

REPUBLIC OF SOUTH AFRICA

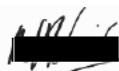


**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

Case No: 2024/ 009866

DELETE WHICHEVER IS NOT APPLICABLE
REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED: NO

30 January 2026
DATE


SIGNATURE

IN THE MATTER BETWEEN:

HLENGIWE HAPPINESS SHABALALA

APPLICANT

AND

CALC 9 (PTY) LTD
(REGISTRATION NUMBER: 2021/934260/07)

FIRST RESPONDENT

THE CITY OF JOHANNESBURG

SECOND RESPONDENT

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

This Judgment is handed down electronically by circulation to the Applicant and the Respondent's Legal Representative by email and publication on Case Lines. The date for the handing down is deemed 30 January 2026 at 10h00.

NAIR AJ

INTRODUCTION:

[1] This is an application for leave to appeal in terms of Rule 49(1)¹ of the Uniform Rules of the High Court read with section 17(1) of the Superior Courts Act 10 of 2013 ("Superior Courts Act"), lodged by the first respondent in the main application, Ms Hlengiwe Happiness Shabalala ("now the applicant in the leave to appeal application"), against the order of eviction in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (the "PIE Act") handed down on 21 September 2025, wherein this Court granted an eviction order in favour of Calc 9 (Pty) Ltd ("the first respondent in this leave to appeal application").

[2] The application is opposed by Calc 9 (Pty) Ltd. The City of Johannesburg did not enter any appearance in this matter and was not called upon by any party to render

¹ Rule 49(1) of the Uniform Rules of the High Court provides as follows:

"49 Civil Appeals from the High Court

(a) When leave to appeal is required, it may on a statement of the grounds therefor be requested at the time of the 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 therefor shall be furnished within 15 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 15 days after such later date: Provided further that the court may, upon good cause shown, extend the aforementioned periods of 15 days."

any reports in the matter. The applicant was initially legally represented by Counsel instructed by Sithi and Thabela Attorneys at the hearing of the eviction application but appeared in person in this leave to appeal application after having been refused legal aid and pro-bono assistance. Due to the applicant being a lay person the first respondent consented to the late filing of the applicant's application for leave to appeal on the basis that the first respondent is being prejudiced by the leave to appeal application not being finalised. Condonation for the late filing of the applicant's application for leave to appeal was granted on this basis.

[3] There are two grounds of appeal raised by the applicant which are procedural in nature. They did not challenge the substantive findings relating to ownership, unlawful occupation, or the applicability of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("PIE Act"). Instead, the applicant for leave contends, although not expressly stated that this Court misdirected itself in two respects:

[3.1] Firstly, that the Court erred in paragraph [3] of the judgment by making an adverse finding that the first respondent failed to file heads of argument and a joint practice note, despite the fact that she was dependent on her attorneys to comply with the relevant Practice Directives for filing heads of argument;

[3.2] Secondly, that the Court erred in paragraph [5] of the judgment by drawing an adverse inference from the absence of a confirmatory affidavit by the first respondent's adult son, where such omission allegedly arose from a failure by her legal representatives to properly advise her.

LEGAL PRINCIPLES APPLICABLE TO LEAVE TO APPEAL APPLICATIONS:

[4] The application for leave to appeal must be determined against the statutory threshold set by section 17(1) of the Superior Courts Act.²

[5] The test for reasonable prospects of success is well established. It requires more than a mere possibility that another court might come to a different conclusion. There must be a sound, rational basis for concluding that another court would probably do so.³ The statutory threshold is deliberately stringent. As the Supreme Court of Appeal has repeatedly emphasised, leave to appeal is not there for the asking, nor is it intended to afford litigants a second bite at the cherry.

FIRST GROUND OF APPEAL: FAILURE TO FILE HEADS OF ARGUMENT

[6] The first ground of appeal relates to the comments made by this court in paragraph [3] of the judgment that the first respondent's legal representatives failed to file heads of argument and a joint practice note in accordance with Practice Directive 25.1.2 of the Consolidated Practice Directives 1/2024 (the "Consolidated Practice Directives"). The applicant for leave to appeal contends that this finding unfairly prejudiced her, as she was dependent on her attorneys and counsel to comply with procedural requirements, and that any failure should not have been attributed to her. This ground

² Section 17(1)(a) of the Superior Courts Act 10 of 2013 provides that leave to appeal may only be granted where the judge concerned is of the opinion that:

"(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."

³ S v Smith 2012 (1) SACR 567 (SCA) at para 7, Mont Chevaux Trust (IT 2012/28) v Tina Goosen and 18 Others Unreported judgment of the Land Claims Court under case number LCC14R/2014 dated 3 November 2014.

of appeal is misconceived for several reasons. Firstly, the court did not make any finding against the applicant arising from the failure to file heads of argument or a practice note prior to the hearing of the matter. This ground of appeal does not raise a ground of appeal relevant to the decision or order of the court.

[7] Secondly, notwithstanding the absence of heads of argument, the first respondent was represented by counsel at the hearing, who made oral submissions from the bar. Those submissions were expressly recorded and considered by this Court. There is accordingly no basis for suggesting that the first respondent was denied a hearing or that her case was not properly ventilated.

[8] Thirdly, it is a settled principle of our law that litigants are, as a general rule, bound by the conduct of their legal representatives. The Appellate Division has held that there is a limit beyond which a litigant cannot escape the consequences of the negligence of his or her attorney. Each case must be decided on its own merits.⁴ In *Grootboom v National Prosecuting Authority and Another*⁵, the Constitutional Court held that while courts must be slow to penalise litigants for the remissness of their legal representatives, there comes a point where the administration of justice and the principle of finality require that litigants be held to the conduct of those they choose to represent them. Attorney negligence does not automatically constitute a basis for indulgence and each case must be decided on its own facts.

⁴ *Saloojee and Another NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 141C–H; *Webster and Another v Santam Insurance Company Ltd* 1977 (2) SA 874 (A) at 883G

⁵ *Grootboom v National Prosecuting Authority and Another* 2014 (2) SA 68 (CC) at paras 32 to 35

[9] Similarly the Constitutional Court in *Ferris and Another v FirstRand Bank Ltd*⁶ held that reliance on attorney error, without more, does not oblige a court to overlook procedural or evidentiary shortcomings. The eviction order was not granted because of procedural default. It was granted after a substantive and informed enquiry under PIE as set out in the judgment which I stand by. There is accordingly no reasonable prospect that another court would find that the reference to the absence of heads of argument constitutes a material misdirection warranting interference on appeal. The first ground of appeal must accordingly fail.

SECOND GROUND OF APPEAL: ABSENCE OF A CONFIRMATORY AFFIDAVIT:

[10] The second ground of appeal concerns paragraph [5] of the judgment, where this Court noted that no confirmatory affidavit was filed by the first respondent's adult son to substantiate the assertion that he was unemployed and financially dependent on her. The applicant for leave to appeal contends that the omission arose because her legal representatives failed to advise her of the need for such a confirmatory affidavit, and that the Court ought not to have drawn an adverse inference from its absence. This ground similarly to the first ground lacks merit.

[11] It is trite that motion proceedings stand or fall on the affidavits. Parties are required to place all material facts before the court by way of admissible evidence. Confirmatory affidavits serve a critical evidentiary function, particularly where allegations are made

⁶ *Ferris and Another v FirstRand Bank Ltd* 2014 (3) SA 39 (CC) at para 25

about the circumstances of third parties.⁷ The Court did not reject the first respondent's version outright; rather, it found that her allegations regarding her adult son's unemployment and dependency were unsubstantiated and vague.

[12] Importantly, the Court accepted, applying the Plascon-Evans rule, that the first respondent experienced financial distress and feared homelessness. The eviction order was granted not because of the missing confirmatory affidavit, but because the evidence as a whole did not establish that eviction would render the household destitute or homeless. This after having considered that the applicant's counsel at the hearing conceded that the applicant was an unlawful occupier of the property in question but requested on behalf of the applicant that a period of six months be afforded to the applicant to save up money in order to vacate the property and obtain her own alternative accommodation. I have already addressed the aspect of the applicant's homelessness in my judgment and have nothing further to add thereto in that regard apart to say that more than six months have passed since the hearing of the matter.⁸

[13] The applicant further attempted during the leave to appeal proceedings to introduce new evidence in the form of filing a confirmatory affidavit by her son Mazwamahle Shabalala which I have not taken into account as it did not form part of the initial application and record of the proceedings when the matter was heard and when she was legally represented. The suggestion that a litigant may, at the stage of leave to appeal, seek to attribute evidentiary deficiencies to her attorneys does not

⁷ Wightman t/a JW Construction v Headfour (Pty) Ltd 2008 (3) SA 371 (SCA) at para 13

⁸ Resnick v Government of RSA 2014 (2) SA 337 (WCC) at 344 F

assist the applicant.⁹ It is trite that a court of appeal decides the case on the record as it stands. It is for this reason that the second ground of appeal must fail.

CONCLUSION:

[14] Although not specifically raised as a ground of appeal the applicant in the leave to appeal application alleged that she would be rendered homeless as a result of the eviction. The judgment applied settled constitutional and statutory principles governing eviction under PIE. I am mindful that eviction matters engage section 26 of the Constitution of the Republic of South Africa Act 108 of 1996 (the “Constitution”) and the right of access to adequate housing. The eviction judgment itself applied the full constitutional and statutory enquiry mandated by PIE, expressly considered the first respondent’s personal circumstances, and determined that the eviction was just and equitable. The present application raises no new constitutional issue, nor does it allege that the section 26 enquiry in terms of the Constitution was absent or misconceived. I have fully addressed the aspect of homelessness in my judgment and stand by my reasons as set out in the judgment.

[15] The grounds advanced for leave to appeal ultimately seek to revisit factual and evidentiary findings on the basis of alleged attorney default. To grant leave to appeal in these circumstances would undermine the principle of finality in litigation and impose further prejudice on a property owner who has already been kept out of the use and enjoyment of its property for a considerable period. The two grounds of appeal as well as the implied ground of “homelessness” if the eviction order is to be executed do not to my mind convince me that there is a reasonable prospect that another court would

⁹ Luanga v Perthpark 2019 (3) SA 214 (WCC) at 222 paras 36 to 44

come to a different finding. Thus the application for leave to appeal must therefore fail on both the first and second grounds of appeal as well as the implied ground of homelessness.

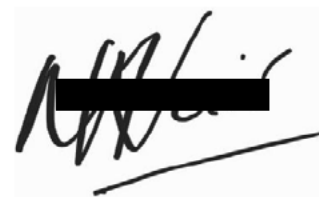
[16] It is established law that costs should ordinarily be granted in favour of the successful party. The first respondent did not however request any punitive costs order against the applicant in this leave to appeal application.

ORDER:

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

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

[17.2] The first respondent is ordered to pay the costs of the application for leave to appeal on scale B.

A handwritten signature in black ink, appearing to read 'M Nair', is written over a black rectangular redaction box. A horizontal line is drawn below the signature.

M NAIR
ACTING JUDGE OF THE
HIGH COURT
JOHANNESBURG

Date of appearance: 22 January 2026

Date Judgment delivered: 30 January 2026

Appearances:

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For the Applicant: Adv C Van Der Linde

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