

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE

(1)	<u>REPORTABLE: YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES:</u> <u>YES/NO</u>
(3)	<u>REVISED.</u>
.....
SIGNATURE	DATE

In the matter between:

BODY CORPORATE OF THE CHELSTON HALL
SECTIONAL TITLE SCHEME
Applicant

and

FAHEEM MOHAMED
First Respondent

THE COMMUNITY SCHEMES OMBUD SERVICE
Second Respondent

DOMBOLO MAKGOMO MASILELA N.O.
(IN HER CAPACITY AS ADJUDICATOR)
Respondent

Third

LEAVE TO APPEAL J U D G M E N T

LOMBARD, AJ:

1. The Applicant seeks leave to appeal against my whole judgment, dated the 2nd of January 2020, in terms of which I dismissed the Applicant's application appealing against an adjudication order made by the Third Respondent, with costs.
2. I held that the application was improperly before me, insofar as it had not been instituted within the time period prescribed by Section 57 of the Community Schemes Ombud Service Act No. 9 of 2011 (**"the CSOS Act"**), and a basis for condonation for the late institution thereof, had not been established.
3. Section 17 (1)(a) of the Superior Courts Act of 2013 (**"the Superior Courts Act"**), prescribes that leave to appeal may only be given, where the judge concerned is of the opinion that:
 - 3.1. The appeal would have a reasonable prospect of success;or

- 3.2. There is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.
4. In addition to the criterion of a reasonable prospect of success, the word “*would*” is used in determining the conclusion to which the Judge must come, before leave to appeal can be granted.
 5. The use of the word “*would*” in Section 17, has raised the bar of the test that now has to be applied to the merits of the proposed appeal, before leave should be granted.¹
 6. It has been held that an applicant for leave to appeal now faces a higher and more stringent threshold, in terms of the Act, compared to the provisions of the Supreme Court Act of 1959.²
 7. The Applicant premised its application on Section 57 of the CSOS Act.

¹ **The Mont Chevaux Trust (IT 2012/28) v Tina Goosen - Unreported decision, LCC Case No LCC14R/2014 dated 3 November 2014, cited with approval by the full Court in The Acting National Director of Public Prosecution v Democratic Alliance - Unreported decision, GP Case No 19577/09 dated 24 June 2016, paragraph 25**

² **Notshokovu v S - Unreported Decision, SCA Case No 157/15 dated 7 September 2016**

8. Section 57 (2) of the CSOS Act preemptorily prescribes that an appeal against an order must be lodged within thirty days after the date of delivery of the order of the adjudicator.
9. Applying section 4 of the Interpretation Act No. 33 of 1957 (**“the Interpretation Act”**), the envisaged thirty day time period, comprises of calendar and not Court days.
10. It is apparent from a calculation of the relevant time period, that the Applicant failed to deliver the application within thirty calendar days.
11. Consequently, the Applicant’s assertion that I incorrectly found that it had conceded the late delivery, takes the matter no further.
12. In his answering affidavit³, the First Respondent correctly took issue with the late delivery of the application.
13. The Applicant failed to amend its notice of motion and to apply for leave to supplement its founding affidavit, for purposes of both requesting condonation and setting out the basis for such request, in response; or to launch a separate condonation application.

³ Paginated pages 82 - 83, paragraphs 28 - 32

14. Instead, and impermissibly in reply, the Applicant merely states that little to no prejudice has been suffered by the Respondents due to the late institution of this application, whilst the Applicant will suffer immense prejudice, should the adjudication order be allowed to stand.⁴

15. The Applicant further avers in reply that it will “...be just, fair and equitable for the Honourable Court to condone the late filing of the application”.⁵

16. It is trite that a party cannot make out its case in reply.⁶

17. I remain satisfied that I was unable to grant condonation for the late delivery of the application, without an application for condonation, which sets out a full explanation for the late delivery of this application.

18. Without an application for condonation, I was unable to understand how the delay came about, for purposes of assessing the Applicant’s conduct and motives.⁷

⁴ Paginated page 114, paragraphs 24.3 and 24.4

⁵ Paginated page 114, paragraph 24.5

⁶ **Hart v Pinetown Drive-in Cinema (Pty) Ltd 1972 (1) SA 464 (D) and other related cases**

⁷ **Silber v Ozen Wholesalers (Pty) Limited 1954 (2) SA 345 (A) at 353A
Laerskool Generaal Hendrik Scoeman v Bastian Financial Services (Pty) Limited 2012 (2) SA
637 (CC) at 640H - I**

19. The Applicant relied on the decision of **PEARL KLOBERIE v ABSA BANK LIMITED & OTHERS (7264/2013) [2013] ZAGPJHC (16 AUGUST 2013)**, which references the decision of **MCGILL v VLAKPLAS BRICKWORKS (PTY) LIMITED 1981 (1) SA 637**, in asserting that a litigant can apply for condonation informally from the bar.

20. Both these decisions are distinguishable from the case at hand, insofar as:

20.1. A basis had been set out for condonation in the founding affidavits;

20.2. The respondents had the benefit of considering and responding to these averments; and

20.3. Resultantly, the respondents were not prejudiced.⁸

21. I am not satisfied that the appeal has reasonable prospects of success or that some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration, exists.

⁸ See paragraphs [10] and [11] of the KLOBERIE decision

22. The First Respondent requested that I dismiss the application for leave to appeal with costs on an attorney and client scale, premised in part, on the Applicant's delay in prosecuting the application for leave.

23. The First Respondent was entitled to enrol the application for leave to appeal for hearing, when the Applicant did not do so. The First Respondent however elected not to do so.

24. I am not convinced that a punitive costs order is warranted in the circumstances.

25. In the premises, I grant an order in the following terms:

25.1. The application for leave to appeal is dismissed; and

25.2. The Applicant is ordered to pay the costs of the application for leave to appeal.

Date of hearing: 18 March 2021

Judgment handed down on: 28 June 2021

Appearances:

Counsel for the Applicant: G Hardy

Attorneys for the Applicant: Dewey Hertzberg Levy Inc.

Counsel for the First Respondent: S Bhyat

Attorneys for the First Respondent: Hajibey-Bhyat Inc.

No appearance for the Second and Third Respondents