

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 35877/2018

1. REPORTABLE: YES / NO
2. OF INTEREST TO OTHER JUDGES: YES/NO
3. REVISED: YES / NO
DATE: 23 October 2025
SIGNATURE OF JUDGE:

[Handwritten signature and a black redaction box are present over the signature line.]

In the matter between:

MOTSEPE: BANAKILE PEARL TETE

APPLICANT

and

NEDBANK LIMITED

RESPONDENT

JUDGMENT

HERSHENSOHN AJ

INTRODUCTION

[1] The current matter comes before me as an application for leave to appeal subsequent to an order handed down by me on Thursday, 24 April 2025. In terms of the abovementioned order I dismissed the current application and subsequently an application for leave to appeal was filed.

[2] I should note at this stage that I did not at the granting of the order, give any reasons, nor were any reasons sought, however, and as will become apparent from what is set out hereunder, the application for leave to appeal revolves around a very crisp issue.

BACKGROUND FACTS

[3] The current application was initially an application launched in 2018 and in terms of which default judgment was granted on a loan agreement and mortgage bond. In this regard default judgment was granted on 19 August 2019 by Swanepoel AJ (as he then was).

[4] Subsequent to the granting of default judgment and on 20 April 2022 a rescission application was launched by the applicant. The rescission application was opposed and I must note that after opposing the rescission application it took some doing to persuade the applicant to ensure that its papers were properly filed, most notably, an application being launched to compel the applicant to file their heads of argument which application was launched on 7 October 2022. Consequently, the applicant was compelled by an order of court to file its heads of argument on 24 November 2022, and ultimately the rescission application was set down for hearing.

[5] On 16 August 2023 Yende AJ dismissed the rescission application and gave a reasoned judgment.

[6] On 15 January 2024 some five months after the judgment of Yende AJ was handed down, the applicant launched an application for leave to appeal the said judgment. By this time, almost five years had passed since the issuing of summons and the granting of default judgment.

[7] On 31 May 2024 and at a sale in execution, sanctioned as such, a certain Ms Lizzy Moota purchased the immovable property which was the subject of the default judgment.

[8] It was consequent to the abovementioned sale in execution that the application which was before me was launched on 11 June 2024. Shortly after the application being launched the second respondent (Nedbank) filed their opposing papers and to date and in that matter the applicant has neither filed a replying affidavit nor has the applicant filed heads of argument in the said application.

[9] Be that as it may, the crisp issue of the application which served before me was that in essence, since the applicant had launched an application for leave to appeal on 15 January 2024, this, in terms of the provisions of section 18(1) of the Superior Courts Act, 10 of 2013, would suspend the order of Yende AJ and would have precluded the second respondent from selling the immovable property in execution.

[10] The obvious flaw in this argument is that the application for leave to appeal was to be filed within fifteen court days of the granting of the order which took place on 16 August 2023. Alternatively, condonation was to be sought for the late filing of the application for leave to appeal. This was not done.

[11] This was the basis upon which the application was dismissed and by myself, and resulted in the order which leave is sought to appeal.

THE APPLICATION FOR LEAVE TO APPEAL

[12] Subsequent to the granting of my order on 24 April 2025 and on 6 May 2025 an application for leave to appeal was filed in the matter and by the applicant.

[13] In the application for leave to appeal the issues raised can be summarised from quoting the application and as follows:

- “2. *The learned Acting Judge’s judgment is in direct contrast with section 18(1) read with section 18(5) of the Supreme Court Act, 10 of 2013. The application for leave to appeal was instituted in January 2024. The sale in execution was pursued in May 2024. The sale in execution ought not to have been launched by the respondent at all.*
3. *The learned Acting Judge erred in not granting the relief sought by the applicant, alternatively, not ordering that the application to set aside the sale in execution be kept in abeyance pending the finalisation of the appeal proceedings.*
4. *The learned Judge erred in holding that the applicant had not made an application for condonation in the application for leave to appeal proceedings. The merits of the application for leave to appeal was not heard before the court.”*

[14] At the hearing of the application for leave to appeal which took place on 9 October 2025, the applicant’s heads of argument had for a technical reason not been uploaded. I afforded the applicant an opportunity to, after argument, file their heads of argument and furthermore afforded the second respondent (Nedbank) the further opportunity to file answering heads of argument if they deemed it necessary, which I undertook to consider prior to delivering judgement on the application for leave to appeal.

[15] Both parties complied with the above request, and I now consider the arguments raised by the parties, both in argument, and in their heads of argument, and in the current application for leave to appeal.

[16] As alluded to already hereinabove the issue appears very crisp.

[17] In this regard the crisp point relied upon by the applicant, both in argument and in his heads of argument, relates to the suspension of decisions pending an appeal and more particularly the provisions of section 18(1) of the Superior Court Act, 10 of 2013. For purposes of this judgment I quote the particular provision as follows:

“18. ***Suspension of decision pending appeal***

- (1) *Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and*

execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.”

[18] In this regard and in order to bolster the contents and provisions thereof (which principles in my view are in any event trite) the applicant relied upon the matter of **Minister of Finance v Sake Liga NPC and others** 2022 (4) SA 401 (CC) where Madlanga JA (as he then was) at paragraphs 12, 13 and 15 recorded as follows:

“[12] *Crucially, the Minister is aware of the import of section 18(1) on the Superior Courts Act. He says in terms of this section the operation of the order of the Supreme Court of Appeal was suspended from the date the Minister lodged an application for leave to appeal to this court on 23 November 2020. Law is and has always been, clear on the issue. In Ntlemeza the Supreme Court of Appeal traces the law from the common law position before any statutory intervention South Cape Corporation, which held:*

‘Whatever the true position may have been in the Dutch courts, and more particularly the Court of Holland ... it is today the accepted common law rule of practice ... that generally the execution of a judgment is automatically suspended upon the noting of an appeal, with the result that, pending the appeal, the judgment cannot be carried out and no effect can be given thereto, except with the leave of the court which granted the judgment. To obtain such leave the party in whose favour the judgment was given must make special application ... The purpose of this rule as the suspension of a judgment on the noting of an appeal is to prevent irreparable damage from being done to the intended appellants, either by a levy under a writ of execution or by execution of the judgment in any other manner appropriate to the nature of the judgment appealed from.’

[13] *Plainly, execution of a judgment means giving effect to the judgment and reference to ‘execution of the judgment in any other manner appropriate to the nature of the judgment appealed from’ gives a wide meaning to the word ‘execution’. We should not be led to think it relates only to execution under a writ of execution. Put simply, it means giving effect to the order, whatever its nature. So, the suspension of the execution of a judgment means ‘the judgment cannot be carried out and no effect can be given thereto’. And that applies to whatever it is that is required to be done or has to take place in terms of the judgment.*

...

[15] This position is now governed by section 18(1) of the Superior Courts Act. This section provides:

‘Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of an application for appeal.’

This too is in line with the common law position which has already been explained. And ‘operation’ which the section couples with an ‘execution’ (‘operation and execution’) does not alter the legal position stated above.”

[19] Upon this authority it appears the entire applicant’s case rests.

[20] In fact, during the course of argument, counsel acting on behalf of the applicant recorded very clearly that this was a very crisp point and this was the entirety of his argument.

[21] However, the abovementioned argument does not take into account the provision that such an application for leave to appeal ought to be filed within the provided fifteen days. In this regard in the **Sake Liga** *supra*, the application for leave to appeal was properly brought and within the provided fifteen court days.

[22] In this regard the applicant’s argument and so too his heads of argument, ignore the provisions of section 18(5) of the Superior Courts Act which provides as follows:

*“18(5) For the purposes of subsection (1) and (2) a decision becomes the subject of an application for leave to appeal or of an appeal, as soon as an application for leave to appeal or a notice of appeal is lodged with the Registrar **in terms of the rules.**”*

(My own emphasis)

[23] Accordingly, one is required to consider the provisions of the rules and more particularly the provisions of Rule 49.

[24] The provisions of Rule 49(1) of the Uniform Rules of Court provide as follows:

“49(1)(a) When leave to appeal is required, it may on a statement of the grounds therefore be requested at the time of judgment or order.

(b) When leave to appeal is required and it has not been 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**: provided that when the reasons or the full reasons for the court’s order are given on a later date than the date of the order, such application may be made within fifteen days after such later date: provided further that the court may, upon good cause shown, extend the aforementioned periods of fifteen days. ...”

(My own emphasis)

[25] In this regard it is clear. The provisions of Rule 49(1) are peremptory, when one considers the use of the word “*shall*”.

[26] It appears that at least initially the applicant was aware of the fact that it was required to seek condonation for the late filing of the application for leave to appeal. However, no application for condonation serves before me and in the matter at all.

[27] In fact, an application for condonation for the late filing of the application for leave to appeal was not sought in the prayers of the application which served before me nor was a case made out therefore in any of the papers.

[28] Obviously, a condonation application ought to be brought in terms of the provisions of Rule 27 of the Uniform Rules of Court and in such circumstances the applicant ought to have demonstrated to this court:

[28.1] That there was a good cause for the late filing of the application for leave to appeal (which was filed five months out of time);

[28.2] That it indeed had a *bona fide* defence against the claim, to which no real substance was given in any of the previous applications.

[29] As I have already alluded to hereinabove, this was not dealt with. As such, there was no condonation application that served before me nor could I find any other application and/or order in terms of which the late filing of the application for leave to appeal, some five months later, was condoned.

[30] In these circumstances one must return to the provisions of section 18(5) which requires that the application for leave to appeal must be filed in terms of the rules in order for the applicant to be entitled to rely upon the provisions of section 18(1).

CONCLUSION AND REASONING

[31] In the absence of an application for condonation or alternatively an order already granted condoning the late filing of the application for leave to appeal, there is no application for leave to appeal.

[32] When one considers the provisions of section 18(5) of the Superior Courts Act, 10 of 2013, then it must be so that the applicant is not entitled to rely upon the provisions of section 18(1) of the Superior Courts Act and more particularly the suspension of the order granted by Yende AJ previously.

[33] In the absence of this the second respondent, being Nedbank, was fully entitled to proceed with the execution of the immovable property and the commensurate sale. There, in my considered view, was no bar to these proceedings.

[34] I must now consider the test for leave to appeal.

[35] Section 17(1)(a) of the Superior Courts Act, 10 of 2013 regulates applications for leave to appeal provides:

“Leave to appeal may only be given where the judge or judges concerned are of the opinion that–

- (1) *the appeal would have a reasonable prospect of success; or*
- (2) *there are some other compelling reasons why the appeal should be heard, including conflicting judgments on the matter under consideration.”*

[36] It is trite that in recent legislative amendments, the test for application for leave to appeal has changed with a change in the Act from the wording of “*might*” to “*would*” and has resulted on a what some judges have considered a higher test than previously applied.

[37] In this regard the judgment in the Supreme Court of Appeal of **MEC for Health, Eastern Cape v Mkhitha** [2016] ZASCA 176 at paragraphs 16–18 very nicely elucidated this test. In this regard a mere possibility that another court **might** come to a different conclusion is not enough to convince the trial court to grant leave to appeal.

[38] In the matter before me I have no doubt whatsoever that there are no reasonable prospects of appeal in this matter, nor were any other compelling reasons justifying leave to appeal being granted, provided.

[39] I do not believe another court can come to a different conclusion. This simply because the applicant has failed to meet the jurisdictional requirements to rely on the provisions of section 18(1) by properly complying with the provisions of Rule 49(1) and filing the application for leave to appeal within fifteen days after the granting of judgment.

[40] As I have alluded to hereinabove the applicant was not without recourse and was quite within its means to launch an application for condonation and to seek the reinstatement of the application for leave to appeal. Such an application does not serve before me nor has it served before another court and as such, there can be no condonation for the late filing as matters currently stand.

[41] A further consideration which I take into account is the fact that this is a matter which has dragged on since 2018. These days this appears to be common place

where litigants with some times hopeless cases drag litigation out to avoid the inevitable consequences of a negative judgement against them. This cannot be fair, nor ought it be allowed.

[42] Although and albeit that a party is entitled to exercise all remedies available to them in litigation, litigation cannot be dragged out *ad infinitum* as is the current case, and particularly not by a litigant who launches one application after the next, often not even seriously pursuing the litigation by, as in this case, not filing replying affidavits, or having to be compelled by order of Court to file heads of argument in order to have the matter heard.

[43] Surely, against this backdrop of how the litigation has been driven, the second respondent ought to be entitled to recover the monies it advanced to the applicant and in terms of the loan agreement and mortgage bond, and obtain finality to this matter.

[44] In fact the second respondent (Nedbank) has been substantially prejudiced by the continued dragging out of this matter over the last several years.

[45] Justice delayed is justice denied. This much is trite.

[46] Even if I would have liked to be of assistance to the applicant I cannot allow this matter to continue *ad infinitum*, and with no finality.

[47] As such, the application for leave to appeal cannot succeed.

[48] Accordingly I make the following order:

[47.1] The application for leave to appeal is dismissed with costs;

[47.2] Costs are ordered to the second respondent on an attorney client scale as provided for and in terms of the mortgage bond.



HERSHENSOHN AJ
ACTING JUDGE OF THE HIGH COURT

This Judgment was handed down electronically by circulation to the parties' and or parties' representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed to be 10h00 on this 23rd day of October 2025.

Appearances

Counsel for the Applicant: Adv. HR Liphosa
instructed by Muthapuli Attorneys

Counsel for the Second Respondent: Adv. WJ (Wynand) Roos
Instructed by BHI Attorneys

Date of Hearing: 9 October 2025
Date of Judgment: 23 October 2025