



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

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

15 July 2025

DATE



SIGNATURE

Case no: 23339/2020

In the application between:

P M M on behalf of M D M

Applicant/ Plaintiff

and

MEC FOR HEALTH, GAUTENG PROVINCE

Respondent/ Defendant

JUDGMENT

DELIVERED: This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email and by upload to CaseLines. The date and time for hand-down is deemed to be 12h00 on 15 July 2025.

GOODMAN, AJ:

INTRODUCTION

1. This matter came before me as an opposed application for interim payment in terms of Rule 34A of the Uniform Rules of Court. On 1 February 2024, I handed down a judgment and order removing the application from the roll and issuing directions for its further conduct (“the Order”). On about 4 September 2024, the applicant lodged an application in this Court, for leave to appeal the Order to the full bench or to the Supreme Court of Appeal. That application is opposed by the respondent.
2. The application for leave to appeal was first brought to my attention on about 26 June 2025. I set it down for hearing on Monday 7 July 2025.
3. The application for leave to appeal was initially not accompanied by a condonation application. The applicant lodged an application for condonation for the late filing of the application for leave to appeal late on Friday 4 July 2025. The respondent responded with a notice intention to oppose.
4. The parties argued both the condonation application and the leave to appeal before me on 7 July 2025.

CONDONATION

5. Mr Malatji for the applicant argued that because the respondent had failed to file answering papers, the Court is obliged to treat the condonation application as unopposed and to grant it on that basis alone. By contrast, the respondent’s counsel, Mr Dlamini SC (who appeared together with Ms Rakgwale), submitted that the respondent was entitled to an opportunity to oppose condonation, and had been deprived of that chance because the condonation application had been filed so shortly before the hearing date. He indicated that rather than delay the application for leave to appeal by seeking time to file answering papers, the respondent would oppose and argue the condonation application on the applicant’s papers alone.

6. For the reasons set out in paragraph 17 of my judgment, I accept that the respondent is entitled to adopt that approach. It is for the applicant to make out a case for condonation, and the respondent is entitled to argue that she has failed to do so. The applicant was unable to provide any case law to the contrary. It would, in any event, be unfair to preclude the respondent from opposing condonation, in circumstances where it was the applicant's timing in bringing that application that deprived the respondent of a fair opportunity to file answering papers.
7. The requirements for condonation are well established. An applicant for condonation must address:
 - 7.1. the extent and cause(s) of the delay;
 - 7.2. the effect of the delay on the administration of justice and each of the litigants;
 - 7.3. the nature of the relief sought and the importance of the matter;
 - 7.4. prospects of success; and
 - 7.5. the overall interest of justice criterion.¹
8. The explanation provided for a delay must must cover the entire period of default and must be reasonable. A superficial or unconvincing explanation will not justify the grant of condonation.²
9. In this case, the delay was substantial. The application for leave to appeal was due within 15 court days of the Order and judgment. It was lodged some 7 months later.
10. The primary explanation for the delay proffered by the applicant's attorney is that the applicant first applied to the Constitutional Court for leave to appeal the Order

¹ See, for example, *Federated Employers Fire & General Insurance Co Ltd and Another v McKenzie* 1969 (3) SA 360 (A) at 362F-H; *Van Wyk v Unitas Hospital and Another* 2008 (2) SA 472 (CC) para 21.

² *Van Wyk* para 22.

directly to that Court. The applicant awaited the outcome of that application before lodging her application for leave to appeal in this Court. The application for direct access to the Constitutional Court was dismissed on 11 June 2024.

11. Even assuming that the applicant could await the outcome of the direct access application before lodging its application for leave to appeal in this Court (which is doubtful),³ that explanation does not provide any account of the almost 3-month delay between 11 June 2024 when the applicant received the Constitutional Court's order, and 4 September 2024, when the application for leave was lodged in this Court. Of this period, Mr Malatji's affidavit says only:

"The other reasons for the late filing of the application to appeal is/are that the Appellant/ Applicant does not have money to pay for the legal fees and Mr Malatji has been instructed to institute these legal proceedings on the contingency fee agreement".

12. But as Mr Dlamini pointed out, the applicant's attorneys have been acting on contingency throughout. The applicant's inability to pay fees is irrelevant where she already has legal representatives who have undertaken to act on contingency. They should have brought the application for leave to appeal timeously or explained why they were unable to do so. The condonation application does not do so.
13. I accordingly find the explanation for the lengthy delay in bringing the application for leave to appeal to be inadequate. It falls short of the showing good cause.
14. Nor do the other factors tip the scales in favour of condonation.
15. I am mindful that the main application concerns a minor child who has been harmed and has suffered loss through the admitted negligence of the provincial government, and who is in need of ongoing medical care. The main application

³ Applications for leave to appeal from the High Court are, in practice, often lodged timeously and in parallel to an application for leave to appeal directly to the Constitutional Court, with the former application being conditional upon leave being refused by the Constitutional Court. Rule 19(3)(d) of the Constitutional Court Rules expressly recognizes and requires disclosure of such conditional applications for leave. See also *Public Protector South Africa v The Commissioner for the South African Revenue Service* 2021 JDR 1601 (GP) para 9, which describes the Public Protector's decision to await the outcome of an application for leave to appeal to the Constitutional Court before seeking leave to appeal in the High Court as "*an error of judgment*".

does therefore touch upon the rights and the best interests of the minor child. But that alone does not demand the grant of condonation. The question is whether the applicant will suffer specific prejudice and/or infringements of her rights, if condonation were to be refused.

16. On these germane issues, the condonation affidavit is silent. It does not allege that the applicant is unable to comply with the terms of the Order and, if that is the case, why not. Nor does it explain why, given the interlocutory nature of the Order,⁴ the applicant is unable to approach the High Court for a variation of its terms if they are unduly onerous.
17. Mr Malatji sought to make a factual case on these issues from the Bar. But in the absence of admissible evidence before me, the Court cannot have regard to his submissions (which were, in any event, vague and speculative). There is simply nothing before me that shows that, in the absence of condonation, the litigants or the administration of justice will be prejudiced or the applicant's constitutional rights impinged.
18. Nor has the applicant showed reasonable prospects of success in the appeal. That is so for a number of reasons.
19. First and foremost, the Order is interlocutory in nature.⁵ An interlocutory order is generally not appealable; to appeal it, an applicant for leave must show that it is final in effect or that the interests of justice favour the grant of leave.⁶ The applicant has not met that hurdle. She has not demonstrated that the Order is determinative of any rights or legal issues between the parties. Nor has she put up facts to show that the interests of justice demand an appeal in this case. I have dealt with this above.

⁴ It is well established that, at common law, a purely interlocutory order may be corrected, altered or set aside any time before final judgment: see, for example, *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 550H; *Zondi v MEC, Traditional and Local Government Affairs, and Others* 2006 (3) SA 1 (CC) para 30.

⁵ See *Fair v SA Eagle Insurance Co Ltd* 1995 (4) SA 96 at 99D.

⁶ *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others* 2023 (1) SA 353 (CC) para 45; *Tshwane City v Vresthena (Pty) Ltd and Others* 2024 (6) SA 159 (SCA) paras 8-11 and the cases cited therein.

20. Second, the applicant has failed to identify any respect in which the judgment erred in its interpretation of Rule 34A, or the basis on which another court may overturn the Order. In this regard:

20.1. The grounds of appeal contained in the notice of application for leave to appeal are vague. The application identifies those grounds as follows:

“The Court erred in removing the matter from the roll with costs and failed to consider the children’s rights as enshrined in the Constitution;

... .

The Court erred in allowing Advocate Dlamini to obstruct her legal proceedings since the MEC’s legal team did not file answering affidavit.

... .

Her Ladyship erred in finding that the Applicant has not made out a proper case for interim payment.

... .

His Lordship failed to exercise judicial oversight where different Justice would have done so by not prejudicing the minor child.”

20.2. The application for leave to appeal does little more than suggest that another court might have approached the matter or exercised its discretion differently. But it does not provide a legal or a factual basis why that would be so. The central finding of the judgment was that the applicant had failed to adduce evidence to support the total amount of damages claimed in the action, or the extent of the interim payment claimed. No basis was identified, in the application for leave to appeal or in argument, to gainsay that finding.

20.3. In any event, an appeal court can only interfere with a court’s exercise of a discretion if it appears that the court operated under a wrong appreciation of the facts or wrong principle of law.⁷ The application for leave to appeal does not cite particular legal provisions or relevant facts that the Court should have considered and overlooked, or that it misapplied. The applicant has consequently not pleaded or shown prospects of success in an appeal based on the misapplication of the Court’s discretion.

⁷ *Giddey NO v JC Barnard and Partners* 2007 (2) BCLR 125 (CC) para 19.

20.4. In the application for condonation and in his written and oral submissions, Mr Malatji sought to expand his grounds of appeal – primarily to argue that the respondent’s legal team had been improperly, unlawfully and/or corruptly appointed and that I consequently should not to have allowed them to participate in the proceedings. Even if such an expansion were permissible (which it is not), that complaint cannot found a basis for leave to appeal since:

20.4.1. This issue was not raised in the Court a quo. The applicants’ counsel expressly elected not to forego a challenge to the authority of the respondent’s legal team. Having done so, the applicant cannot now complain that the issue ought to have been, but was not, decided.

20.4.2. In any event, there is no factual basis laid in any of the affidavits before me to support the claims of fraud, corruption, maladministration and misconduct of which Mr Malatji accuses the respondent’s legal team. Serious allegations of this nature should not be made in the air – particularly not against officers of the court. In the absence of any evidence in support of these claims, the Court cannot have regard to them, let alone grant leave to appeal on the back of them.

21. In the circumstances, the applicant has failed to establish good cause for condoning the late filing of the application for leave to appeal, and I do not find it to be in the interests of justice. Condonation will therefore be refused. The costs should, in my view, follow the result.

LEAVE TO APPEAL

22. For completeness, the application for leave to appeal would, in any event, fall to be dismissed for the reasons set out in paragraphs 18 to 20 above.

ORDER

23. In the result, the following order is made:

The condonation application, and accordingly the application for leave to appeal, are dismissed with costs.



ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Hearing date: 7 July 2025
Judgment date: 15 July 2025

Appearances:

Attorneys for the plaintiff:	S Malatji Malatji S Attorneys
Counsel for the defendant:	MW Dlamini SC L Rakgale
Instructing attorneys:	MBA Inc.