

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 28781/2021

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
_____	_____
DATE	SIGNATURE

In the matter between:

WINGPROP (PTY) LTD
(REGISTRATION NUMBER: 2002/000246/07)

Applicant

and

BAHLEKAZI, APOLLO PEPSI

1st Respondent

NYEMBE, PHINDILE CAROLINE

2nd Respondent

NCAMBACHA, NOMKHANGO

3rd Respondent

SHEVERI, AGNES

4th Respondent

MOKOBE, AGNES MANGWATO

5th Respondent

VUMASE, LINDIWE GOODNESS

6th Respondent

CHARLIE, LESIBA PIET

7th Respondent

VISAGIE, JOHNNY

8th Respondent

KELEMBE, VUSUMZI	9th Respondent
MASOKO, DAVID MOSETE	10th Respondent
MTHETHWA, JANE ZETHU	11th Respondent
KOTANE, LESLEY JOSEPH	12th Respondent
ZIKHALI, SIPHO MAHLABANE	13th Respondent
MLANGENI, VUSANI JOHN	14th Respondent
NGCOBO, LINDIWE BEAUTY	15th Respondent
MOHLABE, REPHEDILE GRACE	16th Respondent
NGCOBO, PHYLLIS BUSISIWE	17th Respondent
MASHIANE, LESET JA JERRY	18th Respondent
THE FURTHER UNLAWFUL OCCUPIERS OF UNITS 1801, 2803, 1907, 501, 602, 806, 1108, 1308, 1402, 1410, 1707, 1911, 2004, 2207, 2210, 2311, 2503 AND 2603 OF THE HIGHPOINT BUILDING	19th Respondent
CITY OF JOHANNESBURG	20th Respondent

Neutral Citation: *Wingprop Pty (Ltd) vs Bahlekazi, Appollo Pepsi and others* (28781/2021) [2023] ZAGPJHC 526 (19 May 2023)

APPLICATION FOR LEAVE TO APPEAL JUDGMENT

Kemack AJ:

Introduction

[1] On 12 December 2022 this court delivered a judgement in an opposed application, granting the Applicant an order inter alia for the eviction of the First to Eighteenth Respondents from their apartments in the Highpoint

building, situated at the corner of Klein and Kotze Streets in Hillbrow, Johannesburg.

- [2] The First Respondent represented himself in the main application. The Third, Ninth, and Twelfth Respondents did not oppose the main application, and the judgement against them was by default.
- [3] The Second, Fourth to Eighth, Tenth, Eleventh, and Thirteenth to Eighteenth Respondents opposed the eviction order, and were represented in the main application by Mr Gaju. On 3 March 2023 these 14 respondents delivered an application for leave to appeal, together with an affidavit by the Fourth Respondent (Agnes Sheveri) seeking condonation for late delivery of this application for leave to appeal, on behalf of all 14 applicants for leave to appeal.
- [4] This judgement refers to the original applicant as Wingprop, and to the 14 applicants for leave to appeal as “the 14 Applicants”.
- [5] The application for leave to appeal essentially raises two grounds of appeal: that Wingprop’s service of its notice of set down was defective for non-compliance with section 4(2) of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998, commonly known as the PIE Act (the short-service defence); and that the court decided this matter while there was a pending earlier eviction application between the same parties (*the lis alibi pendens defence*).

The Short Service Defence

- [6] Section 4(2) of the PIE Act states: *“At least 14 days before the hearing of the proceedings contemplated in subsection (1), the court must serve written and effective notice of the proceedings on the unlawful occupier and the municipality having jurisdiction.”*
- [7] In paragraphs 2, 3 and 4 of the application for leave to appeal, the 14 Applicants state that service of the required notice on Wednesday 2 November 2022 for a hearing on Monday 21 November 2022 amounted to 12 days’ notice, two days short of the required 14 days, and that Wingprop’s application should therefore have been dismissed for defective notice under section 4(2).
- [8] The definition of “*court day*” in the Uniform Rules of court, excludes Saturdays, Sundays and public holidays. If this method of counting days is used, Wingprop’s notice was served less than 14 days before the hearing date. The PIE Act, however, neither includes nor refers to this definition. It contains no definition of days.
- [9] For this reason, the normal civilian method of computing time is applicable, as described in 27(2nd ed) LAWSA 285, 290 & 309: the first day is included, the last day is excluded, and Sundays and public holidays are included.
- [10] Applying the civilian method, the notice was served 19 days before the hearing date, and there is no reasonable prospect of an appeal court finding differently.

The Lis Alibi Pendens defence

- [11] In paragraphs 5, 6 and 7 of the application for leave to appeal, the 14 Applicants state that the court incorrectly decided the main application in favour of Wingprop while there was a pending eviction application between the same parties, giving rise to the defence of *lis alibi pendens*.
- [12] *Lis alibi pendens* is a dilatory defence in which a respondent seeks a stay of proceedings on the basis that there is pending prior litigation between the same parties, based on the same cause of action, in respect of the same subject matter. The party raising this defence bears the onus of proving these requirements.¹ Moreover, a court cannot grant a stay to a respondent who has not pleaded *lis alibi pendens*².
- [13] The 14 Applicants relied on *lis alibi pendens* with reference to an uncompleted application six years earlier under Gauteng Local Division case number 35016/2016, for an eviction order against numerous parties including the 14 Applicants.
- [14] In paragraph 56 of its founding affidavit, Wingprop alleges that this 2016 application has subsequently been overtaken by events and arose from a different cause of action. This appears to be correct, since the 2021 eviction application is based on a letter of cancellation dated 4 June 2021 to all the first 18 respondents in the main application, and this letter did not exist when the 2016 eviction was claimed.
- [15] Wingprop's claiming of eviction orders five years apart for different reasons, does not satisfy the requirement of the same cause of action. It accordingly

¹ see *George v Minister of Environmental Affairs & Tourism* 2005 (6) SA 297 (EqC).

² see *Kerbel v Kerbel* 1987 (1) SA 562 (W).

appears that there is no reasonable prospect of an appeal court finding that any of the 14 Applicants has proved this element of *lis alibi pendens*.

[16] It was unnecessary, however, to determine this issue in deciding the main application, because on 22 November 2022 during the hearing of the main application, Wingprop's attorney served a notice on the 14 Applicants' attorney withdrawing the 2016 application against all 18 respondents in the main application, including the 14 Applicants. This notice satisfies the requirements of Uniform Rule 41(1)(a).

[17] *RSA Faktors Bpk v Bloemfontein Township Developers (Edms) Bpk en Andere 1981 (2) SA 141 (O)* is authority for the proposition that withdrawal of earlier proceedings precludes reliance on *lis alibi pendens*.

[18] It follows that there is no reasonable prospect of an appeal court upholding the *lis alibi pendens* defence.

The 14 Applicants' request for condonation

[19] The application for leave to appeal was delivered on 15 February 2023, approximately one month after the expiry of Uniform Rule 49(1)(a)'s 15 court day period for delivery of a such a notice.

[20] In seeking condonation, the 14 Applicants refer to some of them being absent from Johannesburg because they went home for the holidays, to difficulty raising funds for their attorney, and to genuine prospects of success.

- [21] Absence of some of the 14 Applicants during the holiday, is not a valid reason for granting condonation. The condonation affidavit does not state which of the 14 Applicants were absent and which were present during December 2022, nor does it explain why their attorney and those who remained could not have taken action, including contacting them.
- [22] The 14 Applicants vaguely allege financial inability to pay their attorneys during January 2023, without any meaningful details. It is not sufficient to allege merely that "*January 2023 was tough month for us*", particularly as there are 14 applicants to contribute to legal fees.
- [23] Moreover, as stated above, neither ground of appeal has even reasonable prospects of success.
- [24] The 14 Applicants have not made out a case for condonation, and their application for condonation is dismissed.

The Third Respondent in the Main Application

- [25] At the commencement of the hearing of the application for leave to appeal, Mr Gaju representing the 14 Applicants, orally requested leave to also represent the Third Respondent in the main application (Nomkhango Ncamacha).
- [26] In view of the consequences of an eviction order, the court was inclined to permit this, and Mr van der Merwe for Wingprop did not object.
- [27] In making this request, Mr Gaju did not point out to the court that the Third Respondent in the main application had not opposed the main application,

was not one of his clients in the main application, and that the judgement against him is by default.

[28] Once his representation of the Third Respondent had been established, Mr Gaju submitted that Wingprop's service of the notice of withdrawal did not assist Wingprop in respect of the Third Respondent, as the Third Respondent was not one of the parties in court on whom the notice was served. Therefore, Mr Gaju submitted, the Third Respondent had reasonable prospects of succeeding with *lis alibi pendens* on appeal.

[29] The Third Respondent, however, has no such prospects for the following reasons:

- 29.1. As a respondent who did not oppose the main application and against whom the court granted default judgement, the Third Respondent has no right at all to an appeal. If the Third Respondent wished to revisit the judgement, the appropriate procedure at the time was rescission.³
- 29.2. Not having pleaded *lis alibi pendens* in the main application, the Third Respondent cannot rely on this defence on appeal;
- 29.3. As a latecomer to the application for leave to appeal, the Third Respondent has not applied for and is not entitled to condonation for a late application for leave to appeal; and
- 29.4. The Third Respondent was in any event named in the notice of withdrawal, as one of the parties against whom Wingprop's 2016 application is withdrawn. Since this notice was served in court on the same attorney who now represents the Third Respondent, the Third Respondent effectively received service of the notice when the attorney took up the appointment.

³ See *Pitelli v Everton Gardens Projects CC 2010 (5) SA 171 (SCA)* at paragraphs 22-36;

[29] Mr Gaju has not made out a case for granting leave to appeal to the Third Respondent, whose prospects of success are lower than those of the 14 Applicants, and no such leave is granted.

The Order

[30] The application for leave to appeal is accordingly dismissed.

[31] The 14 Applicants named in the notice of application for leave to appeal are ordered to jointly and severally pay Wingprop's costs as respondent in this application for leave to appeal.

Kemack AJ
Acting Judge of the High Court

Heard: 2 May 2023

Judgment: 19 May 2023

For the Applicant,

Mr C Van Der Merwe

Instructed by

Vermaak Marshall

Wellbeloved Inc.

For the Respondent(s), 2nd and 4th -18th

Mr Gaju

Instructed by, 2nd and
4th – 18th Respondents

Sudeshnee Naidoo

Attorneys