



**HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)**

Case number: **73504/2014**

*Not reportable*

*Not of interest to other Judges*

In the matter between:

**KARIBA FURNISHERS MANUFACTURERS (PTY) LTD**

Applicant

and

**NORTH WEST DEVELOPMENT CORPORATION (PTY) LTD**

Respondent

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**JUDGMENT – Leave to appeal**

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**MAKGOKA, J**

[1] This is an application for leave to appeal against the whole judgment and order of this court (Louw AA, J) on 20 October 2015. Louw AA, J has since died, and the Deputy Judge President has requested me to deal with the application.

[2] The applicant, Kariba Furnisher Manufacturers (Pty) Ltd (Kariba) was the first respondent in the main application, in which the respondent, the NorthWest Development Corporation (North West Development Corporation) sought the eviction of Kariba from certain commercial premises. At that stage, Kariba was under business rescue in terms of s 129 of the Companies Act 71 of 2008. Mr Jordaan, who had been appointed the business rescue practitioner for Kariba, the second respondent. But following the judgment of the Supreme Court of Appeal in *African*

*Banking Corporation of Botswana v Kariba Furniture Manufactures and others* 2015 (5) SA 192 (SCA), Kariba was no longer in business rescue.

[3] During the hearing on 19 October 2015, Kariba was not legally represented. Kariba's attorneys had withdrawn two days before the hearing. It had not filed an answering affidavit, but had given notice in terms of rule 6(5)(d)(ii) of the Uniform Rules of Court to argue four points of law. Mr Mchite had, a day before the hearing, wrote a letter to the judge indicating his intention to apply for a postponement, and the basis for the application.

[4] When the matter was mentioned on 19 October 2015, Mr Mchite indeed moved the postponement application, and in the process of addressing the court, handed up certain documents and photographs. The application was opposed on behalf of NorthWest Development Corporation.

[5] In considering the application for a postponement, the court took into account, the issue of prejudice on both sides, were a postponement granted or refused. In respect of Northwest Development Corporation the court considered the fact that, on the papers, it was not disputed that Kariba owed rental to NorthWest Development Corporation in the sum of over R2 000 000.00 as up to July 2014, and that no payment had been made since then. Also, that Kariba was no longer doing business as found by the Supreme Court of Appeal, a fact supported by the objective facts which the court mentioned in the judgment. Flowing from that, the court concluded that Kariba would not suffer any prejudice if ejected from the property (for the simple reason that it was not trading, in any event). The learned judge proceeded to consider the prospects of success of the defences raised by Kariba. He considered each of the four points of law raised in the notice in terms of rule 6(5)(ii) and found no merit in any of them. Under these circumstances, he refused the application for a postponement and granted the eviction order.

[6] In its notice of application for leave to appeal it is stated that the court erred in not finding that Mr Mchite's letter and oral submissions constituted a sufficient basis for a postponement. It is further stated that Kariba's constitutional right to be heard

had been infringed by the refusal of a postponement. Further, that the court erred in not finding that the prejudice of adjournment could be ameliorated by a suitable costs order, and that the prejudice to it far outweighed that likely to be suffered by the NorthWest Development Corporation.


[7] The common law test in an application for leave to appeal has always been whether there are reasonable prospects that another court, given the same set of facts, might arrive to a different conclusion. That test has been codified by s 17(1)(a)(i) and (ii) of the Superior Court Act 10 of 2013, in terms of which leave to appeal may only be given where a judge is of the opinion that the appeal would have reasonable prospect of success, or that there is some compelling reason why the appeal should be heard.

[8] In considering the present application, one must bear in mind that in considering an application for a postponement, the court exercises a discretion. If such discretion has been properly exercised, there is no room for interference by an appellate court. In my view, the learned judge properly exercised this court's discretion in considering the application for a postponement. Legal representation for Kariba would not have altered the fact that it had elected not to file an answering affidavit, but sought to rely on points of law, which the learned judge, correctly in my view, dismissed as lacking merit. It would also not have altered the fact that the lease agreement had, in any event come to an end. On every conceivable basis, Kariba no longer has a legal basis to remain in occupation of the property.

[9] I am therefore of the view that the intended appeal would not have any prospects of success. There is no compelling reason why the appeal should be heard, either. The application should thus be dismissed.


[10] In the result the following order is made:

The application for leave to appeal is dismissed with costs.



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P. M. Makgoka  
Judge of the High Court



## APPEARANCES:

For the Applicant:

EJJ Nel

Instructed by:

VDT Incorporated, Pretoria

For the Respondent:

RF De Villiers

Instructed by:

Jacques Van der Merwe Attorneys, Pretoria