



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: 17574/2022P

In the matter between:

**BANDRA INVESTMENTS CC
MERCHANT MOHAMMED**

**FIRST APPLICANT
SECOND APPLICANT**

and

**SIMON CHETWYND-PALMER
LEGAL PRACTICE COUNCIL
S. NAIDOO INVESTIGATOR LPC**

**FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT**

Coram: Davis AJ
Heard: 26 January 2024
Delivered: 31 January 2024

ORDER

The following order is made:

The application for leave to appeal is refused with costs.

JUDGMENT

Davis AJ

[1] This is an application for leave to appeal a judgment that I delivered on 5 October 2023, with reasons handed down on 18 October 2023. I heard the matter in Pietermaritzburg, however for convenience the parties agreed to hear the application in Durban. I am indebted to them for making themselves available.

[2] Only the first applicant wishes to appeal my judgment of 5 October 2023. The second applicant is not a party to this application. The second and third respondent play no role in this application, and for convenience I will refer to the first respondent as the respondent. The appearances are Ms Gates for the first applicant and Mr G Campbell for the respondent.

[3] The essence of my judgment, against which leave to appeal is sought, is that I dismissed the applicants' condonation application after refusing the first applicant's earlier application for a postponement to obtain legal representation at the eleventh hour. The second applicant had sought a postponement ostensibly for the applicants¹ to brief counsel in the matter. The second applicant is the sole member of the first applicant and the central figure in all the 'litigation' that surrounds this matter.

[4] The application was opposed by the respondent. After the indulgence was refused the second applicant declined to address the court on the merits of the application for condonation, with the founding affidavit being inadequate for the purposes of condonation the application was inevitably dismissed.

[5] Section 17 of the Superior Courts Act 10 of 2013 (the Act) regulates applications for leave to appeal from a decision of a high court. It provides as follows:

'(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-

(a) (i) the appeal would have a reasonable prospect of success; or

¹ See founding affidavit of the second applicant in the application postponement of 5 October 2023.

- (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
- (b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and
- (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.

[6] Prior to the enactment of the Act, the applicable test in an application for leave to appeal was whether there were reasonable prospects that the appeal court may come to a different conclusion than that arrived at by the lower court. The enactment of the Act has changed that test and has significantly raised the threshold for the granting of leave to appeal.² The use of the word 'would' in the Act indicates that there must be a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.

[7] Leave to appeal may thus only be granted where a court is of the opinion that the appeal would have a reasonable prospect of success, and which prospects are not too remote.³ As was stated by Schippers JA in *MEC for Health, Eastern Cape v Mkhitha*:⁴

'An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.'

[8] The key issue in the leave appeal application is the refusal to grant the applicant a postponement. In my reasons for judgment⁵ I comprehensively dealt with the refusal of the postponement and I stand by the reasons set out therein.

[9] It suffices to point out that the applicants filed their application for condonation on 15 December 2022, the matter was set down for hearing on the

² *Mont Chevaux Trust v Goosen* [2014] ZALCC 20 para 6, *Narainsamy and others v Nel and others* [2020] ZAKZPHC 20 paras 9 – 13, *Public Protector of South Africa v Speaker of the National Assembly and others* [2022] ZAWCHC 222 para 14.

³ *Ramakatsa and others v African National Congress and another* [2021] ZASCA 31 para 10.

⁴ *MEC for Health, Eastern Cape v Mkhitha and another* [2016] ZASCA 176 para 17.

⁵ Handed down on 18 October 2023.

opposed roll on 13 April 2023.⁶ The applicants as *dominus litis* in the proceedings adopted a completely supine approach to these proceedings.

[10] The second applicant deposed to an affidavit in support of the application for an adjournment in which he stated inter alia, that he is the sole member of the first applicant, the first applicant has authorised him to depose to this affidavit seeking an postponement, and unless otherwise stated reference to himself in the singular includes himself and the first applicant.

[11] In all the applications before this court and the Legal Practice Council (LPC), the second applicant is the person driving the process, he has deposed to all the founding and replying affidavits, he is without doubt the main protagonist in all cases involving the first applicant. This accords with the fact that he is the sole member of the first applicant.

[12] The explanation for the applicants' inertia is a very weak one, the chosen address for service of documents in the matter failed to forward the documents until 2 October 2023, three days before the hearing. The notice of set down being absent and had to be obtained. The actual responsibility for this obviously rests with the applicants.

[13] There is no explanation in the affidavit of what the applicants did to ensure that their application proceeded, that they as *dominus litis* had instituted and needed to prosecute. For some six months they did nothing to take their case forward.

[14] I dealt extensively with why the postponement was refused,⁷ I considered the fact that this matter traversed a complaint against the conduct of an attorney and was alive to the fact that the complaint concerned the legal profession and thereby attracted public interest. I was aware that there were considerations of fundamental fairness and justice to be considered and that is why even during the application for a postponement issues raised in the papers were traversed.

⁶ Indexed bundle at page 298.

⁷ See para 15 to para 28 of the reasons of 18 October 2023.

[15] The second applicant is the sole member of the first applicant, they cannot be described as a person and entity who are unaware of the manner in which the courts operate. He cannot either for himself or on behalf of the entity he represents legitimately claim that he is a completely uninformed lay litigant deserving of undue leniency. He has litigated in the high court previously, before the taxing master and with the LPC. He would know first hand how litigation worked in the courts.

[16] I do not believe another court would have granted the postponement in these circumstances, the applicants were the authors of their own misfortune. The purpose behind requiring litigants to obtain leave to appeal was set out in the matter of *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd*,⁸ where Wallis JA said that:

‘The need to obtain leave to appeal is a valuable tool in ensuring that scarce judicial resources are not spent on appeals that lack merit.’

[17] Counsel for the first applicant has alluded to the point that the second applicant could not make submissions on behalf of the first applicant in law. The second applicant elected not to address the court on the merits of the application for condonation, not because he was precluded from doing so, but because he did not have the expertise to do.

[18] The application for a postponement was refused in respect of the applicants for the reasons given, whether the second applicant could act on behalf of the first applicant did not and could not affect that ruling. What is clear is that the second applicant role, as the sole member of the first applicant, in these proceedings is all pervasive.

[19] The second applicant is central to every aspect of this case, he sought the postponement on behalf of the first applicant. Once that application was refused the matter proceeded, the applicants were undefended with no appearance. The result was inevitable, if the second applicant could not represent the first applicant it would not matter as the result is the same. There was no appearance to pursue the

⁸ *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd* [2013] ZASCA 120; 2013 (6) SA 520 (SCA) para 24.

application on behalf of the first applicant and on the papers filed in respect of the condonation application it fell to be dismissed with costs.

[20] There was no argument made on behalf of the applicants' in respect of the condonation application. That decision was made by the second applicant after the postponement was refused. It was the court, noting that the applicants were not lawyers that decided that it would, in the interests of justice, consider the submissions on the papers insofar as they pertained to the application for a postponement and condonation. This was an indulgence to the applicants to avoid an unfair result.

[21] It is trite law that where an application for condonation does not traverse the prospects of success, then the application for condonation might fail on that point alone.⁹ In the application for condonation the second applicant in his founding affidavit confines his affidavit to an explanation of the delay in filing the review, the only mention of the prospects of success is in a four-line paragraph shorn of any factual basis.¹⁰ Consequently the founding affidavit deposed to by the second applicant is woefully inadequate for the purpose of condonation.

[22] I gave detailed reasons why in this matter condonation was not appropriate and I do not believe that the first applicant has formulated a sound, rational basis to conclude that there is a reasonable prospect of success on appeal, on both the issue of the refusal of the postponement and the dismissal of the condonation application.

[23] It was not submitted that there are any compelling reasons why an appeal should be allowed in the matter and I am not independently able to conceive of one.

[24] It follows that I am not persuaded that there is a reasonable possibility that another court would come to a different decision than the one to which I came. I am

⁹ *De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd* 1994 (4) SA 705 (E) at 711D-E: 'The correct approach is not to look at the adequacy or otherwise of the reasons for the failure to file a plea in isolation. Instead, the explanation, be it good, bad, or indifferent, must be considered in the light of the nature of the defence, which is an all-important consideration, and in the light of all the facts and circumstances of the case as a whole. In this way the magistrate places himself in a position to make a proper evaluation of the defendant's *bona fides*'.

¹⁰ Indexed bundle at page 13.

of the view that this is precisely the type of matter that Wallis JA was referring to in *Dexgroup*, namely, an appeal that lacks merit.

[25] In the circumstances, the application for leave to appeal is dismissed with costs.

Davis A.J.

Appearances:

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For the respondent

Mr G Campbell

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Date of hearing:

26 January 2024

Date of judgment:

31 January 2024