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**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION - MAHIKENG**

CASE NO.: M117/2022

In the matter between

**AT & T TRANSPORT AND GROUP OF
COMPANIES (PTY) LTD**

(Registration Number: 2012/036994/07)

Applicant

and

GOVERNMENT EMPLOYEES PENSION FUND

(Represented by Mowana Properties (Pty) Ltd

(Registration Number 2015/124999/07)

Respondent

Delivered: This judgment was handed down electronically by circulation to the parties' representatives *via* email. The date and time for hand-down is deemed to be 16h00pm on **10 AUGUST 2023.**

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

PETERSEN J

Introduction

- [1] This is an opposed application for leave to appeal. On 15 December 2022, I handed down an order granting the provisional winding-up of the applicant (“AT & T”- respondent in the main application). My reasons for the order followed on 05 January 2023 and was transmitted to the legal representatives of the parties by e-mail on the even date. The judgment and order was further served at the behest of the respondents, by the Sheriff of the High Court on AT & T on 13 January 2023.
- [2] AT & T filed a Notice of Application for Leave to Appeal on 15 March 2023. In terms of Rule 49(1) of the Uniform Rules, the said application was to be filed by no later than 03 February 2023, calculated from the date of service of the judgment and order, on 13 January 2023. AT & T seeks leave to appeal only against a part of the judgment on the following grounds:

“1) *The learned Judge erred in finding that:*

1.1 Mowana has the necessary locus standi to institute legal proceedings on behalf of the Government Employees Pension Fund (GEPF) in that the point in limine dealing with the Notice in terms of Rule 7(1) was dismissed;

1.2 Finding that Mowana was a duly authorized representative of the GEPF;

1.3 Finding that the authority of Mowana to represent GEPF was not seriously challenged by the Respondent;

1.4 That the Respondent did not specifically plead that the GEPF and the Public Investment Company did not comply with the Public Finance Management Act 1 of 1999 and Preferential Procurement Policy Framework Act, 2000.

2) The learned Judge erred in:

2.1 failing to accept the Rule 7(1) notice and not inviting the Attorneys of Mowana and by implication Mowana, to prove that they are duly authorized to act on behalf of the GEPF;

2.2 failing to accept the request that the Mowana is to provide a resolution of the Board of Trustees of the GEPF to confirm the relevant authority to act;

2.3 failing to accept the request that a Resolution of the Board of Directors of the Public Investment Company be provided in confirmation of the necessary authority to act;

2.4 Failed to find that there was non-compliance with PFMA and PPPFA by GEPF, specially in light of the fact that no proof or record thereof was provided.”

Condonation

- [3] AT & T was 39 days out of time when it filed its Notice of Application for Leave to Appeal on 15 March 2023. AT & T accordingly seeks condonation for the late filing of its Notice of Application for Leave to Appeal.
- [4] In the founding affidavit in support of the application for condonation deposed to by Tshepo Immaculate Lekalake, the Director of AT & T (in liquidation), the main reason put forward for the lateness of the application for leave to appeal is set out as follows at paragraphs 4.5 to 4.7:

“4.5 I was under the impression that the Judgment cannot be Appealed against as the nature of the order has an interim and/or provisional effect. It was only after consultation with our legal representative, after the matter was postponed in light of the employees wanting to intervene, that we were advised that the orders pertaining to the point in limine’s are final, and the Applicant can Appeal against these orders specifically should good grounds for the Leave to Appeal exists.

4.6 It is not frequently seen that there are two final orders granted within an interim and/or provisional order and the Appellant is of the view that there are reasonable prospects of success should an Application for Leave to Appeal against the orders specifically dealing with the point in limine, be raised.

4.7 The Applicant is not deliberate in filing the Application for Leave to Appeal out of the timeframes provided by the Rules of Court but was

rather oblivious of the right and possibility to file such an Application pertaining to the final orders within the provisional order.”

- [5] The approach to an application for condonation is settled in our law. In *Mulaudzi v Old Mutual Life Assurance company (SA) Limited*,¹ Ponnan JA re-affirmed the factors to be considered in respect of an application for condonation as stated in *Melane v Santam Insurance Co. Ltd*, that:

*“Factors which usually weigh with this court in considering an application for condonation include the degree of non-compliance, **the explanation therefor**, the importance of the case, a respondent’s interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice.”*

(my emphasis)

- [6] In *Grootboom v National Prosecuting Authority*² the Constitutional Court re-affirmed the trite principle that:

*“It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court’s indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court’s directions. **Of great significance, the explanation must be reasonable enough to excuse the default.**”*

(my emphasis)

¹ [2017] ZASCA 88; [2017] 3 All SA 520 (SCA); 2017 (6) SA 90 (SCA); 1962 (4) SA 531 (A) at 532 C - E

² [2013] ZACC 37; 2014 (2) SA 68 (CC) at paragraph 23.

[7] As to the prospects of success in the face of a poor explanation for the lateness of an application for leave to appeal, the Supreme Court of Appeal in *Mathibela v The State*³, succinctly summarized the law on condonation as follows:

“[5] This Court recently stated the following in *Mulaudzi v Old Mutual Life Insurance Company Limited & others, National Director of Public Prosecutions & another v Mulaudzi*:

“[34] **In applications of this sort the prospects of success are in general an important, although not decisive, consideration.** As was stated in *Rennie v Kamby Farms (Pty) Ltd*, it is advisable, where application for condonation is made; that the application should set forth briefly and succinctly such essential information as may enable the court to assess an applicant’s prospects of success. This was not done in the present case: indeed, the application does not contain even a bare averment that the appeal enjoys any prospect of success. It has been pointed out that the court is bound to make an assessment of an applicant’s prospects of success as one of the factors relevant to the exercise of its discretion, unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation obviously unworthy of consideration.”

(my emphasis)

[8] AT & T has been duly represented at all material times in the application by attorneys and Counsel. The allegation by Mr Lekalake in the founding affidavit in support of the application for condonation, that he was “...under the impression that the Judgment cannot be Appealed against as the nature of the order has an interim and/or

³ (714/2017) [2017] ZASCA 162 (27 November 2017).

provisional effect.” is therefore unfounded and opportunistic. In the present application, as with affidavits deposed to by him in opposing the application for the liquidation of *AT & T*, he has always asserted that where he makes express legal submissions, that same is based on legal advice received from his legal representatives which he accepts as being correct.

[9] Counsel for *Mr Lekalake* may have changed from time to time but he has retained his attorneys of record and his assertion that he was under the impression that the judgment could not be appealed, as it had a provisional effect cannot be accepted as a reasonable explanation. In particular, therefore, the explanation put forward by *AT & T* premised on a lack of knowledge that an application for leave to appeal could be brought on the limited grounds premised on the dismissal of the Rule 7 challenges as such orders are final in effect, is a very poor explanation. In the face of this poor explanation it still remains the duty of this Court to consider the prospects of success on appeal. To determine whether or not there are reasonable prospects of success on appeal, it is peremptory that information is set out in the founding affidavit to enable this Court to assess *AT & T*’s prospects of success.

[10] No information is set out in the founding affidavit of *AT & T* to place this Court in a position to assess its prospects of success. As pertinently stated in *Mathibela* with reference to *Rennie v Kamby Farms (Pty) Ltd*, “... it is advisable, where application for condonation is made; **that the application should set forth briefly and succinctly such essential information as may enable the court to assess an applicant’s**

prospects of success. This was not done in the present case: indeed, the application does not contain even a bare averment that the appeal enjoys any prospect of success.”

[11] The only “information” advanced, for this Court to assess *AT & T*’s prospects of success, was in oral submissions by Counsel for *AT & T*, at the hearing of the application. That in terms of our authorities does not suffice and is further insufficient to be considered within the ambit of the interest of justice. It is further trite that in motion (application proceedings), an applicant must make out his case in the founding papers.


Conclusion

[12] In the absence of any information set out in the founding affidavit in support of the application for condonation, dealing with prospects of success of appeal, and in the face of a poor explanation for the late filing of the application for leave to appeal, the application for condonation stands to be dismissed with costs, such costs to be costs in the liquidation.

Order

[13] Consequently, the following order is made:

- (i) Condonation for the late filing and prosecution of the application for leave to appeal is dismissed.
- (ii) Costs shall be costs in the liquidation.



**A H PETERSEN
JUDGE OF THE HIGH COURT,
NORTH WEST DIVISION, MAHIKENG**

Appearances

For the Applicant:	Adv N G Laubscher
Instructed by:	Gerhard Culhane Attorneys c/o Ntsamai Attorneys 54 Molopo Road Golf View MAHIKENG
For the Respondent:	Adv R R Kisten
Instructed by:	Pather & Pather Attorneys Inc. c/o Setshedi Makgale & Matlapeng Inc. 20448 Andrew House Cnr James Moroka & DP Kgotleng Street MMABATHO
Date of hearing:	28 July 2023
Date of judgment:	10 August 2023