IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

Case No: 2025-119931

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

Date of hearing:
1 June 2026

SIGNATURE

DATE OF JUDGMENT
22 June 2026

In the matter between:

LERATO ELIZABETH LEHOKO	First Applicant
DUMANI MADALANE	Second Applicant
and	
THANDAZWA KETILE	First Respondent
LARA LOUISE EVANS KAY	Second Respondent
MINISTER OF POLICE	Third Respondent
STATION COMMANDER, HILLBROW POLICE STATION	Fourth Respondent
SHERIFF OF THE HIGH COURT, JOHANNESBURG CENTRAL	Fifth Respondent

In re:

THANDAZWA KETILE	First Applicant

LARA LOUISE EVANS KAY	Second Applicant
and	
LERATO ELIZABETH LEHOKO	First Respondent
DUMANI MADALANE	Second Respondent
MINISTER OF POLICE	Third Respondent
STATION COMMANDER, HILLBROW POLICE STATION	Fourth Respondent
SHERIFF OF THE HIGH COURT, JOHANNESBURG CENTRAL	Fifth Respondent

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JUDGMENT IN RE APPLICATION FOR LEAVE TO APPEAL

DE LIMA JORGE, AJ

***AD* CONDONATION**

[1] The First and Second Applicants in this application for leave to appeal, being the First and Second Respondents in the main application in the court a quo, delivered their application for leave to appeal on 29 March 2026.

[2] The Applicants have incorporated a prayer for condonation for the late filing of their application in the application for leave to appeal.

[3] The basis for the condonation, as set out in the notice of leave to appeal, is that the Applicants requested reasons for the judgment through the registrar; however, same was only provided on 5 March 2026, resulting in the Applicants being unable to deliver their application within the prescribed time period.

[4] The request for written reasons by the Applicants was made on 26 August 2025 and transmitted to the office of the appeals registrar. As no response was received, a follow-up email was thereafter sent by the attorney of record for the Applicants to my registrar on 6 October 2025. The said request for written reasons was received by me on 6 October 2025.

[5] Written reasons were accordingly prepared and uploaded to CaseLines on 28 October 2025.

[6] The Applicants addressed further correspondence to my registrar on 14 January 2026 and 5 March 2026 and, according to the Applicants, received same on the latter date.

[7] In terms of Rule 49(1)(b) of the Uniform Rules of Court, an applicant is required to institute an application for leave to appeal within 15 days from the date on which the written reasons are provided.

[8] Having regard to the above timeline, the Applicants' application for leave to appeal was served 105 days after the written reasons were provided and uploaded to CaseLines and, at best for the Applicants, 17 days from when the Applicants were provided with the reasons, namely 5 March 2026, i.e. 2 days after the lapse of the 15-day period.

[9] Whenever a party to litigation fails to comply with any of the Rules or time periods contained therein, the Court may condone such failure upon application by the defaulting party[1]. Condonation is not there for the mere taking. In ***Du Plooy v Anwes Motors (Edms) Bpk*** 1984 (4) SA 213 (O) at 216H–217D, the Court concluded that the subrule (Rule 27(3)) requires "good cause" to be shown. The Court has a wide discretion[2], which must be exercised with due regard to the merits of the matter as a whole. This applies to all applications brought under the subrule[3]. What may differ is the degree of assurance required that there is indeed a defence, which may vary from case to case. The applicant should

[1] Rule 27 Extension of time and removal of bar and condonation
[2] ***Smith NO v Brummer NO*** 1954 (3) SA 352 (O) at 358A
[3] ***Gumede v Road Accident Fund*** 2007 (6) SA 304 (C) at 307C–308A

satisfy the Court on oath [my emphasis] that he has a bona fide defence or that his action is clearly not ill-founded, as the case may be.

[10] An applicant seeking relief under this Rule must show good cause. The Court will refuse to grant the application where there has been a reckless or intentional disregard of the Rules of Court, or where the Court is convinced that the applicant does not seriously intend to proceed. The application must be bona fide and not made with the intention of delaying the opposing party's claim [4].

[11] In ***High Tech Transformers (Pty) Ltd v Lombard*** (2012) 33 ILJ 919 (LC) the importance of a reasonable and acceptable explanation for a delay was emphasised at para 25 of the judgment:

'[25] . . . Condonation is not merely for the asking as was duly pointed out by the court in NUMSA & another v Hillside Aluminium [2005] ZALC 25; [2005] 6 BLLR 601 (LC):

"[12] Additionally, there should be an acceptable explanation tendered in respect of each period of delay. Condonation is not there simply for the asking. Applications for condonation are not a mere formality. The onus rests on the applicant to satisfy the court of the existence of good cause and this requires a full, acceptable and ultimately reasonable explanation. ... Nevertheless, to do justice to the aims of the legislation, parties seeking condonation for non-compliance are obliged to set out full explanations for each and every delay throughout the process. ..."'

[12] At no point did the Applicants file an affidavit setting out, under oath, the reasons for the late filing of the application for leave to appeal or demonstrating good cause.

[13] All submissions in support of condonation were made by counsel for the Applicants from the bar. This, in effect, amounts to "leading evidence from the bar." When questioned as to why no supporting affidavit had been deposed to by

[4] Erasmus, supra, RS 7, 2018, D1-323.

the Applicants, the only explanation advanced was that the Applicants were entitled to proceed in this manner in the interests of justice.

[14] Furthermore, when asked whether the Applicants' legal representatives had checked CaseLines to ascertain whether the reasons had been uploaded, it was indicated that the Applicants were of the view that the reasons would be provided by my registrar. On this basis, they did not consider it necessary to check CaseLines to determine whether the reasons had, in fact, been uploaded.

[15] This is untenable in light of the submission by counsel for the Respondent that CaseLines automatically issued an email notification on 28 October 2025 to all parties invited to the matter. The notification stated: "*This email has been sent on behalf of the Office of the Chief Justice to notify you that a change has occurred in section 077-1 in case [Urgent Application] Thandazwa Ketile v. Lerato Elizabeth Lehoko #2025-119931*." It was through this notification that the Respondents became aware of the reasons for the order granted.

[16] Save for the above, no further explanation has been provided for the late filing of the application for leave to appeal, including for the period within the 15-day timeframe from 5 March 2026 to 29 March 2026.

[17] An applicant should also show that he would have reasonable prospects of success in the process for which he seeks condonation to proceed with (in the present matter that would be that there are prospects that the court which will entertain the appeal would come to another conclusion). In this regard the following principle was stated in ***Democratic Alliance v President of the Republic of South Africa*** (21424/2020) [2020] ZAGPPHC 326 (29 July 2020) para 5:

'[5] This dictum serves to emphasis a vital point: Leave to appeal is not simply for the taking. A balance between the rights of the party which was successful before the court a quo and the rights of the losing party seeking leave to appeal need to be established so that the absence of a realistic chance of succeeding on appeal dictates that the balance must be struck in favour of the party which was initially successful.'

[18] Taking into account the extent of the Applicants' failure to comply with Uniform Rule 49(1)(b), their explanation does not approach compliance with the test laid down in the Rule and the applicable authorities.

[19] However, *ex abundanti cautela*, the sole remaining issue is whether the Applicant's prospects of success on appeal are sufficiently strong—or at least viable—so as to justify, to some extent, overlooking the Applicant's failure to adequately explain the delay.

AD MERITS OF THE APPLICATION THE LEAVE TO APPEAL

[20] The Applicants seek leave to appeal to the Full Court against the whole judgment and order dated 7 August 2025 and the reasons provided on 28 October 2025, on five grounds.

[21] On 17 May 2024 the Honourable Madam Justice Crutchfield J confirmed the validity of the notarial servitude, ordered registration, compelled access, and awarded attorney-client costs.

[22] The Applicants instituted an application for leave to appeal the Honourable Madam Justice Crutchfield J's judgment and orders and which application for leave to appeal was dismissed on 16 October 2024. The Applicants thereafter on 3 April 2025 petitioned the Supreme Court of Appeal.

[23] The Supreme Court of Appeal dismissed the application for leave to the appeal instituted by the Applicants in respect of the whole judgment and order of the Honourable Madam Justice Crutchfield. The order by the Supreme Court of Appeal is dated 7 August 2026, and communicated to the parties on or about 23 August 2025.

[24] In ***Acting National Director of Public Prosecutions v Democratic Alliance In Re Democratic Alliance v Acting National Director of Public Prosecutions*** (19577/09) [2016] ZAGPPHZ 489 (24 June 2016), the court held (at paragraph 25 of the judgment) that the Act has raised the bar for granting leave to appeal and in this regard, referred to ***The Mont Chevaux Trust (IT 2012/28) v***

Tina Goosen and 18 Others 2014 JDR 2325 (LCC), where the following was stated:

'It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see ***Van Heerden v Cronwright & Others 1985 (2) SA 342 (T) at 343H.*** *The use of the word "would" in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.'*[5]

[25] In ***Municipality of Thabazimbi v Badenhorst*** (66933/2011) [2024] ZAGPPHC 195 (26 February 2024) paras 9 – 10 the court also dealt with the more stringent test for an application for leave to appeal and held, *inter alia*, as follows:

'[9] ... A possibility and discretion were therefore, in the words of the legislation and consciously so, amended to a mandatory obligatory requirement that leave may not be granted if there is no reasonable prospect that the appeal will succeed. It must be a reasonable prospect of success; not that another Court may hold another view.

[10] The Court a quo may not allow for one party to be unnecessarily put through the trauma and costs and delay of an appeal. ...'

[26] In ***MEC Health, Eastern Cape v Mkhitha*** (1221/2015) [2016] ZASCA 176 (25 November 2016) the Supreme Court of Appeal held:

"[17] ... An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal."'

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[5] See also ***Rohde v S*** 2020 (1) SACR 329 (SCA) para 8 and ***Fair-Trade Independent Tobacco Association v President of the Republic of South Africa and Another*** (21688/2020) [2020] ZAGPPHC 311 (24 July 2020) para 4.

[27] In considering whether there is some other compelling reason why the proposed appeal should be heard, as provided for in section 17(1)(a)(ii) of the Act, an important question of law or a discrete issue of public importance that will have an effect on future disputes may constitute such a compelling reason.

[28] I do not intend repeating all the grounds of the proposed appeal, as these already form part of the record.

[29] In relation to the first ground, namely that the Court erred in proceeding despite pending proceedings and a petition to the Supreme Court of Appeal in respect to the order granted by the Honourable Madam Justice Crutchfield under case number 2023 – 018412:

[29.1] as indicated above, the Supreme Court of Appeal dismissed the application for leave to the appeal instituted by the Applicants in respect of the whole judgment and order of the Honourable Madam Justice Crutchfield dated 3 April 2025;

[29.2] it is important to note that the order by the Supreme Court of Appeal is dated 7 August 2026, being the same day the urgent application was heard;

[29.3] at the time of delivering this application for leave to appeal, on 29 March 2026, the Applicants were fully aware of the aforementioned fact;

[29.4] the import thereof accordingly renders this ground for leave to appeal moot. However, counsel for the Applicants contended that, because on 7 August 2026 the parties were not aware of the outcome of the Supreme Court of Appeal's decision this ground stands;

[29.5] even if there is any merit in the above contention, the following bears refence: the independence of spoliation proceedings from the determination of underlying rights is firmly established. In ***Ngqukumba v Minister of Safety and Security*** 2014 (5) SA 112 (CC) at para 10, the Constitutional Court reiterated that the mandament van spolie is concerned with the restoration of possession, irrespective of competing claims to rights;

[29.6] likewise, in ***Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality*** 2007 (6) SA 511 (SCA) at para 24, it was confirmed that the remedy is not concerned with the merits of the

underlying dispute, but with the restoration of unlawfully deprived possession;

[29.7] the first ground of appeal further losses sight of the contents of paragraphs [38] to [40] of my reasons, and more specifically that the SCA has held in ***National Sorghum Breweries v International Liquor Distributors (Pty) Ltd*** [2000] ZASCA 159; 2001 2 SA 232 (SCA) that for *res judicata* to apply, it is not sufficient that claims share similar elements; the court must compare each claim in its entirety and ensure that the same parties, as well as the same essential issues of fact or law, were previously determined. In this matter, the cause of action is based on new acts of unlawful obstruction arising in July 2025, which were not contemplated in the earlier order of 17 May 2024 by Her Ladyship Justice Crutchfield. The relief sought is therefore based on fresh deprivation and not enforcement of the prior order. Furthermore, it was conceded by the Applicants that the order of 17 May 2024 did not address the servitude on the western boundary of Erf 9[...] or the northeastern boundary of Erf 9[...]; and

[29.8] it follows that the existence of pending appeal proceedings relating to the validity or scope of the servitude could not preclude the Court from determining whether a new act of spoliation had occurred. There was accordingly no misdirection in proceeding with the matter, and no risk of conflicting orders arises where the relief is confined to restoration of possession.

Accordingly, the first ground of appeal is without merit.

[30] The second ground, that the Court failed properly to consider the existing order of 2023 and registered real rights, similarly rests on a misapprehension of the law:

[30.1] it is trite that spoliation proceedings do not determine or affect underlying proprietary rights;

[30.2] in ***Eskom Holdings SOC Ltd v Masinda*** 2019 (5) SA 386 (SCA) the Supreme Court of Appeal held that that the mandament operates irrespective of the merits of the dispute, and that possession must be restored even if the respondent believes that they are legally entitled to act as they did. This principle was reaffirmed in ***Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi*** 1989 (1) SA 508 (A) at 514–515, where the

Court held that even quasi-possession of a servitude right is protectable without determining the validity of the right itself;

[30.3] the Applicants' reliance on the Deeds Registries Act, SPLUMA, or alleged effects on property value is therefore misplaced, as those considerations are legally irrelevant to the spoliation enquiry; and

[30.4] as pointed out by Counsel for the First and Second Respondents, the Court a quo correctly confined itself to restoration of access and did not purport to vary or interfere with any registered real rights. I agree with this submission.

Accordingly, the second ground of appeal is without merit.

[31] The third ground for leave to appeal concerning an alleged procedural irregularity based on documents being signed by a candidate legal practitioner, does not disclose a valid basis for appeal.

[31.1] counsel for the Respondent submitted that it was not averred in the answering papers to the spoliation application that the notice of motion was signed by a candidate attorney and was, as such, irregular. This constitutes new evidence to which the Respondents could not reply;

[31.2] the Supreme Court of Appel has reiterated that it is a well-established principle that, in considering on appeal whether a judgment appealed from is right or wrong, the appeal court considers the judgment based on the facts in existence at the time the judgment was given[6];

[31.3] during the spoliation application, the Respondents were not confronted with the contention that the notice of motion constituted an irregular step whether by way of a Rule 30 notice, a point in limine, or otherwise;

[31.4] counsel for the Applicants' response to the above was confined to the proposition that the Court a quo ought to have raised the irregularity *mero motu*. This proposition is untenable, *inter alia,* because the notice of motion contains a signature for the First and Second Respondents' attorneys without specifying the name or designation of the signatory. It would therefore have been impossible for the Court to identify the alleged irregularity without it being formally raised by the Applicants;

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[6] ***Bechan and Another v SARS Customs Investigations Unit and Others*** (1196/2022) [2024] ZASCA 20 (5 March 2024) and ***Weber-Stephen Products Co v Alrite Engineering (Pty) Ltd*** 1992 (2) SA 469 (A) at 507C-D.

[31.5] further reliance on Section 18(1) and section 4(2) of the Right of Appearance in Courts Act 62 of 1995 does not assist the Applicants, as a notice of motion is not a pleading and, in any event, Act 62 of 1995 has been repealed;

[31.6] it is well established that not every procedural irregularity vitiates proceedings; only those that cause prejudice or affect the fairness of the process are material. In ***Trans-African Insurance Co Ltd v Maluleka*** 1956 (2) SA 273 (A) at 278 E-G, the Appellate Division held that "*in the absence of prejudice to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits*". The principal that formal defects should not be permitted to override the substance of litigation where no prejudice is shown has been reiterated by our courts in numerous cases since then. Furthermore, motion proceedings are founded upon affidavits, not pleadings, and the evidential material placed before the Court was properly deposed to by the First and Second Respondents; and

[31.7] the alleged irregularity is therefore at best technical and does not affect the correctness of the order.

Accordingly, the third ground of appeal is without merit.

[32] The fourth ground, relating to an alleged failure to consider the rights of third parties and a purported non-joinder, is likewise unsustainable:

[32.1] this fourth ground suffers the same fate as the third ground, namely that it was not averred in the answering papers to the spoliation application;

[32.2] the test for joinder is whether a party has a direct and substantial interest in the order sought: ***United Watch & Diamond Co v Disa Hotels 1972 (4) SA 409 (C) 415F***. A direct and substantial interest is one that may be prejudicially affected by the judgment. In the present matter, the order granted was limited to the removal of unlawful obstructions and the restoration of access; it did not alter any registered servitude or impose obligations on third parties;

[31.3] in ***Henri Viljoen (Pty) Ltd v Awerbuch Brothers*** 1953 (2) SA 151 (O) at 169–170, it was emphasised that a financial or indirect interest is insufficient to found a case of non-joinder. The respondents have failed to demonstrate any direct and substantial interest on the part of the alleged third parties that required their joinder; and

[32.4] finally I accept and agree with the submissions by counsel for the First and Second Respondents that: the Applicants have failed to provide any detail as to how the court a quo varied and or shifted the servitude and which in turn would affect the third parties. The order was limited to the spoliation application and the removal of the obstructions, on the northeastern boundary of ERF 9[...] and the western boundary of ERF 9[...], which affect the First and Second Respondent's use of the servitude.

This ground is therefore devoid of merit.

[33] The fifth ground, concerning an alleged discrepancy between the servitude and the terms of the order, similarly fails to meet the threshold required for purposes of granting the leave to appeal:

[33.1] the Applicants do not identify the alleged discrepancy with any particularity, nor do they demonstrate how it renders the order unworkable or incorrect in law; and

[33.2] if the discrepancy refers to a clerical or typographical error, it is well established that clerical or typographical errors may be corrected under Rule 42 of the Uniform Rules of Court and do not constitute a basis for appellate interference. In ***Firestone South Africa (Pty) Ltd v Genticuro AG*** 1977 (4) SA 298 (A) at 306F–H, the Court held that a court retains the inherent power to clarify or correct its own order where necessary. The alleged discrepancy, even if established, would not affect the central finding that the Applicants unlawfully obstructed access and that the First and Second Respondents demonstrated entitlement to the relief granted.

[34] The Applicants' grounds seek to introduce defences directed at the validity or scope of the servitude rather than the act of dispossession. As consistently held, such considerations are irrelevant to spoliation proceedings. In ***Van Eck v Etna Stores*** 1947 (2) SA 984 (A) at 998 (A) and reaffirmed in Ngqukumba v Minister of Safety and Security 2014 (5) SA 112 (CC), the Court emphasised that no one is entitled to take the law into their own hands, and that even a person with a valid claim must approach the courts for relief. The Applicants' conduct, on their own version, involved the erection of structures that interfered with access, and this constitutes precisely the form of self-help that the mandament is designed to prevent.

[35] The factual findings underpinning the order are not susceptible to attack on appeal. There is no basis upon which another court would interfere with these findings.

[36] In the result, the Applicants have failed to demonstrate any misdirection of fact or law, nor have they shown that there is a reasonable prospect that another court would arrive at a different conclusion. On the contrary, the grounds advanced are legally misconceived and fail to engage with the established principles governing the *mandament van spolie*.

[37] There is accordingly no basis for granting the application for condonation for the late filing of the application for leave to appeal and, the application for leave to appeal.

[38] There is no reason why costs should not follow the outcome. In view of the totality of the factors to be considered in terms of Uniform Rule 67(A)(3)(b), as well as the facts and circumstances of the present matter, I agree with the submission by counsel for the Respondents that the appropriate scale of counsel's fees be scale B.

Order:

[39] The following order is made:

The application for condonation and, consequently, the application for leave to appeal are dismissed with costs, including costs of counsel on scale B.

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DE LIMA JORGE AJ

Acting Judge of the High Court,

Gauteng Division, Johannesburg