



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

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

SIGNATURE

DATE: 13 December 2022

Case No. A5066/2021

In the matter between:

RALPH WERNER KOSTER

Appellant

and

INDUSTRIAL ZONE LIMITED

First Respondent

SOUTH AFRICAN NATIONAL PARKS

Second Respondent

**MINISTER OF ENVIRONMENTAL AFFAIRS AND
TOURISM**

Third Respondent

MINISTER OF PUBLIC WORKS

Fourth Respondent

CORAM: MEYER J, FRANCIS J and WILSON J

JUDGMENT

WILSON J (MEYER AND FRANCIS JJ concurring):

- 1 In June 2003, the appellant, Mr. Koster, entered into an agreement with the first respondent, Industrial Zone, for the purchase and sale of nine farms

which together extend over 24 000 hectares of land in and near Knysna, in what is now the Garden Route National Park. The second respondent, SAN Parks, occupies the land as a lessee.

- 2 The sale agreement between Mr. Koster and Industrial Zone contained three stipulations that are relevant to this appeal. The first stipulation was that the agreement would automatically be cancelled in the event that Industrial Zone received a notice of expropriation or intended expropriation of the farms at any point before ownership passed to Mr. Koster by registration. The second stipulation was that the South African Parks Board (now SAN Parks) had 90 days in which to pre-empt the sale by offering to purchase eight of the nine farms itself. If that did not happen, then the third stipulation was that Mr. Koster then had a further 120 days in which to raise “sufficient funds for the development of the property”. I shall refer to this as the “finance condition”.
- 3 On 15 December 2003, Industrial Zone received what it regards as a notice of intended expropriation of the farms from the Acting Director-General of the Department of Environmental Affairs and Tourism, which is represented in this appeal by the third respondent, the Minister of Environmental Affairs and Tourism. Industrial Zone took the view that its receipt of this notice automatically cancelled the sale agreement. It told Mr. Koster so in a letter dated 17 December 2003.
- 4 Mr. Koster disagreed. He took the view that the notice Industrial Zone received was not a notice of intended expropriation within the meaning of a sale agreement. He demanded specific performance of the sale agreement. Industrial Zone demurred.

The action in the trial court

- 5 Accordingly, on 31 October 2006, Mr. Koster instituted an action for specific performance. There were substantial delays in bringing the action to trial, but the matter finally proceeded in the trial court on 22 May 2019. The main issue explored in evidence before the trial court was whether the notice Industrial Zone received counted as a “notice of intended expropriation” for the purposes of the sale agreement.
- 6 By the time the parties closed their respective cases, it appears that no attention had been paid in evidence to whether or not the finance condition had been fulfilled. Industrial Zone’s counsel argued that fulfilment of the finance condition had not been proved. This appears to have alerted Mr. Koster’s counsel to the issue for the first time, at which point it was contended that the parties had reached an agreement in earlier litigation that the finance condition had in fact been fulfilled. In order to prove that contention Mr. Koster’s counsel sought to introduce affidavits filed in the earlier litigation.
- 7 Industrial Zone objected to the introduction of that evidence at such a late stage and argued that, in any event, the affidavits did not bear the meaning which Mr. Koster’s counsel ascribed to them. Sensing that the trial court would disallow the new evidence, or decline to read them as he contended they should be read, Mr. Koster’s counsel then changed tack. He sought leave to amend Mr. Koster’s particulars of claim to introduce a wide variety of new contentions, each advanced in the alternative to the other.

8 These contentions were, first, that the finance condition was void for vagueness; second, that on a proper interpretation of the sale agreement, the finance condition was not really a condition at all; third, that the finance condition was objectively impossible to fulfil; fourth, that the finance condition was for the sole benefit of Mr. Koster, who had waived it; fifth that the parties had agreed not to enforce the finance condition; and sixth, that Industrial Zone had in fact waived the finance condition.

9 Industrial Zone opposed Mr. Koster's application for leave to amend his particulars of claim. The trial court, faced with a bewildering array of sometimes mutually destructive contentions, and having been given no explanation, other than counsel's oversight, for the amendment application being advanced so late in the proceedings, refused leave to amend. The upshot of all of this was that Mr. Koster's action fell to be dismissed, because there was no genuine dispute that the finance condition had not been fulfilled. That being so, his claim for specific performance had to fail.

10 The trial court refused Mr. Koster leave to appeal, but the Supreme Court of Appeal reversed that decision, and granted leave to appeal to this court.

The lapsing of the appeal

11 The appeal was first enrolled on 23 May 2022, but was struck from the roll because Mr. Koster had failed to enter into the "good and sufficient security" required by Rule 49 (13) (a). A security bond was subsequently provided to the Registrar's satisfaction, but Industrial Zone nonetheless persists in the point that the appeal has lapsed because of Mr. Koster's failure to prosecute it timeously.

12 The appeal has indeed lapsed for non-prosecution. But much if not all the delay in prosecuting the appeal is explained by Mr. Koster's death on 23 June 2021, and the fact that the executors of his estate were not appointed until 9 November 2021. If that were not enough to condone the delays in providing security and in taking the appropriate steps to prosecute the appeal (it is), then I would nonetheless be inclined to reinstate the appeal on the basis that it stands very good prospects of success, for reasons to which I will now turn.

The merits of the appeal

13 The question before us is whether the trial court ought to have granted Mr. Koster's application for leave to amend his particulars of claim. The principles applicable to applications for leave to amend are well-known and require little elaboration. The trial court summarised them pithily at paragraph 63 of its judgment. Given that Mr. Koster sought his amendment at such a late stage in the proceedings, he was bound to provide a satisfactory explanation for the delay. He was also required to show that the amendment was pursued in good faith, that the respondents would not suffer prejudice from the granting of leave to amend that could not be cured by an order for postponement and costs, that the amendment raised triable issues, and that the amendment was not excipiable. In addition, a court will be slow to grant leave to amend after evidence has been led and argument has been submitted, unless the evidence already led provides sufficient material upon which to decide the issues canvassed in the proposed amendment.

- 14 These considerations are not a checklist, but a series of factors to be weighed in coming to a just outcome. As is often pointed out in the context of condonation applications, sound prospects of success on the merits can often compensate for poor explanations for delay (see *Junkeepsad v Solomon* [2021] ZAGPJHC 48 (7 May 2021), paragraph 7 and the cases cited there). Equally, in the context of applications for leave to amend, an amendment may be so material to the ventilation of the true issues between the parties that refusing it would effectively abrogate the court's function to decide those issues fairly on their merits. In such a case, even a very late amendment, with a very poorly explained delay, should nonetheless be granted if it is otherwise essential to enable a court decide a case properly.
- 15 In this case, the amendment Mr. Koster sought was very late, and the explanation for its lateness was very poor. In those circumstances, only a very strong case on the merits of the amendment would have allowed the trial court to grant the application. In my view, the bulk of the amendment Mr. Koster sought before the trial court lacked that sort of merit. Mr. van Riet, who appeared for Mr. Koster's executors before us, conceded as much. During oral argument, he abandoned all but two of the contentions advanced in the application for leave to amend pursued before the trial court.
- 16 Mr. van Riet nonetheless persisted in seeking leave to amend insofar as would be necessary to contend that the finance condition was void for vagueness or that, in the alternative, the finance condition was solely for the benefit of Mr. Koster and was waived by him.

17 I do not think that the waiver point has the clear merit necessary to overcome either the shortcomings of Mr. Koster's explanation for his delay in raising it, or the obvious prejudice that allowing it to be pursued would cause Industrial Zone. It is not at all clear to me that the finance condition was only for Mr. Koster's benefit. It was not argued before us that Mr. Koster would not have entered into the agreement if he knew that he could not raise the finance necessary to develop the property. The farms were not acquired as bare land in need to development. Clause 3 of the sale agreement stipulates that the farms were acquired as a going concern capable of separate operation, and that the assets of the going concern, together with the proceeds of the income earning activity taking place on the farms, would transfer to Mr. Koster with registration of the farms in his name. In any event, the trial court was right to conclude, at paragraphs 90 and 91 of its judgment, that waiver had not been established on the evidence, and that Mr. Koster would have to re-open his case to establish the waiver upon which he sought to rely. That in itself counts strongly against allowing the amendment.

18 The vagueness point is, however, on a different footing. There is no gainsaying that the finance condition is vague on its face. The obligation to raise "sufficient funds for the development of the property" is not supported in the sale agreement with any stipulation at all about the development contemplated, the form in which the funding should come, or how compliance with the obligation is to be demonstrated. These deficits may be cured by the leading of further evidence, but the duty to lead that evidence would fall on the party asserting the finance condition's enforceability. Without such evidence, Mr. Koster's executors would likely prevail on the

point that his failure to comply with the finance condition makes no difference to the claim for specific performance.

19 At paragraph 83 of its judgment, the trial court addressed the merits of the vagueness point by observing that “[a] court will always seek to uphold the terms of a contract concluded between the parties”. That much is true, but it does not provide an answer to the central question raised by Mr. Koster’s amendment. That question is whether the finance condition is objectively capable of enforcement. The trial court’s judgment does not explore this issue. Neither does Industrial Zone’s written argument before us. Mr. Ossin, who appeared for Industrial Zone, did not contend that the finance condition is enforceable on its face.

20 For all these reasons, it is my respectful view that the trial court was mistaken in refusing to allow Mr. Koster’s application for leave to amend insofar as is necessary to allow the vagueness point to be ventilated.

21 Mr. Ossin argued that even if we were to reach that conclusion, we would not be entitled to interfere with the discretion the trial court exercised when it refused Mr. Koster leave to amend. I do not think that is correct. In my view, the trial court’s failure to address the merits of the vagueness point head-on vitiates the exercise of its discretion. Because it did not explore the issue of whether the finance condition was indeed vague on its face, the trial court deprived itself of the material necessary to exercise its discretion properly.

22 That said, the trial court was faced with a wide-ranging application for leave to amend, almost all of which lacked any merit. There was no serious dispute before us that the explanation advanced for the lateness of the

amendment was very poor, and the circumstances in which the amendment was sought bore all the hallmarks of a desperate litigant, knowing that defeat was imminent, trying to shape the evidence “to relieve the pinch of the shoe” (see *Hladhla v President Insurance Co Ltd* 1965 (1) SA 614 (A) at 621D-H and *S v Felthun* 1999 (1) SACR 481 (SCA) at 487A-B). The trial court was plainly correct to dispose of the bulk of the amendment in the manner that it did. It is perhaps only with the benefit of the hindsight the appeal process affords us that it becomes possible to isolate the kernel of merit in the application for leave to amend advanced before the trial court.

23 It is nonetheless in my view necessary to the just disposition of the case that we allow the appeal and that we grant the application for leave to amend to the limited extent necessary to ventilate the vagueness point.

24 Mr. van Riet accepted before us and before the trial court that, if the amendment is allowed to the extent necessary to ventilate the contention that the finance condition is void for vagueness, Mr. Koster would also need leave to delete the words “[a]ll conditions in the deed of sale have been fulfilled and” from the opening sentence of paragraph 24 of the particulars of claim. I shall incorporate that into the order I will make.

Costs

25 None of this means that Mr. Koster conducted his case in the court below in a manner worthy of approval. Before us, too, the bulk of the amendment was only abandoned in response to a query from the court. It is trite that an applicant for leave to amend seeks an indulgence and will generally be ordered to pay the costs of the application unless the opposition to it was

unreasonable. The same general rule applies to applications to reinstate an appeal, and to applications for condonation. In this court, the appeal was only narrowed to something approximating its true merit well into oral argument. Industrial Zone's opposition to each one of the applications brought on Mr. Koster's behalf, and to the appeal itself, was plainly reasonable. Had Mr. Koster's legal representatives restricted themselves to the vagueness point from the outset, a great deal of time and money might have been saved.

26 In these circumstances, Mr. Koster's estate will pay the costs of the application for leave to amend, of the application for reinstatement and of the appeal itself.

Order

27 For all these reasons the following order is made –

1. The late prosecution of the appeal and the late provision of security for costs are condoned, and the appeal is reinstated.
2. The appeal is upheld.
3. The order of the trial court is set aside and substituted with the following order –

“1. The plaintiff is granted leave to amend his particulars of claim by the insertion of paragraphs 29bis and 29bis.1 of the plaintiff's notice of amendment dated 30 May 2019, and the deletion of the words “[a]ll conditions in the deed of sale have been fulfilled and” from the opening sentence of paragraph 24.

“2. The plaintiff is to pay the costs of the application for leave to amend.”

4. The matter is remitted to the trial court for further proceedings consistent with this judgment.
5. The appellant is to pay the costs of the appeal, including the costs of the applications for condonation and reinstatement.

S D J WILSON
Judge of the High Court

HEARD ON:	16 November 2022
DECIDED ON:	13 December 2022
For the Appellant:	RS van Riet SC (Heads of argument drawn by RS van Riet SC and SA Jordan SC) Instructed by Kobus Boschoff Attorneys, Cape Town and De Jager-Du Plessis Attorneys, Randburg
For the First Respondent:	T Ossin Instructed by Fairbridges Wertheim Becker, Johannesburg
For the Second and Third Respondents:	No argument submitted Mkhabela Huntley Adekeye Inc, Sandton