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THE REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

Case No.: 2025-229199

In the matter between:

COLIN BRIAN CARY N.O.

(in his capacity as trustee of

the Cary Family Trust IT6522/1991)

First Applicant

ALAN JEFFREY THORNTON N.O.

(in his capacity as trustee of

the Cary Family Trust IT6522/1991)

Second Applicant

JUDITH ANN FRASER N.O.

(in her capacity as trustee of

the Cary Family Trust IT6522/1991)

Third Applicant

MICHELLE MAURITZ N.O.

(in her capacity as trustee of

the Cary Family Trust IT6522/1991)

Fourth Applicant

COLIN BRIAN CARY

Fifth Applicant

and

LAUREN CARY

Respondent

Summary: Condonation - Leave to Appeal - Limited Duration Relief -
Reasonable Conditions Imposed by the Court - Exercise of a
Discretion - Mandamus of Limited Duration Only - Appealability
Condonation Granted - Leave to Appeal Dismissed.

Coram: Wille, J

Heard: 12 February 2026

Delivered: 16 February 2026

JUDGMENT - [CONDONATION & LEAVE TO APPEAL]

WILLE, J:

INTRODUCTION

[1] The parties will be referred to as they were cited in the initial application proceedings. This is an application for condonation regarding the non-compliance with specific Practice Directives (PDs) of this court. This is in relation to an application for leave to appeal. This

judgment also addresses the application for leave to appeal. The condonation application was also initially concerned with a belated request for reasons.¹

[2] At the outset, what is striking about the application for condonation is that not a single word is said about the failure of the respondent's legal representatives to inform my registrar (or me) about their notice of application for leave to appeal until they were prompted to do so by the applicant's legal representatives.²

[3] The respondent uploaded her application for leave to appeal to the 'Case-Lines' system on 24 December 2025, then adopted a supine attitude for almost a month until 22 January 2026. No communication was sent to my registrar regarding the application for leave to appeal. Had the applicants' attorneys not communicated with the respondent's attorneys, this application may never have come to my attention.³

[4] I say this also because the attorneys representing the respondents advance a plethora of excuses for why they allegedly could not gain access to my registrar's chambers. In any event, these attempts were made only after they received a communication from the applicants' attorneys stating that their request for reasons and their application for leave to appeal may not have come to my attention. Further, in a bizarre attempt to further blame my registrar and me, the respondent's attorney avers that no application to strike out the application for leave to appeal was ever made. The respondent's attorneys obviously do not know about the court's powers to address non-compliance with this court's PDs.⁴

[5] In addition, the respondent's attorneys, in their condonation application, rely on an outdated PD in support of their request for reasons. This makes the entire respondent's application challenging to adjudicate and lends credence to their supine attitude. This notwithstanding, the respondent's attorney suggests that the respondent should not be

¹ My reasons for the order have since been delivered notwithstanding the condonation application.

² It is only after they received a letter from the applicant's legal representatives that they notified my registrar.

³ Had I been aware of the request for reasons I would have dealt with this during the December recess period.

⁴ The respondent relies on an outdated PD and not PD 45B (7) which came into effect during 2023.

prejudiced. This is an illusory stratagem and the first issue I will address in connection with this condonation application.⁵

THE ORDER GRANTED

[6] After hearing the various arguments, I granted the following order:

1. *The respondent is directed to vacate the property **on a temporary basis only**, being No. [...] O[...] R[...], S[...] E[...], Constantia, Cape Town (“the property”), by no later than **12h00 on Saturday, 28 February 2026**, to enable the completion of the overhaul and upgrading of the home automation system at the property and other repair work, commencing on **Monday 2 March 2026**.*
2. *The applicants (jointly and severally) are hereby compelled to hand back vacant occupation and possession of the property to the Respondent by no later than **12h00 on Wednesday, 1 July 2026**.*
3. *The fifth applicant is directed to contribute an amount of **R140,000.00** (such payment to be in advance and when required) to the respondent to obtain suitable alternative accommodation for the interim period between **12h00 on Saturday, 28 February 2026 and 12h00 on Wednesday, 1 July 2026**. (the interim period). The fifth applicant is also directed to pay all such and any deposits that may be reasonably required by the landlord and/or by the respondent to enable her to secure and find alternative accommodation during the interim period. The fifth applicant shall also pay on presentation of invoice all the necessary and reasonable removal and associated costs to be incurred or actually incurred by the respondent to enable her to move to the alternative accommodation during the interim period.*
4. *The fifth applicant will continue paying such maintenance to the respondent as he is presently paying to the respondent. In addition, the fifth applicant shall pay all*

⁵ PD 45A.

electricity, water, municipal, and levy accounts, plus the internet and domestic assistant costs, to the extent that the respondent incurs these expenses in the alternative accommodation during the interim period.

5. *The trustees of the Cary Family Trust (jointly and severally) are ordered to restore vacant occupation and undisturbed possession of the property to the respondent by no later than **12h00 on Wednesday, the 1st of July 2026.***
6. *The respondent's counterapplication is dismissed.*
7. *There shall be no order as to the costs in respect of the application and in respect of the counterapplication.⁶*

THE RESPONDENT SHOULD NOT BE PREJUDICED

[7] The submission suggests that it would be unfair to prejudice the respondent for the conduct of their legal representatives. It is contended that the respondent always intended to appeal the order I granted, as evidenced by their timely application for leave to appeal. That said, no communication was made to my registrar or to me during this time.⁷

[8] As I have said, the condonation application also deals with a belated request for reasons. This is on a different footing, as I understand it, because, as a matter of law (constitutionally infused), a litigant is entitled to reasons for an order. I will only deal with the alleged prejudice to the respondent in connection with the application for leave to appeal.⁸

[9] One crucial issue for me to decide is whether condonation should be granted where the lawyer's conduct is relied upon as the sole basis for condonation, and there is no evidence to support it (the negligent conduct). Put another way, there is no proper explanation for the attorney's failure to perform in accordance with the PDs. Moreover, no communication was made to the court requesting that the application be heard promptly or

⁶ This was because of nature of the application.

⁷ The application for leave to appeal was filed on 24 December 2025.

⁸ My reasons for the order were delivered shortly after the request was brought to my attention.

seeking directions to that effect within the prescribed period (as set out in the PDs) for the application for leave to appeal. Thus, this really goes to the conduct of the attorneys representing the respondent.⁹

[10] It is this conduct (or lack thereof) that bears scrutiny. This is then the real issue which I need to consider in this condonation application. The Supreme Court of Appeal has decisively ruled on this type of conduct by a lawyer. I accept the law to be the following on the conduct failure by an attorney:

*'...I should point out, however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence, or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations ad misericordiam should not be allowed to become an invitation to laxity. In fact, this Court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the Rules of this Court was due to neglect on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are...'*¹⁰

[11] As a matter of pure logic, this must be so, and even more so in a case when: (a) the attorney's explanation for non-compliance is wholly unsatisfactory (b) the attorney refers to outdated PDs, and (c) the prospects of success in the application for leave to appeal cannot be determined because the order granted is not subject to the appeal process. I now turn to this issue, as this falls to be considered not in isolation but also in the context of the

⁹ No satisfactory application is advanced by the respondent's attorneys.

¹⁰ *Salojee and Another NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 141 B-E.

provisions of s17(1)(a)(i) and (ii) of the Superior Courts Act, 10 of 2013. Also, I must consider whether it would be advisable to grant condonation for non-compliance with the PDs of this court, where there are slim or no prospects of success on appeal.¹¹

THE APPEALABILITY OF THE ORDER

[12] It is submitted that the order, although framed as a very limited interlocutory interdict, is nevertheless subject to the appeal process. Whether an order of this nature is appealable or not depends on the consideration of a range of factors. The requirements for appealability continue to play an important role in determining whether a case is appealable. For an order to be appealable, the decision has to be: (a) final in effect and not susceptible to alteration by the court that granted the order; (b) definitive of the rights of the parties; and (c) have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.¹²

[13] While these requirements still play an important role in determining appealability in a particular case, they are not immutable, because the interests of justice continue to inform the enquiry, and what those interests are (or not) involves a finely balanced consideration of relevant and specific factors in each case.¹³

FINAL IN EFFECT

[14] In following the reasoning of the jurisprudence referred to above, it is important to consider the hallmarks of the order that is the subject of the application for leave to appeal. The duration of the order granted in this case is not indefinite, meaning that it shall endure only for a very limited period.¹⁴

[15] Thus, the parties will not be left in any state of uncertainty for any long period of time (or at all). Manifestly, the applicants and the respondent would only have to remain bound by

¹¹ The application for leave to appeal is seemingly an anguish and tears application.

¹² Zweni Minister of Law and Order 1993 (1) SA 523 (A) at 531 B – C.

¹³ Tshwane City v Vresthena (Pty) Ltd [2024] 1 All SA 615 (SCA).

¹⁴ The order granted was for a limited period of four months only.

the terms and conditions of this limited-duration interdict for a very short time and only for a very specific purpose until the remedial work to the house has been completed. This, in turn, leads me to the next consideration, namely, the interests of justice.¹⁵

THE INTERESTS OF JUSTICE

[16] The respondent failed dismally to make out a case for appealability on public-interest grounds. With regard to the issue of irreparable harm, it must be emphasised that the respondent, on her own version, agreed to vacate the subject property but subject to her conditions. What we are left with is that the respondent did not like the conditions that I attached to the order. Self-evidently, it could also never be submitted that if leave to appeal were to be granted, the ultimate appeal (if successful) would result in a just and reasonably prompt resolution of the real issues between the parties. It would be the opposite.¹⁶

[17] In conclusion, it is submitted that the interests of justice could never demand that an appeal against this interim limited duration order be permitted.¹⁷

THE GROUNDS OF APPEAL

[18] The grounds of appeal are equally challenging to understand. The first ground of appeal deals with the dismissal of the respondent's counterclaim. My reasons for the order granted deal with the respondent's misunderstanding of the law in this regard. In addition, no application was piloted to remove the fifth applicant as a trustee of the trust because of his alleged conflict of interest. Equally, the second ground of appeal has no merit. I say this because we are dealing here with a test for a limited-duration interdict. The test for granting relief in this case remains the same, and *Plascon-Evans* was applied. In any event, the respondent tendered to vacate the property. Admittedly, this was on different conditions

¹⁵ Also known as "public interest" grounds.

¹⁶ Cilliers NO v Ellis (unreported, SCA case no 200/2016 dated 17 March 2017) at para [16].

¹⁷ The appeal is in connection only with the conditions attached to the interim order of limited duration.

imposed by the court. However, I was empowered to impose conditions as I deemed appropriate. I did this by adding additional conditions to the order in the respondent's favour.¹⁸

[19] In this case, the respondent had as a fact tendered to vacate the subject property, and it was only the conditions attached to the vacation of the property that were not amenable to her and her legal representatives. Put another way, the portion of the order requiring the respondent to temporarily vacate the property was agreed to by the respondent before the order was granted and was tantamount to a consent order, which does not commend itself to appeal. There is no basis to grant leave to appeal against a consent order.¹⁹

[20] Put another way, the open tender made by the respondent was tantamount to a pre-emption of the respondent's right to appeal. The respondent agreed to temporarily vacate the property and thus waived her right to appeal that portion of the order requiring her to do so for the remedial work to proceed.²⁰

[21] I have the discretion not to entertain an application for leave to appeal where there is no longer any live dispute between the parties. The respondent's temporary vacation of the property so that remedial work could be carried out had, in view of the open tender, become academic and hypothetical.²¹

[22] Turning now to the third ground of appeal. This ground of appeal concerns a highly technical shield that also lacks merit. The respondent says that the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998, find application (PIE). The first enquiry to be made in a matter involving the provisions of PIE is to determine whether the respondent is in unlawful occupation of the property from which he

¹⁸ Shoprite Checkers Ltd v Blue Route Property Managers (Pty) Ltd and Others 1994 (2) (SA) 172 (C) 184 -185.

¹⁹ It may well be that the respondent may have the right to apply for the rescission of the order.

²⁰ Dabner v SARNH 1920 (AD) 583 at 594.

²¹ Port Elizabeth Municipality v Smit (2002) (4) SA 241 (SCA) at para 7.

or she is sought to be evicted. The respondent could never have been in unlawful occupation of the subject property because of her *sui generis* right to occupy the property because of her marriage to the fifth applicant, as set out in the reasons for my order. This is a highly technical shield, and bread does not rise with a bit of yeast.²²

DISCRETION AND THE TEST FOR APPEAL COURT INTERFERENCE

[23] It must be appreciated that the order granted followed the court's exercise of discretion, and only the conditions of the order remain in issue. The respondent submits that this exercise was misguided and erroneous, and that the order is liable to be overturned on appeal.²³

[24] The prospects of success at this juncture are difficult, if not impossible, to assess because of the pleadings and the defects in the application for leave to appeal. As currently formulated, the application lists three alleged and purported errors in the order (instead of explaining why the order was incorrect) in general terms, with little or no regard for the pleadings. In summary, the application for leave to appeal consists of a random list of three alleged errors.²⁴

[25] Thus, the application for leave to appeal as currently formulated is of little or no assistance in defining the legal or factual grounds of the intended appeal.²⁵

[26] The only possible live issue remaining between the parties was whether, upon vacating the property, the respondent would move into the cottage next door or into alternative accommodation for which the applicant would pay at least R140 000,00 per month. There was a typographical error in my initial order as I left out the words *per month*. All the parties agree that this was an error which is subject to verification in accordance with

²² This ground of appeal is stillborn.

²³ It is unknown how and why the exercise of the court's discretion was wrong.

²⁴ The grounds of appeal as formulated are in essence a summary of the arguments made at the hearing.

²⁵ *Hing and Others v Road Accident Fund 2014 (3) SA 350 (WCC)*.

Rule 42(1)(b) of the Uniform Rules. I will attach to this judgment and amended order. Nothing turns on this. What is significant is that the respondent never raised the issue of her relocation to the cottage next door in the pleadings. She refused to vacate the property (before the tender). Thus, there was no dispute of fact, and there is nothing left for any appellate court to decide.²⁶

[27] Put another way, should this court grant leave to appeal to the Supreme Court of Appeal (based on the application for leave to appeal as currently formulated), it would make it difficult, if not impossible, for the learned judges in the Supreme Court of Appeal to determine and decide upon the grounds upon which the appeal is being sought. In addition, the parties would be left in complete darkness as to the actual grounds of appeal advanced by the respondent, given the heavy thumb of evidence against the respondent.²⁷

[28] The unfortunate nature of the application for leave to appeal also makes it difficult, if not impossible, to apply the test under s17(1)(a)(i) and(ii) of the Superior Courts Act, 10 of 2013, due to the three randomly formulated alleged errors in the order. In summary, an appeal court would be asked to decide whether the respondent's temporary occupation of the next-door cottage would be preferable to the temporary occupation of the alternative accommodation tendered at a value of R140 000, 00 per month, when this issue was never raised by the respondent in her papers. I am also enjoined not to deal with issues not raised on the papers.²⁸

[29] The application for leave to appeal is no more than a regrettable attempt at obfuscation, if not intimidation. Our jurisprudence dictates that applications formulated in this manner are defective and fall to be dismissed for this reason alone.²⁹

²⁶ Beinash v Wixley 1997 (3) SA 712 at 743D - F.

²⁷ The court is also left in the dark.

²⁸ Fischer v Ramahlele (203/2014) [2014] ZASCA 88 (4 June 2014) para 14.

²⁹ The applicants and the court are simply left in the dark as the actual grounds of appeal.

[30] Put another way, the grounds of appeal must be clearly defined and set out in unambiguous terms. As a matter of pure logic, this must be so to enable the parties and the court to be fully informed of the case which the applicant in an application for leave to appeal seeks to make out and which the respondent thereto is to meet. The application for leave to appeal, as currently formulated, has very little value (if any).³⁰

[31] The applicants oppose the condonation application on the basis that an appeal would have no prospects of success and that, because of the nature of the issues raised, they are of no special importance. The bar for granting leave to appeal has been raised. Besides this, there is another obstacle. The issues in this application for leave to appeal are of such a nature that the decision sought (from an appeal court) will have no practical effect or result.³¹

[32] Self-evidently, if I were to grant leave to appeal, by the time that the appeal is decided, the divorce between the parties may have already been concluded, and the respondent's *sui generis* right to occupy the property may or may not have come to an end. More importantly, the date by which the respondent has been ordered to vacate the property will have expired by the time the appeal is heard and determined.³²

COSTS

[33] The way the respondent piloted (or omitted to pilot) this application for leave to appeal leaves a lot to be desired. The applicants must be compensated for the failures and omissions by the respondent's legal representatives.³³

[34] The applicants participated in the hearing on the opposition to the condonation application. Thus, they are also entitled to recover the costs that they incurred as a result. Undoubtedly, because of the omissions and failures by the respondent's legal

³⁰ Songono v Minister of Law-and-Order 1996 (4) SA 384 (ECD) at 385E.

³¹ Section 16(2)(a)(i) of the Superior Courts Act, 10 of 2013.

³² By 28 February 2026.

³³ The submissions made by them were of assistance to the court.

representatives, these costs fall to be paid by the respondent. Also, in the circumstances, I considered that these costs should be paid personally by the attorneys who deposed to the affidavits in support of the condonation application. However, I am unsure of all the circumstances surrounding the deposing of these affidavits, and I have accordingly (against my better judgment) decided against this type of personal cost order.³⁴

ORDER

[35] Purely for the sake of bringing some sort of finality to this matter, the following order is granted:

1. The respondent's condonation application is granted.
2. The respondent's application for leave to appeal is refused.
3. The respondent (Lauren Carey) shall be liable for the costs of and incidental to the application for condonation and the costs of and incidental to the application for leave to appeal on the party and party scale, as taxed or agreed.
4. The costs shall include the costs of two counsel and shall be taxable on Scale C (for both counsel).

E D WILLE
CAPE TOWN

³⁴ There may be some other excuse for this conduct and/or inaction.