



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 46484/2021

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

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In the matter between:

PASEKA PASCAL NDEVU

FIRST APPLICANT

THE BORWA COMMUNITY ACTION GROUP,

SECOND APPLICANT

CONSISTING OF ALL OCCUPIERS

and

WESTONARIA SOUTH PROPRTY HOLDING

FIRST RESPONDENT

(PTY) LTD t/a WESTONARIA SOUTH

WESTONARIA BORWA MEGA PROJECT (PTY) LTD

SECOND RESPONDENT

CRIMSON KING PROPERTIES 351 (PTY) LTD

THIRD RESPONDENT

t/a CRIMSON KING DEVELOPMENTS

In Re:

WESTONARIA SOUTH PROPRTY HOLDING (PTY) LTD t/a WESTONARIA SOUTH	FIRST APPLICANT
WESTONARIA BORWA MEGA PROJECT (PTY) LTD	SECOND APPLICANT
CRIMSON KING PROPERTIES 351 (PTY) LTD t/a CRIMSON KING DEVELOPMENTS	THIRD APPLICANT
and	
PASEKA PASCAL NDEVU	FIRST RESPONDENT
JACOB SIBIYA	SECOND RESPONDENT
THE BORWA COMMUNITY ACTION GROUP, CONSISTING OF ALL OCCUPIERS	THIRD RESPONDENT
THE STATION COMMANDER FOR SAPS, WESTONARIA	FOURTH RESPONDENT
MINISTER OF POLICE	FIFTH RESPONDENT
RAND WEST CITY LOCAL MUNICIPALITY	SIXTH RESPONDENT
GAUTENG DEPARTMENT OF AGRICUTURAL AND RURAL DEVELOPMENT	SEVENTH RESPONDENT
GAUTENG DEPARTMENT OF HUMAN SETTLEMENTS	EIGHT RESPONDENT

JUDGMENT

This Judgment was handed down electronically by circulation to the parties' and or parties representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed on 21 January 2022.

BAQWA J

Introduction

[1] The applicants, a group of one hundred and sixteen persons who occupy a government sector housing development seek urgent relief to stay an eviction order granted by this court on 15 December 2021.

[2] The relief is sought on a temporary basis pending the finalisation of the application for the leave to appeal which was delivered on 13 January 2022 about four days after the 15 days' period prescribed by Rule 49 had expired. At the same time the applicant applied for condonation for the late filing of the application for leave.

The Law

[3] Rule 45A provides:

“The court may, on application, suspend the operation and execution of any order for such period as it may deem fit: provided that in the case of appeal such suspension is in, compliance with section 18 of the (Superior Courts) Act”. Notably, other than the proviso added post the advent of the Superior Courts Act 10 of 2013 the Rule offered the court a discretion of the widest kind and imposed no procedural or other limitations or fetters on the power it confers.

[4] In the matter of *Panayiotou vs. Shoprite (Pty)Ltd and others*¹, Sutherland J: (as he then was) held that the filing of an application to condone the late filing of a petition to the Supreme Court of Appeal in itself did not have the effect of suspending the judgment against which leave was sought and in doing so said the following“ the failure to serve notices of appeal or court records within the prescribed periods is common place. The result of such failures is that the appeals lapse and require condonation and require to revive them”.

¹ *Panayiotou vs. Shoprite (Pty)Ltd and others* 2016(30) SA 110 (GJ).

[5] In the present application the applicants concede that they cannot rely on Section 18 to claim automatic suspension of the order if the application was filed four days late. They also do not contend that the application for condonation would have the same effect.

[6] They do contend however, that a proper reading of the Rule does not preclude the relief sought in cases such as the present application because, as there is “no appeal” until condonation is granted, the restricting provision to Rule 45A to suspend an order does not apply.

[7] In the alternative the court’s powers may be sourced from the common law which empowers the court to exercise its inherent jurisdiction to suspend the operation of an eviction order.

[8] In *Road Accident Fund vs. Legal Practice Council and others*² a full court held “a stay of execution falls within the purview of a court’s common law inherent power to regulate its procedures and also S.173 of the Constitution”. It may therefore not be necessary to determine the suspension on the basis of Rule 45A.

Urgency

[9] The applicants allege the second degree of urgency as referred to in *Luna Meubel Vervaardigers (Edms) BPK*³ where the following was said: “Only if the matter is so urgent that the applicant cannot wait for the next motion day (i.e. 25 January 2022), from the point of view of the obligation to file the papers by the preceding Thursday, can he consider placing it on the roll for the next Tuesday (i.e. January 2022) without having filed the previous Thursday. In this case the application was issued and served

² *Road Accident Fund vs. Legal Practice Council and others* 2021 (6) SA 230 (GP).

³ *Luna Meubel Vervaardigers (Edus) BPK* 1972(1) SA 3A at 137A-E.

on the 14 January 2022 to be heard on the 18 January 2022, the papers not having been filed on Thursday (13 January 2022) at 12h00 to be enrolled for 18 January 2022.

[10] The respondents contend that there had been an undue delay by the applicants in filing their application for leave to appeal for a whole month prior to delivering their application and that they have created their own urgency.

[11] The applicants deny the “own urgency” allegation and submit that they undertook initiatives to prosecute the appeal since 15 December 2021 by trying to obtain legal representation but could not succeed due to the holiday season and that they only got a response from the Human Rights Commission on 7 January 2022 and a confirmation regarding representation by the Lawyers for Human Right on 14 January 2022. They further state that they also tried during the same period to raise funds from the community to try and achieve the same purpose, due to the fact that they mainly rely on donations.

[12] As a further reason for urgency the applicants draw attention in their replying affidavit to a letter from the respondent’s attorneys dated 17 January 2022 which states as follows: *“our client’s instructions are to move ahead with the execution of the eviction order this week. The sheriff will do an audit today of the houses that are still unlawfully occupied in order to make the necessary arrangements with the police department and additional security for the eviction”.*

[13] Having considered the above submissions, I am satisfied regarding the urgency of this matter.

Requirement for stay of execution

[14] Counsel for the applicants submits that the present application is not the classical application for an interdict in that the relief sought does not seek to prohibit anything. He submits, and I accept that the right which the applicant seeks to protect is the right to be heard or to have access to the screening process which is undertaken by a court during an application for Leave to Appeal.

[15] The principles to be considered were summarised in *Gois t/a Shakespeare's Pub vs. Van Zyl*⁴:

“(a) A court will grant a stay of execution where real and substantial justice requires it or where injustice would otherwise result.

(b) The court will be guided by considering the factors usually applicable to interim interdicts, except where the applicant is not asserting a right, but attempting to avert injustice:

(c) The court must be satisfied that:

(i) The applicant has a well-grounded apprehension that the execution is taking place at the instance of the respondents, and

(ii) Irreparable harm will result if execution is not stayed and the applicant alternatively succeeds in establishing a clear right.

(d) Irreparable harm will invariably result if there is a possibility that the underlying causa may ultimately be removed i.e. where the underlying causa is the subject matter of an ongoing disputes between parties.

(e) The court is not concerned with the merits of the underlying dispute. The sole enquiry is simply whether the causa is in disputes”.

Interdict Factors

⁴ *Gois t/a Shakespeare's Pub vs. Van Zyl* 2011 (1) SA 148 (CC).

[16] Let me emphasise that the above factors are being considered purely in the context outlined in the *Gois decision (Supra)*

16.1 **Prima Facie Right**

The applicants seek interim relief of the shortest possible duration, namely, until the application for condonation cum leave to appeal is heard. Needless to say, in the event of stay of execution, there is nothing to prevent the parties from approaching the leave to appeal judge to determine the application for leave matter expeditiously. This would ensure that the respondents are not unduly prejudiced.

In Besserglik vs. Minister of Trade Industry and Tourism and Others⁵ the Constitutional Court drew a distinction between the right to apply for leave to appeal with reference to section 34 of the Interim Constitution it stated:

"Whatever the scope of S.22, it cannot be said that a screening procedure which excludes unmeritorious appeals is a denial of a right of access to a court. As long as the screening procedure enables a high court to make an informed decision as to the prospects of success upon appeal it cannot be said to be in breach of S.22". Section 22 was the precursor of section 34 and it is the right to the screening process which includes the right to apply for condonation which the applicants assert as a right to access courts.

16.2 **Balance of Convenience**

The applicants state that they face homelessness in the event of their being evicted whilst the respondents alleges economic harm of significant proportions. Each party claims that the balance of convenience favours them.

16.3 **No Alternative Remedy**

The applicants submit that there is no alternative remedy and that this is evident from the stated intention to execute the eviction order and their opposition to this application.

⁵ In *Besserglik vs. Minister of Trade Industry and Tourism and Others* 1996 (4) SA 331 (CC).

[17] Even though the applicants have attempted to place some aspects of the grounds of appeal before this court, I have assiduously avoided being drawn into a hearing of the merits of underlying dispute. What I am required to determine is simply whether the underlying causa is in dispute and nothing further. (See Gois decision)

[18] As alluded to above, the respondents have strenuously opposed this application and raised points in limine.

18.1 Two Remedies

Firstly, counsel for the respondent submits that this application does not exist in law in that the application which the appeal which the applicants seek to prosecute has lapsed. In the respondents' submission the applicants ought to have brought an urgent application for condonation of the late filing of the application for leave to appeal and that, that was the alternative remedy available to them. The applicants submit that the only option they had was this urgent application for the following reasons.

The application for leave to appeal is being brought together with the condonation application due to the fact that prospects of success are part of the screening process that has to be undertaken by the leave to appeal court and that process cannot be undertaken by this court. This court would therefore not be the proper forum to deal with the condonation application.

18.2 The respondents have also sought to challenge the locus standi of the first applicant as the deponent to the founding affidavit in which he asserts that he acts in his capacity as representative of the applicants. The respondents also submit that he is not affected by the order which the application seeks to challenge.

The applicant's response is that locus standi of either the first or third applicant was never raised in any of the papers filed by the respondents be it in the present application or the main application and that in the circumstances it ought to be accepted as admitted, by the respondents. I accept that submission as a correct statement of the law.

[19] It is trite such matters as locus standi ought not to be raised in heads of argument to enable their proper determination by the court. Equally, I accept that it would not

have been proper for the court to purport to consider the issue of condonation of the late filing of the application for appeal as it would not have been in a position to conduct the requisite screening procedure.

[20] I am satisfied that the applicants do not have an alternative remedy other than bringing the present application and I am assisted reaching that conclusion by the dictum in *City of Johannesburg Metropolitan Municipality vs. Blue Moonlight Properties 39 (Pty) Ltd and Another*⁶ where the Constitutional Court said “of course a property owner cannot be expected to provide free housing for the homeless on its property for an indefinite period. But in certain circumstances an owner may have to be somewhat patient, and accept that the right to occupation may be temporarily restricted, as Blue Moonlight’s situation in this case. An owner’s right to use and enjoy property at common law can be limited in the process of the justice and equity enquiry mandated by PIE.”

[21] It was stated in *Panayiotu* that failure to serve notices of appeal or records within the prescribed periods is common place, thereby needing condonation to revive them. In my view, failure to serve a notice of application for leave to appeal ought not to be treated differently. This is what this application seeks to achieve.

[22] In light of the above,

The following order ensues:

1. Condonation is granted for the non-compliance with the Uniform Rules of Court and the application is heard as one of urgency in terms of Rule 6(12) (a).
2. The operation and execution of the order of the Honourable Acting Justice Manamela made under the above-mentioned case number on 15 December 2021 is suspended pending the finalisation of the applicants’ application for condonation and leave to appeal.

⁶ *City of Johannesburg Metropolitan Municipality vs. Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC) at para 40.

3. The first, second, and third respondents shall, jointly and severally, pay the applicants' costs.



SELBY BAQWA

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of hearing: *18 JANUARY 2022*

Date of judgment: *21 JANUARY 2022*

Appearance

On behalf of the Applicants

Adv H Scholtz

Instructed by

Lawyers for Human Rights

Tel: 012 320 2943

Email: Herman@hscholtz.co.za

On behalf of the Respondents

Adv P Lourens

Instructed by

Strydom, Rabie Heijstek & Faul Attorney

Tel: 012 786 0954

Email: plourens@rsabar.com