



**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 no: 2019/3628

In the matter between:

**JACO DU PLESSIS N.O.**

1<sup>st</sup> Applicant

**LITTLE MAURITIUS HOMEOWNERS ASSOCIATION**

2<sup>nd</sup> Applicant

and

**WILLIAM DAFFUE**

1<sup>st</sup> Respondent

**LEON JOHANNES VAN SCHALKWYK**

2<sup>nd</sup> Respondent

**BELINDA ROSSOUW**

3<sup>rd</sup> Respondent

**STANLEY PRETORIUS**

4<sup>th</sup> Respondent

**HESTER PAULINA DOROTHEA VAN LEEUWEN**

5<sup>th</sup> Respondent

**LEON JOHANNES VAN SCHALKWYK**

**1<sup>ST</sup> COUNTER APPLICANT**

**WILLEM DAFFUE**

**2<sup>nd</sup> COUNTER APPLICANT**

and

**LITTLE MAURITIUS HOMEOWNERS  
ASSOCIATION**

**1<sup>st</sup> COUNTER RESPONDENT**

**THE REGISTRAR OF DEEDS,  
BLOEMFONTEIN**

**RESPONDENT**

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**HEARD ON:** 22 APRIL 2021

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**CORAM:** MATTHEWS, AJ

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**JUDGEMENT BY:** MATTHEWS, AJ

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**DELIVERED ON:** 27 MAY 2021

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- [1] This is an application for leave to appeal, based on the failure to comply with the order made in a previous application.
- [2] On 06 March 2020 this court, inter alia granted and order in terms of which inter alia, the counter respondent, Little Mauritius Home Owners Association (LMHOA), was obliged to transfer property to the first counter applicant, Mr L J van Scalkwyk, for which he has already paid the agreed purchase price. In addition, the court made an order that the first counter applicant had to comply with rules of the counter respondent, Little Mauritius Home Owners Association.
- [3] On 08 May 2020, the counter applicant, Mr L J van Scalkwyk, gave notice of his intention to apply for leave to appeal, mainly to obtain a mandamus to secure the transfer of the property referred to above. The said property had at the time of this hearing not been transferred in terms of the court order.
- [4] It is common that the Registrar of the Bloemfontein High Court, thereafter engaged the parties and myself, during October 2020, to secure a suitable date, which was eventually determined to be the 19 March 2021.

- [5] On the 29 October 2020, the Mr J du Plessis, on behalf of the counter respondent, wrote to the legal representative of the counter applicant, that they have not received the application for leave to appeal.<sup>1</sup>
- [6] On the 15 March 2021, Mr J du Plessis notified the counter applicant and the Registrar of the High Court, stating that the leave to appeal was out of time and without an application for condonation for being late.
- [7] On the 17 March 21 an application for condonation was lodged by the counter applicant and Mr du Plessis notified them in writing that, the late filing made it impossible for them to prepare for said application.
- [8] Other relevant disputes leading to the application, can be summarised as follows.
- [9] The counter applicant Mr LJ van Scalkwyk says that the has complied with the order a quo, by lowering his water tanks so that it is out of sight.
- [10] The counter respondent, as per Ms Z J Kitchen disputes this claims, in her affidavit dated the 12 April 2021. She asserts that the water tanks can still be seen and that the counter applicant has not properly covered the caravans on his premises.
- [11] The counter applicant, claims that the counter respondent is wilfully withholding consent to the transfer of his property, because they have not been responding to his frequent request to give consent to the transfer.

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1. letter dated 29 October 2020. No 19 paginated, bundle

- [12] The counter respondent disputes that their conduct has been wilful. She asserts that their chairperson during the initiation of this legal proceedings was a Mr van Braaken, who had without notice to them withdrawn from his position as chairperson.
- [13] The counter applicant referred to notices that they have forwarded to the counter respondent's attorney, Mr J du Plessis and who has not responded to their request for action on the transfer and neither to the warnings on taking the case on appeal.
- [14] The counter respondent stated that the counter applicant has used the wrong email of Mr J du Plessis, which was not [jacoduplessislaw@gmail.com](mailto:jacoduplessislaw@gmail.com). Instead it was [1jacoduplessislaw@gmail.com](mailto:1jacoduplessislaw@gmail.com) and [jacoattorney@gmail.com](mailto:jacoattorney@gmail.com)
- [15] The counter respondent stated further that their slow response was due to the untimely withdrawal of Mr van Braaken as chairperson as well as the effect that the Covid pandemic and its accompanying regulation had on them.
- [16] The counter respondent, Ms Z J Kitchen stated further that she is now the chairperson of LMHOA, and although the counter applicant had not fully complied with the rules of the LMHOA, they will deal with his non-compliance in another way and have signed consent for the transfer of the property.
- [17] The first day of the hearing for leave to appeal was on the 19 March 2021 and Adv. Greyling, for the counter respondent argued that the application for leave to appeal was out of time. He submitted that the prayer for condonation was only served to them on 17 March 2021 and lacked merit. He argued further that the late service upon them was unfair and did not allow him to properly prepare himself. The court accordingly granted the postponement, so that the counter respondent can adequately prepare their opposition.

- [18] On the second date of 22 April 2021, Adv. Greyling submitted that Level 1 Covid 19 lockdown, authorised in terms of the regulation 10 of the Disaster Management Act, 57 of 2002, had curtailed litigation country wide, to urgent matters, from 26 March 2020 to 16 April 2020.
- [19] He submitted further, that the Judge President of the Free State, issued a directive on 17 April 2020 that notices and pleadings including notice of intention to defend should be filed via e mail to the Registrar of the High Court. Importantly the directive read that only urgent applications, relating to bail, maintenance and matters involving children or the claims would prescribe within the lockdown period, could be filed.
- [20] He submitted further that the counter applicant, had from 17 April 2020 to prosecute his leave to appeal.
- [21] He submitted further that even if the instructing attorney was at fault, the court cannot excuse all such delays and should hold the counter applicant responsible if the delays were unreasonably long and the excuses given are poor.
- [22] Adv. van der Merwe, conceded that they were out of time, but that the lateness was out of their control. He stated that the Regulations promulgated in terms of the COVID 19 disaster act, as well as the consequences of the pandemic, had placed restrictions on the operations of the offices of his instructing attorney.
- [23] He conceded that they only realised that they were late, when the counter respondent raised it to them in a letter dated 17 March 2021.
- [24] He submitted further that the counter applicant should have objected to their irregular application in terms of Rule 30 (2) (b) of the Uniform Rules of Court.

- [25] He submitted further that the counter respondent, had a duty to inform them of the withdrawal of Mr van Braaken from his position of chairperson and their failure to keep him informed of their developments, had given him no option but to institute leave to appeal proceedings.
- [26] He submitted further that although notice for leave to appeal was given, they kept trying to resolve the issues amicably. He referred to a fourth demand for transfer, that was dated 27 October 2020.
- [27] He submitted further that it was only between the first hearing for postponement on 19 March 2021 and 22 April 2021, that the first respondent gave consent to the transfer of the property. He submitted that the first respondent had invited unnecessary cost by having opposed this application from the beginning and should be liable for all the cost incurred.
- [28] He submitted further that the court adjourned the application in order to afford council for counter respondent to prepare and respond, yet the postponement granted did not influence the facts provided by the counter applicant, and all the postponement allowed was for the counter respondent to strengthen the counter applicants case, by granting an consent to transfer.

## Condonation

- [29] Rule 49 of the Uniform Rules of Court, requires that leave to appeal shall be made within fifteen days after the date of the order made<sup>2</sup>.
- [30] Rule 49 (1)(d), requires the Registrar of the High Court to set down a date, upon request and give written notice to the affected parties

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2. GN R48 of 1965/Rules of court/49 Civil Appeals from the High Court

- [31] The applicant has 60 days after the delivery of a notice to appeal to the Registrar, to make a written application to the Registrar for a date for the hearing. Should the applicant fail to do so, then the respondent may within 10 days after the expiry of the said sixty days apply for the set down of the appeal or cross appeal and if no such application is made, then the appeal and cross appeal shall be deemed to have lapsed.<sup>3</sup>

#### Leave to Appeal

- [32] Section 17(1) of the Superior Court Act 10 of 2013 provides as follows:  
 “Leave to appeal may only be given where the judge or judges concerned are of the opinion that-
- (a)(i) the appeal would have a reasonable prospect of success; or
  - (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgements on the matter under consideration;
  - (c) where the decision sought to be appealed does not dispose of all the issues in a case, the appeal would lead to a just and prompt resolution of the real issues between the parties.
- [33] It is trite law, that an application for condonation is not viewed in isolation, without considering the prospects of success on appeal.<sup>4</sup>
- [34] The counter respondent, explained his papers, one of the reasons for the delay in transfer is that they had to get all members together in order to make resolutions for the changing of office bearers because their chairperson withdrew from his duties without notice. These events occurred after the order of this court, and because of the Covid pandemic, they have been delayed in dealing with the counter applicant.

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3 Rule49 (6)(a)

<sup>4</sup> Melane v Southern Insurance Co Ltd 1962 (4) SA 531 AD

- [35] It is common cause, that their resolution of the counter respondent to transfer of ownership to the counter applicant was filed after the appeal hearings had commenced and its inclusion into the counter respondent's case had made this application for leave to appeal moot.

## Costs

- [36] Adv. Greyling submitted that the application be removed from the roll because it has become moot. He submitted further that his opposition to the late application, bought by the counter applicant was reasonable
- [37] Adv. van der Merwe submitted that all the proceedings instituted by the counter applicant was caused by the counter respondent's failure to give effect to the courts order dated the 06 March 2020. He submitted further that the counter applicant be held liable for the costs from 6 March 2020, including the wasted costs of 19 March 2021 and the drawing up of heads of argument.
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- [38] The practice is to award cost to the winning party, but the court has a discretion in this regard and may award cost against the party that ought not to have opposed the application.<sup>5</sup>
- [39] At the time of writing this judgement we are still in grips of the covid epidemic. No one can dispute that this epidemic has affected our lives and the conduct of our professional duties significantly.
- [40] Understandably, the Judge President of the Free State's directives dated from 26 March 2020, encouraged parties to agree in extensions of the dies periods.
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5. Rabinowitz v Van Graan 2013 (5) SA 315 GSJ; Meintjies v Administrasieraad van Sentraal – Transvaal 1980 (1) SA 283(T).

[41] To my mind, the application for leave to appeal had merit at the time that it was initiated and enrolled. It would have been unreasonable to expect the counter applicant to be satisfied by the non-compliance of the counter respondent and their failure to communicate with him.

[42] Fault for the delay in pursuing the leave to appeal with condonation is shared by the counter applicant. I accept that he could not contact the counter respondent due to the actions of Mr van Braaken, yet one can reasonably expect litigants to do more than forward e mails, before embarking on expensive litigation. Against the background of an epidemic that is sporadically disrupting different areas and different sectors of our society, surely a second method of contacting the opposing party is reasonable.

[43] In addition to the use of a wrong e mail address, the counter applicant had at a late stage realised that his leave to appeal was without condonation and had contributed to the application to postpone on the 19 March 2021.

[44] Judgement

1. The application for condonation is granted
2. The application for leave to appeal is refused.
3. Cost is awarded to the counter applicant on a party and party scale including the wasted cost of the 19 March 2021.

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**R MATTHEWS, AJ**

For the Plaintiff: Adv. R Greyling  
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Bloemfontein

For the Respondent: Adv. C van der Merwe  
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