was recognised in this matter, it would be an extension of the duty of care previously recognised by our courts.
7. It is also trite that our law is generally reluctant to recognise pure economic loss claims, where it would constitute an extension of the law of delict².

¹ *Commission, South African Revenue Services & Another v Absa Bank Limited* 2003 (2) SA 96 (W)

² *Country Cloud Trading CC v FNB* 2015 (1) SA 1 (CC) at para 24 and footnote 2 and *Old Mutual Unit Trust Managers Limited v Living Hands (Pty) Limited & Others* [2024] ZASCA 75 at para 47

8. It was argued on behalf of Mr and Mrs Ross that indeterminate liability was one of the primary considerations that influenced my finding that Nedbank did not owe them a legal duty³. This is a misreading of my judgment.
9. The argument referred to in paragraph 8 above, ignores the following findings contained in my judgment:
 - 9.1. it fails to recognise that I found that the Ross' had failed to discharge the onus of wrongfulness in that –
 - 9.1.1. FICA does not give rise to private law duties owed to third parties⁴;
 - 9.1.2. Mr and Mrs Ross were best placed to prevent the risk of payment into the wrong bank account and were the architects of their own misfortune⁵; and
 - 9.1.3. Mr and Mrs Ross did not prove their loss⁶.
10. It was contended on behalf of Mr and Mrs Ross that leave to appeal should be granted because I took a *“firm stance on the questions of indeterminate liability and vulnerability to risk”*⁷ in an answering affidavit filed with the Constitutional Court for an application for leave to appeal, in which the firm at which I practice, is the respondent⁸.
11. It is therefore alleged by Mr and Mrs Ross that I could never have been open to the issues and be persuaded by their counsel, because of the firm stance that I adopted on behalf of ENS in the above-mentioned answering affidavit. In addition, the argument was advanced on behalf of Mr and Mrs Ross that I could not objectively and reasonably have been open minded and open to persuasion when I presided over the matter⁹.

DISCLOSURES BY THE JUDGE

³ 0029-4 at para 8

⁴ 0028-16 at para 60

⁵ 0028-18 at para 62

⁶ 0028-19 at para 67

⁷ 0029-18 at para 26

⁸ Hawarden v Edward Nathan Sonnenbergs Inc. (ENS) CCT199/24

⁹ 0029-11 at para 23.1

- i. Mr and Mrs Ross also contended that my involvement in the Hawarden matter was not disclosed to the parties at any point in time, even though I, through the Registrar, had on the Friday preceding the commencement of the trial on the Monday conveyed to both parties in writing that in my practice, I was dealing with a matter for Nedbank and if that concerned them, they should urgently write to me prior to the commencement of the trial. The Ross' and Nedbank had no objection to me being the judge appointed to the matter, despite me disclosing my involvement on behalf of ENS in the Hawarden matter, in chambers, on the Monday morning before the commencement of the trial.
12. This raises the question as to why I did not disclose to the parties in writing my involvement in the Hawarden matter.
13. When I asked the Registrar to enquire whether the parties had any concerns about me hearing the matter because I was dealing in my practice with a matter for Nedbank, I had not studied the court file and I did not know what the issues were in the matter.
14. I did read all the documents filed in the matter over the weekend before the trial commenced on the Monday. Prior to the trial starting on the Monday, the parties' counsel and Mr and Mrs Ross' attorney came to my chambers to introduce themselves.
15. During the discussions in chambers, I mentioned to the parties' legal representatives that I was the attorney at ENS that was liaising with the attorneys appointed for ENS by its insurers in the matter involving Ms Hawarden and ENS. I recorded that I was the person that co-ordinated the giving of instructions from ENS to the attorneys appointed by our insurers to defend ENS against Ms Hawarden's claim and invited the parties to raise with me whether this raised any concerns on their part about me adjudicating the matter.
16. The parties had no objection despite this disclosure that I made and Mr and Mrs Ross' counsel went as far as suggesting that they did research about me and they were comfortable that I will deal with the dispute fairly. They had picked up that I did an article following the determination of an interlocutory application in this matter. At the time, I had no recollection of the article they were referring to, but subsequently established

that I had done an article regarding joinder of parties, after the judgment in an interlocutory application in this matter was delivered. The Ross' noted in their replying affidavit in the leave to appeal application that *"nothing sinister turned on the fact that the article with regards to the joinder application, (sic) relation to this matter, was mentioned as the article does not remotely deal with any of the issues in the trial"*¹⁰.

17. The disclosure I made in chambers was raised by Nedbank in its answering affidavit in opposition to the condonation application, even though my disclosure about my involvement in the Hawarden matter was not raised on behalf of Mr and Mrs Ross in the founding affidavit filed on their behalf in the condonation application.
18. In the replying affidavit in the condonation application, the Ross' attorney indicated that he could not recall that there was a discussion in chambers with regard to the Hawarden matter and my involvement in that matter, but he recalled me mentioning during the trial that I was involved in the Hawarden matter. I allegedly did not disclose my involvement in that matter in the discussions in chambers prior to the commencement of the trial¹¹.
19. It is important for me to highlight that the Ross' attorney did not expressly deny that I made the disclosure about my involvement in the Hawarden matter. He simply said that he could not recall it¹².
20. In addition, in the replying affidavit, Mr and Mrs Ross' attorney took issue with Nedbank's attorney recording what had transpired in chambers in the answering affidavit, on the basis that she was not present in chambers when I disclosed my involvement in the Hawarden matter¹³. This for me was an unduly technical approach and I asked the Ross' counsel whether I could take into account my recollection of what had transpired in chambers, which seems to be consistent with the version set out in Nedbank's answering affidavit.
21. The Ross' counsel conceded that I could take into account my recollection of what had transpired in chambers.

¹⁰ 0029-128 at para 10

¹¹ 0029-136 at paras 55 and 56

¹² see footnote 11

¹³ 0029-128 at para 7

22. It is also important to emphasize that the Ross' counsel confirmed that they were not relying on actual bias, but only a reasonable apprehension of bias. What is strange in this matter is that the Ross' counsel argued that a reasonable apprehension of bias "*did not arise prior, during or after the hearing*". Instead, according to the Ross' counsel, the "*sole and exclusive basis*" for the reasonable apprehension of bias arose from what they saw in the answering affidavit in the Hawarden matter in Ms Hawarden's application for leave to appeal to the Constitutional Court. They say that this affidavit only came to their knowledge on the evening of 13 November 2024, but they did not disclose exactly who had sent my affidavit to them. This was a number of days after the judgment had already been delivered.
23. Actual bias, or a reasonable apprehension thereof, is typically raised by a party before the matter is heard, or alternatively, during the course of the proceedings. Be that as it may, I will consider whether the apprehension of bias raised by the applicants after the delivery of my judgment was reasonable in this matter.
24. The Ross' contend that because of the views I expressed in the answering affidavit regarding indeterminate liability and the risk of vulnerability in the Hawarden matter, that I had already formed the view that no legal duty can arise against third parties premised on *inter alia* the factors of indeterminate liability and vulnerability to risk¹⁴ on the facts of this case. They further argue that I could not reasonably and objectively have been open-minded and open to persuasion when presiding over the matter, and that I had a vested interest in the principles to be decided in this matter as "*this is inter alia the same principle that ENS implores the Constitutional Court to refuse Hawarden's leave to appeal*"¹⁵.
25. These arguments however, ignore the following:
- 25.1. The principles relating to indeterminate liability and risk of vulnerability are well-known and trite in our law. They were not only for the first time dealt with in the Hawarden matter. The views expressed in the answering affidavit in Mr Hawarden's application for leave to appeal were based on the settled legal position.

¹⁴ 0029-10 at para 21

¹⁵ 0029-11 at para 23.2

- 25.2. My judgment in this matter could not bind the Constitutional Court. There is therefore no merit to the suggestion that I had a vested interest in the outcome of this matter.
- 25.3. The facts in the Hawarden matter and this matter are not identical, even though in both matters the court had to determine who should bear the loss after there had been business email compromise. In the Hawarden matter, a crucial issue that persuaded the Supreme Court of Appeal to absolve ENS from liability is the fact that Ms Hawarden was aware of business email compromise and also aware of the steps to take to guard against business email compromise, which was making a phone call to verify the bank account details received by email. This is what Mr Hawarden had previously done, when she received bank account details from Pam Golding. These facts are not what transpired in this matter.
26. During argument, the Ross' counsel conceded that the facts of this case were not identical to the facts in the Hawarden case.
27. Whether or not a legal duty arises and whether or not there are risks of indeterminate liability and issues relating to vulnerability to risk is fact dependent. I therefore do not agree with the Ross' contention that I did not keep an open mind, I was not open to persuasion and consequently they had a reasonable apprehension of bias.
28. Counsel for the Ross' conceded during argument that I found against the majority of objections raised by Nedbank's counsel during the trial and, in addition, on a critical issue for determination in this matter, I found against Nedbank, namely that the plaintiffs were duped by a fraud into paying someone other than the sellers of the property or their agents. At the commencement of the trial, an outstanding issue was also whether there should be a separation of the factual issue as to whether a fraud had been committed from the other issues in this matter. I expressed a *prima facie* view that such a separation would not be convenient in this matter and thereafter Nedbank's counsel elected not to persist with the separation application.
29. In *Bernert v Absa Bank Ltd* 2011 (4) BCLR 329 (CC), the Constitutional Court noted the following:

- 29.1. *“The test for recusal which this Court has adopted is whether there is a reasonable apprehension of bias, in the mind of a reasonable litigant in possession of all the relevant facts, that a judicial officer might not bring an impartial and unprejudiced mind to bear on the resolution of the dispute before the court”*¹⁶.
- 29.2. *“The presumption of impartiality is implicit, if not explicit, in the office of a judicial officer”*¹⁷.
- 29.3. *“This presumption [of impartiality] can be displaced by cogent evidence that demonstrates something the judicial officer has done which gives rise to a reasonable apprehension of bias”*¹⁸.
- 29.4. *“The idea is not to permit a disgruntled litigant to successfully complain of bias simply because the judicial officer has ruled against him or her. Nor should litigants be encouraged to believe that, by seeking the disqualification of a judicial officer, they will have their case heard by another judicial officer who is likely to decide the case in their favour”*¹⁹.
- 29.5. *“An application for recusal should not prevail unless it is based on substantial grounds for contending a reasonable apprehension of bias”*²⁰.
- 29.6. *“It is not in the interests of justice to permit a litigant, where that litigant has knowledge of all the facts upon which recusal is sought, to wait until an adverse judgment before raising the issue of recusal. Litigation must be brought to finality as speedily as possible. It is undesirable to cause parties to litigation to live with the uncertainty that after the outcome of the case is known, there is a possibility that litigation may be commenced afresh because of a late application for recusal which could and should have been brought earlier. To do otherwise would undermine the administration of justice”*²¹.

¹⁶ at para 29

¹⁷ at para 31

¹⁸ at para 33

¹⁹ at para 35

²⁰ at para 35

²¹ at para 75

30. Bearing in mind the disclosure I made in chambers and the plaintiffs' counsel indicating that they were satisfied that I would adjudicate the matter impartially (after doing background research on me), I do not believe that it would be in the interests of justice to allow the Ross' to raise my recusal only after my judgment was delivered. I also do not believe that the Ross' have, on the basis of cogent evidence, demonstrated a justification for them, or a reasonable person believing that a real risk existed that the Ross' would not get an unbiased decision from me.
31. In *McKonie v Body Corporate, Laborie* [2023] ZAGPPHC 477, the court noted the judgment in *Le Car Auto Traders v Degswa 10138 CC and Six Others* (2011/47650) [2012] ZAGPGHC 286 wherein it was held that *"The effect of a recusal can only be in respect of a prospective or current proceedings. Asking a judge to recuse himself after judgment is given is silly. Even if he chose to recuse himself, the judgment is not thereby nullified. A judgment once given stands until an appeal sets it aside. The judge who gave the judgment is functus officio"*²².
32. In the matter of *Mulaudzi v Old Mutual Life Assurance Co (South Africa) Ltd and Others* 2017 (6) SA 90 (SCA), the SCA quoted with approval the judgment in *S v Le Grange & others* 2009 (2) SA 434 SCA which held that:

"A cornerstone of our legal system is the impartial adjudication of disputes which come before our courts and tribunals. What the law requires is not only that a judicial officer must conduct the trial open mindedly, impartially and fairly, but that such conduct must be manifest to all those who are concerned in the trial and its outcome. . . . The right to a fair trial is now entrenched in our Constitution The fairness of a trial would clearly be under threat if a court does not apply the law and assess the facts of the case impartially and without fear, favour or prejudice. The requirement that justice must not only be done, but also be seen to be done has been recognised as lying at the heart of the right to a fair trial

It must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial. The integrity of the justice system is anchored in the impartiality of the judiciary. As a matter of policy it is important that the public should have confidence in the courts.

²² at para 13

Upon this social order and security depend. Fairness and impartiality must be both subjectively present and objectively demonstrated to the informed and reasonable observer. Impartiality can be described — perhaps somewhat inexactly — as a state of mind in which the adjudicator is disinterested in the outcome, and is open to persuasion by the evidence and submissions. In contrast, bias denotes a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues. Bias in the sense of judicial bias has been said to mean a departure from the standard of even-handed justice which the law requires from those who occupy judicial office. In common usage bias describes a leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to legal proceedings, it represents a predisposition to decide an issue or cause in a certain way that does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case²³.

33. The SCA further held in *Mulaudzi v Old Mutual Life Assurance Co (South Africa) Ltd and Others* that “An apprehension of bias may arise from an association or interest a judicial officer has with or in one of the litigants or in the outcome of the case. It may also arise from conduct or utterances by a judicial officer prior to or during proceedings. There is as well what has been described as ‘prejudgment’, which means that a decision may have been made or an opinion formed, most often unfavourable, about a person or issue before knowing or examining all the facts. In all these situations, the judicial officer must ordinarily recuse himself or herself”²⁴.
34. Prior to argument being presented in the court *a quo*, and shortly after the defendant’s case was closed, I asked both counsel to look at the judgments in the Hawarden matter and in *Commissioner, South African Revenue Service, and Another v ABSA Bank Limited*²⁵.
35. If I was hell-bent on dismissing the plaintiffs’ claim, I would not have alerted counsel to cases that may have a bearing on the issues that were debated before me in the court *a quo*.

²³ at para 47

²⁴ at para 48

²⁵ 2003 (2) SA 96 (W)

36. In *SARFU II* the Constitutional Court formulated the approach to an application for recusal as follows:

*'It follows from the foregoing that the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial Judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial'*²⁶.

37. As previously set out, the Ross' counsel indicated that they had no reasonable apprehension of bias prior, during or immediately after the trial. Instead, they only did so after judgment had been delivered by me and after being provided with a copy of the answering affidavit that I had deposed to in Ms Hawarden's application for leave to appeal. I do not believe that this gives rise to a reasonable apprehension of bias as the contents of the answering affidavit were based on trite legal principles.
38. It was also contended on behalf of the Ross' that I had a vested interest in the principles applicable to this matter regarding the question of the imposition of liability on Nedbank, as this was the same principle that ENS implored the Constitutional Court to take into account to refuse Ms Hawarden's leave to appeal. This is not correct. In the Hawarden case, Ms Hawarden was not alleging that there was a duty on the part of a bank, as was the case in this matter. In addition, the Ross' counsel conceded during argument that the facts in the Hawarden matter were not the same as the facts in this matter.

²⁶ 1999 (4) SA 147 at para 48

39. The suggestion that I had a vested interest also overlooks the fact that my judgment could not bind the Constitutional Court and there was, in any event, a finding already from the Supreme Court of Appeal in the Hawarden matter in favour of ENS. The paragraphs quoted from the affidavit that I deposed to in the Constitutional Court are not novel issues, but are based on trite legal principles.
40. The stance I took in relation to indeterminate liability and vulnerability to risk in the affidavit were not views plucked from the air but were based on trite legal principles.
41. I therefore find that there is no merit to the Ross' suggestion that I ought to have recused myself on the basis of a reasonable apprehension of bias.

PROSPECTS OF SUCCESS ON APPEAL

42. It was argued on behalf of the Ross' that I had erred in finding that Nedbank did not owe a legal duty to Mr and Ms Ross, and that I should have found that Nedbank owed the Ross' a legal duty under the common law when it opened the account of Mr Nkomane and its subsequent failure to monitor the account²⁷. These arguments overlook the fact that the alleged expert that provided evidence on behalf of the Ross' was never involved in the opening of bank accounts, or the monitoring of bank accounts when he operated as a banker. He could not testify what a reasonable banker would do when accounts were opened and how accounts were monitored.
43. He was not familiar with the systems that the banks use to monitor transactions and the rules that dictate which transactions the system identifies as suspicious or concerning.
44. There was therefore no evidence before me to prove that Nedbank acted wrongfully and negligently when Mr Nkomane's account was opened or in monitoring transactions on the account.

²⁷ 0029-25 at paras 47 and 49

45. It was also argued on behalf of the Ross' that I had erred in concluding that the question of indeterminate liability mitigated against the recognition of indeterminate liability²⁸, but I disagree. These arguments ignored the Constitutional Court finding in the *Country Cloud* judgment.
46. The Ross' also contended that I erred in finding that they could reasonably have taken steps to avoid their loss and that I should have found that it would be unreasonable to expect the Ross' to be aware of the risk of possible fraud.²⁹ Mr and Mrs Ross were sophisticated business people and it is not credible to suggest that they were not aware of probable fraud. It is well-known amongst business professionals who utilize computer-based communication and payment methods that cybercrime is prevalent³⁰.
47. In addition, our courts have regularly found that there is a duty on the payer to verify the bank account details set out in an invoice or email sent to them, before making the payment.³¹ This they could have done by:
- 47.1. phoning Ms Van Vreden or an accountant at NDBV Inc. to verify the relevant bank account details;
 - 47.2. checking with their daughter whether the bank account details stipulated for NDBV Inc. was indeed the correct bank account details;
 - 47.3. using the functionality on internet banking to verify that the bank account details were the details of NDBV Inc.'s trust account.
48. I therefore found that the plaintiffs were best placed to prevent the risk of payment into the wrong bank account and they were the architects of their own misfortune³².
49. I do not believe that there is a reasonable probability that another court would come to a different conclusion on the question of whether the plaintiffs were best placed to prevent the loss from occurring.

²⁸ 0029-26 at para 50

²⁹ 0029-28 at para 6 and 0029-29 at para 57

³⁰ *Gripper & Co (Pty) Ltd v Ganedhi Trading Enterprises CC* 2025 (3) SA 279 (WCC) at para 30.1

³¹ See *Mosselbaai Boeredienste (Pty) Ltd v OKB Motors CC* 2024 (6) SA 564 (FB) at para 58

³² 0028-18 at para 62

50. It is common cause that no evidence was led on behalf of the Ross' to prove that they had suffered a loss. It was argued on their behalf that this was not an issue in dispute because it was not listed as an issue in dispute according to the parties' joint practice note.
51. It was, however, an issue on the pleadings because the plaintiffs alleged in paragraph 19 of the particulars of claim that as a consequences of the defendant's breach of the duty of care owed to the plaintiffs, the plaintiffs suffered damages in an amount of R1 663 400 and Nedbank denied this in paragraph 40 of its plea.³³
52. In *Dale v Rian Du Plessis Attorney & Conveyancer and Others* (38406/2020) [2022] ZAGPPHC 452, the Pretoria High Court heard an application for leave to appeal. The main ground of appeal raised by the applicant was that the court misdirected itself in raising a point that was never raised by the parties and not delineated in the parties' Joint Practice Note for determination. Accordingly, the applicant contended that the court should have exercised judicial restraint.³⁴
53. The High Court disagreed with this contention and noted that "*According to Quartermark Investments (Pty) Ltd v Mkhwanazi & Another (768/2012) [2013] ZASCA 150, the court is well within its powers to raise an issue even though it had not been raised by the parties*".³⁵
54. The Ross' counsel also conceded that even if the issue was not raised in argument by Nedbank's counsel, I could raise the issue *mero motu*.
55. I therefore find that the failure of the plaintiffs to prove their loss was fatal to their claim and I do not believe that there is a reasonable probability that another court would arrive at a different conclusion in this regard.
56. I am therefore of the view that the application for leave to appeal should be dismissed with costs.

CONDONATION

³³ A10 at para 19 and A21 at para 40

³⁴ at para 3

³⁵ at para 11

57. That leaves me to deal with the condonation application. In *Grootboom v National Prosecuting Authority* 2014 (2) SA 68 (CC), the Constitutional Court stated that the granting of condonation is a matter to be determined having regard to the “interests of justice”. In this regard, reference must be paid to:
- 57.1. the nature of the relief sought;
 - 57.2. the extent and cause of the delay;
 - 57.3. the effect of the delay on the administration of justice and other litigants;
 - 57.4. the reasonableness of the explanation for the delay;
 - 57.5. the importance of the issue to be raised in the intended appeal; and
 - 57.6. the prospects of success.³⁶
58. The Constitutional Court further stated that: *“It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default”*.³⁷
59. In *Van Wyk v Unitas Hospital and Another* 2008 (2) SA 472 (CC), the Constitutional Court reiterated that: *“an applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And, what is more, the explanation given must be reasonable.”*³⁸
60. My judgment after the trial was delivered on 8 November 2024. The application for leave to appeal ought to have been delivered by 29 November 2024. It was only delivered on 3 December 2024.
61. It was alleged on behalf of the Ross’ that on the evening of 13 November 2024, my judgment in this matter came to the attention of the legal representatives involved in the *ENS v Hawarden* matter³⁹. Presumably this was a reference to Ms Hawarden’s legal representatives.

³⁶ at para 22

³⁷ at para 23

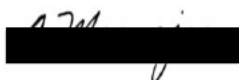
³⁸ at para 22

³⁹ 0029-9 at para 17

62. It was then also alleged that the Ross' attorney was advised on 13 November 2024 that I deposed to the grounds of opposition for leave to appeal in Ms Hawarden's application for leave to appeal to the Constitutional Court⁴⁰. The Ross' were apparently only available for a consultation on 22 November 2024. No indication was given as to why they were not available to meet earlier and whether they were informed by their attorney that an application for leave to appeal must be delivered by 29 November 2024.
63. On 27 November 2024, the Ross' provided instructions to proceed with the application for leave to appeal and counsel was briefed to draft the application papers. There is no indication of whether the Ross' were told at the consultation on 22 November 2024 that urgent instructions were required from them because the application for leave to appeal had to be prepared and delivered by 29 November 2024.
64. There is also no reasonable explanation for why the application for leave to appeal was not finalized by 29 November 2024, and why it was only delivered on 3 December 2024.
65. In my view, even though the delay was not significant, the Ross' failed to set out a full and frank explanation for the full period of the delay. I have also already concluded that the application for leave to appeal did not have reasonable prospects of success. In these circumstances, the application for condonation for the late filing of the application for leave to appeal is also dismissed with costs.

Order

66. I therefore make the following order:
- a. The application for the late filing of the application for leave to appeal is dismissed;
 - b. The application for leave to appeal is dismissed;
 - c. The applicants are ordered to pay the costs of both of these applications.


A, MOOSAJEE

ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

⁴⁰ 0029-9 at para 18

For the applicants: Theuns J Jooste instructed by WWB Botha Attorneys

For the respondent: Moroka Phalane instructed by Cliffe Dekker Hofmeyr Attorneys

Date of Hearing: 24 February 2025

Date of Judgment: 20 June 2025