

## REPUBLIC OF SOUTH AFRICA

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

CASE NO: 2011/17143

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| (1) REPORTABLE: / NO<br>(2) OF INTEREST TO OTHER<br>JUDGES: /NO<br>(3) REVISED. |
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In the matter between:

**BENSON, JOHAN MARVIN****1<sup>ST</sup> APPLICANT****BENSON, GLORIA VALENTIA****2<sup>ND</sup> APPLICANT**

And

**THE STANDARD BANK OF SOUTH AFRICA****1<sup>ST</sup> RESPONDENT****SHERIFF JHB WES H.M. BOTHA****2<sup>ND</sup> RESPONDENT****THE REGISTRAR OF DEEDS: JOHANNESBURG****3<sup>RD</sup> RESPONDENT****GERT CORNELIUS DU PLESSIS****4<sup>TH</sup> RESPONDENT**

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## JUDGMENT LEAVE TO APPEAL

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WEINER, J

1. The Applicants apply for leave to appeal against the judgment and order which I handed down on 14 October 2014, dismissing a rescission application against the judgment of Mia AJ. Mia AJ had dismissed an earlier rescission application brought by the applicants against the order of Kgomo J, in which he declared the property<sup>1</sup> previously owned by the applicants specifically executable. The sale in execution took place and the fourth respondent purchased the property.
2. The application for leave to appeal was delivered on the last day allowed for in terms of Rule 49(1), on 4 November 2014. This application was then left standing, with no effort made to have it heard for some 7.5 years. There was initially no explanation proffered by the applicants as to why it took such time to have this matter set down for hearing.
3. Despite the applicants admitting the breach of the loan agreement and the arrears owing, there have been a myriad of applications brought by the applicants to rescind various previous judgments in this matter. In this regard default judgments were granted by Kathree-Setloane J<sup>2</sup> and Kgomo J<sup>3</sup>; rescissions of those judgments failed.<sup>4</sup>

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<sup>1</sup> 74 Kent Avenue, Montclare, Randburg (the property)

<sup>2</sup> 1 June 2011

<sup>3</sup> 31 January 2012

<sup>4</sup> Setloane J's judgment was for the monetary judgment; Du Plessis AJ refused rescission, but granted leave to appeal to the Full Bench. The Full Bench dismissed the appeal on 21 February 2019. *Benson and another v Standard Bank and others* 2019 (5) SA 152 (GJ). Kgomo J's judgment was for the sale in execution of the judgment. Mia AJ dismissed the rescission of this judgment.

4. I dismissed the application to rescind Mia AJ's judgment on the ground that rescission was inappropriate; an appeal should have been launched.<sup>5</sup> This issue formed the basis of the application for leave to appeal before me. Although there are conflicting judgments on this issue, it is not necessary to deal with this issue as the merits of the application for leave to appeal have no prospects of success and thus leave to appeal is not warranted for the reasons set out below.
  
5. I was informed in the affidavits filed by the attorneys referred to below that Mr Van Zyl, the fourth respondent's attorney had stated at a previous hearing that he had obtained an eviction order against the applicants. The eviction application was heard on 12 August 2020. Judgment was delivered on 16 February 2021. The applicants and their attorneys did not inform me of this.<sup>6</sup> The applicants, in the eviction application, raised the same defences that they have relied upon for the past decade i.e that the sale in execution should be cancelled as the relevant documents contained an incorrect description of the property. Ally AJ, who heard the eviction application, dealt with this issue and the attack on the fourth respondent's ownership and title in the property. The defences raised in the present matter were dealt with by Ally AJ.
  
6. Ally AJ referred to this leave to appeal before me. He stated that '[n]othing has been done to prosecute this appeal. The First and Second Respondents have not

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<sup>5</sup> The applicants raised the point that my view was incorrect, based upon the judgment in *Moshoeshoe and Another v Firstrand Bank Ltd and Others* [2018] 2 All SA 236 (GJ).

<sup>6</sup> Unfortunately, there were several connectivity problems during the hearing of the matter previously and I do not have a note of this, but I accept the submissions from all counsel that I was informed on a previous occasion that an eviction order had been granted.

responded nor explained the delay in prosecuting the appeal. It is my view that the Applicant's rights cannot be held in abeyance simply by the First and Second Respondents failing to prosecute their leave to appeal or appeal.' Ally AJ held that no defence had been raised and ordered the eviction of the applicants herein. Leave to appeal was refused. The applicants petitioned the Supreme Court of Appeal (the SCA) for leave to appeal. This was refused on 30 January 2022. No doubt, this is the reason the applicants suddenly decided to pursue the appeal against my judgment when they did. It is noteworthy and unprofessional that the applicants failed to inform me, when the application for leave to appeal Ally AJ's judgment was heard and the outcome of the petition to the SCA.

7. Although there is no time period set out in the Rules of Court as to when a leave to appeal application should be set down and heard, a matter cannot be held in abeyance indefinitely. The prejudice to the respondents, in particular the fourth respondent, in this matter, is self-evident. He has been waiting for over a decade to finalise the matter. He has now done so, via the eviction application and the subsequent refusal of leave to appeal by the SCA.
8. Although the rules do not provide for a time period, and therefore condonation need not be sought, a delay must be reasonable and also fully explained<sup>7</sup>. The applicants have done neither. For that reason alone, the application for leave to appeal must be dismissed.

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<sup>7</sup> As was held in *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* [2019] ZACC 15, (which dealt with a legality review with does not have a time limit and therefore the necessity to ask for condonation is not a prerequisite.

9. From what appears above, in any event, the issues in this appeal are now *res judicata* and the appeal has become moot. In addition, none of the defences raised by the applicants have any prospect of success.
  
10. I requested the applicant and the applicants' attorneys to explain by way of affidavit:
  - a. their failure to apprise this court of the eviction judgment of Ally AJ and the SCA's refusal of their petition;
  - b. why the applicants' attorneys should not be reported to the Legal Practice Council (LPC) for their unprofessional conduct;
  - c. why the applicants should not pay the first and fourth respondent's costs of this application on an attorney and client;
  - d. why the applicants' attorneys should not pay the costs of this application *de bonis propriis* jointly and severally with the applicants.
  
11. Affidavits were filed by Ms Van Schalkwyk, on behalf of the applicants' attorneys, and the first applicant. No affidavit was filed by Mr Hadebe who appeared for the applicants at all material times. He however addressed the court on these issues. In summary, the applicants and Ms van Schalkwyk in their affidavits state:
  - a. As Mr Van Zyl (for the fourth respondent) had informed me of the eviction order, there was no duty on them to inform me of the circumstances surrounding the eviction, or of the fact that leave to appeal had been refused and a petition to the SCA had been refused in January this year.

- b. The delay was not the fault of the applicants or their attorney. Blame was placed on the transcribers, the Registrar's office, my erstwhile clerk and me for failing to set the matter down. The file had been lost and they could find no help from the filing clerks in the Registrar's office.<sup>8</sup> I had taken six months to deliver judgment.<sup>9</sup>
- c. Judges were biased and/wrong even though their judgments had been upheld by the Full Bench and /or leave to appeal had been refused by the SCA.
- d. They intended to approach the Constitutional Court to appeal the refusal by the SCA to decide their appeal.<sup>10</sup>

12. Mr Hadebe, at the hearing, informed me that:

- a. He does not practice with Ms Van Schalkwyk; he has his own firm and was briefed to deal with these matters;
- b. He was interrupted in court during the hearing (connectivity problems) whilst he was explaining what had occurred since 2014;
- c. Although he thereafter failed to inform the Court of the Ally AJ judgment and the fact that the SCA had refused leave to appeal, this was not intentional.

13. In my view, the conduct of the applicants and their attorneys in this matter has been of such a nature that a punitive costs order is warranted. The non-

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<sup>8</sup> No attempt was made by the applicants' attorneys over the past eight years to compile a duplicate file

<sup>9</sup> This was a blatant misrepresentation as I had delivered judgment the day after the matter was heard. The transcript of the judgment was received by me for editing in June 2015 and it was signed in June 2015.

<sup>10</sup> The petition to the SCA was refused in January 2022; the applicants have done nothing to pursue this appeal.

disclosure of the refusal of the petition by the SCA, which directly affects this matter amounts to a serious breach of the professional ethics applicable to legal practitioners.

14. I intend furnishing this judgment to the Chairperson of the LPC for investigation.

The LPC has the obligation to conduct an appropriate investigation on receipt of a complaint, which this judgment is.

15. The following order is issued:

- a. The application for leave to appeal is dismissed with costs on the attorney and client scale.
- b. The applicants' attorneys, Ms van Schalkwyk and Mr Hadebe are to be reported to the Legal Practice Council for their conduct to be investigated.
- c. A copy of this judgment and the affidavits of the applicant and Ms van Schalkwyk, as well as a transcript of today's proceedings are to be delivered to the Legal Practice Council for this purpose.

S WEINER  
JUDGE OF THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION  
JOHANNESBURG

Electronically submitted

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date of the judgment is deemed to be 17 May 2022.

APPEARANCES:

COUNSEL FOR THE APPLICANT: T HADEBE

INSTRUCTED BY: E D Van SCHALKWYK ATTORNEYS

COUNSEL FOR FIRST RESPONDENT: C E THOMPSON

INSTRUCTED BY: SWANEPOEL VAN ZYL ATTORNEYS

DATE OF THE HEARINGS: 01 April 2022 and 12 May 2022

DATE OF JUDGMENT: 17 May 2022