



**IN THE HIGH COURT OF SOUTH AFRICA,  
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case Number: **2277/2019**

In the matter between:

**ISAAC JON-JON WLADIMORE MATTHYS**

Applicant

and

**HERHOLDT'S ELECTRICAL WHOLESALERS  
(PTY) LTD**

Respondent

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**LEAVE TO APPEAL**

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**HEARD ON:                      12 FEBRUARY 2021**

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**JUDGMENT BY:              CHESIWE, J**

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**DELIVERED ON:              13 MAY 2021**

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- [1] This is an application for leave to appeal to the full bench of this division against the whole judgment delivered on 1 August 2019 for a summary judgment granted against the applicant.
- [2] The applicant filed simultaneously an application for condonation as well as an application to lead further evidence on appeal. However, the application to lead further evidence was abandoned.
- [3] The application for condonation was granted and judgment in the leave to appeal was reserved.
- [4] Firstly, I would deal with the reasons for granting condonation.
- [5] Adv. Mazibuko, counsel on behalf of the applicant submitted in oral argument that the applicant has shown good cause and gave a proper explanation for the delay, as well as that there are prospects of success.
- [6] Adv. Van der Merwe, counsel on behalf of the respondent submitted that the applicant applied for condonation 11 months after the judgment was granted on 1 August 2019. Counsel disputed that the applicant has given a proper explanation for the delay. Counsel also submitted that in September 2019 the applicant knew of the judgment and did not react to it, but instead gave attention to the writ of execution proceedings.
- [7] When considering an application for condonation, factors to be weighed by the court include, the degree of non-compliance, the

explanation thereof, the importance of the case and the avoidance of unnecessary delay in the administration of justice.<sup>1</sup>

- [8] In *Uitenhage Transitional Local Council v South African Revenue Service*<sup>2</sup>, the requirement of an explanation for the delay was stated as follows:

“condonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the non-compliance is time-related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out.”

- [9] In **Minister of Agriculture and Land Affairs v CJ Rance (Pty) Ltd**<sup>3</sup>, it was stated: “...a court may grant condonation if it is satisfied that the three requirements have been met.” At para 35 of **Rance** *supra*, Majiedt AJA further highlighted that the interests of justice play an important role.

- [10] In the unreported case of **MD Marais v Minister of Safety and Security and the MEC for Roads and Transport** (case no 1521/2010), Jordaan, J held that: “any explanation is not ordinarily regarded as acceptable only because it is a full explanation. That full explanation must be acceptable as well.”

- [11] In considering a condonation application, the court has a discretion to be exercised judicially upon a consideration of all facts, and in essence, it is a question of fairness for both parties. Condonation is not

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<sup>1</sup> Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd & Others [2013] 2 ALL SA 251 (SCA)

<sup>2</sup>2004 (1) SA 292 (SCA) at para 6

<sup>3</sup> 2010 (4) SA 109 (SCA) at para 33

a mere formality and it is not to be had “merely” for the asking.<sup>4</sup> The applicant in the founding affidavit gave an explanation and reasons for the lateness. The applicant mentioned that he had challenges with the legal representative, as a result he had to terminate the legal representative’s mandate. He had to appoint a new legal representative to handle the matter. The applicant gave a detailed account with dates on which attempts were made to have the matter before court.

- [12] The challenges in respect of the attorney is noted in annexure FA2 and FA3, (pages 20 to 21 of the application for condonation), where the applicant’s attorney requested copies of the file. It is further noted in annexure FA4, on page 24 that:

“The court file could not be located as the matter has the same case number for different defendants and it is assumed the court file could be on the roll for another defendant other than our client above. We could therefore not make copies of the pleadings.”

- [13] What followed to the applicant’s predicament was the National Lockdown due to the Covid-19 pandemic. According to the applicant, the lockdown made it difficult to have consultations with his legal representative and counsel. The applicant’s reasons and explanation in respect of Covid-19, cannot be denied as it was indeed such that every person or citizen was affected by the pandemic. The applicant

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<sup>4</sup> Uitenhage Transnational Local Council v South African Revenue Services, 2004 (1) SA 292 SCA at para 6.

can therefore not be prejudiced due to an event that was not of his own doing. It is not difficult to believe neither to doubt that the applicant indeed had challenges, including the lockdown challenges. It is no secret that 2020 had serious challenges for any person who had litigation matters before court.

- [14] Aligning myself with the matter of **Shange** *supra* that good cause may include a number of factors that are entirely dependent on the facts of each case and that prospects of success in the main action play a significant role, in essence the overall impression made on the court by the facts as set out by the applicant does warrant that condonation be granted.
- [15] In my view the applicant has shown that good cause exists and has given a detailed explanation of the delay. The explanation is reasonable and acceptable and thus should be granted the relief sought. The respondent will not be prejudiced by the relief sought for condonation.
- [16] I now turn to deal with the leave to appeal application.
- [17] The applicant seeks leave to appeal to the full court of this Division against the whole of the judgment granted on 1 August 2019.
- [18] The grounds of appeal are listed extensively in the application and will therefore not be repeated herein. The main contention of the applicant is that the court erred in not dismissing the application for summary judgment.

- [19] The applicant contends that there are good prospects of success and that another court would arrive at a different conclusion in respect of summary judgment. The respondent's contention is that the applicant's defense in respect of the suretyship that the particulars claim referred to 2018 instead of 2016 is neither here nor there, as the applicant remains, indebted to the respondent.
- [20] The applicant relies on several grounds for the appeal. Most of the grounds the applicant relied on are essentially a reiteration of the case as was set out in the summary judgment application which issues were argued extensively by parties. The dispute that the suretyship contract was signed on 2016 and not in 2018 does not change the fact that the applicant is indebted to the respondent. Counsel on behalf of the respondent submitted that the date of 2018 in the particulars of claim was a typing error and that the applicant is fully aware that the contract was signed in 2016, and there was no new contract that the applicant referred to.
- [21] The applicant simply revisited the same issues that were raised in the main application, which issues were opposed and challenged by the respondent. The applicant is not precluded from revisiting such issues, provided that the court is satisfied that another court would come to a different decision.
- [22] In terms of the provisions of section 17(1) of the Superior Courts Act 10 of 2013, leave to appeal may only be granted if the judge concerned is of the opinion that:<sup>5</sup>

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<sup>5</sup> MEC for Health, Eastern Cape v Mkitha and Another, 1221/2015 [2005] ZASCA 176 (25 November 2016).

- “(a) (i) the appeal would have reasonable prospects of success or  
(ii) there is some other compelling reason why appeal should be heard;
- (b) the decision sought on appeal does not fall within the ambit of section 16(2)(a) and;
- (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.”

[23] In an unreported decision of the **Mont Chevaux Trust v Tina Goosen**,<sup>6</sup> Bertelsmann, J held that:

“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...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.”

[24] The **Mont Chevaux** decision was cited with approval in the matter of **Matoto v Free State Gambling and Liquor Authority**,<sup>7</sup> where Daffue, J at paragraph 5 said:

“There can be no doubt that the bar for granting leave to appeal has been raised...The use by the legislature of the word ‘only’, emphasised *supra* is a further indication of a more stringent test.”

[25] In **Smith v S**<sup>8</sup>, the court dealt with the question of what constitute reasonable prospects of success and stated as follows:

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<sup>6</sup> 18 2014 JDR LCC.

<sup>7</sup> 4629/2015 [2017] ZA FSHC 80 (8 June 2017).

<sup>8</sup> 2012 (1) SACR 567 (SCA) at para [7]

“What the test of reasonable prospects of success postulates is 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 order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.”

- [26] The applicant’s reliance on the fact that the surety contract that was dated 2018 is needed as proof of the claim of debt towards the respondent is unacceptable, as it was submitted that the suretyship was signed in 2016 and not in 2018. The submission that the 2018 was a typing error is quite acceptable as the 2016 suretyship was attached to the summons. The applicant does not deny that the contract was signed. The applicant knew about the judgment already on 23 August 2019.
- [27] Most of the grounds sought to be relied upon are essentially a reiteration of the case as set out in the pleadings and was fully argued and dealt with in the summary judgment.
- [28] That the bar has been raised in considering whether leave to appeal the judgment of a court should be granted, is not in dispute. In my view, the applicant has failed to meet the threshold required in section 17(1) of the superior Courts Act 10 of 2013.



[29] I am therefore of the considered view that the application is without merit and that the applicant does not have reasonable prospects of success on appeal.

[30] I accordingly make the following order:

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



**S. CHESIWE, J**

On behalf of Applicant:      ADV. M.S. MAZIBUKO  
Instructed by:                MATLHO ATTONEYS  
   BLOEMFONTEIN

On behalf of Respondent:    ADV. R. VAN DER MERWE  
Instructed by:                PHATSHOANE HENNEY INC.  
   BLOEMFONTEIN