



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

JUDGMENT

Not Reportable
Case no: 3590/22

In the matter between:
VOLKER UDO ZAHN
and
CAPSTONE 1471 CC

APPLICANT

RESPONDENT

In re matter between:
ENVER MOHAMED MOTALA
CAPSTONE 1471 CC

FIRST PLAINTIFF
SECOND PLAINTIFF

and

VOLKER UDO ZAHN

DEFENDANT

Neutral citation: *Volker Udo Zahn v Capstone 1471 CC* (Case no 3590/22)
[2025] ZAWCHC (3 December 2025)

Coram: MTHIMUNYE AJ

Heard: 14 August 2025

Delivered: 8 December 2025

Summary: Application for leave to appeal against whole judgment and order in which the court dismissed the respondent's (second plaintiff in the main action) claim in the main action due to its failure to file their answering affidavit and provide security to the applicant (defendant in the main application) in the amount of R500 000.00 as ordered by the court on 26 September 2024.

ORDER

1. The application for leave to appeal is dismissed with costs.
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JUDGMENT

Mthimunye AJ:

Introduction

[1] This is an application for leave to appeal by the respondent to the Full Bench of this court, alternatively to the Supreme Court of Appeal, against the whole judgment/ order handed down by this court on 25 July 2025.

[2] For ease of reference, I shall simply throughout this judgment refer to the parties as cited as in the main application, thus the applicant (second plaintiff) in the leave to appeal will be referred to as the respondent and the defendant as the applicant.

Litigation History

[3] I will first set out the brief history of the litigation which forms the basis of this leave to appeal. The main application was to dismiss the respondent's (second plaintiff in the main action) claim due to its failure to provide security to the applicant (defendant in the main application) in the amount of R500 000.00 as ordered by the court on 26 September 2024.

[4] On 17 March 2025, the respondent delivered a notice of intention to oppose the application by applicant to dismiss their claim. The respondent failed to deliver their answering affidavit timeously resulting in the applicant bringing a chamberbook application in terms of Replacement Practice Directive PN37(20) for an order compelling the respondent to deliver their answering affidavit.

[5] On 13 June 2025, Mantame J granted the chamberbook application, ordering the respondent to deliver its answering affidavit within 5 days of service, failing which the applicant shall be entitled to enroll the application to dismiss the respondent's claim on the unopposed roll. The order was duly served on the respondent on 23 June 2025. Respondent acknowledged service on 30 June 2025.

[6] The respondent failed to deliver its answering affidavit within the specified time. Consequently, the applicant enrolled the matter on the unopposed roll in accordance with Replacement Practice Directive PN 37(20) and in terms of paragraph 3 of court order dated 26 September 2024.

[7] On 30 June 2025 the respondent's legal representative sought an indulgence from the applicant to deliver its answering affidavit by 11 July 2025 as their client was hospitalised. This request was rejected by the applicant, due to the dilatory conduct of the respondent in this matter. Despite the notice of set

down being served on the respondent on 3 July 2025, no further communication had been received by the applicant from the respondent by 22 July 2025.

[8] On 25 July 2025, matter was enrolled on the unopposed roll as per court order dated 26 September 2024. During the proceedings, the respondent filed and served its answering affidavit together with an application for condonation of the late filing of its answering affidavit on the applicant as well as the court. As condonation application was brought while the court was dealing with the matter it is apparent that it was brought on an urgent basis. On perusing the condonation application, the court observed that there was no prayer in the respondent's papers for condonation of the non-compliance with the forms and timeline provided by Rule 6 of the Uniform Rules of Court. There were also no exceptional circumstances set out in the condonation application why it had to be considered on an urgent basis. Under the circumstances the court in exercising its judicial discretion proceeded with the matter which was enrolled on the motion court roll as unopposed in accordance with the Practice Directives and court order granted by Mantame J on 26 September 2024.

Respondent/Second Plaintiff's Grounds

[9] The respondent's principal grounds of appeal are that this court erred in treating the application to dismiss their claim as opposed notwithstanding the fact that they had filed an answering affidavit, albeit outside the prescribed time period. Further, that the court misdirected itself in finding that it was in the interest of justice to proceed with the matter on an unopposed basis, without affording the respondent an opportunity to present its application for condonation for the late filing of its answering affidavit. Additionally, that the court failed to properly consider, or at all, the respondent's explanation for the delay in filing its answering affidavit and the circumstances giving rise thereto.

Applicant / Defendant's Grounds of Opposition

[10] The applicant opposes the application, arguing that the respondent failed to file their answering affidavit timeously, after a chamber book application was granted. Further that the respondents filed their answering affidavit outside the timelines provided for by the rules of court, despite serving a notice to oppose in March 2025. Consequently, the applicant was forced to bring a chamber book application compelling the respondent to deliver their answering affidavit and still the applicant failed to do until the very last minute. The condonation for this late filing of the answering affidavit was brought on an urgent basis while the court was already in session.

[11] It was further argued that the order of court granted in terms of the chamber book application clearly stated that in the event the plaintiff /respondent failed to file his answering affidavit within a specific time period, the defendant/ applicant may enroll the matter as unopposed on the third division roll, which is what had happened in this matter. Furthermore, that the proper procedure would have been for the respondent to bring an application having the existing court order set aside.

[12] It was further argued that even if the respondent were to be granted condonation for the late filing of its application, the order granted on 26 September 2024 specifically states that the respondent must provide security for the costs of the applicant in the sum of R500 000.00 within 10 days of the order, alternatively in a form acceptable to the applicant. The respondent failed to comply with the court order in providing a bond of security, as the security provided by the respondent is labelled as performance security. It states further that the parties/ beneficiaries entered into an agreement in terms of security of costs.

[13] It was further argued that it should be noted by this court that the condonation application which the respondent wanted the court to consider was only served on the instructing attorney of counsel, who was sitting at the far back while counsel was already busy addressing the court. Furthermore, that no reasonable prospects of success exists that another court would find differently, as there is prospect of the eventual appeal. Finally, that the argument raised by respondent, that the amount that was released was to be held in trust pending the finalisation of the claim was not a ground raised by the applicant in his notice for leave to appeal.

The test for leave to appeal

[14] Section 17(1)(a) of the Superior Courts Act 10 of 2013 provides:

“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 judgments on the matter under consideration”.

[15] In *Ramakatsa and Others v African National Congress and Others* [2012] ZACC 31, the Constitutional Court held that a higher threshold must be met, namely that the applicant must show that there is a realistic, reasonable prospect of success, and not merely an arguable case.

[16] The Constitutional Court in *Zuma v Secretary of the Judicial Commission of Inquiry into State Capture* 2021 (11) BCLR 1263 (CC) at para 53-54, and the Supreme Court of Appeal in *Mkhitha v MEC for Health, Eastern Cape* [2016] JOL 36940 (SCA), confirmed that leave should not be granted unless there exists a real, not remote, prospect that another court would arrive at a different conclusion.

Evaluation

[17] Mantame J has specifically ordered that the application to dismiss the respondents claim should proceed on an unopposed basis if the respondent fail to comply with her order of court. The respondent not only failed to file its answering affidavit within the 5 days as ordered by Mantame J on 26 September 2024 but also filed a condonation application on the applicant's attorney urgently, who was sitting at the back of the court. During this time counsel for the applicant was busy addressing the court. The applicant was given no opportunity to oppose the application. In perusing the application for condonation, it was apparent that the respondent had failed to set out what the urgency was or shown good cause why this court had to condone its non-compliance with the Rules of Court.

[18] The attack that the court did not consider the condonation application, is incorrect. The court did consider it even though the court did not pronounce on it. Furthermore, in exercising its judicial discretion the court took into consideration the time the condonation application was served on the applicant and handed to the court, which was after 10 am while counsel for the respondent was busy addressing the court. If the court had to allow the condonation to which the applicant clearly objected it would have been prejudicial to both parties and not in the interest of justice. Further on perusal of the condonation application, the court noted that no urgency or good cause was set out by the respondent in their application as to why the court could not deal with the matter before court on the unopposed roll. The respondent had ample time to bring the application before court prior to the matter being heard on 25 July 2025 as they had been served with the court order by 3 July 2025 already. They decided to wait till the last moment to ambush not only the court but the applicant, which is clearly an ambush of the court proceedings which is unfair nor in the interest of justice.

[19] The dilatory conduct of the respondent for nearly 2 years resulted in the applicant suffering prejudice. Furthermore, the respondent even after being compelled by a court order to file their answering affidavit within 5 days of being served with the court order still flagrantly continued with their delaying tactics. This is clearly illustrated by the fact that by 22 July 2025, nearly 10 months after the Mantame J order was granted the respondents still had not filed their answering affidavit.

[20] The court demonstrating its displeasure against the respondent's dilatory actions in finalising this matter and its flagrant disregard of the rules of law proceeded with the matter on the unopposed roll as per order granted by Mantame J and the Replacement Practice Directive PN 37(20).

[21] Finally, I am inclined to agree with the applicant that the argument raised by respondent, that the amount that was released was to be held in trust pending the finalisation of the claim was not a ground raised by the applicant in its notice for leave to appeal as an afterthought and need no further consideration.

[22] Having considered the applicant's submissions, including that of the respondent, I am not persuaded that there are reasonable prospects that another court would come to a different conclusion. Nor has the applicant advanced any other compelling reasons, such as conflicting authority or public interest, to justify a hearing by the full bench of this court or before the Supreme Court of Appeal. In the circumstances, I am not satisfied that there are reasonable prospects of success on appeal.

Costs

[23] The general rule is that costs follow the result. What this means is that the successful party should be entitled to costs. I find that the applicant was successful in opposing the application and costs should be awarded in their favour.

Order:

[24] In the result, I make the following order:

24.1 That application for leave to appeal is dismissed with costs.

A handwritten signature in black ink, appearing to be 'S Mthimunya', is written over a solid black rectangular redaction box.

S MTHIMUNYE
ACTING JUDGE OF THE HIGH COURT

Appearances:

Counsel for Respondent/Plaintiff: Adv Tait

Attorneys for Respondent/Plaintiff: Knowles Hussain Lindsay Inc
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