



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: D3133/2025

In the matter between:

MOUNTAIN MEADOW INVESTMENTS (PTY) LTD
(Registration Number: 2015/451359/07)

FIRST APPLICANT

JIVESH RAJENDRAN PATHER
Identity Number: 9[...]

SECOND APPLICANT

and

CAPITEC BANK LIMITED

RESPONDENT

Coram: MOSSOP J

Heard: 22 April 2026

Delivered: 22 April 2026

ORDER

The following order is granted:

1. The application for condonation is refused with costs.
2. The application for leave to appeal is struck off the roll with costs.

3. The costs ordered in paragraphs 1 and 2 shall be paid by the applicants jointly and severally, the one paying the other to be absolved, on the scale as between attorney and client.

JUDGMENT

MOSSOP J:

Introduction

[1] On 21 January 2026, there was an opposed motion on my roll. The respondents in that opposed motion are now the applicants in the application before me and I shall therefore refer to them as 'the applicants'. When the opposed motion was called on 21 January 2026, there was no appearance for the applicants. I accordingly granted two money judgments against them, jointly and severally, for payment of the amount of R2 098 877.35 and R4 543.47 respectively, together with orders for the payment of interest on the aforesaid amounts and costs. In doing so, I delivered a full ex tempore judgment.

[2] What is before me now is an application for leave to appeal the judgment that I granted on 21 January 2026. Given the lateness of the delivery of the application for leave to appeal, there is also an application for condonation for that lateness.

[3] The first applicant is a private company. The second applicant is its guiding mind and I permitted him to advance argument on behalf of the first applicant.

Condonation

[4] Uniform rule 49(1)(b) provides as follows:

'When leave to appeal is required and it has not been applied for at the time the judgment or order is given, application for such leave, stating the grounds for the application, shall be made within 15 days after the date of the order appealed against:

Provided that -

(i) when the reasons or the full reasons for the court's order are given on a date later than the date of the order, such application may be made within 15 days after such later date; and

(ii) the court may, upon good cause shown, extend the aforementioned periods of 15 days.'

[5] The applicants accordingly had 15 days from 22 January 2026 to deliver their application for leave to appeal. The applications for condonation and for leave to appeal were delivered to the Registrar of this court on 26 March 2026, slightly in excess of two months after judgment was handed down. It is for this reason that the applicants seek condonation for the late lodging of their application for leave to appeal.

The allegations in support of condonation

[6] The second applicant has deposed to an affidavit in support of the condonation application. It is a rolled up affidavit, dealing both with condonation and the basis of the application for leave to appeal. It is a substantial document that is some 32 pages long.

[7] Despite its great length, the allegations advanced in support of the application for condonation are so brief that they can easily be quoted in full in this judgment. The allegations populate four short paragraphs under the heading 'Condonation'. They read as follows:

'1. I hereby like to apply for Condonation for the late filing of this Application, and seek Leave to Appeal the judgement granted on 21st January 2026 by the Honourable Justice Mossap (sic).

2. We have been prejudiced by the legal counsel representing myself and the first applicant. The plethora of properly indexed documents, as described in Annexure 3, was given to the legal counsel representing the first applicant. However, as indicated by the Honourable Judge Mossap, the Answering affidavit drafted by the legal counsel representing the first applicant is vague and embarrassing as indicated by Annexure (page 4 of the Judgement):

[Then followed an extract from the judgment that I delivered, which is not repeated]

3. I seek leave to appeal this Judgement, to submit tangible evidence of substance to assist the court to make a properly informed, impartial and fair judgement of the issues in dispute.

4. I respectfully submit, that there are excellent prospect of success in this application, and if the proposed appeal is successful, it will create a benchmark for the respondent to ensure that they abide by their Code of Banking Practice and Fiduciary Duties when performing their Due Diligence processes in the future.’

[8] That is the entire condonation application.

General principles

[9] The granting of an order of condonation is not simply a formality that can be claimed as of right. Facts must be advanced to satisfy the court that a proper and complete explanation has been given for the failure to observe the rules of this court. This is because the law cherishes finality in its proceedings,¹ and cases should not be prolonged by a party drawing out proceedings unnecessarily and on spurious grounds.

[10] The court hearing an application for condonation is endowed with a discretion that it must exercise judicially. That simply means that the court must not exercise its discretion capriciously but must exercise it for substantial reasons. In other words, if a discretion is exercised on no proper grounds, then it has not been judicially exercised.²

[11] As to what must be advanced in a condonation application, the Constitutional Court in *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)*, explained that:

‘An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And, what is more, the explanation given must be reasonable.’³

¹ The principle of the finality of litigation is expressed in the maxim *interest rei publicae ut sit finis litium* (it is in the public interest that litigation be brought to finality). See also: *Schmidlin v Multisound (Pty) Ltd* 1991 (2) SA 151 (C) page 156A-D; *Vermeulen and Another v Bense Building Contractors CC* [2025] ZAKZPHC 112 para 61.

² *Merber v Merber* 1948 (1) SA 446 at 452-3.

³ *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)* [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) para 22.

[12] In *Grootboom v National Prosecuting Authority*,⁴ the majority judgment of the Constitutional Court, observed that:

‘It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court’s indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court’s directions. Of great significance, the explanation must be reasonable enough to excuse the default.’

The test

[13] The test to be applied is whether it is in the interests of justice that condonation should be granted.⁵ That question is best answered by a consideration of the following

factors:

- (a) the degree of lateness or the extent of non-compliance with the prescribed time frame;
- (b) the explanation for the lateness or the failure to comply with time frames;
- (c) the prospects of success or the existence of a *bona fide* defence in the main case;
- (d) the importance of the case,
- (e) the respondent’s interest in the finality of the judgment;
- (f) the convenience of the court; and
- (g) the avoidance of unnecessary delay in the administration of justice.

[14] The factors just mentioned were identified by Zondo J in his dissenting judgment in *Grootboom*.⁶ They are, nonetheless, the generally recognised factors that are applicable when the issue of condonation is considered.

[15] Must all those factors be considered in each and every case? It appears not, for in *NUM v Council for Technology*, Myburgh JP stated that:

⁴ *Grootboom v National Prosecuting Authority* 2014 (1) BCLR 65 (CC) (*Grootboom*) para 23.

⁵ *Ibid* para 22.

⁶ Most of them were also identified by Bosiello J in the majority judgment in that matter.

'[t]here is a further principle which is applied and that is, without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused.'⁷

[16] That approach was later confirmed by Zondo J in *Grootboom* when he explained that:

'... some of the factors may justifiably be left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party. As a general proposition the various factors are not individually decisive but should all be taken into account to arrive at a conclusion as to what is in the interests of justice.'⁸

Analysis

[17] The delay in this instance is a period slightly in excess of two months. That is not an insignificant period. Indeed, that was the same period of delay in the matter of *eThekweni Municipality v Ingonyama Trust*.⁹ In that matter, condonation was sought and an explanation for the delay was given but was found to be wanting by the Constitutional Court and the condonation application was accordingly refused. That being said, I do not, however, hold the view that matters involving similar periods of delay should all lead to the same result, namely refusal of condonation, because each case is to be determined on its own unique facts.

[18] The facts of this matter reveal that despite the existence of a substantial delay, no explanation for its occurrence has been advanced by the applicants. The case may be of some importance to the applicants but it appears to me to hold no interest to any other person nor does it have any remarkable legal significance

⁷ *National Union of Mineworkers v Council for Mineral Technology* [1998] ZALAC 22; [1999] 3 BLLR 209 (LAC) (*NUM*) para 10.

⁸ *Ibid* para 51.

⁹ *eThekweni Municipality v Ingonyama Trust* [2013] ZACC 7; 2013 (5) BCLR 497 (CC); 2014 (3) SA 240 (CC).

despite the lofty sentiments expressed by the second applicant in his affidavit delivered in support of the condonation application. The respondent clearly desires that this matter be brought to its natural end and it would be inconvenienced if the matter were to be allowed to limp on, thereby occasioning a delay in the administration of justice.

[19] Both Zondo J and Myburgh JP in their respective judgments mentioned that where there is no explanation for a delay, whether there is any prospect of success should an appeal be allowed becomes immaterial. That is the position in this matter. There is simply no explanation at all for the delay in bringing the application for leave to appeal. Not a single fact is advanced to explain what the applicants did between 21 January 2026, when the judgment sought to be appealed was delivered, and 26 March 2026, when this application was launched. There is accordingly no need, on the authority of *Grootboom* and *NUM* to consider the applicants' prospects of success for the application must fall at the first hurdle. In *Chetty v Law Society, Transvaal*,¹⁰ the Appellate Division remarked as follows when dealing with an application for the rescission of a judgment:

'And ordered judicial process would be negated if, on the other hand, the party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits.'

Those words apply equally to a party seeking condonation who provides no explanation for the delay that the court is requested to overlook and condone.

[20] I have, nonetheless considered the quintessence of the reasons why the applicants say that they have prospects of success on appeal. The explanation is lengthy, covering 24 of the 32 pages that make up the application. Unfortunately, nothing that is there said appears in the applicants' answering affidavit delivered in the main application. As Ms *Thobela-Mkhulisi*, who appears for the respondent this morning, states in her heads of argument, an application for leave to appeal is not designed to afford an applicant an opportunity to present new facts and make out a new case. The applicants appear to labour under the incorrect apprehension that they may do so. In this they are both incorrect.

¹⁰ *Chetty v Law Society, Transvaal* 1985 (2) 756 (A) at 765E.

[21] I am unpersuaded, therefore, that even if condonation had been properly addressed by the applicants, which it has not, that they have any prospects of success on appeal. As Wallis J observed in *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and Others*:

‘The need to obtain leave to appeal is a valuable tool in ensuring that scarce judicial resources are not spent on appeals that lack merit.’¹¹

[22] Those sage words apply fully to the facts of this application for this is an application for leave to appeal that lacks any merit. The application for condonation must fail and as a consequence the application for leave to appeal must be struck from the roll.

Costs

[23] As to the costs of this application, the parties agreed when concluding the loan agreement, the overdraft agreement, and the deed of suretyship that lie at the heart of their dispute that any costs arising out of litigation between them would be paid by the losing party on the attorney and client scale. There is no reason to deviate from their agreement.

Order

[24] I accordingly grant the following order:

1. The application for condonation is refused with costs.
2. The application for leave to appeal is struck from the roll with costs.
3. The costs ordered in paragraphs 1 and 2 shall be paid by the applicants jointly and severally, the one paying the other to be absolved, on the scale as between attorney and client.

¹¹ *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and Others* [2013] ZASCA 120; 2013 (6) SA 520 (SCA); [2014] 1 All SA 375 (SCA) para 24.

MOSSOP J**APPEARANCES**

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In person

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