IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY

Case No:	**658/2022**
Reportable:	YES / **NO**
Circulate to Judges:	YES / **NO**
Circulate to Magistrates:	YES / **NO**
Circulate to Regional Magistrates:	YES / **NO**

In the matter between:

PRAIA ROCHA 122 INVESTMENTS (PTY) LTD
(Registration No: 2007/008499/07) First Appellant

GLEN GILMOUR MURDOCH
(Identity No: 7[...]) Second Appellant

and

THE LAND AND AGRICULTURAL BANK OF SOUTH AFRICA Respondent

In re:

THE LAND AND AGRICULTURAL BANK OF SOUTH AFRICA Applicant

and

PRAIA ROCHA 122 INVESTMENTS (PTY) LTD
(Registration No: 2007/008499/07) First Respondent

GLEN GILMOUR MURDOCH
(Identity No: 7[...]) Second Respondent

GIDEON JACOBUS KOEGELENBERG Third Respondent

Heard: 11 June 2025

Delivered: 20 June 2025

Summary: Application for leave to appeal brought out of time. Whether condonation should be granted. The applicants had raised points of law on notice in terms of Rule 6(5)(d)(iii). New grounds raised in seeking leave to appeal.

ORDER

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1. The application to condone the late filing of the application for leave to appeal is dismissed.
2. The application for leave to appeal is refused.
3. The applicants, jointly and severally, are ordered to pay the costs of the respondent on the scale as between attorney and client including the costs of counsel.

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

Mamosebo J

[1] The applicants seek leave to appeal to the Supreme Court of Appeal (SCA), alternatively, the Full Court of the Northern Cape Division against the order and judgment I delivered on 26 May 2023 in which I granted the Land and Agricultural Bank of South Africa (the Land Bank) monetary judgment and declared several immovable properties specially executable. The applicants contend that the appeal would have a reasonable prospect of success.

[2] On 22 April 2024 I heard the application for leave to appeal launched by Mr Gideon Jacobus Koegelenberg, who was cited in the main application as the

third respondent. Praia Rocha 122 Investments (Pty) Ltd and Mr Glenn Gilmour Murdock (who were the first and second respondents in the main application), filed a Notice to Abide the court's decision. I refused Mr Koegelenberg leave to appeal having found that there was neither a case made out for prospects of success nor a compelling case for the appeal to be heard. Mr Koegelenberg petitioned the SCA and leave was also refused. According to the parties, Mr Koegelenberg's application is pending before the Constitutional Court and has not been allocated a date yet. I am also informed that the applicants, in the current application, have only filed a Notice in terms of Rule 30 against Mr Koegelenberg's application in the Constitutional Court.

[3] The test whether to grant leave to appeal is trite. Leave should only be granted in terms of s 17(1)(a)(i) and/or s 17(1)(a)(ii)[1] if the applicant has satisfied the court that the appeal would have a reasonable prospect of success or that there is some compelling reason why the appeal should be heard[2].

Condonation

[4] The applicants filed an application in terms of Rule 27 of the Uniform Rules of Court urging this Court to condone their late filing. Having listed 21 grounds upon which they rely in their application for leave to appeal dated 06 November 2024 and filed on 07 November 2024 under the head: *'Application for leave to appeal in terms of Uniform Rule 49',* the applicants, below those grounds and on the same document, proffered this explanation for their non-compliance with the timeframes in these terms:

4.1 This application is brought following a change of legal representation. The applicant[s] [were] previously represented by BJ

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[1] 10 of 2013 Superior Courts Act

17 Leave to appeal

(1) Leave to appeal may only be given where the judge or judges are of the opinion that –

(a) (i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.

[2] Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd 2020 (5) SA 35 (SCA); Mont Chevaux Trust v Goosen 2014 JDR 2325 (LCC); Ramakatsa and Others v African National Congress and Another (724/2019) [2021] ZASCA 31 (31 March 2021).

Liebenberg Attorneys. However, *due to reasons beyond applicants' control,* the applicants terminated the mandate of the previous legal representatives during July 2024, and new attorneys, Engelbrecht Attorneys, were appointed to represent the applicants;

4.2 The change in attorneys resulted in a delay in the preparation of the necessary documentation, as the new legal representatives required time to familiarise themselves with the case and fully understand the history and complexities of the matter;

4.3 following the change of attorneys, the applicants and the new legal representatives only *became aware of certain critical facts* that were previously not made clear or adequately considered in the original application. These facts are material to the applicant's position and are pivotal to the decision to seek leave to appeal;

4.4 The delay in filing the application was therefore not due to any negligence or lack of diligence on the part of the applicant or their new legal representatives but rather due to the necessity of reviewing and reassessing the case considering newly discovered facts;

4.5 The applicants are also awaiting a pending decision from the Constitutional Court in a matter that has significant relevance to the issues raised in this case. The outcome of this matter is expected to have a bearing on the legal arguments in the current case and may influence the outcome of the appeal, there is indeed a *prima facie* [case] and as such the appeal has reasonable merits to be successful;

4.6 In light of this, the applicants believed it prudent to await the decision of the Constitutional Court before proceeding with the application for leave to appeal, as it could materially affect the viability of the appeal or the grounds upon which the applicant may seek leave;

4.7 There will be no prejudice to the public interest should the condonation be granted, the only thing would be the costs associated with the auction;

4.8 The applicants are willing to tender reasonable costs for the day that the auctioneers would incur for the auction and as such there will be no prejudice towards them; and

4.9 The respondent will not be prejudiced as the balance of interest, together with facts that became known to the applicant and his legal team favour the applicant based on law.

[5] It is trite that condonation cannot be had for the mere asking. The Constitutional Court (ConCourt) in *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)*[3] reaffirmed the principle regarding condonation to this effect:

'This court has held that the standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success.'

The Court went on to state:

'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.'

[3] 2008 (2) SA 472 (CC) paras 20 and 22

[6] Since the applicants are seeking an indulgence from the court, they bear the onus of making out a case entitling them to the relief that they are seeking. What is immediately striking is that no dates or periods are furnished between one event to the next and what specifically was done during the relevant periods. The requirements and principles set out in the *Van Wyk* case (above) have been seriously flouted.

[7] Counsel for the applicants, Mr Van Staden, submitted that the applicants were let down by their erstwhile attorneys, and it was only when they became aware of the sale in execution of the properties that were specifically declared executable by this Court on 26 May 2023, scheduled to take place on 08 November 2024 that they sprang into action. That action pertained to them filing an application for leave to appeal on 07 November 2024. A day before the auction sale and more than sixteen months after the declaration.

[8] The instructive remarks by the appellate court in *Saloojee and Another NNO v Minister of Community Development*[4] bear repeating:

‘There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity. In fact. this Court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the Rules of this Court was due to neglect on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are. (Cf. Hepworths Ltd v Thornloe and Clarkson Ltd., 1922 T.P.D. 336; *Kingsborough Town Council v Thirlwell and*

[4] 1965 (2) SA 135 (A) at 141C -H

Another, 1957 (4) SA 533 (N)). A litigant, moreover, who knows, as the applicants did, that the prescribed period has elapsed and that an application for condonation is necessary, is not entitled to hand over the matter to his attorney and then wash his hands of it. If, as here, the stage is reached where it must become obvious also to a layman that there is a protracted delay, he cannot sit passively by, without so much as directing any reminder or enquiry to his attorney (cf. *Regal v African Superslate (Pty.) Ltd*., supra at p. 23 i.f.) and expect to be exonerated of all blame; and if, as here, the explanation offered to this Court is patently insufficient, he cannot be heard to claim that the insufficiency should be overlooked merely because he has left the matter entirely in the hands of his attorney. If he relies upon the ineptitude or remissness of his own attorney, he should at least explain that none of it is to be imputed to himself. That has not been done in this case. In these circumstances I would find it difficult to justify condonation unless there are strong prospects of success (*Melane v Santam Insurance Co. Ltd*., 1962 (4) SA 531 (AD) at p. 532).'

[9] Rule 49(1)(b) stipulates that when leave was not requested at the time of the judgment or order, application for such leave shall be made and the grounds therefore shall be furnished within fifteen days after the date of the order appealed against. Judgment and order was delivered on 26 May 2023. The applicant's new attorneys filed a Notice of intention to Oppose the Constitutional Court matter on 21 August 2024, but only filed this application for leave to appeal the judgment relating to the main application on the eve of the sale in execution, 07 November 2024, as stated. It can therefore not be correct that they acted as soon as they came on record. It is apparent that the applicants were thereby trying to frustrate the auction and giving the respondent less than 24 hours to respond.

[10] At para 4.1 the applicant makes this allegation: '*due to reasons beyond the applicants' control'* the applicant terminated the mandate of the previous legal representatives.' That statement is vague and inadequate and is not supported by any content and context. It is further unclear how long it took the attorneys of record to familiarise themselves with the papers after

receiving instructions in July 2024. It is not disputed that they were in the fray when Koegelenberg filed his application at the SCA and at the ConCourt. Their election to abide the decision of this court when Mr Koegelenberg sought leave has consequences.

[11] It is significant that the applicants have in the main application not filed any answering affidavit and only raised these three points of law in terms of Rule 6(5)(d)(iii): (a) service of the s 129 notice of the National Credit Act, 34 of 2005; (b) compliance with Rule 46(1) of the Uniform Rules of Court; and (c) compliance with Rule 41A of the Uniform Rules of Court. These three issues are adequately addressed in the main judgment, and I find it unnecessary to regurgitate them here.

[12] The applicants cannot be allowed to raise completely new issues not only in the application for leave but also in the written submissions. They rely on these three grounds: (1) Error in law in the interpretation of the principle that no one can transfer more rights to another than he himself has; (2) that the court's factual findings were not supported by evidence when it said the debt is not in dispute; (3) error in law in the interpretation of Rule 46A(2) of the Uniform Rules of Court read with s 26 of the Constitution without taking into account the judgment in *Bestbier and Others v Nedbank Ltd* 2024 (4) SA 331 (CC). There was absolutely no evidence before this court pertaining to the occupants of the immovable properties at the time of hearing the main application. I must reiterate that the applicants did not invoke Rule 46A(2) before me but 46(1).

[13] The contention regarding whether or not the debt is in dispute was not only not challenged when the matter was argued before court but the SCA has laid this aspect to rest in *Boxer Superstores Mthatha and Another v Mbenya*[5] when it said:

[5] 2007 (5) SA 450 (SCA) para 4

‘As yet there is no answering affidavit, and we must at this stage take the allegations in the founding affidavit to be established facts.’

[14] The applicants have to surmount two hurdles: First the inordinate delay in bringing this application and the lack of a reasonable explanation thereto and, secondly, whether they have made out a case that the interests of justice demand that the appeal be heard. They failed on both counts.

[15] In *Corpclo 2290 CC t/a U-Care and Another v Registrar of Banks*[6] the Court said:

‘On appeal, the appellant’s counsel (who did not appear in the court a quo) seek, in their heads of argument, to make out a completely new case on behalf of the appellants. This has three parts. First, they contend that the court *a quo* failed in its duty under sections 8 and 39 of the Constitution to interpret the Act in a way that respects, promotes and fulfils the rights in the Bill of Rights. It did this, according to the argument, because it failed to take account of sections 1, 22, 25 and 33 of the Constitution. Second, they contend that even if the court *a quo’s* interpretation is correct, Notice 498 is unconstitutional …Thus, the appellants raise three constitutional issues, the proper interpretation of the Act, the constitutionality of the Notice and the constitutionality of the power conferred on the Registrar to determine the meaning of “the business of a bank”’.

The Registrar’s counsel contends that because these issues were not canvassed in the appellant’s answering affidavit the appellants are precluded from advancing them on appeal.

The appellants’ approach ignores all the well-established rules of practice governing motion proceedings and the raising of constitutional issues. It is trite that in motion proceedings the affidavits comprise both the pleadings

[6] [2012] JOL 29703 (SCA) paras 13, 15 and 16

and the evidence and that the parties' contentions should appear clearly from the affidavits so that the opposing party can deal with them.'

[16] Ms van der Merwe correctly asked the court to disregard the arguments made on behalf of the applicants as they were not canvassed when the matter was argued before the court. The applicants had made the election to only argue the specified points of law. I find that there is no justifiable reason to come to the aid of the applicants because they have been dilatory in the conduct of their litigation.

[17] Arguing a completely new case when seeking leave ignores all the well-established rules of practice governing motion proceedings and cannot be countenanced by this court. The applicants have not made out a case of prospects of success which warrant leave to be granted. Even if that were the case, the applicants are non-suited based on the inordinate delay of 17 months without a reasonable explanation.

[18] On the question of costs. The applicants' belated concern for the farmworkers and their security of tenure is indeed self-serving as it was only raised when seeking leave to appeal. If it were the case this aspect would have been argued earlier in the main application. I find that their sole purpose is to frustrate the execution of the already declared specially executable property in favour of the bank.

[19] In the result, the following order is made:

1. The application to condone the late filing of the application for leave to appeal is dismissed.

2. The application for leave to appeal is refused.

3. The applicants, jointly and severally, are ordered to pay the costs of the respondent on the scale as between attorney and client including the costs of counsel.

M.C. MAMOSEBO
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

For the Applicant:	Adv. HP Van Staden
Instructed by:	Engelbrecht Attorneys
	c/o Roux Welgemoed & Du Plooy Attorneys
For the Respondent:	Adv. A.van der Merwe
Instructed by:	Leahy Attorneys Inc
	c/o Van de Wall Inc