



**OFFICE OF THE CHIEF JUSTICE
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case NO: 22132/2024

**REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO**

In the matter between:

CAREL ARON VAN DER MERWE

APPLICANT

and

MAGISTRATE BLAAUW N.O.

FIRST RESPONDENT

MAGISTRATE GEA JACOBS N.O.

SECOND RESPONDENT

DEON MARIUS BOTHA N.O.

THIRD RESPONDENT

JOCHEN ECKHOFF N.O.

FOURTH RESPONDENT

PHILIMON TATENDA MAWIRE

FIFTH RESPONDENT

**THE LAND AND AGRICULTURAL
DEVELOPMENT BANK OF SOUTH AFRICA**

SIXTH RESPONDENT

MASTER OF THE HIGH COURT

SEVENTH RESPONDENT

Coram: Slingers J et Kholong, AJ

Date of hearing: 4 August 2025

Date of judgment: 25 August 2025

JUDGMENT

KHOLONG AJ

Introduction

[1] The applicant has filed an application for leave to appeal against the judgement and orders of this Court delivered on 23 May 2025. The background to the main application is set out in the judgment and need not be repeated herein.

[2] The applicant, now appearing in person, seeks leave to appeal in terms of section 17(1)(a)(i) and (ii) of the Superior Courts Act.

[3] The application for leave to appeal is opposed by the 3rd to 6th respondents.

Grounds of Appeal

[4] In bringing the application for leave to appeal, the applicant submits that the Court erred in law and fact thereby prejudicing the applicant, creditors, and public interest by failing to uphold the rule of law thereby violating the applicant's section 9 constitutional right to equality, and section 33 right to just administrative action.

[5] In a nutshell, the applicant attacks:

- (i) the Court's directive that the Rule 30 application would be heard with the main application;
- (ii) the Court's refusal of the condonation application for the late bringing of the rule 30 application;

- (iii) the Court's refusal to grant the informal application for a postponement of the hearing of the main application; and
- (iv) This court's assessment of the main application in dismissing it.

[6] The applicant argues that this court's refusal of his application resulted in an infringement of his constitutional right to equality; right to just administrative action and to a fair public hearing.

[7] The applicant was legally represented throughout the hearing, with his legal representatives electing not to participate in the proceedings when their request for a postponement was denied. It must be emphasized that the applicant's legal representatives did not withdraw as his legal representative and remained on record but that they simply left the court and elected not to participate further in the proceedings.

[8] Had the applicant's legal representative withdrawn, the court would have had to consider the applicant's right to legal representation. However, in the circumstances of this matter that did not arise.

[9] The election of the applicant's legal representative not to participate in the proceedings pertaining to the main application was a manipulative ploy to engineer a postponement after it was refused by the Court and borders on an abuse of the court process.

[10] The court's refusal to postpone the hearing does not amount to a violation of the applicant's constitutional rights to equality, nor right to a fair hearing or to just administrative action.

[11] The applicant argued that the Court erred when it failed to consider the alleged conflict of interest which resulted from a trustee and creditor in the insolvent estate having the same legal representative. The applicant also repeated these arguments presented at the hearing (prior to him and his legal representatives walking out) but failed to show why the Court erred in finding as it did.

[12] The applicant equally complains that the Court left some matters undetermined and raise as illustration the argument that the court did not deal with the point raised by respondents on his locus standi nor determine prayer 5 and 6 in the notice of motion. This argument is without foundation. Applicant had been granted interim relief by this court on 8 November 2024 thereby accepting his locus standi as insolvent to launch this application. More importantly, respondents did not pursue this line of argument during the hearing on the return date. This argument by applicant is thus superfluous.

[13] Similarly, the argument that the court, whilst it noted prayer 5 and 6, did not decide this question thereby raising an error is without foundation on the facts and in law. Rule 6(1) prescribes that every application shall be brought on notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief. It was held in **Reynolds**¹ that the facts must be set out simply, clearly and in a chronological sequence, and without argumentative matter, in the affidavits which are filed in support of the notice of motion.

[14] Prayer 5 in the notice of motion deals with a request for an order *“that the order of court issued...by the second respondent on 24 May 2024 be declared invalid and be set aside”*. Prayer 6 requested that *“..the decisions taken at the first meetings and second meetings of creditors including all decisions to postpone the said meetings of creditors, the resolutions passed, and the subpoenas issued, be declared invalid and be set aside”*.

[15] It is trite per authority in **R v Dhlumayo**², that judgements can never be all embracing and therefore that just because something was not mentioned specifically in the judgement, does not mean it was not considered. Schreiner JA in **Dhlumayo** noted that where an appellate court is not satisfied that the verdict appealed from is wrong, but is seriously dissatisfied with the treatment of issues of fact in the judgement supporting the verdict, it must be a question of degree whether the flaws in the judgement, coupled with appellate court's doubts as to the correctness of the

¹ Reynolds NO v Mecklenberg (Pty)Ltd 1996(1) SA 75 at 781.

² R v Dhlumayo and Another 1948 (2) SA 677 (A) at 702.

verdict, are such as to require the appeal to be allowed. On the facts foreshadowed above, this court would think not.

[16] Appeals lie in any event against the substantive order of the court, not the reasons or lack thereof for the judgement as held in ***Cape Empowerment Trust***³

[17] Paragraph 24 of the main judgement which applicant seeks leave to appeal states that despite applicant's Counsel decision to excuse himself, this court had been left with "the papers" and respondent to consider his papers and assessing the merits of the application and defense. The court went on to point out that it will consider "the applicant's version from his affidavit and the evidence on the papers". It goes without saying that an affidavit is in support of the relief or prayers sought in the notice of motion. Paragraphs 24 to 47 of the judgement proceeds to summarize and consider submissions made with reference to applicable law on applicant's reasons to have the following set aside as set out in the notice of motion: 1st and 2nd meeting of creditors; the decisions made in those meetings and the directions made by 3rd respondent per prayer 5 and 6 in the notice of motion. This court in giving its judgement on the relief applicant sought, pointedly prayer 5 and 6, at paragraph 47 stated as follows "This court thus concludes that the main application falls to be dismissed". The main application was about prayers 1 to 8 in the notice of motion.

[18] The argument therefore that the court did not determine prayers 5 and 6 is thus misplaced on the facts and in law for the reasons foreshadowed above. In any event even if there was doubt, which there isn't, this court's order makes it plain per paragraph 52 of the judgement with its order that applicant's "application dated 14 October 2024 is dismissed". The dismissal of the application logically and as a matter of common sense includes prayers 5 and 6 with the reasons set therein for refusing to set aside the meetings and as a corollary, decisions made therein, as stated in the judgement.

The Law

³ Cape Empowerment Trust Limited v Fisher Hofman Sithole 2013 (5) 183 (SCA) at 1981-J.

[19] Section 17(1) of the **Superior Courts Act**⁴ reads:

“(1) Leave to appeal may only be given where the judge or judges concerned 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 judgements on the matter under consideration”.

[20] The Supreme Court of Appeal in **Notshokovu**⁵ noted that an appellant faces a higher and stringent threshold in terms of the Act compared to the provisions of the repealed **Supreme Court Act 59 of 1959**. Whilst **Erasmus** in its commentary observed that this remark by the SCA was obiter dictum as far as it possibly relates to section 17(1)(a)(i), it is significant that the **Notshokovu** remark was applied in applications for leave to appeal under section 17(1)(a)(i) of the Act in **Mtungwa v Premier of Kwazulu-Natal**⁶, **Talhado Fishing Enterprises (Pty) Ltd v Firstrand Bank Ltd t/a First National Bank**⁷ and **Mombeeg (Pty) Ltd v Eskom Rotek Industries SOC Ltd**⁸.

[21] In **MEC for Health, Eastern Cape v Mkhitha**⁹ the Supreme Court of Appeal held that leave to appeal, especially to that court must not be granted unless there truly is a reasonable prospect of success. The Court noted in this judgement that the **Superior Courts Act** makes it clear that leave to appeal may only be granted where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success or there is some other compelling reason why it should be heard. An applicant for leave to appeal must convince the Court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. The Court noted that a mere possibility of success; an arguable case or one that is not

⁴ Superior Courts Act 10 of 2013.

⁵ Notshokovu v S (unreported, SCA case no 157/15 dated 7 September 2016.)

⁶ Mtungwa v Premier of Kwazulu Natal, unreported, KZP case no 3618/22P dated 28 February 2023 at para 5.

⁷ Talhado Fishing Enterprises (Pty) Ltd v Firstrand Bank Ltd t/a First National Bank, unreported ECGq case no 1104/2022 dated 14 March 2023 at para 3.

⁸ Mombeeg (Pty) Ltd v Eskom Rotek Industries SOC Ltd, unreported, GJ case no 2021/15418 dated 27 March 2023 at para 9.

⁹ MEC for Health, Eastern Cape v Mkhitha, unreported, SCA case no 1221/2015 dated 25 November 2016

hopeless is not enough. There must be a sound rational basis to conclude that there is a reasonable prospect of success on appeal.

[22] **Erasmus**¹⁰ in its commentary observes that from this foreshadowed list of authorities following enactment of the new Act, it follows that leave to appeal must only be granted when there is a rational basis for doing so. This court concurs.

[23] After considering the grounds set out in the application for leave to appeal together with the parties' submissions, this Court is not satisfied that the applicant has demonstrated that this Court misdirected itself on the facts or in law in dismissing the Rule 30 application nor refusing the postponement and determining the main application.

[24] It was held in **Trencon Construction**¹¹ that judicial discretion in the true sense is found where a court has a wide range of equally permissible options available to it. A true discretion obtains in circumstances where a court has an election as to which option it will apply and no option can be said to be wrong where each is entirely permissible given the circumstances. By contrast, where a court has a discretion in the loose sense, it does not necessarily have a choice between two equally permissible options. Instead, such a discretion means no more than that a court is entitled to have regard to a number of disparate and 'incommensurable features' in coming to a decision.

[25] It is this Court's view that its decision regarding its direction to hear both the Rule 30 application together with the main application as directed in February 2025 to the parties entailed a true discretion. It is also this Court's view that its authority in relation to consideration and decision in respect of the condonation applications (i.e. condonation application for late filing of heads; condonation application for late filing of the rule 30 application; condonation application for the postponement) as dealt with on the day of this hearing involved the exercise of a true discretion.

¹⁰ Erasmus, Superior Court Practise, vol 1 3rd edition, service 4, 2024 at D-106.

¹¹ Trencon Construction (Pty)Ltd v Industrial Development Corporation of South Africa and Another 2015 (5) SA 245 (cc) at 82-86.

[26] In **Giddey**¹², it was observed that the approach of an appellate court to an appeal against the exercise of a discretion by another court will depend upon the nature of the discretion concerned. That where a discretion is a true discretion, the appellate court will not consider whether the decision reached by the court of first instance was correct, but will only interfere in limited circumstances for instance if it is shown that the discretion has not been exercised judicially or has been exercised based on a wrong appreciation of the facts or wrong principles of law.

[27] This Court empowered by Rule 6(11) directed that the rule 30 application will be heard together with the main application understanding that the matters raised by the parties were urgent. The argument that this direction was not judicious is thus incorrect and misplaced given that applicant himself came to court on an urgent basis. It was in the interest of justice for both insolvent, the trustees and creditors that these matters are dealt with expeditiously.

[28] The Court did not receive a satisfactory explanation in the rule 30 condonation application why the applicant did not or could not prepare a replying affidavit if he deemed it critical to his case after getting the directions on 27 February 2025 that the matter is set down for 14 March 2025 from the Judge hearing this matter. The applicant ignored the Court's directive and when the condonation for late filing is refused the applicant seeks a postponement to allow him to prepare.

[29] In any event a case for an applicant is not made out in a replying affidavit nor can the applicant raise new matters therein. A replying affidavit is limited to those matters as may have been raised in the answer requiring a substantive rebuttal. A reply is thus at the election of an applicant, where if so employed requires due diligence such that a court is put into a position to take account of when the matter is considered. In this case the applicant did not, after getting clear court's direction on how it intends to manage proceedings, draft a replying affidavit. Even if applicant's counsel believed he could not take any further step, which was legally incorrect, as he argued before this court after filing the rule 30. If proper regard is had to the direction given by this court on 27 February 2025 there was no explanation why a

¹² *Giddey N.O. v JC Barnard and Partners* 2007 (5) SA 525 (cc) at 19.

draft could not be kept in hand to hand up or file should the rule 30 application they had filed fail.

[30] It was held by Schutz JA¹³ that a party opposing an application to postpone as was the case in this matter has a procedural right that the matter should proceed on the appointed day. That it is also in the public interest that there should be an end to litigation. The court found in that case that in order for an applicant for a postponement to succeed, he must show a 'good and strong reason' for the grant of such relief. The more detailed principles were summarized by the Constitutional Court as follows:

'The postponement of a matter set down for hearing on a particular date cannot be claimed as of right. An applicant for a postponement seeks an indulgence from the Court. Such a postponement will not be granted unless this Court is satisfied that it is in the interest of justice to do so. In this respect the applicant must show that there is good cause for the postponement. In order to satisfy the Court that good cause does exist, it will be necessary to furnish a full and satisfactory explanation of the circumstances that give rise to the application. Whether a postponement will be granted is therefore in the discretion of the Court and cannot be secured by mere agreement between the parties. In exercising that discretion the Court will take into account a number of factors, including but not limited to:

- i) Whether the application has been timeously made;*
- ii) Whether the explanation given by the applicant for postponement is full and satisfactory;*
- iii) Whether there is prejudice to any of the parties; and*
- iv) Whether the application is opposed.'*

[31] It is apparent that the applicant took it for granted, against a clear direction of this Court, that if the Rule 30 application fail they will be entitled to a postponement. Postponements are not just there for the taking as held in **McCarthy Retail's** case. This application for postponement was opposed. There must be sound reason

¹³ McCarthy Retail Ltd v Shortdistance Carriers cc [2001] 3 All SA 236 (a) at 28.

advanced which in the Court's view justify granting an order for postponement. The Court had to consider prejudice or potential prejudice not only to applicant but also to respondents. The applicant's failure to advance sound reasons for the court to grant a postponement is not a miscarriage of justice nor can it be said to raise a constitutional infringement as it relates to a litigant's right to a fair hearing. A Court has a duty to always balance the rights of an applicant to those of respondents.

Conclusion

[32] The applicant has failed to show that there are reasonable prospects that another court would differ from our judgement and orders.

[33] Furthermore, the applicant has failed to show that there is any other compelling reason why leave to appeal should be granted.

Costs

[34] Applicant and respondents have asked for costs. This Court is satisfied that respondents are entitled to costs.

Order

Accordingly, I would make the following order:

[35] The application for leave to appeal is dismissed.

[36] The applicant is to pay costs of the 3rd to 6th respondents on Scale C.

KHOLONG, AJ

I agree. It is so ordered.

Appearances:

For the Applicant: Mr. Van der Merwe
(appearing in person)

For the Third to
Fifth Respondent: Adv L.M Olivier SC

Instructed by: JI Van Niekerk Incorporated Attorneys

For the Sixth
Respondent: Adv. D.W Baguley
Instructed by: Strydom and Bredenkamp