IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA (MAIN SEAT)

CASE NUMBER: 1050/2021

In the matter between:-

JACOB CHARLES MNISI	**APPLICANT**
and	
MAQANDASHI ELIAS MATHABA *N.O.*	**FIRST RESPONDENT**
RODAH LINDIWE MGWENYA *N.O.*	**SECOND RESPONDENT**
MENZI JOHN NYAMBI *N.O.*	**THIRD RESPONDENT**
ISAAC SITHOLE *N.O.*	**FOURTH RESPONDENT**
SMILE ZANDILE NKOSI *N.O.*	**FIFTH RESPONDENT**
HENDRY SIPHO LAMOLA *N.O.*	**SIXTH RESPONDENT**
MAHLEKISANE MOSA CHIRWA *N.O.*	**SEVENTH RESPONDENT**
BONGANI KENNETH SHAKOANE *N.O.*	**EIGHTH RESPONDENT**
JOSIAH NDABAMBI MOKOENA *N.O.*	**NINETH RESPONDENT**
AGNES NTOMIKAYISE MAVUSO *N.O.*	**TENTH RESPONDENT**
HLUPHEKA SALMINAH NOHALE *N.O.*	**ELEVENTH RESPONDENT**
FANYANA ENOCH BHEMBE *N.O.*	**TWELFTH RESPONDENT**

JUDGMENT (LEAVE TO APPEAL)

GREYLING-COETZER J

[1] On 2 September 2022 this court dismissed the applications application for recission of default judgement in terms of Rule 42(1)(a). The aforesaid judgment was delivered ex tempore. Resulting in the inability to transcribe the record of proceedings this court on request received on 13 August 2025 reconstructed its ex-tempore judgment. The circumstances relevant thereto has been fully set out in the reconstructed ex tempore judgment dated 13 August 2025 and need not be repeated herein.

[2] Aggrieved by the dismissal of the recission application, the applicant now applies for leave to appeal to be granted to the full bench of this division.

[3] The facts that lead up to this point was equally set out in the reconstructed ex tempore judgment dated 13 August 2025 and need not be restated safe to highlight that the main action came before court as a default judgment. The default judgment was granted by Roelofse AJ on 19 July 2021. The applicant there after launched the recission application in February 2022, which was dismissed as set above by this court.

[4] The grounds relief on by the applicant is as follows:

"

1.

During the ex-tempore judgment handed down on 2 September 2022 the learner judge held the following:

> *"I am not persuaded that it was a requirement of the respondent to annex the facta probantia which it would ordinarily in a trial have relied on in the form of a bank statement. Although in the particulars of claim it is alleged that the plaintiff seeks damages, it is tried the damages are not automatically considered to be*

illiquid. Damages, when it requires no intervention or grappling by the court in order to establish same or perfectly liquid as in this case."

"Here the exact amount was pleaded to the cent and there was nothing for the Court to establish therefore the Court granting the judgment was not required to receive evidence as envisaged in terms of Rule 31(2) before granting the order. This is in any event always remains an aspect in the discretion of the Court."

2.

2.1 In holding the above the court urged in dealing with a claim for a sum of money alleged to have been stolen from the trust by the defendant as it would any other claim for damages.

2.2 A claim for a sum of money alleged to have been stolen does not constitute a claim for a debt or liquidated amount in terms of Rule 31 (2)(a).

2.3 In the absence of prima facie evidence not only of the defendant's indebtedness and the amount of liability the plaintiffs require the assistance of the court to determine liability on the amount thereof.

3.

3.1 In paragraph 18 of the plaintiff's particulars of claim the plaintiff pleads that the defendant disputes his liability towards the plaintiff

3.2 Once a debt is disputed then it is no longer liquid for purposes of default judgment.

3.3 Considering paragraph 3.1 and 3.2 supra, the Court erred in not giving any consideration to the fact that it was common cause between the parties at the time that the default judgment was sought that the date was disputed by the defendant.

..."

[5] It is unclear where the quotation above as it appears per paragraph one of the Application for leave to appeal emanates from, as same does not derived from the reconstructed ex tempore judgment dated 13 August 2025. Which was reconstructed on the request of the applicant as the record of proceedings of 2 September 2022 was untraceable and could not be transcribe, it matters not.

[6] It is evident from paragraph 3 of the application for leave to appeal and so confirmed in the heads of argument filed on behalf of the applicant that is the applicants contend that: (1) the claim as pleaded was not liquidated and that this court erred in finding that it was and (2) this court erred in not considering that it is common cause that the applicant disputed the amount that was alleged to be stolen.

[7] The relevant portion of Section 17 of the Superior Court Act, 2013 provides that leave to appeal may only be granted where the judge or judges concerned are of the opinion that the appeal would have a reasonable prospect of success; there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration and where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just an prompt resolution of the real issues between the parties.

[8] In the matter of **Ramakatsa and Others v African National Congress and Another**,[1] and dealing with the relevant provisions of the Superior Courts Act, held as follows:

> *"[10] ... leave to appeal may only be granted where the judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there are compelling reasons which exist why the appeal should be heard such as the interests of justice."*[2]

[9] This court in **Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd**,[3] concerning the provision of Section 17(1)(a)(ii) of the Superior Courts Act, pointed out

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1 (Case number: 724/2019) [2021] ZASCA 31 (31 March 2021)

2 Nova Property Holdings Limited v Cobbett & Others [2016] ZASCA 63: 2016 (4) SA 317 (SCA) par [8]

3 [2020] ZASCA 17; 2020 (5) SA 35 (SCA)

that "...*if the court is unpersuaded that there are prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal. Compelling reason would of course include an important question of law or a discreet issue of public importance that will have an effect on future disputes. However, this Court correctly added that 'but here too the merits remain vitally important and are often decisive' ... The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist.*"[4]

[10] In respect of the first ground, the applicant submitted that there are conflicting judgments pertaining to the question whether a claim for a debt or liquidated demand where the claim is that the sum of money was stolen from the plaintiff. On this basis it is contended that it is in the interest of the pubic that legal certainty be obtained.

[11] In this respect the applicant relies on **Du Toit v Grobler 1947 (3) SA 213 (SWA)** (Du Toit), **Brown Bros and Taylor (Pty) Ltd v Smeed 1957 (2) SA 498 (C)** (Brown) **and Colrod Motors (Pty) Ltd v Bhula 1976 (3) SA 836 (W)** (Colrod) to demonstrate same. Eloff J in Colrod declined to follow Du Toit and followed the position in Brown.

[12] In respect of the second ground, it is contended on behalf of the applicant that although the respondent pleaded that the money was stolen by the applicant per the particulars of claim, the respondent went further and placed its own cause of action in dispute by pleading that the applicant contends that the transferred were authorized by a traditional leader, Chief Dhlamini. Therefore, it was argued on the respondent's own pleadings the claim was disputed, and default judgment should not have been granted. Further that the cause of action was no theft of money but a *condictio sine cause*. It was submitted that once the claim was disputed (even by the respondent itself) the default court is then to enquire into the claim before the judgment was granted. According to the applicant a dispute of fact pertaining to the authority of Chief

4 Smith v S [2011] ZASCA 15

Dhlamini was present on the particulars of claim.

[13] In opposing the application for leave to appeal the respondents contend that ground 1 has no merit in that the applicant misinterprets Section 17(1)(a)(ii) of the Superior Courts Act, 2013 and that the mere existence of a historic divergence in case law does not constitute a compelling reason for the appeal to be hears. It was submitted that the applicant failed to demonstrate that this court was patently incorrect or erred in law, by electing to apply the reason in Brown oppose to Du Toit.

[14] In respect of ground 2 the respondents' content equally has no merit as the issue of authorization was dealt with. It is also submitted that the respondents did not "*place their claim in dispute*" by disclosing the anticipated baseless defence of authority to the court in its particular of claim.

[15] Having carefully considered the parties argument, I find myself in agreement with the respondent in respect of the first ground. The fact that court in Du Toit adopted a different position than the courts in Brown and Colrod does not establish a compelling reason to allow an appeal. Departure from a position held by an earlier court is not novel. Nor is it unheard of that a court after considering the specific facts before it elected not to follow that found in an earlier case.

[16] The position in Colrod was subsequently followed and Du Toit departed from in **Nedcor Bank Ltd v Behardien 2000 (1) SA 307 (C)**[5] (Nedcor) where the court held: *"Colrod Motors (Pty) Ltd v Bhula 1976 (3) SA 836 (W) is clear authority for the proposition that a claim for a specific amount of money wrongfully and unlawfully misappropriated by the defendant from the plaintiff is liquidated within the meaning of Rule 32 of the Uniform Rules of Court. I agree with the view expressed in that decision that the decision in which a different view is expressed, namely that of Du Toit v Grobler 1947 (3) SA 213 (SWA), ought not to be followed, for the reasons given by Eloff J, as he then was."*

[17] This courts reliance on Brown is aligned with that of the courts in Colrod and Nedcor. It held that the claim was a liquidated monetary claim. The amounts were

[5] See also *Van der Westhuizen NO v Kleynhans* 1969 (3) SA 174 (O), and on appeal *sub nomine Kleynhans v Van der Westhuizen NO* 1970 (1) SA 565 (O).

specifically pleaded together with the date on which it was alleged to have been unlawfully withdrawn from the Trust account. The term 'debt or liquidated demand' can be equated with a claim for a fixed, certain or ascertained amount or thing, and includes a liquidated claim as known at common law.

[18] The second ground of appeal suffers a similar fate. No challenged served before the default court. In default proceedings, the court is tasked with determining whether the plaintiff is procedurally entitled to the order, in the absence of the claim being defended. In action proceedings a dispute is foreseen and pleading such a foreseen defence take the matter no further. It does not oust the default courts authority to grant default judgment by its mere mention as contended for by the applicant. Nor does it not trigger the default court to consider such a defence as a possibility, in the absence of the claim being defended.

[19] The applicant has failed to demonstrate that the appeal has reasonable prospect of success or that a compelling reason exists, as contemplated by Section 17 of the Superior Courts Act, 2013.

[20] It warrants mention that this application for leave to appeal was instituted approximately three years after the delivery of the ex-tempore judgment. The applicant accordingly sought condonation for the late filing of the application. The events that unfolded following the delivery of the ex-tempore judgment, together with the steps taken by the applicant to obtain the record of proceedings and to secure the transcription of the ex-tempore judgment, are set out in the reconstructed ex tempore judgment dated 13 August 2025. Upon circulation of the reconstructed ex tempore judgment, the applicant acted promptly in filing its application for leave to appeal. The application for condonation was not opposed, appropriately so in my view.

[21] In light of the prevailing circumstances the applicant is entitled to condonation for the belated filing of the application for leave to appeal.

[22] I make the following order: -

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

2. The application for leave to appeal is dismissed with costs.

[redacted]

GREYLING-COETZER J

Hearing date: 23 October 2025

Date of Judgment: 29 January 2026

FOR THE APPLICANT: Adv DH Hinrichsen

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