

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO:13623/2022

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

Date: 26 March 2024 E van der
Schvff

In the matter between:

FABIAN ZIMPANDE MSIMANG

FIRST APPLICANT

UNLAWFUL OCCUPIERS OF 321 DERRICK
AVENUE, WATERKLOOF RIDGE, PRETORIA

SECOND APPLICANT

FABIAN ZIMPANDE MSIMANG N.O.

THIRD APPLICANT

and

MARTIN LAWRENCE KINGSTON

FIRST RESPONDENT

CITY OF TSHWANE METROPOLITAN
MUNICIPALITY

SECOND RESPONDENT

THE MASTER OF THE HIGH COURT

THIRD RESPONDENT

JUDGMENT

APPLICATION FOR LEAVE TO APPEAL

Van der Schyff J

- [1] The applicants, the respondents in the eviction application, applied for leave to appeal against the whole of the judgment handed down on 27 November 2023. The parties are referred to as cited in this application. The application was filed out of time, and the applicants seek condonation for the late filing of the application for leave to appeal.
- [2] Rule 49(1)(b) prescribes that when leave to appeal is required and it has not been requested at the time of the judgment, application for such leave shall be made within fifteen days after the date of the order appealed against. A written judgment was handed down on 27 November 2023. The application for leave to appeal is dated 29 February 2024. The Rule provides that a court may, on good cause shown, extend the fifteen-day period. In *High School Ermelo and Another v Head of the Department Mpumalanga Department of Education and Others*,¹ a Full Court of the Transvaal Provincial Division² stated that, although courts usually adopt a robust attitude by granting condonation so that the matter is disposed of on appeal, care must be taken not to create the impression that an application for condonation is a mere formality.
- [3] The Constitutional Court in *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)*³ reiterated that the standard for considering an application for condonation is the interest of justice. Whether it is in the interest of justice to grant condonation depends upon each case's facts and circumstances. A case-specific cohort of interrelated factors, which are not individually decisive, must be weighed against each other in determining whether it is in the interest of

¹ [2008] 1 All SA 139 (T) at para [19].

² Presided over by Ngoepe JP, Seriti J and Ranchod AJ.

³ 2008 (2) SA 472 (CC) at 477A-B.

justice to grant condonation.⁴ Although the list is not exhaustive, relevant considerations may include the degree of non-compliance, the thoroughness, extent, and reasonableness of the explanation of the delay, the prospects of success on appeal, the importance of the case, and the issue(s) to be raised in the intended appeal, the respondent's interest in the finality of his judgment, the convenience of the court and the avoidance of unnecessary delay in the administration of justice.⁵

[4] The first applicant, Mr. Msimang, attributes the lateness of the application for leave to appeal to the following factors:

- i. As the executor of his late father's estate, he is involved in various litigious matters and suffered litigation fatigue;
- ii. He was represented in the eviction application by attorneys who did not set forth the facts as they are and should leave to appeal be granted, there will be an application to place the new evidence before the court;
- iii. He had to instruct a new attorney to represent him in the application for leave to appeal;
- iv. He was erroneously under the impression that he could arbitrate the matter and come to a settlement agreement;
- v. From November 2023, there were various attempts between the parties and the elders to settle the agreement and find an amicable resolution;
- vi. He only realized on 19 February 2024 that the matter will not be settled;
- vii. He was debilitated by the prospect of being evicted from his family home and did not think clearly to act, nor was he advised by his previous attorney of record that he could appeal the judgment.

⁴ See *United Plant Hire (Pty) v Hills* 1976 (1) SA 717 A at 7210E-G.

⁵ See the case law referred to above.

- [5] The first respondent, Mr. Kingston, states that his intention to execute the order granted on 27 November 2023 was made known to the applicants already on 5 December 2023.

The explanation for the delay

- [6] Mr. Msimang fails to provide a reasonable explanation explaining the entire delay period. He does not explain what motivated him to seek new legal representation in this matter or exactly when he approached his new legal representatives. Mr. Msimang avers that his previous attorney did not inform him of the possibility of appealing the judgment. He does, however, not provide a confirmatory affidavit from his previous attorney, nor did he serve the application on his previous attorney. Where a delay is attributed to the mistake or default of a third party, there should be an affidavit by such party, or such party should at least be informed of the allegation to enable it to answer to the conduct attributed to it if it disagrees.
- [7] From the onset of the litigation between the parties, a concurrent theme throughout the papers filed by Mr. Msimang is that he wanted to settle the matter and purchase Mr. Kingston's 55% share of the property. The parties were not able to come to an amicable solution, and that was the root cause of the initial application. In the founding affidavit filed in support of an application to postpone the eviction application, Mr. Msimang stated: '... the attorney continued to comply with the court rules and filed papers while simultaneously making various attempts to have a round table meeting with the first respondent's attorneys. My family also made various attempts of their own to meet with the first respondent. The proposed round table meeting was to try and resolve the matter out of court. Self-evidently, these attempts did not bear any fruit.' In this context, attributing the delay to the hope that the matter could be settled is not reasonable.
- [8] In terms of the order handed down on 27 November 2023, Mr. Msimang was afforded three months to get his affairs in order to settle the matter or facilitate

moving from the property. Mr. Msimang avers in a replying affidavit filed, that he and his family were already packing their belongings and intended to vacate the property when the Sheriff attended to the property. He does not explain when this happened, or what caused the change of heart resulting in the application for leave to appeal.

- [9] Mr. Msimang claims that he is a lay person, not *au fait* with the rules and court processes. Mr. Msimang is, however, not illiterate. Before retirement, he was the Chief of the Air Force. He is, on his own version, involved in several litigious matters. One would not expect him to be familiar with all legal processes, but the notion that a court order erroneously granted may be appealed is not limited to the knowledge of those who have legal training. The explanation for the delay is provided in broad general terms and is not, comprehensive or reasonable.

Reasonable prospects of success

- [10] When the eviction application was considered, Mr. Msimang claimed that he and his family were lawfully occupying the property because he is entitled to occupy the property based on the fact that he is the executor of his deceased father's estate, and as executor owns the estate's share of the property. That argument was dismissed in the judgment. He changed his version now and claims that the occupancy is lawful because he and the family members residing therein, had the late Mr. Msimang's tacit or express consent to occupy the property.
- [11] Mr. Hollander, on behalf of Mr. Kingston, correctly pointed out that consent to occupy is either tacit or express. While consent may, in theory, be either express or tacit, it cannot, in practice, be both at the same time. The litigant relying on consent, must either make out a case based on facts that express consent was given, or the necessary factual context must be provided for the consent to be surmised through conduct or behavior. Where consent to occupy is a contentious point, as both parties indicated it was, the party relying on such consent must provide a proper factual basis for the court to draw the inference in its favour. In an

application where the affidavits embody both the pleadings and the evidence, a litigant must pin its colours to the mast and make out a case that the consent was either given expressly or tacitly.

[12] Mr. Hollander, In addition, submitted that it was not averred in the answering papers to the eviction application that the property was occupied with the consent of the late Mr. Msimang. This is a new case, he submitted, to which Mr. Kingston could not answer, and the court should disregard it.

[13] The Supreme Court of Appel recently reiterated that it is a well-established general principle that in considering on appeal whether the judgment appealed from is right or wrong, the appeal court considers the judgment according to the facts in existence at the time the judgment was given.⁶ Mr. Msimang stated in the supplementary founding affidavit in the eviction application that he moved from his own house to the property concerned in November 2018 to look after his father, who fell ill. This averment, counsel argued on his behalf, is sufficient for this court to find that a factual basis has been laid in the eviction application that Mr. Msimang occupied the property with his late father's tacit or express consent. I disagree. In the factual context where Mr. Msimang states that he moved to the property in November 2018, without stipulating the date in November 2018, and the late Mr. Msimang passing on 3 December 2018, the mere fact of his presence on the property does not lend itself to an inference of consent to occupy. I also have to consider the fact that Mr. Msimang is not consistent in his version as to when he commenced to occupy the property. Mr. Kingston averred in the founding affidavit to the eviction application that Mr. Msimang started to occupy the property on 1 June 2020. In the first answering affidavit filed, Mr. Msimang did not take issue with that averment and merely 'noted' it. Without addressing this point in the supplementary answering affidavit filed in the eviction application, he states that he moved to the property in November 2018 to look after his father, who fell ill. Mr.

⁶ *Bechan and Another v SARS Customs Investigations Unit and Others* (1196/2022) [2024] ZASCA 20 (5 March 2024).

Msimang did not make out a case in the eviction application that he, or any of the other occupants, was occupying the property with his late father's consent.

[14] During the eviction application, Mr. Kingston was not confronted with the case that the property was occupied before the late Mr. Msimang's passing with his consent. He could not answer to such a case. Mr. Msimang does not explain why such a case was not made out in the answering papers to the eviction application, except for blaming his first attorney of record, who was also not afforded the opportunity to address the allegation against it. In addition, Mr. Msimang states in this application for leave to appeal that his late father only 'allowed his grandchildren in his space'. He does not explain with sufficient detail how it then came about that his father consented to him occupying the property, if he only tolerated his grandchildren's presence.

[15] Counsel representing Mr. Msimang submitted that the grounds of appeal are premised on arguments that were not advanced when the matter was initially heard. Mr. Msimang acknowledges that it would be necessary to apply for the leading of new evidence in the appeal if leave to appeal is granted. On the papers before me, it is not an accepted fact that Mr. Msimang had his deceased father's consent to occupy the property. The eviction application was opposed on a completely different footing. It would be unfair to Mr. Kingston to shift the goalposts at this point in the litigation, particularly if it is considered that Mr. Msimang was afforded the opportunity to file a supplementary answering affidavit in the eviction application when he obtained the services of his second attorney of record. The test set out in *Paddock Motors (Pty) Ltd v Igesund*⁷ is not met.

[16] In considering the respective grounds of appeal, I fail to understand the logic behind the reasoning that Mr. Kingston did not have the necessary *locus standi* to apply for Mr. Msimang's eviction without Mr. Msimang's consent to institute the eviction application. Mr. Msimang is the executor of the estate who holds a 45% interest in the property concerned, but he is also the person who occupied the

⁷ 1967 (3) SA 16 (A).

property and relied on his status as executor to justify the occupation. The issue of *locus standi* was dealt with in the written judgment and needs no further exposition in this application for leave to appeal.

- [17] The second ground of appeal is that Mr. Msimang and his family were lawful occupiers and could not be evicted. I indicated herein above that this ground of appeal is based on a case that was not made out in the eviction application. No issue is taken in the application for leave to appeal with the finding that Mr. Msimang's status as executor did not clothe him with the entitlement to occupy the property.
- [18] The third ground of appeal is that the relief granted to proceed with the sale by public auction is premature. The terms of the joint venture agreement in this regard are unambiguous, and no reason exists not to give effect thereto. This ground of appeal has no merit.
- [19] Mr. Msimang takes issue with Mr. Kingston's non-compliance with rule 41A prior to launching the eviction application. In the context of the application, and having regard to the fact that previous round table discussions did not bear any fruit, I fail to see how the parties could successfully have mediated the dispute. There is no merit in this ground, and counsel correctly indicated that she is not relying on it in this application.
- [20] I fail to find any other compelling reason why an appeal should be heard.
- [21] Considering that Mr. Msimang was not able to provide a reasonable explanation for the delay in instituting the application for leave to appeal, and because I am of the view that there is no reasonable prospect that another court would come to a different conclusion, the condonation application is dismissed.

[22] Mr. Kingston submitted that the circumstances justify the granting of a punitive costs order. No case was made out for a punitive costs order to be granted against the estate of the late Mr. Msimang, and it was not argued that Mr. Msimang, the first applicant, be solely held responsible for the costs in his personal capacity. A court should be slow to grant the impression that the doors of the court would be closed for a party who wants to apply for leave to appeal.

ORDER

In the result, the following order is granted:

1. The applicants' application for the condonation of the late filing of the notice of application for leave to appeal against the judgment of this court handed down on 27 November 2023 is dismissed;
2. The applicants' application for leave to appeal dated, and filed on, 29 February 2024 is struck from the roll;
3. The first and third applicants, jointly and severally, the one paying the other to be absolved, are ordered to pay the costs of the application.

E van der Schyff
Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. It will be emailed to the parties/their legal representatives as a courtesy gesture.

For the applicants:	Adv. N Nortje
Instructed by:	Aaron Stanger & Associates
For the first respondent:	Adv. L Hollander
With:	Adv. V Quithi
Instructed by:	Schindlers Attorneys

Date of the hearing: 22 March 2024
Date of judgment: 26 March 2024