

**REPUBLIC OF SOUTH AFRICA**



**IN THE LAND CLAIMS COURT OF SOUTH AFRICA  
HELD AT RANDBURG**

**CASE NO: LCC88/2019**

**DELETE WHICHEVER IS NOT APPLICABLE**

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

11 November 2021

SIGNATURE

DATE

In the matter between:

**ISEDOR SKOG N.O.**

1<sup>st</sup> Applicant

**REINETTE SKOG N.O.**

2<sup>nd</sup> Applicant

**HENDRIK COLLINS GERRYTS N.O.**

3<sup>rd</sup> Applicant

and

**KOOS AGULUS AND 25 OTHERS**

1<sup>st</sup> to 26<sup>th</sup> Respondents

**DRAKENSTEIN MUNICIPALITY**

27<sup>th</sup> Respondent

**HEAD: WESTERN CAPE PROVINCIAL DEPARTMENT  
OF RURAL DEVELOPMENT AND LAND REFORM**

28<sup>th</sup> Respondent

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## APPLICATION FOR LEAVE TO CROSS-APPEAL JUDGMENT

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**NCUBE AJ**

### **Introduction**

[1] This is an application for condonation and leave to cross-appeal against part of this court's judgment handed down on 18 February 2021. The application is opposed. I shall refer to the parties as Applicants and Respondents as they were referred to in the main application ("original application"). The original application was for the eviction of the First to Twenty Sixth Respondents ("occupiers"), from Rein Hill Estate, Remainder Farm No 1458, Division Paarl, Western Cape ("the farm").

### **Background**

[2] The original application was premised on the breach of the relationship between the occupiers and the farm owner or person in charge in terms of section 10(1)(c) of the Extension of Security of Tenure Act, Act No 62 of 1997 ("the Act"). The Applicants were not certain as to who amongst the twenty-six occupiers was responsible for all the transgressions committed on the farm. Consequently, the Applicants applied for the eviction of all the occupiers irrespective of which occupier was responsible for committing the atrocities complained of. This court dismissed the original application. Amongst other defences raised, the occupiers raised a special plea of *Res Judicata* as the same application had been heard at the Magistrate's Court. This court dismissed the *Res Judicata* plea on the basis that parties in this court were not the same as those cited at the Magistrate's Court. The Applicants sought leave to appeal the dismissal of their original application. Leave to appeal to the

Supreme Court of Appeal (“SCA”) was granted on 07 July 2021. On 02 September 2021 the occupiers filed their application for leave to cross-appeal and condonation.

### **Grounds of Cross-Appeal**

[3] The occupiers stated two grounds of cross-appeal. The first ground was that this court erred in holding that the *Res Judicata* special plea could not stand, since the parties in the Land Claims Court application were not the same as those cited in the Magistrate’s Court. The second ground raised was that this court erred in refusing to accept Mrs Wilhemina Syster’s submission at paragraph 88 of her opposing affidavit that the original application was an abuse of the court process and was tantamount to forum shopping.

### **Application for Condonation and Leave to Cross- Appeal**

[4] The original application was decided on 18 February 2021. The application for leave to appeal should be filed within fifteen (15) days after the order was made.<sup>1</sup> The applicants brought their application for leave to appeal on 11 March 2021. The occupiers did not file their application for leave to cross-appeal until the 2<sup>nd</sup> of September 2021, five (5) months after the date of the order.

[5] It is trite that condonation will be granted only where good cause is shown. The occupiers have advanced two reasons for the late filing of their application to cross-appeal. The first reason is that they did not expect the Applicants’ application for leave to appeal to be successful. The second reason is that it took time for their legal

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<sup>1</sup> Rule 69(1)(b)(i) of the Land Claims Court Rules.

representatives to get funding for this application approved by the Department of Rural Development and Land Reform ("the Department").

[6] The first reason does not make sense and it only needs to be stated to be rejected. There is merit in the second reason. The occupiers are indigent; their legal fees are paid by the Department. Funding to prosecute an appeal is not automatic and it is not dependent on the first funding having been approved. The factors considered in an application for condonation are "(a) the degree of lateness, (b) the explanation given, (c) the prospects of success and (d) the importance of the case."<sup>2</sup> The last two considerations are important in this case.

### **Prospects of Success**

[7] In my view, occupiers have a good prospect of success on appeal. The occupiers, in their application to cross-appeal, rely on the decision of the SCA in the matter of ***Ceasarstone Sdot.Yam v World of Marble and Granite 2000***.<sup>3</sup> Although that case was concerned with the plea of *lis alibi pendens*, the SCA held that the plea of *lis alibi pendens* was akin to the plea of *Res Judicata* and the requirements were the same. On the requirement of "same parties," the court held:

*"It may be that the requirement of the "same persons" is not confined to cases where there is an identity of persons, or where one of the litigants is a privy of a party to the other litigation, deriving their rights from that other person. Subject to the person concerned having had fair opportunity to participate in the initial litigation, where the relevant issue was litigated and decided, there seems to be something odd in permitting that person to demand that the issue be litigated all over again with the same evidence in the hope of a different outcome, merely because there is some difference in the*

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<sup>2</sup> *Melane v Santam insurance Co Ltd* 1962 (4) SA 531 (A) 532 B-F

<sup>3</sup> 2013 (6) SA 499 (SCA)

identity of the other litigating party.<sup>4</sup> This case provides an illustration of that type of problem.”<sup>5</sup>

[8] The Supreme Court of Appeal also referred to the decision by Milne J in **Cook and Others v Muller**<sup>6</sup> where the learned Judge expressed himself in the following terms<sup>7</sup>, which I find relevant in this case:

*“Even if this does not strictly constitute a defence of lis alibi pendens, it is clear that the court may, in the exercise of its discretion in controlling the proceedings before it, debar a person from ventilating a dispute already decided against him under the guise of an action against another party.” See **Burnham v Fakheer 1938 NPD 63**. Although the previous proceedings had not even been between the same parties, the Court there held that for the respondent to attempt to re-try an issue which had already been decided merely by changing the form of action, was an abuse of the process of the Court, and was vexatious. See also **Niksch v Van Niekark and Another 1958 (4) SA 453 (E) at p456**, and the English decision of **Reichel v Magrath (1889) 14 APP Cas 665 (HL)**.”*

[9] Considering the principle enunciated in the above cases, in my view, the occupiers have a reasonable prospect of success on appeal. Had the decision of the Supreme Court of Appeal been brought to the attention of this court during the hearing of the original application, the occupiers were bound to succeed in their special plea of *Res Judicata* it stands to reason therefore that the occupiers’ application to cross-appeal must succeed.

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<sup>4</sup> My own emphasis

<sup>5</sup> At para 43.

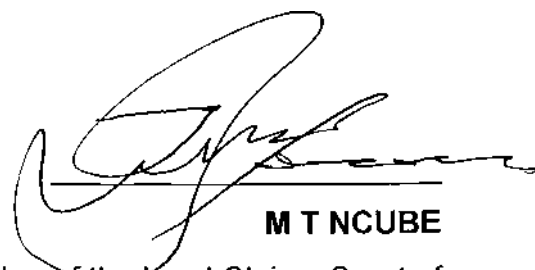
<sup>6</sup> 1973 (2) SA 240

<sup>7</sup>At 245 H- 246 B

### **Order**

[10] In the result, I make the following order:

1. Application for condonation is granted.
2. Leave to cross appeal to the Supreme Court of Appeal is granted.
3. Costs will be costs on appeal.



**M T NCUBE**  
Acting Judge of the Land Claims Court of  
South Africa, Randburg

### **Appearances**

For Applicant: Mr L F Wilkin

Instructed by: Meyer Sarkas Inc,  
8 Kloof Street,  
Gardens,  
CAPE TOWN

For Respondents: Ms L Dzai

Instructed by: Wakaba & Partners Inc,  
29 Guillaume Avenue,  
Bordeaux,  
RANDBURG

Date of Hearing: 02 November 2021

Date of Judgment: 11 November 2021