



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Not Reportable
Case no: 2502/2023

In the matter between:

SIFISO NDIYA MBOMBI

FIRST APPLICANT

IGNITE SERVICES CC

SECOND APPLICANT

and

BMW FINANCIAL SERVICES SOUTH AFRICA (PTY) LTD

RESPONDENT

Neutral Citation: *Mbombi and Another v BMW Financial Services SA (Pty) Ltd*
(2502/2023) [2025]

Coram: Buys AJ

Heard: In Chambers on the papers after heads of arguments were filed by the applicants on 20 May 2025, the respondent on 27 May 2025 and supplementary heads by the applicants on 29 May 2025.

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date and time for hand-down is deemed to be 13h00 on 13 June 2025.

Summary: Application for leave to appeal – application delivered out of time with no application for condonation – application dismissed.

ORDER

1. The application for leave to appeal is dismissed.
 2. The applicants shall pay the respondent's costs of the application for leave to appeal, counsel's fees to be taxed on scale A.
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JUDGMENT

Buys AJ

Introduction

[1] The first and second applicants (the applicants) brought an application to rescind the default judgment in favour of the respondent granted by the court on 23 November 2023. The application to rescind the default judgment was heard on 20 March 2025, whereafter judgment in favour of the respondent was handed down on 28 March 2025.

[2] On 24 April 2025, the applicants served and filed a notice of application for leave to appeal the judgment and order handed down by De Kock AJ on 28 March 2025.

[3] On 12 March 2025, a directive was issued to the legal representatives of the applicants and the respondent in terms of which the parties were notified of my intention to deal with the application for leave to appeal by dispensing with oral arguments, unless any of the parties objected thereto. It was further directed that, should no objection be received, the applicants had to file their heads of argument on or before 20 May 2025, the respondent to file its heads of argument on or before 26 May 2025 and replying heads of argument by the applicant, if any, to be filed on or before 29 May 2025.

[4] No objection has been received to dispense with oral arguments, as a result, this application for leave to appeal has been determined on the papers before me and the heads of arguments filed on behalf of the parties in terms of the directive referred to *supra*.

[5] The applicants rely on the following grounds in their application for leave to appeal:

- ‘1. The court *a quo* erred in finding that when the applicants made a R 100 000.00 payment on 18 May 2023 their outstanding arrears were R114 65.14 (sic).
2. The court *a quo* erred in finding that when the summons was served, the agreement was lawfully cancelled between the parties.
3. The court *a quo* erred in finding that the agreement was lawfully cancelled before the applicants made a further payment on 22 May 2023.
4. The court *a quo* erred in not finding that at the time the summons was served, the applicants were not in arrears with the respondent.
5. The court *a quo* erred in not finding that the respondents failed to account for the payments made by the respondents (sic) before obtaining judgment.
6. The court *a quo* erred in finding that on the date of judgment, despite the applicants not being in arrears, lawfully possession had been terminated.
7. The court *a quo* erred in finding that the agreement had been lawfully cancelled when default judgment was granted.
8. The court *a quo* erred in finding that the default judgment was not erroneously sought and granted.’

[6] In terms of rule 49(1)(b) of the Uniform Rules of Court (the rules), the applicants had to file and serve their application for leave to appeal within 15 days after the date of the order appealed against. It is common cause that the judgment was delivered on 28 March 2025 and that the applicants notice of application for leave to appeal was served and filed out of time, namely on 24 April 2025.

[7] Rule 49(1)(b) further provides that a court ‘may, upon good cause shown, extend’ the prescribed time period of 15 days.

[8] No substantive application has been filed and served by the applicants requesting this court to either extend the prescribed time period of 15 days or to condone the non-compliance with the prescribed time period. The applicants’ counsel, in what seems to be an afterthought, and only after the applicants’ non-compliance with the time period set out in rule 49(1)(b) has been raised by the respondent, requested this court, in her supplementary heads of argument, to condone the applicants’ non-compliance with the said prescribed time period.

[9] It is trite that an applicant in an application for condonation should explain,

comprehensively, the reasons for the delay and/or the failure to adhere to and comply with the prescribed time limits with which an applicant was obliged to comply.

[10] In *High Tech Transformers (Pty) Ltd v Lombard*,¹ the importance of a reasonable and acceptable explanation for a delay was accentuated:

‘Condonation is not merely for the asking as was duly pointed out by the court in *NUMSA & another v Hillside Aluminium* [2005] ZALC 25; [2005] 6 BLLR 601 (LC):

“[12] Additionally, there should be an acceptable explanation tendered in respect of each period of delay. Condonation is not there simply for the asking. Applications for condonation are not a mere formality. The onus rest on the applicant to satisfy the court of the existence of good cause and this requires a full, acceptable and ultimately reasonable explanation.”.’

[11] In *Colyn v Tiger Foods Industries t/a Meadow Feed Mills*,² the Supreme Court of Appeal cited with approval what courts generally expect from an applicant to show good cause, namely:

‘With that as the underlying approach the courts generally expect an applicant to show good cause (a) by giving a reasonable explanation of his default; (b) by showing that his application is made *bona fide*; and (c) by showing that he has a *bona fide* defence to the plaintiff’s claim which *prima facie* has some prospect of success . . .’³

[12] It is common cause that the applicants filed their application for leave to appeal out of time without an application for condonation. However, in an attempt to cure this defect after it was raised by the respondent, the applicants’ counsel makes application in the supplementary heads of argument to condone the applicants’ non-compliance with the prescribed time period. This application by counsel is not in the form of an affidavit and is based on mere submissions – which are not only insufficient but also improper.

[13] In the premise, no evidence in the form of a proper application (notice of motion and affidavit(s)) has been presented to me to determine whether the applicants’ non-compliance with the prescribed time period should be condoned or not. For this reason alone, the application for leave to appeal should be dismissed.

¹ *High Tech Transformers (Pty) Ltd v Lombard* (2012) 33 ILJ 919 (LC) para 25.

² *Colyn v Tiger Food Industries t/a Meadow Feed Mills Cape* [2003] ZASCA 36; [2003] 2 All SA 113 (SCA); 2003 (6) SA 1 (SCA) para 12.

³ See also *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) at 476-477.

[14] However, I find it prudent, regardless of the applicants' failure to file an application for condonation, to deal with the applicants' prospects of success in the application for leave to appeal.

[15] In terms of the provisions of s 16(1)(a)(i) of the Superior Courts Act 10 of 2013 (Superior Courts Act), an appeal against any decision of a division as a court of first instance lies, upon leave having been granted, if the court consisted of a single judge, either to the Supreme Court of Appeal or to the full court of that division, depending on the direction issued in terms of s 17(6) the Superior Courts Act .

[16] The application for leave to appeal is made in terms of the provisions of s 17(1)(a)(i) of the Superior Courts Act in that the appeal would have reasonable prospects of success. In *S v Mabena and Another*,⁴ Nugent JA explained the manner in which a court should approach an application for leave to appeal:

'It is the right of every litigant against whom an appealable order has been made to seek leave to appeal against the order. Such an application should not be approached as if it is an impertinent challenge to the Judge concerned to justify his or her decision. A court from which leave to appeal is sought is called upon merely to reflect dispassionately upon its decision, after hearing argument, and decide whether there is a reasonable prospect that a higher court may disagree.'

[17] An applicant was previously required to merely show that there is a reasonable possibility that another court, differently constituted, would find differently to the court whose judgment leave to appeal is sought. Section 17(1) of the Superior Courts Act provides now for a somewhat different situation, namely, that an applicant, in an application for leave to appeal, is required to convince the court that there is a reasonable prospect of success and not only merely a possibility of success.⁵

[18] The Supreme Court of Appeal held, in *Ramakatsa and Others v African National Congress and Another*,⁶ as follows:

⁴ *S v Mabena and Another* [2006] ZASCA 178; [2007] 2 All SA 137 (SCA); 2007 (1) SACR 482 (SCA) para 22.

⁵ See *Mthethandaba v The State* [2014] ZAKZPHC 4; 2014 (2) SACR 154 (KZP); see also *Van Heerden v Cronwright* 1985 (2) SA 342 (T); *Botes v Nedbank Ltd* 1983 (3) SA 27 (A); [1983] 2 All SA 153 (A) and *Normkow Administrators (Pty) Ltd v Fedsure Health Medical Scheme* 2005 (1) SA 80 (W).

⁶ *Ramakatsa and Others v African National Congress and Another* [2021] ZASCA 31 para 10.

'I am mindful of the decisions at high court level debating whether the use of the word "would" as opposed to "could" possibly means that the threshold for granting the appeal has been raised. If a reasonable prospect of success is established, leave to appeal should be granted. Similarly, if there are some other compelling reasons why the appeal should be heard, leave to appeal should be granted. The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist.'

[19] This application for leave to appeal is primarily grounded in the contention that the court *a quo* erred by not accepting the applicants' version of events, and various grounds are advanced in support of this application.

[20] Firstly, the applicants rely on the assertion that the respondent failed to comply with the provisions of s 129 of the National Credit Act 23 of 2005 (the NCA) in that, the s 129 notice was not served on the applicants' *domicilium* address without confirming actual receipt thereof. Considering the provisions of ss 4(1)(b) and 4(2)(c) of the NCA, the court *a quo* correctly found that the provisions of the NCA does not apply to the credit guarantee to the extent that the NCA does not apply to the credit agreement, namely the Instalment Sale Agreement (the agreement), for reason being that the agreement is a large agreement in terms of the threshold established in terms of s 7(1)(b) of the NCA. In the premises, the court *a quo* correctly found that the respondent was not obliged to give notice to the applicants in terms of s 129 of the NCA.

[21] Secondly, the applicants rely on the assertion that the combined summons was not properly served on them. However, it is common cause that service of the combined summons was effected on 23 May 2023 in terms of rule 4(1)(a)(iv) by affixing a copy of the said summons on the main entrance of applicants' respective chosen *domicilium citandi et executandi* addresses. In the premises, the court *a quo* correctly found that the combined summons was properly served on both applicants.

[22] Thirdly, it is evident from the evidence that, at the time when the combined summons

was served on the applicants, on 23 May 2023, the applicants were in default of the instalment sale agreement. The instalment sale agreement was thus validly and lawfully cancelled prior to any subsequent payments being made, and, as a result, the court *a quo* correctly found that the agreement was validly and lawfully cancelled.

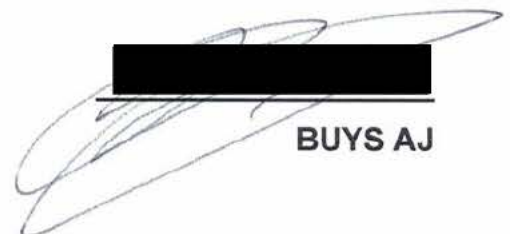
[23] Lastly, dealing with payments made by the applicants subsequent to the combined summons being issued, the court *a quo* found that the four payments made subsequent to the cancellation of the agreement, of which three payments are not in dispute, do not revive the agreement, and consequently it does not warrant the conclusion that default judgment was erroneously sought and/or granted. I align myself with these findings made by the court *a quo*.

[24] In the premises, I am not satisfied, even if a proper application for condonation for the late filing of the application for leave to appeal was before me, that the applicants have met the required threshold as set out in s 17(1)(a)(i) of the Superior Courts Act, namely that the appeal would have a reasonable prospect of success.

Order

[25] Accordingly, I make the following order:

1. The application for leave to appeal is dismissed.
2. The applicants shall pay the respondent's costs of the application for leave to appeal, counsel's fees to be taxed on scale A.



BUYS AJ

Appearances

For the applicants:	Adv Z Nyezi
Instructed by:	Blair Attorneys, Bloemfontein
For the respondent:	Adv A Verhoef
Instructed by:	MM Hatting Inc, Bloemfontein.