



FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

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

Case No: 819/2019

In the matter between: -

MAUREEN LABUSCHAGNE

1st APPLICANT

WILLEM ADRIAAN LABUSCHAGNE

2nd APPLICANT

and

ELLA VAN STRAATEN

RESPONDENT

In re:

Case No: 819/2019

In the matter between:

ELLA VAN STRAATEN

APPLICANT

And

WILLEM ADRIAAN LABUSCHAGNE

1st RESPONDENT

MAUREEN LABUSCHAGNE

2nd RESPONDENT

JUDGMENT: MOLITSOANE, J

HEARD ON: 20 AUGUST 2021

DELIVERED: 28 OCTOBER 2020

- [1] The Applicants seek leave to appeal the whole of the judgment of this Court delivered on 19 September 2019 to the Full Court of this Division, alternatively to the Supreme Court of Appeal.
- [2] The Applicants contend that there are reasonable prospects that another Court would come to a different finding than the findings this court made. Section 17(1) of the Superior Court's Act, 10 of 2013 provides that leave to appeal may only be granted where the judge in the matter concerned is of the opinion that the appeal would have reasonable prospects of success or there is some compelling reason why the appeal should be heard. In this regard the bar has been raised where an application for leave to appeal is sought.¹

¹ MEC For Health, Eastern Cape v Mkhitha and Another ((2016) ZASCA 176(25 November 2016).

[3] In *Democratic Alliance v President of the Republic of South Africa and Others*² the Full Court held as follows:

“The test as now set out in s17 constitutes a more formidable threshold over which an applicant must engage than was the case. Previously the test was whether there was a reasonable prospect that another court might come to a different conclusion. See, for example, *Van Heerden v Cronwright and Others* 1985(2) SA 342 (T) at 343 H. The fact that the Superior Courts Act now employs the word ‘would’ as opposed to ‘might’ serves to emphasise this point. As the Supreme Court of Appeal said in *Smith v S* 2012(1) SACR 567 (SCA) at para 7;

‘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.’

This dictum serves to emphasise 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.”

[4] The following issues serve for determination in this application:

- a) Condonation for the late filing of the application for leave to appeal;
- b) Whether the Applicants have made out a case for leave to appeal.

[5] With regard to the explanation for the late filing of the application for Leave to Appeal, it is well settled in our law that the applicant is

² (2124/2020) [2020] ZAGPPHC 326(29 July 2020) par [4] – [[5].

required to give a full and candid explanation in this regard. In *Melane v Santam Insurance*³ regarding the test for granting condonation the court said:

“In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success and the importance of the case. Ordinarily these facts are interrelated, they are not individually decisive, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. *Thus a slight delay and a good explanation may help to compensate prospects which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay* (own emphasis). And the respondent’s interests in finality must not be overlooked.”

- [6] This matter has a long history. The judgment for rectification of the instalment sale agreement and cancellation of the said agreement was granted on 12 September 2019. It is necessary to mention that after the application which culminated in the order of 12 September 2019 was served on the Applicants, they did not file any opposing papers. According to the First Applicant she signed the opposing affidavit prepared by her then attorney. The attorney, according to her, failed to file the said document. This led to the judgment being granted by default and in the absence of the Applicants.

³ 1962(4) SA 531 (A).

- [7] The Applicants then launched an application for rescission of judgment. On 28 February 2020 Naidoo J dismissed that application. It is after the dismissal of that application that the Applicants sought leave to appeal the default order granted on 12 September 2019. They were already out of time hence the condonation application. With regard to the delay in bringing the application for leave to appeal the Applicants essentially blame their legal representatives for not bringing the application in time.
- [8] The Applicants aver that after the order of Naidoo J, they filed a review application which was unopposed. According to them, the review application has not been finalised although they have since received advise that review application was not the correct procedure to follow in these circumstances.
- [9] In their quest to oppose the application the First Applicant also addressed a letter to the President of the country as well as to the Department of Justice seeking assistance. Such assistance was not forthcoming. According to her she even proceeded with the matter on her own by 'Googling' the steps and procedures.
- [10] What is apparent from the conduct of the Applicants is that they never lied passively without taking action. It is indeed so that at times there was flagrant disregard of the court rules. By way of an example, the Applicants explanation lacks details and explanation as to what happened from the time Naidoo J handed her judgment on 28 February 2020 until she directed parties to file Heads of Argument in the Application for leave to appeal. That, notwithstanding, I am of the view that the Applicants have

reasonable prospects of success on appeal. The good prospects of appeal in this case compensate for the tardiness in dealing with this matter after rescission of judgment was granted.

[11] During 2011 the parties entered into an instalment agreement of sale of land. The contract is thus governed by the Alienation of Land Act, 68 of 1981 (the ALA). It is the case for the Applicants that there was an obligation on the part of the seller to register the agreement at the Deeds Office as prescribed by the ALA. It is further contended that absent registration of the instalment sale agreement, the seller was not entitled to receive any consideration prior to registration.

[12] The ALA provides as follows:

s 20 (1)(a) "A seller, whether he is the owner of the land concerned or not, shall cause the contract to be recorded by the registrar concerned in the prescribed manner provided a prior contract in force in respect of the land has not been recorded or is not required to be recorded in terms of this section.

S 26(1) No person shall by virtue of a deed of alienation relating to an erf or unit receive any consideration until-

- a) Such erf or unit is registrable; and
- b) In case the deed of alienation is a contract required to be recorded in terms of s20, such recording has been effected."

[13] It is not in dispute that the agreement between the parties constituted an instalment sale agreement of land. The agreement as it stands, however, is silent on the registration of same with the

Deeds Registry. It is undisputed that it was not registered with the Deeds Office. The court in *Amardien and Others v Registrar of Deeds and Others*⁴ held that there was an obligation on a seller in an instalment sale agreement of land to register the agreement of sale at the Deeds Office and if such registration had not taken place, then in that case the seller was not entitled to receive consideration prior to registration. On this point alone it appears that the amount alleged to be in arrears and which led to the cancellation of the agreement between the parties was not due at the time the said cancellation of the agreement was done. The reason being that the recordal of the agreement had not taken place.

[14] While I understand the defence raised by the Applicant in showing that they have good prospects of success on appeal, it has to be borne in mind that the defence raised in this application was not raised before court, either in an answering affidavit (as same was not filed) or when the matter was heard in court.

[14] The applicants have, however, indicated that they intend to approach the Court of Appeal with an application for leave to adduce further evidence. Section 19(c) of the Superior Courts Act 10 of 2013 provides that:

“The Supreme Court of Appeal or a Division exercising appeal jurisdiction may, in addition to any power as may be specifically provided for in any other law remit the case to the court of first instance, or to the court whose decision is the subject of the appeal, for further hearing, with such instructions as

⁴ 2019(3) SA 341(CC).

regards the taking of such further evidence as the Supreme Court of Appeal or the Division deems necessary.”

[15] It is in my view not within this court’s powers to decide on the application to lead further evidence. What however this court intended to highlight was that in the appeal itself that route is permissible for the applicants to follow. It is my considered view that owing to the fact that the Applicants have good prospects of success on appeal, condonation and the application for leave to appeal ought to succeed. I accordingly order as follows:

ORDER

1. The Applicants are granted condonation for the late filing of the application for leave to appeal.
2. The application for leave to appeal is granted to the Full Court of this Division.
3. The costs of this application shall be costs in the appeal.

P.E. MOLITSOANE, J

On behalf of the Applicant:
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On behalf of the Respondent:
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