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: 1275/2021

In the matter between:

THABO AARON MOTHABENG Applicant

And

MAPASEKA FRANSIENA MOTHABENG Respondent

HEARD ON: This application was determined on written arguments. Written heads of argument were delivered on 20th and 28th of June 2022, respectively.

JUDGMENT BY: AFRICA, AJ

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to have been at 11h00 on the 26th of July 2022.

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[1] The applicant seeks leave to appeal the Judgment of this court handed down on the 12th of May 2022, following the dismissal with costs, of applicant's Application for Rescission.

[2] In terms of the judgment, the court found that the application was not brought within a reasonable time and that the applicant failed to set out sufficiently full, the reasons apart from lack of knowledge, why the rescission application was only brought after a lapse of nearly 7 (seven) months.

[3] The applicant's grounds for leave to appeal are embodied in the notice of application for leave to appeal. I don't deem it necessary to repeat them herein.

[4] Further, that the written heads of argument were handed in by concurrence of the parties for the matter to be determined without oral hearing. I will not repeat the parties' submissions *verbatim* except to refer to the relevant parts thereof for the purpose of this judgment.

[5] It is trite that Application for leave to Appeal is governed by the provisions of section 17(1) (a) of the Superior Courts Act 10 of 2013 ("The Act"), which reads:

> *"Leave to appeal may only be given where the judge or judges concerned are of the opinion that-*
> *(a)(i) the appeal would have reasonable prospects of success; or*
>
> *(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration,"*

[6] The applicant submits that there are reasonable prospects of success within the meaning of section 17(1)(a)(i) of the Superior Courts Act. What is meant by reasonable prospects of success has always been defined to mean that there is a reasonable possibility that another court might come to a different decision.[1]

[1] Van Heerden v Cronwright & others 1985 (2) SA 342 (T) at 343H.

[7] In *Acting National Director of Public Prosecution & others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions & Others,*[2] Ledwaba DJP writing for the full court considered the test as envisaged in s17 of the Superior Courts Act. The court dealt with the test set out in *The Mont Chevaux Trust (IT 2012/28) v Tina Goosen & 18 others LCC 14R/2014 dated 3 November 2014* where Bertelsmann J held the following:

> *'It is clear that the threshold for granting leave to appeal against the 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, see Van Heerden v Cronwright & others 1985 (2) SA 342 (T) at 343H. 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.' It is indeed correctly pointed out by both parties that Leave to appeal can only be granted where the Judge or Judges are of the opinion that the appeal would have a reasonable prospect of success or there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.* [3]

[8] The first ground of appeal is that this court was persuaded by the argument raised by the respondent that the 20-day period as prescribed by Rule 31 (2) (b) should be used as a yardstick and that the court in fact found that there is no reason in principle that an applicant under the common law should have more time than an applicant under Rule 31 (2) (b).

[9] In rebuttal, the respondent referred this court to the case of *Roopnarain v Kamalapathy and Another,*[4] where the court held that, in respect of a delay of approximately five and a half months:

> "Roopnarain has failed to satisfy me that his explanation for the delay is a reasonable one…he himself is not absolved as the delay in this case is so unreasonably long as to be inexcusable…Although the rule does not apply to motion proceedings it is nevertheless a pointer to what would be a reasonable time within which to seek rescission in a case such as the present one"

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[2] (19577/09) [2016] ZAGPPHC 489 (24 June 2016).
[3] Id at para 25.
[4] 1971 (3) (D) 381 at 390F to 391D.

[10] This court at paragraph 17 of the Judgment specifically addressed the fact that what is reasonable will depend on the circumstances of the case, and that the 20-day period provides some guidance as a starting point. The crux of this statement is that the 20-day period was not used by this court as an overriding factor, in finding that the application was not brought within a reasonable time.

[11] It is further contended that grounds 5 to 7 of the Notice of Application for Leave to Appeal, have good prospects of success.

[12] This court was acutely aware that:

> "If the explanation is sufficiently adequate and is set out in a manner that, it is clear to the court that the applicant has taken this court into his confidence, it seems to me that the court should be slow to refuse an applicant entirely the opportunity to have his defence heard".[5]

[13] In *casu*, in as much as the respondent "went behind the applicants back", that in itself does not explain the lapse of nearly seven months, before the Rescission application was launched.

[14] This court is criticised at paragraph 7 of the Notice for Leave to Appeal, as follows:

> "The Hounorable Court erred in failing to take into account that the application for the Rescission of judgment could only be launched after receipt of the Valuation Report and that the application was brought on 18 January 2022, shortly after the end of December/January recess period"

[15] This court specifically stated that even if it has regard to the *dies non* period, where many offices are closed, the founding affidavit is silent as to what happened <u>specifically</u> after 22 July 2021, when the last correspondence were exchanged. Further, that the founding affidavit extensively deals with why the respondent will unduly benefit if a forfeiture order is not brought but nowhere in the founding affidavit is the explanation forthcoming that the applicant

[5] At para 07 of the Judgement.

awaited the valuation Report. This averment is made, in the Replying affidavit, when this oversight is discovered. [6]

[16] Counsel for respondent correctly points out that;[7]

> "If one peruses the Founding Affidavit then it is clear that the applicant has not dealt with this lengthy delay at all...This is important because an Applicant must, as a general rule, stand and fall with the averments in his Founding Affidavit."

[17] Further, this court agrees with the submission made by the Respondent that;

> "It was not necessary for the Applicant to establish his defence or counterclaim at this stage of the proceedings because what is expected from applicant is to disclose a *bona fide* defence which, if proved at a trial in due course, would entitle the Applicant to the relieve sought".

[18] The Applicant submits that the "Applicant has excellent prospects of success in his defence and counterclaim".[8]

[19] At paragraph 27 of the Judgment, this court specifically referred to the principle in the case of *Chetty v Law Society , Transvaal*[9] where it was stated:

> "There is a further principle which is applied and that is: without a reasonable explanation for the delay, the prospects of success are immaterial and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused".

[20] In the absence of a full, detailed and accurate account of the delay, this court could not find that the application was brought within a reasonable time.

[21] As regard the remainder of the grounds of appeal, I am of the view that the Judgment has adequately dealt with all the aspects raised in these grounds of appeal.

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[6] At paragraph 18 of the Judgment.
[7] At paragraph 11.1 of the written heads of argument.
[8] At paragraph 7.1 of the written heads of argument.
[9] 1985 (2) 756 (A) at 765 A-C.

[22] This court is not persuaded that another court will reasonably come to a different conclusion or that compelling reasons exist why leave to appeal should be granted.

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

1. The application for leave to appeal to the full bench of this division against my Judgment granted on the 21st of April 2022 is dismissed with costs.

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AFRICA, AJ

COUNSEL FOR THE APPLICANT:	Adv. Els Instructed by: Honey Attorneys
COUNSEL FOR THE RESPONDENT:	Adv. Coetzer Instructed by: OJ Van Schalkwyk